



Guide for the Foundation and Establishment of a European Works Council



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Introduction:

Development of the EU Directive on the Establishment of European Works Councils

1. New Company Strategies Require New Structures of Interest Representation

Since the late 1980s, the creation of the European Single Market has initiated a far-reaching restructuring process of the economy. This has become evident in an increase in business combinations, transnational mergers and takeovers so far unknown on the European continent.

- Companies adapted to the changed economic conditions in a common market and restructured their manufacturing strategies and locations. The decision level of corporate policy increasingly shifted towards transnationally-oriented corporate headquarters.
- Fundamental decisions on the economic development of more and more locations are, thus, taken in a different country than the one, where the employees' rights of participation apply.
- An increasing number of employee representatives and trade unions is faced with the challenge of insufficient access to the decision-making levels of a corporate group. Local management as the direct point of contact is increasingly losing decision-making authorities.
- Cheap transport and new communication technologies facilitate corporate groups to take advantage of global differences in labour costs and to transfer production facilities from national locations to locations throughout Europe and the world.
- Increasing relocations of production facilities to other countries may lead to the actual degradation of employee rights, as the increasing activities abroad lie beyond the scope of national labour law.

The increasing internationalisation of the economy also requires new structures of employee interest representation. An according "Europeanisation of labour relations" in the face of new company strategies is particularly faced with the following necessities:

- Interest representation itself needs to re-orientate and direct its own policies towards Europe or even towards the global strategy of the company.
- Moreover, it needs to prevent that the internationalisation of the company neither has negative impacts on labour conditions, nor leads to the dismantling of the welfare state and the loss of jobs.
- Productivity comparisons presented by the company to justify, e.g. working time extensions, are hard to disprove without sufficient information.
- Thus, information is a fundamental prerequisite for an effective employee-related interest policy. This information can protect employees of the subsidiaries at home and abroad from being played off against each other.

Creating or extending a broad basis of information for employee representations is best suited to counter the actual degradation of national rights of participation of employees due to the increasing internationalisation of business activities. Having passed the European Works Council Directive, the

European legislator rudimentarily accounted for these developments.

Following years of tug-of-war and vehement demands by the European trade union movement, in 1994, the European Union adopted a directive on the protection of employee interests in companies operating within the EU named: "Council 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".

In 2009, this European legislative basis on transnational employee representation was amended, whereby, some important clarifications particularly regarding the established information and consultation rights took place.

2. Passing the EU Directive on the Establishment of a European Works Council (EWC)

On September 22, 1994, the EU Council of Ministers adopted the "Council 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".

- Except for the UK, the EU Member States, therewith, committed themselves to providing for labour or works constitutions in their respective national legislation to enable the establishment of employee representation bodies according to the EU Directive in all corporate groups employing more than 1,000 employees in the EU and EEA area, including a minimum of 150 employees in two or more Member States.
- Thus, in all cases where requests for the establishment of a EWC were submitted, agreements on the transnational information and consultation of employee representations in the group of companies were to be concluded.
- Otherwise, minimum provisions on the establishment of a European Works Council are to become effective "by act of law" in accordance with the EU Directive for all corporate groups within the scope of the directive.
- With the amendments to the EU Treaty decided in Amsterdam in 1997 – according to which the directives adopted within the framework of the social protocol on social policy were also apply to the United Kingdom – the UK gradually also lost its special position regarding European Works Councils. Thus, the way was paved for a coherent European provision.
- The British referendum on leaving the EU in 2016 has again challenged this expansion of EU law regarding European Works Councils.
- The two big enlargement rounds in 2004 and 2007 with a total of 12 new Member States joining the European Union have significantly expanded the geographical scope of the EU Directive on European Works Councils. As of their respective accession date, all new Member States were to establish respective EWC laws in their national labour legislations. Today, the Directive is effective in all 31 countries within the European Economic Area (28 EU Member states plus Norway, Iceland and Liechtenstein). The number of corporations that could establish a EWC in Europe has increased to approx. 2,500.

3. The European Works Council: A Procedure for the Transnational Information and Consultation of Employees

With the European EWC Directive a decisive step was taken in the direction of overcoming the territorial limitation of employee representation. Although neither in 1994, nor during the revision in 2009, all trade union demands were included in the wording of the Directive, the text still contains essential binding legal foundations for the establishment of European interest representations in multinational corporations.

- By means of the EWC Directive, the trade unions have achieved that today European Works Councils can be established in more than 2,500 groups of companies operating EU-wide and, thus, specific information and consultation rights for employees in these corporations can be stipulated.
- The EWC Directive stipulates fundamental information duties of the company management, as well as consultation rights of European employee representations. Topics on which information is to be provided and consultation procedures are to be organised include:
 - development of the business situation and perspectives of the corporate group,
 - structure of the company, its economic and financial situation,
 - prospective development of the business, production and sales situation,
 - employment situation and its expected development,
 - investments and substantial changes regarding the company organisation,
 - introduction of new work procedures and manufacturing processes,
 - relocations of production, mergers, downsizing or closures of companies, plants or important parts thereof,
 - and collective redundancies.
- The work of the European Works Council is based on the pillars of information and consultation (hearing). Questions of corporate employee co-determination – as demanded by the trade unions in several European countries since the 1970s – were not settled within the scope of the EWC Directive. Those demands remain on agenda of the European trade union movement and were at least partly achieved as part of the legislation on the Societas Europaea (SE).
- Within the meaning of the improved EWC Directive 2009 in force today, information refers to the reporting of management on the current situation of the company and perspectives for its future development. Furthermore, management is to inform the European employee representation within a framework and procedure to be negotiated.
- This information is to take place timely and regarding form and content is to be organised in such way that allows the EWC to prepare a thorough examination of possible effects of planned decisions for a possible consultation with competent representatives of management.
- As a matter of course, information also means enabling and arranging the exchange of information between employee representations in different locations and countries.
- Consultation in terms of the current EWC Directive refers to the establishment of a procedure that allows the EWC to present own proposals at a time, when those can still be taken into consideration by the company management, as long as the decision-making process has not yet been concluded.

- Thereby, the objective is to be considered that giving an opinion that can be of use for decision-making must be possible. This requires that consultation takes place at a time, in such manner and with such content appropriate for this purpose.
- Contrary to some national works councils and trade union company representations, the European Works Council does not have any genuine further reaching rights. So far, company decisions are not subject to EWC approval.
- It has been clarified that the opinion of the EWC is in demand already before the decision and not only after the execution of the company decision.

Thus, neither in the future will the opinion of the EWC have suspensive effect upon a company decision. Basically, the legal possibilities of the EWC are exhausted upon giving an opinion. A respective agreement by management and the employee representatives of the different locations in the concerned countries (centralised in a so-called "Special Negotiating Body" (SNB)) are to lay down how a future European Works Council is to be structured and how the information and consultation procedures in the corporate group – i.e. the specific forms of transnational employee participation in the company policy – are to be arranged.

- In accordance with the provisions of the EU Directive, the respective national EWC provisions primarily are to lay down rules of procedure for the establishment of a EWC.
- If management fails to conclude an agreement within three years after the request by employee representations from at least two countries, with at least 150 employees employed in the group of companies in each country, the EU Directive provides for minimum requirements for the establishment of a European Works Council "by act of law".

Chapter 1:

Questions and Answers on the European Works Council

1. National Transposition of the EU Directive on the Establishment of European Works Councils (EWC)

What is the main objective of the EU Directive on the Establishment of a EWC?

- The current EU Directive 2009/38/EC provides for transnational information and consultation rights for employees and their interest representations for companies and group of companies having locations in several European countries.
- This Directive requires Member States to transpose the provisions therein into national law.

What does “transposition in national law” mean?

- Directives adopted by the European Union oblige the Member States to implement provisions contained therein in their respective national legislation – generally, within two years. Thus, they are not implemented directly in the legal systems of the Member States, but adapted to the national particularities and transposed into national law. This procedure was also applied regarding the EWC Directive.
- The framework conditions for the establishment of European Works Councils differ in detail in those cases, in which the European legislator granted the Member States leeway for the necessary adaptation to national peculiarities. However, the fundamental rules established by the Directive are to be reflected in all national provisions.

What do the national legislations on the European Works Council contain?

- In accordance with the standards outlined by the EU Directive, the respective national EWC provisions primarily include rules of procedure for the establishment of a EWC.
- If negotiations between corporate management and European employee representatives are not completed within a certain period, substantive provisions for the then compulsory establishment of a “European Works Council by act of law” apply.
- These subsidiary rules on a statutory EWC are to comply with the provisions laid down in the annex to the EU Directive in all national EWC laws.

The legislation of which country is relevant to the establishment of a EWC?

- In principle, always the rules of procedure of that country, on whose territory the central management of the corporation is located, apply for the establishment of a EWC.
- Regarding the appointment of employee representatives to the Special Negotiating Body (SNB) for the establishment of a EWC, as well as the appointment of members to the EWC, the provisions of the labour legislation of that country apply, from which the respective representatives originate. This also applies to their legal status (particularly regarding release from employment duties, protection provisions, as well as further training entitlements).

How was the EU Directive transposed into Austrian legislation?

- The EU Directive on the EWC establishment was transposed into the Austrian labour legislation by means of a comprehensive amendment to the Labour Constitution Act (V. Teil, Europäische Betriebsverfassung, §§ 171-207 ArbVG) in October 1996.
- In 2011, this part of the Labour Constitution Act was amended due to necessary changes regarding the revision of the original EU Directive on the EWC from 1994.

How was the EU Directive transposed into the legislation of the other EU countries?

- In currently all 31 EU and EEA states (EU Member States plus Norway, Iceland, Liechtenstein) concerned by the EWC Directive, it was transposed into national law as follows:
- Denmark, Sweden, Finland, Ireland, Germany, Spain, France, Greece, Luxemburg, Portugal, the Netherlands and Austria passed specific EWC laws until October 1996;
- In Norway, Belgium and Italy the Directive was implemented through collective agreements by the national social partners and corresponding accompanying legislation.
- The United Kingdom adopted the European Social Protocol later, and, thus, transposed the EWC Directive into national law by means of a regulation in January 2000. Due to the possible EU exit of the country, also the legal force of the current EWC legal basis for the United Kingdom is at stake. Also in the future, the continued incorporation of UK employees into the work of European Works Councils should at least be attempted by means of negotiations.
- The new Member States that accessed the European Union in the two enlargement rounds in 2004 and 2007, and Croatia in 2013 respectively, transposed the provisions of the EU Directive into the national labour legislation at their respective dates of accession together with implementing the entire EU acquis regarding social law.

How to obtain the respective legal documents from the other countries?

- Since the establishment and the work of European Works Councils are usually based on the legislation of the country, where the headquarters of the corporate group are located, knowledge of the corresponding laws and collective agreements of that country are of relevance.
- There are several online platforms (e.g. at the European Trade Union Institute) that at least provide the national transposition rules in English, besides the respective national language. These national EWC legal texts can be downloaded from the following website: www.ewcdb.eu.

2. Scope of the EWC Directive

In which states does the EWC Directive apply?

- The EWC Directive applies to all 31 Member States of the European Economic Area (EEA), i.e. all 28 Member States of the European Union (EU), as well as Norway, Iceland and Liechtenstein. In all these countries, there are national EWC laws in accordance with the Directive 2009/38/EC.

Which companies and corporate groups are affected by the EWC Directive?

- Whether a corporate group falls within the scope of the EWC Directive depends on the size of the company, as well as the transnational character of its business activity under the scope of the Directive.
- The size of the workforce is considered a key figure for the possibility of establishing a EWC. The EU Directive applies to all companies in EU/EEA states that have employed a total average of more than 1,000 employees in the past two years, as well as a minimum of 150 employees in one and 150 employees in another country.
- The same applies to groups of companies with a total of at least 1,000 employees, including at least two companies in different states with at least 150 employees each.

What does group of companies mean under the EU Directive?

- Regarding the EWC, generally a more comprehensive understanding of a group of companies applies than in other provisions of the respective national legislations. Thus, each group of companies consisting of a controlling company and a controlled company is considered a corporate group.
- Thus, a company is considered a controlling company, if it can exercise a dominant influence over another company due to ownership, financial participation or the rules which govern it.
- A controlling relationship is presumed, if a company
 - can directly or indirectly appoint more than 50 percent of the members of the administrative, management or supervisory body;
 - or controls a majority of the votes attached to the issued share capital;
 - or holds a majority of another company's subscribed capital.
- A controlling relationship is presumed without prejudice to proof to the contrary.

Must the central management of the respective corporate group be located in the EU to establish a EWC?

- No, a EWC is also to be established, if the management of a company or a group of companies is based outside the EU or EEA states (e.g. in the USA, Japan, Switzerland or Canada) and the specified prerequisites (more than 1,000 employees in the EU/EEA area and at least 150 employees each in at least two states) are met.
- In these cases, the company or plant that has been named its European central representation is considered to be the central management or, in the absence of such an explicit "European headquarters" of the corporate group, the management of the plant/company with the greatest number of employees within the EU/EEA.
- The national legislation applicable to the establishment of a EWC is determined by this provision.

Can locations outside the EU/EEA area also be part of a EWC?

- The mandate of a EWC can be extended to locations/countries beyond the scope of the EU Di-

rective by unanimous decision of the central company management and the Special Negotiating Body.

- The same applies to the admission to the Special Negotiating Body to negotiate a European Works Council agreement.
- This is particularly relevant for locations in Switzerland, but also those countries currently in accession negotiations with the EU or that have concluded association agreements with the EU, provided that the company is economically active in these countries to a larger extent.

How is the number of employees determined?

- The determination of the number of employees is based on the average employment during the previous two years, including part-time employees.
- The two years start with the date of the valid request to establish a Special Negotiating Body.
- The term of employee as defined in the respective national labour legislations is to be applied. For Austrian companies the term "employee" as defined in the Labour Constitution Act (ArbVG) for works council elections applies. Thus, homeworkers and family members excluded from passive suffrage at works council elections are not to be considered upon determining the number of employees in Austrian plants.
- Upon request, central management or the local company management is obliged to inform the works councils, whether the key figures are met within the entire company or the corporate group.

Are purely financial participations in Austria also covered by the scope of the "Europäische Betriebsverfassung" of the Labour Constitution Act?

- According to the "Europäische Betriebsverfassung" of the Labour Constitution Act (ArbVG) (§ 176 Abs. 6) purely financial participations of credit institutions, other financial institutions, as well as insurance and investment companies do not constitute a controlling relationship within the terms of the EWC Directive.

3. Opening of Negotiations for an EWC Agreement

How to open EWC negotiations?

- Negotiations for the establishment of a EWC are usually initiated by request of the employee side, in individual cases on the initiative of the central corporate management.
- If employee representatives get active, they are to draft "requests for the start of negotiations on the establishment of a European Works Council" addressed to management from at least two countries. These two or more requests are either to be made by 100 employees each or their company interest representations and submitted directly to the central management or the local plant/company managements.
- Upon each request submitted to a local management, it is to inform central management immediately. Submission of the second request marks the beginning for the procedure to establish a EWC in the corporate group and the corresponding deadlines.

- Central management is to immediately ask employee representations in the individual countries to nominate delegates to the “Special Negotiating Body” in accordance with the applicable EWC laws, so that negotiations on an agreement to establish of a EWC can be started without undue delay.

Is there a fixed time-frame for negotiations on the establishment of a EWC?

- Following submission of the request by the employees or their representations
 - management has six months to start negotiations,
 - as well as three years to reach an agreement with employee representations on the establishment of a EWC.
- Upon expiry of these deadlines, a “EWC by act of law” is to be established immediately according to the so-called “subsidiary requirements” of the annex of the applicable national EWC law.
- These provisions oblige the company to establish a “EWC by act of law” and to grant it certain minimum rights.

What happens, if a company refuses to negotiate on a EWC?

- The EU Directive makes it difficult for managements to unnecessarily delay the start of negotiations or to block them entirely.
- Upon the submission of a valid request, the company can delay the start of negotiations for no more than six months. Otherwise, the EWC Directive provides for the immediate establishment of a “EWC by act of law” based on the “subsidiary requirements” upon expiry of this deadline.

What happens, if no negotiated agreement between employees and management is reached?

- If no agreement on the establishment of a EWC is signed at the latest three years after the submission of the request by the employees or their representations, the EWC Directive also provides for the application of the “subsidiary requirements” (“EWC by act of law”) laid down in the respective national EWC legislation.

What exactly do “subsidiary requirements” mean?

- The “subsidiary requirements” are an important part of the EWC Directive. These requirements are not subsidiary, because they are only part of the Directive’s annex. „Subsidiary“ rather means that they are only to apply, if no negotiated settlement is reached or the company refuses to enter negotiations.
- Subsidiary requirements are legal norms for the establishment of a EWC. They define important specifications for the composition, organisation and structure of the EWC, as well as regarding cost coverage, provision of material requirements, etc. Moreover, they list those issues that corporate management must inform and consult the EWC on.
- From the perspective of employee representations, they guarantee, inter alia, a certain level of minimum rights to information and consultation in companies, in which corporate management is not willing to negotiate or where negotiations fail.

Are there fixed specifications regarding the content of negotiations on the establishment of a EWC?

- The EU Directive does not specify the content of the individual provisions of the EWC agreement to be negotiated.
- It is at the discretion of the negotiating parties to decide on the final form of the EWC, its composition and organisation, as well as on the extent of information and consultation procedures, etc.: Thus, each company may freely decide, whether the EWC will meet five times or once a year, whether it will consist of ten or 50 persons.
- For the employee side, the “subsidiary requirements” stipulated in the annex to the Directive, however, may be considered as a minimum guideline for the EWC to be negotiated, as the standards contained therein are to be implemented in any case upon expiry of the provided negotiating period. As a rule, the EWC agreements concluded in line with the specific situation and practice in the company provide better provisions.

What significance do the “subsidiary requirements” have during the EWC negotiations?

- Even during the negotiations to establish a EWC, these requirements constitute a certain security to agree upon the widest possible scope of action for the EWC and to specify the provisions for the individual company.
- If provisions on a higher level cannot be negotiated, the subsidiary requirements still oblige the company to establish a EWC with minimum provisions.
- Thus, the so-called “subsidiary requirements” are to be regarded as the basis for negotiating the establishment of a EWC, which according to the possibilities and the necessary practice in the company are to be improved, but by no means are to be undermined.

4. Tasks of the “Special Negotiating Body” (SNB)

What are the tasks of the SNB?

- The task of the Special Negotiating Body (SNB) is to conclude a written agreement with central management on the establishment of a EWC, its structure and composition, as well as to conclude the implementation modalities regarding the information and consultation of employees.

How is the SNB composed?

- The revision of EU legislation on the European Works Council in 2009 led to the harmonization of the provisions on the composition of the Special Negotiating Body for the negotiation of a EWC agreement.
- Thus, the negotiating body consists on the one hand of one representative each from every Member State, where one or more plants/companies of the group of companies are located.
- Moreover, every Member State is entitled to another mandate, if more than 10% of the total workforce within the scope of the EWC Directive are employed in this country. The country is entitled to a third mandate, if more than 20% of the total workforce are employed, a fourth mandate as from 30%, etc.

What provisions are there regarding the appointment of SNB members?

- Upon valid submission of a request to establish a EWC (after receipt of the second request), central management is to immediately ask the employee representations in all locations to appoint members to the SNB.
- The members appointed in accordance with the respective national EWC laws are to be communicated to central management and the local managements without delay. Subsequently, central management is to invite for the constitution of the SNB and first negotiations.

How are Austrian representatives delegated to a SNB?

- Austrian representatives to a SNB are appointed by decision of the highest employee representation body in the plant or company (group works council, central works council, works committee, works council) from among the works council members.
- In Austria, basically only works council members can be appointed delegates to a SNB, irrespective of whether the central management is based in Austria or the EWC is to be established in another country.

What happens in companies without a works council?

- If no works council has been established in an Austrian plant or company, no representatives can be delegated to the a SNB or, consequently, a EWC.

Who is entitled to appoint representatives to the SNB (and subsequently to the EWC) in Austria?

- In plants, the appointment is made by decision of the works committee. If there is no works committee, the works council exercises this task.
- If there are several plants within a corporate group that do not belong to the same company in Austria, the appointment is made by decision of an assembly of the members of the works councils or works committees established in these plants.
- In companies, the appointment is made by decision of the central works council (ZBR). If no ZBR has been established, the works committees' as assembly of the members of the works councils established in the plants decide.
- If there are several companies in Austria and, thus, several central works councils, an assembly of the central works councils established in the companies decides.
- If there is, apart from one or more central works councils, at least one works committee or works council not represented in a ZBR, their chairpersons and deputies are called into the assembly of ZBR members and count as ZBR members for this item of the agenda.
- In groups of companies, the Austrian members of the Special Negotiating Body are to be appointed by decision of the group works council. If no group works council has been established, the appointment procedure outlined above is to be applied mutatis mutandis for the company in question.
- If there is, apart from the group works council, a central works council, works council or works committee not represented by the group works council, the chairpersons and their deputies are called into the assembly and count as members of the group works council for this item of the agenda.

How are representatives from other countries delegated to an SNB?

- For the appointment, delegation or election of members from other EU/EEA countries, the respective national provisions that may differ significantly apply. They are laid down in the corresponding national EWC laws.

How does the constitution of a SNB take place?

- Central management is to convene a constituent meeting of the SNB immediately upon announcement of the members to be appointed according to the corresponding national EWC laws.
- After this meeting, during which a chairperson, as well as a deputy chairperson are to be elected from among the SNB members and rules of procedure are to be defined, negotiations on the establishment of a EWC are to be started immediately.

Who provides the resources for the work of the Special Negotiating Body?

- Central corporate management is to create all the necessary preconditions and to appropriate the required funds for the work of the SNB.
- In particular, central corporate management has to bear the costs of the necessary meetings (including travel and accommodation costs of the SNB members, interpretation and translation costs, as well as the costs for at least one expert exclusively appointed by the employee representatives, etc.).

How does the SNB work?

- The SNB is entitled to convene a preparatory and follow-up meeting before and after the negotiations with central management and can be supported in its works by experts of its choice.
- The body constitutes a quorum, if at least half of the members are present; as a basic principle, a simple majority of votes cast is required for decision-making.

How long is the SNB active?

- The activity of the SNB starts with the date of its constitution.
- The activity of the SNB ends,
 - if the company or the group of companies no longer fulfils the conditions for the establishment of a EWC,
 - if the SNB decides by a two-thirds majority not to open negotiations on the conclusion of a EWC agreement or decides to terminate ongoing negotiations,
 - if a court declares the establishment of the Special Negotiating Body to be invalid (the lawsuit is to be filed no later than one month after the constitution of the SNB),
 - if a EWC agreement has been concluded,
 - or if a EWC is to be established by act of law.

What kind of agreement regarding a EWC can the SNB conclude?

- The agreement concluded by the Special Negotiating Body is to settle at least the following areas:
 - the plants and companies covered by the agreement, including possible plants and companies in non-Member States, provided that they are to be included in the scope of application,
 - the composition of the EWC, the number of members, the allocation of seats and the term of office, including the impact of significant changes in the company structure, as well as significant changes in the number of employees in the group of companies,
 - the composition, the procedural rules and the competences of a steering committee (select committee) to be appointed within the EWC,
 - the topics, the competences and the form of the information and consultation procedures in the EWC,
 - the arrangements for the coordination of information and consultation within the EWC and the national employee representations,
 - venue, frequency and duration of the EWC meetings,
 - financial and material resources to be allocated to the EWC,
 - the duration of the agreement and the procedure to be applied for its renegotiation, as well as the cases, in which such a renegotiation is to take place.

Can the SNB come to a decision other than the establishment of a EWC?

- Yes, the negotiating body can decide by a two-thirds majority not to establish a EWC. In this case, a new request to convene a SNB can be submitted at the earliest two years after such a decision was taken.
- The SNB can also decide on other procedures for the information and consultation of employees. In this case, the agreement must stipulate the conditions under which the employees have the right to meet to discuss the information conveyed to them.

5. The “EWC by Act of Law” (Application of the Subsidiary Requirements)

When does a EWC has to be established by act of law?

- In accordance with the EU Directive, a EWC has to be established by act of law,
 - if central management and the Special Negotiating Body take a respective decision,
 - or if central management refuses to start negotiations or does not start negotiations within six months upon the first request,
 - or if after three years upon such a request no agreement as described above is concluded.

How is a “EWC by act of law” composed?

- For corporate groups with headquarters in Austria, the “EWC by act of law” consists of a minimum of three and a maximum of 30 members according to the provisions of the Austrian Labour Constitution Act and is composed as follows:
 - One representative from each Member State, where one or more plants of the company or one or several companies of the group of companies are located.
 - Additional representatives are determined according to the number of employees in the group of companies in one Member State in relation to the number of employees in the entire company (in the entire group of companies).
 - For at least 10 percent of the total workforce in the EU/EEA area one additional member, for at least 20 percent two additional members, for at least 30 percent three, for at least 40 percent four, for at least 50 percent five, etc. additional members are to be appointed.
- For corporate groups with headquarters in another country within the scope of the EU Directive, the provisions of the respective national EWC law apply that, however, correspond to the outlined allocation of seats regarding the “EWC by act of law”.

How are Austrian members appointed?

- The appointment of the Austrian members follows the same principles applied to the appointment to the Special Negotiating Body (as a rule by the highest employee representation body), with the restriction that officials or employees of the voluntary or statutory interest representation may only become EWC members, if they are works council members according to § 53 Abs. 4 of the Labour Constitution Act.

How does the constitution of the EWC take place?

- Central management is to immediately convene a constituting meeting, where the members of the EWC are to elect a chairperson and one or more deputies. The EWC is represented by the chairperson; in his/her absence, his/her deputy. In individual cases representation by other members is possible.
- The EWC can decide upon rules of procedure by a majority of votes of its members. A select committee of up to five members, consisting of the chairperson and further representatives, is to be formed.

What competences does the EWC have?

- The EWC has the right to be informed and consulted on issues relating to the economic, social, health and cultural interests of the employees of at least two of the plants of a company or at least two companies of a group of companies in different Member States. Such transnational matters also include decisions, which, regardless of the number of countries involved, are of importance for the European Works Council in terms of the scope of their potential effects on the employees.
- It has the right to meet with central management at least once a year on the basis of a report presented by central management on the business situation and the perspectives of the group of companies (the company).

Which issues does the information of the EWC relate to?

- The competences of the EWC are oriented towards the provisions in the annex of the EU Directive, according to which it is to be informed and consulted particularly on the following issues regarding the corporate group:
 - structure and economic and financial situation,
 - probable development of business situation, as well as production and sales,
 - situation and probable trend of employment,
 - investments,
 - substantial changes in organisation and the introduction of new production processes,
 - transfers of production and mergers,
 - cut-backs or closures, location closures and collective redundancies.

What competences does the EWC's select committee have?

- If there are exceptional circumstances affecting the employees' interests to a considerable extent, the select committee has the right to be informed as soon as possible.
- It has the right to meet with central management or other appropriate levels of management in order to be informed and consulted on the measures.

What is the term of office of a "EWC by act of law"?

- According to the Austrian Labour Constitution Act, the term of office of a EWC is four years as of the date of its constitution.
- Four years after its constitution, the "EWC by act of law" can take a decision, whether to negotiate an agreement to establish a EWC or to continue to apply the provisions on the "EWC by act of law".
- If the "EWC by act of law" decides to negotiate an agreement, the provisions on the Special Negotiating Body apply on the "EWC by act of law".
- European Works Councils established by act of law in other European countries are governed by the respective national provisions on the term of office of a EWC.

Who finances the EWC?

- For corporate groups with headquarters in Austria, the EWC and its work are, in principle, financed by central management.
- Thus, in order to properly fulfil its tasks, the EWC is to receive resources appropriate to the size of the company and the requirements of the EWC.
- Administrative costs necessary for the proper fulfilment of tasks, in particular, for the realisation of the meetings and the preparatory and follow-up meetings, including interpretation and translation costs, as well as accommodation and travel expenses of the members and the costs for at least one expert appointed by the EWC are to be met by central management (or the local company or plant managements).

- For corporate groups with headquarters in another country within the scope of the EWC Directive, the provisions of the respective national EWC law apply.

To what extent do the “subsidiary requirements” of the “EWC by act of law” constitute the basis for negotiations to establish a EWC at a higher level?

- The “subsidiary requirements” stipulated in the annex of the Directive are no statutory requirements for European Works Councils to be negotiated within the regular procedure. The EU Directive does not specify the content of the individual provisions of the EWC agreement to be negotiated.
- From the employees’ point of view, these “subsidiary requirements” on the “EWC by act of law” must be regarded as a minimum guideline regarding the EWC standards to be negotiated (composition and organisation, scope of the information and consultation procedures, etc.).
- Thus, the so-called “subsidiary requirements” must be regarded as the basis in the negotiations for the establishment of a EWC, which according to the possibilities and the necessary practice in the company should be improved on a respective higher level, but by no means are to be undermined.

6. Legal Status of Employee Representatives in the EWC

When does the EWC mandate begin and end?

- For Austrian employee representatives, membership in the EWC (as well as in the Special Negotiating Body) starts with the announcement of the appointment decision by the competent works council body.
- The respective mandate ends with the loss of membership in the works council, with resignation or dismissal by the delegating body, as well as upon the withdrawal of the plant or company from the Community-scale operating corporate group or upon the end of the activity or existence of the EWC.

What legal status do the EWC members have?

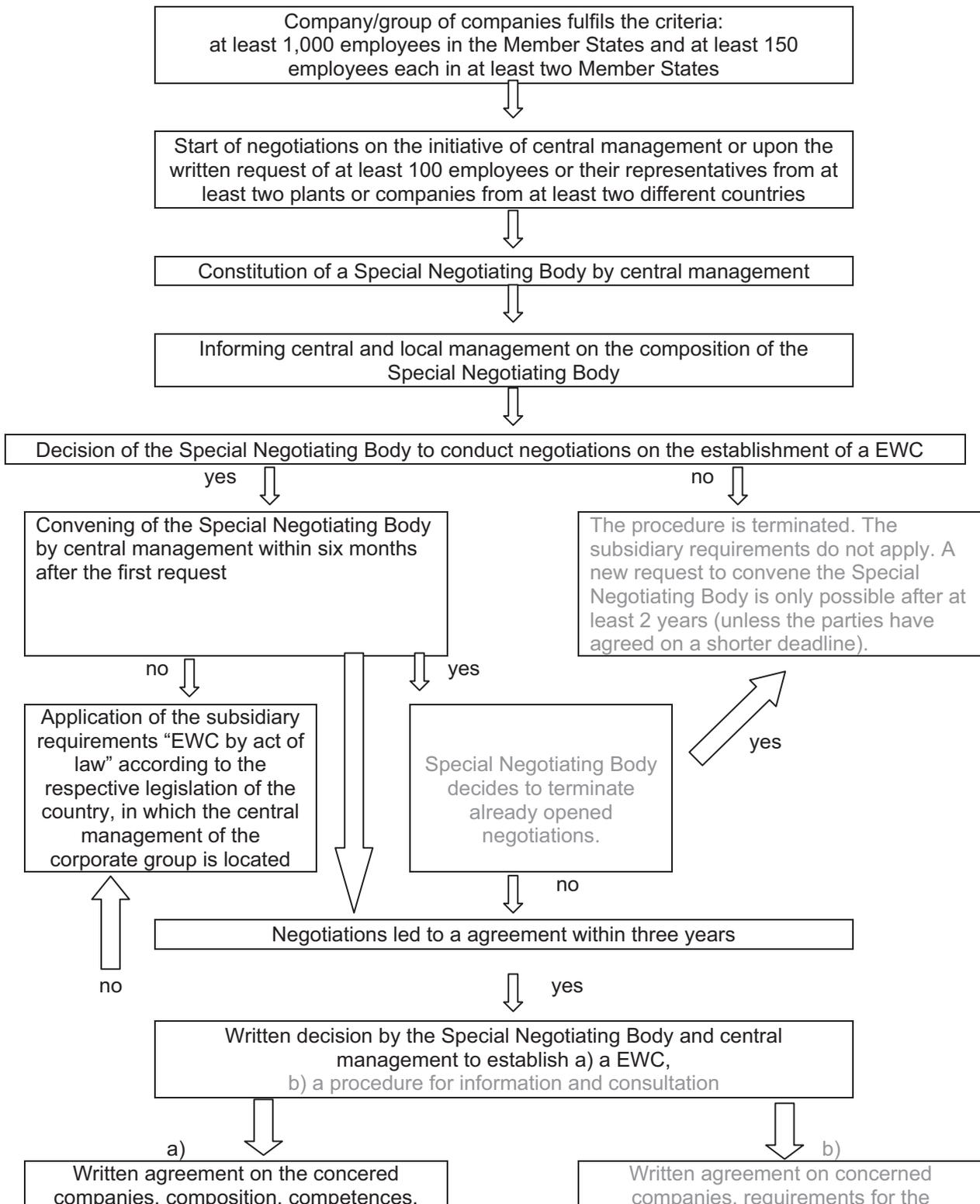
- For the terms of mandate of the Austrian employee representatives belonging to the SNB, the EWC or the “EWC by act of law”, in principle, the same provisions apply as to the activity of works councils in plants on the local level or in companies on the national level.
- This means that their activity must not be restricted and they must not be discriminated regarding remuneration and promotion opportunities.
- The members of the EWC bodies are to be provided with the resources required for exercising their obligations, in particular, they are to be granted the required release from work duties with continued pay. In addition, the protection provisions, in particular, regarding the usual provisions on the protection against termination and dismissal apply.
- For EWC delegates in subsidiaries of the corporate group in other Member States, the provisions regarding the release from work duties and the protection provisions as laid down in the respective national EWC laws of these countries apply.

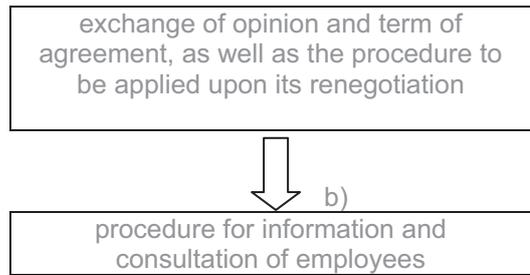
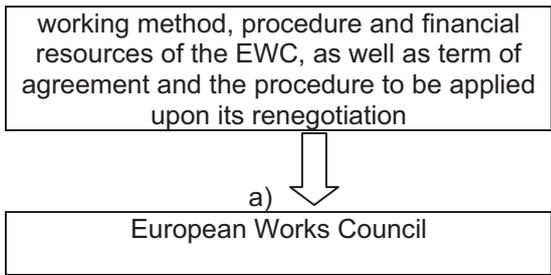
To what extent are EWC members subject to a confidentiality obligation?

- Members of a Special Negotiating Body, a EWC or a “EWC by act of law”, as well as supporting experts are subject to the confidentiality obligations as laid down in the respective national EWC laws.
- According to § 115 Abs. 4 of the Labour Constitution Act (ArbVG), Austrian EWC members are obliged to maintain confidential any business and corporate secrets they have come to know in the performance of their duties or that have been explicitly named as such secrets. This obligation also continues after the expiry of their terms of office.
- The confidentiality obligations resulting from the EWC activity do not apply in cases, in which the local employee representations are to be informed on the content of information and results of consultations based on the EWC agreement or the “EWC by act of law”.
- The confidentiality provisions differ from country to country. Therefore, it is important to comply with the respective provisions in the national EWC laws.
- During the negotiations of a EWC agreement, it is important to ensure that the provisions regarding confidentiality are stipulated in such way that the information and consultation rights are by no means disproportionately limited.
- For instance, it is important to ensure that confidentiality is to be justified objectively and is to be declared explicitly in each case. Furthermore, it is important to ensure that the disclosure of confidential information within the EWC remains possible and that members of the EWC are not to be released from their information obligation towards the body of interest representation that has appointed them.

Chapter 2: Milestones on the Way to a European Works Council

1. Flowchart on the Establishment of a European Works Council





2. Essential Steps in the Establishment and Development of European Works Councils

Phase 1: Orientation on the national and international level

- Getting to know the EU Directive on the establishment of a EWC and the EWC law of the national legislation relevant to the corporate group
- Identifying contact persons in the responsible trade union and the European trade union federations and establishing contact
- Informing employee representatives and possibly also employees on the potential establishment of a EWC (possibly planning information or further training meeting in cooperation with trade unions)
- Nominating EWC responsables and assigning responsibilities in the preparation of the EWC establishment

Phase 2: Information procurement on the national and international level

- Gathering information on the individual plants and locations of the company
- Gathering information on trade unions and interest representations in the involved countries
- Identifying co-determination structures in the different locations
- Preparing first contact meeting of employee representatives in the corporate group

Phase 3: Negotiations with company management

- Getting to know the appointment provisions for delegates in the other countries
- Organising a first international contact meeting and coordinating a first EWC draft
- Submitting a request to company management on starting negotiations on the establishment of a EWC
- Preparing a draft for the EWC agreement in cooperation with the trade unions
- Establishing a negotiating body, negotiating with management and preparing the conclusion of the agreement in close cooperation with the trade unions

Phase 4: Establishment of the European Works Council

- Establishing the EWC (including election of a chairperson and deputies)
- Appointing an executive or a steering committee (select committee)

- Determining organisation and structure of the EWC, establishing rules of procedure

- Specifying content and topics of the future EWC work

- Maintaining close contact to the trade unions

Phase 5: Organising the working methods for the European Works Council

- Developing infrastructure for effective EWC work

- Ensuring the flow of information within the EWC, as well as to the trade unions

- Clarifying issues of interpretation and determining the taking of minutes and the protocol procedures

- Drafting a work programme for the EWC and an agenda for the next EWC meeting

- Developing further training programmes for EWC members (i.a. language training)

3. Ten Milestones on the Way to a European Works Council

Milestone 1: Ensuring the involvement of national and European trade unions in the preparations for the establishment of a EWC

Coordinate activities for the establishment of a EWC with the trade unions

- The initiative to take up negotiations on the establishment of a EWC should be taken by the employee representatives of the respective corporate group, the European trade union federation responsible for the sector or the responsible sectoral trade union of the country, where the European headquarters of the Europe-wide company are located in.
- The works councils or the company trade union representatives should not take any steps for the establishment of a EWC or agree on the establishment of a EWC without consultation with and involvement of the responsible European trade union federation on the sectoral level and the trade unions of the country the company headquarters are based in.
- If proposals for the establishment of a EWC come up, the officials responsible for EWC matters in the relevant trade union should be contacted immediately. Furthermore, all other relevant bodies in the company or in the trade unions should be informed and involved as appropriate.

Ensuring involvement of the European trade union federations

- Information and involvement in the process of the responsible European sectoral trade union should be ensured by the trade union organisations. The international and European departments of the respective trade unions have excellent contact to the officials responsible for EWC matters in the corresponding European sectoral trade unions.
- Moreover, if the group of companies in question is a conglomerate, i.e. the employees work in different sectors and are, therefore, also organised in several trade unions belonging to different trade union federations, cooperation between all these trade union federations should be achieved.

Milestone 2:

Securing high standards through the involvement of trade unions Minimum standards for European Work Councils are to be complied with

High standards in the EWC agreement are the basis for the future work

- Since the EU Directive is committed to the principle of the “autonomy of the social partners”, it only contains few binding specifications relating to the content-related arrangement of a EWC. Therefore, employers and employees can negotiate their own EWC model to meet the specific requirements of the respective company.
- However, this should not lead to minimum standards for a EWC – e.g. as in the “subsidiary requirements” for the so-called “EWC by act of law” – being undermined. These minimum provisions are intended for such cases, in which no negotiations have taken place despite the request to establish a EWC or if no EWC agreement could be reached after a certain deadline (three years).

Do not sign agreements involving bad standards

- Employers disapproving of a EWC often pursue a strategy of establishing preferably “flexible” information and consultation procedures, i.e. only vague definitions of content and little institutionalised in their form. To counteract this strategy, agreements below the standards of the so-called “subsidiary requirements” should not be signed as matter of principle.
- Thus, the “subsidiary requirements” constitute a crucial benchmark during negotiations for employee representatives in the “Special Negotiating Body” and should be regarded as the standard to be improved during negotiations for the conclusion of a EWC agreement.

Securing high standards through the involvement of trade unions

- Thus, everything depends on well-prepared negotiations with company management. It can be assumed that corporate managements work together with well-founded legal experts and even with consultants experienced in international legal transactions during the negotiations for the establishment of a EWC. Therefore, it is urgently recommended that the responsible trade union organisations at the national and European level are contacted as early as possible and to ensure their active involvement in the negotiations in the context of the Special Negotiating Body.
- This is the only way to draw on the broad experiences that have been gained during the numerous previous negotiations for transnational agreements with corporate groups and during the meetings of already established European Works Councils in other companies.

**Milestone 3:
Informing on the planned establishment of a EWC in the company and
assigning responsibilities for EWC preparations**

Creating acceptance for the establishment of a EWC among employees and employee representatives

- Possible reservations and scepticism relating to the establishment of such a European body expressed among employee representatives in the company should be taken up and discussed with the support of the trade unions. Reasons for this scepticism may be grounded in the little formal rights of the EWC compared to the respective national labour constitution, but also in lacking experience in dealing with representatives of other European labour relations and management cultures.
- Transparency in the establishment of the EWC and its work itself is an essential prerequisite for the EWC to be accepted by the company interest representation, as well as the employees.

Organising information and training event on the EWC

- A special EWC information and training event organised with the support and participation of trade union EWC experts can help to illustrate the expected “added value” of a transnational interest representation in the corporate group, build consensus regarding the common willingness on the establishment of a EWC and draft first ideas on further action.
- Thereby, it is also important to make clear
 - a) that the activities of a EWC are no cost-intensive travel and conference tourism, but an essential step towards transnational cooperation and participation of employee representatives in transnational corporate groups;
 - b) that the European Works Council complement the existing bodies of employee representation on the individual level, but shall by no means replace them. Thus, the EWC neither affects the rights to information and consultation granted to employees and their representatives by national legislations, nor any other rights of employees and their representatives, unless they would be improved by the EWC.

Defining responsibilities for the establishment of a EWC

- The establishment process of a EWC should primarily be initiated by the chairperson of the central or group works council, for what reason clarity on the distribution of responsibilities, but also on the division of work between the employee representatives during the establishment process should be established in the first place.
- The concerned employee representatives should be aware that the establishment of a EWC presents considerable challenges. In addition to the everyday business of employee representation at the company level, the preparation of EWC establishments ties up additional time resources and requires dealing with numerous new and demanding issues.
- An employee representative with international work experience and language skills or an employee representative from companies already experienced in EWC matters, for instance, might supply important ideas and impulses and should, therefore, be involved in preparations at an early stage and be appointed “EWC responsible”. Also, the establishment of a “EWC Working

Group” across the different company locations or a specific working group within the group of companies concerned with issues of international employee cooperation at international level should be taken into consideration.

Milestone 4:

Gathering information on the corporate group and its European locations and drafting a profile on the corporate group in cooperation with the trade union

Getting an overview on the profile of the company/group of companies

- A central task of the employee representation or the “EWC responsible” is the quick acquisition and preparation of Europe-wide or global data on the corporate group.
- Thus, from the very beginning it is of essential importance to gather information
 - on (-) the structure, organisation, branch establishments of the company/corporate group, (-) the number of employees in the different locations in all European countries, (-) the type of product lines and business activities in the other countries, (-) working conditions and company or trade union representation at the other locations of the corporate group, (-) company ownership, (-) where the European headquarters are located and (-) who and how are the essential decisions in the corporate group taken?

Information on the corporate group as a whole, as well as on the individual locations

- Furthermore, the following information on the corporate group, gathered with the support of the local trade unions and the responsible European trade union federations, may be relevant in the establishment of a EWC:
 - What is the corporate group profile for Europe and globally (distribution of production facilities, central/decentralised corporate group organisation)?
 - Which products are manufactured in which locations and are there parallel production facilities that might create competition between locations?
 - How many employees work in the different locations?
 - Which business strategies are pursued in the European Single Market?
 - Where are the most important European branch establishments and production facilities of the corporate group located and in which countries are there strategically significant locations (e.g. competence and research centres)?
 - In which locations of the corporate group are there company or trade union employee representations?
 - Are there already any transnational contacts with colleagues in other countries and which countries would be involved in the establishment of a EWC?
 - To which management culture can the corporate group be attributed and how can the attitude of management towards the establishment of a EWC be expected to be?
- According to the EU Directive, the central and also the local managements are obliged to provide information on structure and organisation, branch establishments and the number of employees in the various locations.

Milestone 5:

Gathering information on trade unions and participation rights of the company interest representations in other countries

Gathering information on the company interest representation in other countries

- To build international contacts, it is indispensable to deal with the cultural and political conditions in other countries.
- Missing knowledge on other trade union structures and company interest representations may lead to misunderstandings within the course of the networking with employee representatives and trade unionists from other countries necessary for the establishment of a EWC.

Getting an overview on trade union representations in other locations/countries

- Thus, information on the company and trade union interest representation relevant for the establishment of a EWC in the own corporate group should be gathered with the help of national and European trade unions, even before contacting colleagues in other countries. Among others, the following questions should be of central importance:
 - Which trade unions are represented in the other locations of the corporate group/the other countries? How are they structured? What influence do they have in the company/in the sector?
 - Is there an employee representation similar to a works council? Is there a trade union representation in the plant/company or – as in numerous EU countries – do both representations exist? What are the rights of participation of these interest representations? Who are the decisive players in the event of a EWC establishment and should, therefore, be contacted?
 - What is the social and political situation in these countries? To which European labour relations culture can the countries involved be attributed (North European corporatism, Central European social partnership model, Anglo-Saxon trade union model, South European 'conflict' model)?
 - Which parts of the employment relation (remuneration, working hours, occupational safety) are regulated by law, which by cross-sectoral collective agreements and which are only regulated on the company level?

Milestone 6:

Establishing transnational contacts and determining first strategic considerations regarding the establishment of a EWC

Establishing first contacts to employee representations in other countries

- After a first orientation and information on how the corporate group is organised internationally and how the pan-European trade union and employee representations are positioned, first contacts with colleagues in other countries can be established with the help of the national and European trade unions.
- First and foremost, it is important to sort out, if and in which countries, where there is an interest representation on level of the company or the plant, there is general interest in the establishment

of a EWC. As a next step, it may be appropriate to present the prospect of a first informal meeting.

- After the establishment of first transnational contacts with trade unionists and employee representatives in the corporate group – and in any case prior to the first meeting of trade unionists and employee representatives on a European level – particularly two fundamental questions should be clarified:
 - 1.) How can the basic attitude of the company management towards the establishment of a transnational employee representation be assessed?
 - 2.) At which level of the company/the group of companies should the EWC be established?

Determining the attitude of the company management towards the possible establishment of a EWC

- Regarding the first question, it is necessary to determine, whether management is willing to quickly come to an agreement or whether lengthy negotiations are to be expected. This will decisively determine the strategy to be applied during negotiations with management, since the following approaches regarding the implementation of a European Works Council are possible according to the EU Directive:
 - Conclusion of a EWC agreement, stipulating the transnational information and consultation of employees, valid for all employees of the company that has been negotiated by central company management and the so-called “Special Negotiating Body” consisting of employee representations from the countries represented in the corporate group.
 - Application of the “subsidiary requirements” as laid down in the annex of the Directive upon the failure of negotiations with the employer (“EWC by act of law”).

Locating information and consultation rights on the appropriate level of the corporate group

- Regarding the second question, it is necessary to determine at which level of the company or the group of companies it is appropriate to place the information and consultation rights.
 - In principle, the European Works Council should be established at the top of the company or the group of companies and should comprise the employees of all companies and plants in the corporate group in all countries within the scope of the agreement. This is stipulated by the Directive and corresponds with the intention of establishing a transnational body of interest representation at the level, where central decisions of the company or the corporate group are ultimately taken.
 - The establishment of a EWC at the top level of the corporate group should, however, not prevent exchange on the level of individual divisions and sectors of the company. This is particularly relevant for conglomerates active in different sectors and branches of industry and managed totally independent from each other.
 - In these cases, it may be more appropriate to establish several (maybe smaller) European Works Councils for the individual sectors, instead of one central and comprehensive EWC at the top of the corporate group. As a matter of course, such a “divisioning” of the EWC is only possible in agreement with company management. In such divisional European Works Councils, it is generally useful to unite them under an “overall EWC” that possibly only consists of the chairpersons of the individual divisional EWCs and their deputies.

Milestone 7:
Planning a first international employee meeting:
Getting to know each other, building trust and reaching consensus on the establishment of a EWC

International meeting of employee representations prior to the establishment of a EWC

- If possible, the employee representatives from the different countries in which the corporate group is active should have met at least once at a separate meeting on the European level, prior to taking up negotiations with management. The trade unions can provide valuable support in organising such a meeting.
- Besides getting to know each other, first agreements on the objectives and the working method of a EWC should be achieved. Thereby, the basic principle applies: The clearer the ideas on transnational cooperation within the EWC are developed in the initial phase, the more efficient the body will be able to perform its work subsequently.
- Finally, consensus should be reached regarding the possible request on the establishment of a EWC and a realistic schedule for the negotiations with management should be discussed at such a meeting.

Getting to know the employee representatives in the corporate group

- At the first international meeting the following issues should be discussed for each country, in which subsidiaries of the corporate group are located in:
 - Which products are produced or which services are rendered at the individual locations?
 - How is the economic situation in the country and how many employees are there in the individual plants/companies in the country?
 - Have there been recent restructurings in the plant? What are the plans for the future?
 - Is there an employee representation in the plants? How is it structured? Which trade unions are active in the plants? How do trade union and company employee representatives work together?
 - What is the relationship between management and the trade union or the employee representation body? Are there any specific social problems in the plant?
 - What issues should have priority at future EWC meetings?

Arriving at a timely consensus on the key points of a EWC agreement

- Therefore, a main purpose of a such European meeting should be to reach an understanding on the key points of a joint draft for a EWC agreement with management.
- It is of utmost importance to prepare the meeting on the European level, as well as possible. Together with the responsible trade unions and with the aid of existing EWC agreements, a proposal for an agreement should already be drafted prior to this meeting.
- Thereby, the draft should go as far beyond the subsidiary requirements (i.e. the minimum standards) as possible. The draft may serve as the basis for negotiations and should, thus, be translated into the languages represented in the corporate group.

Milestone 8:
Request for the establishment of a EWC and a Special Negotiating Body (SNB)

- In a first step, the employee side requests the establishment of a Special Negotiating Body (SNB). An effective request is submitted as soon as it has been signed by at least 100 employees or their interest representatives from at least two European countries and has been submitted to corporate management (“central management of the controlling company”).
- Two properly submitted requests initiate the term of period that allows for the establishment of a “EWC by act of law” also without achieving an agreement with corporate management. Such a “EWC by act of law” is to be established upon the expiry of a deadline of six months, if no negotiations were started or upon the expiry of three years, if no EWC agreement has been achieved.
- The composition of the SNB and the appointment of the national employee representatives are guided by national laws. The responsible European federations of employers and employees/trade unions are to be informed on the composition of the Special Negotiating Body.
- Upon willingness to negotiations of the corporate management, the constitution of the SNB takes place in an internal meeting. Further steps are an understanding regarding the key points of the draft agreement and the start of negotiations with corporate management with the objective to conclude an agreement.
- In any case, support and consultation by trade union and further experts should be sought and assured.

Milestone 9:
Strategy for dealing with obstructions of corporate management:
Creating facts by submitting the request and increasing the pressure

The submission of the request to establish a EWC calls for the company management to act

- As a first step, lasting cooperation of the employee representatives/trade unions should be established at the European level. To begin with, it is necessary to pursue one’s own plans and, in any case, submit a valid and transparent request to establish a EWC.
- Only then, do obligations for the company commence (1) to enter negotiations with the employee representations and (2) to establish a negotiated EWC in the corporate group with transnational information and consultation rights within a certain time period.
- A request is submitted, if employee representatives from at least two countries, with more than 150 employees in the group of companies, representing a minimum of 100 employees in a plant or company of the corporate group each, send a letter to the local and/or the central company management requesting the establishment of a European Works Council. Such a request may also be submitted in a joint letter by several employee representations from different countries.
- If central management does not enter negotiations upon due submission of the request within six months, a “EWC by act of law” providing for the minimum rights in line with the EU Directive according to the respective national EWC laws were to be established immediately (equally after three years of unsuccessful negotiations). In face of this establishment by law without any margin for negotiations, the company management has in several cases been finally willing to serious discussions on the establishment of a EWC.

How can possible obstructions of management be overcome?

- First of all, objections by management against a EWC should be met with convincing arguments. For instance, practical examples of successful cooperation between corporate management and EWCs in other major companies can be used to counter possible prevailing prejudices and resentments.
- It should also be pointed out that the EU Directive provides for considerable leeway for the arrangement of the future information and consultation procedures considering the specific needs of the corporate group. In contrast, the employer side may face increased costs for participants, interpreters, travelling and experts in the case of the establishment of a EWC by act of law.
- Frequently, there are different views on the establishment of a EWC and its possible benefit for the corporate group within the different management levels and also within the central corporate management. Experience has shown that corporate managers expect benefits from a EWC in several fields:
 - Information from EWC delegates to the central corporate management is authentic and can be used to check the reports of the local managements in the individual countries;
 - Moreover, the EWC can be used to convince employee representatives from countries with conflict-oriented labour relations cultures of the consensus-oriented negotiation culture in the corporate home country.
 - Finally, the EWC can be a tool for management to promote understanding among the employee representatives for restructuring measures and, thus, avoid the risk of cost-intensive labour conflicts in individual locations.

When it comes to the crunch: Increase trade union pressure on management

- In addition, pressure on management can be increased by publications in the media or on trade union websites, by petitions or legal action (for example, if management refuses to disclose required information).
- It is recommended to closely coordinate the activities and campaigns with the European and national trade unions, which may be organised in the form of "days of action" at the corporate group locations. There is respective experience for corporate groups in several sectors.

Milestone 10: Developing a draft from an employee perspective for a EWC agreement Central considerations for the conception of a EWC agreement

There are no templates for a EWC agreement

- Europe-wide negotiations on transnational information and consultation rights in Europe-wide corporate groups are new ground for many trade unionists and employee representatives.
- The different legal bases of employee participation on the company level and co-determination in companies in the different European countries have to be considered along with the different traditions in the relationship and cooperation between employee representations and trade unions.
- Furthermore, every negotiation for a EWC has to consider the specific structure of the company or the group of companies.

However, there are certain benchmarks that should be contained in every EWC agreement

- Even though there is no standardised agreement template to use for EWC agreements, there are certain benchmarks that have to be considered by all means for every negotiation and that from the perspective of employee representations should be part of all agreements one way or another.
- The EU Directive does not specify standards for the individual provisions in the EWC agreement to be negotiated. Ultimately, it is subject to the discretion of the negotiating partners – central management of the corporate group and the Special Negotiating Body – to decide on the final form of the EWC, its composition and organisation, as well as the extent of the information and consultation procedures.
- Although, even a “good” EWC agreement does not guarantee successful practical work of the future EWC, it is, however, in most cases, its required basis.
- Ultimately, neither the EU Directive nor the national EWC law, but the EWC agreement negotiated between the Special Negotiating Body and central management is the decisive legal basis for the practical work of the EWC.

Transparent structures and binding guidelines as the basis for good EWC work

- It takes transparent structures and binding guidelines to ensure that management is actually willing to open a constructive, comprehensive and co-operative dialogue that contributes to forming an opinion and decision-making after comprehensive consultations with the European representation of employees, as well as the local and national representations.
- Therefore, it is decisive to design the EWC within the scope of a EWC agreement in such a way
 - a. that the employee representatives are actually informed in good time on significant developments and plans with a major impact on labour and employment relations and that they are consulted and involved in the decision-making process before a decision is taken;
 - b. that continuous exchange of information, experiences and objectives of all employee representatives involved in the corporate group is taking place in the practical EWC work and that it is possible to develop joint strategies based on trusting cooperation of the transnational interest representation in the group corporate.
- For this purpose, explicit and clear provisions have to be agreed, so that the company management cannot evade its obligations for transnational information and consultation of employees and their representatives.

The “subsidiary requirements” constitute the basis that is to be improved

- The “subsidiary requirements” laid down in the annex of the Directive for a “EWC by act of law” can be regarded as a guideline for minimum rights for the EWC to be established, as the standards contained therein are to be implemented in any case, if negotiations fail upon expiry of a three-year negotiating period.
- Therefore, they must be regarded as the starting point for the establishment of a EWC during negotiations that should be improved according to the possibilities and the necessary practice of the company on a respective higher level, but that by no means should be undermined.

Ensuring high standards by involving the trade unions

- In any case, it is necessary to contact the responsible trade union organisations at the national and the European level as soon as possible before the start of negotiations on a EWC agreement and to ensure their active involvement in the negotiations in the context of the Special Negotiating Body.
- This is the only way to draw on the broad experiences that have been gained during the numerous previous negotiations for transnational corporate agreements and during the meetings of already established European Works Councils in other companies.
- The support from external experts from the trade unions is indispensable for the development a continuous and substantiated cooperation within the EWC.
- Thus, also the EWC agreement should explicitly settle that at least one external (trade union) expert appointed by the EWC is available to the EWC in all its meetings. The respective costs are to be covered by the company.

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)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 137 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

Having consulted the Committee of the Regions,

Acting in accordance with the procedure referred to in Article 251 of the Treaty ⁽²⁾,

Whereas:

(1) A number of substantive changes are to be made to Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees ⁽³⁾. In the interests of clarity, that Directive should be recast.

(2) Pursuant to Article 15 of Directive 94/45/EC, the Commission has, in consultation with the Member States and with management and labour at European level, reviewed the operation of that Directive and, in particular, examined whether the workforce size thresholds are appropriate, with a view to proposing suitable amendments where necessary.

(3) Having consulted the Member States and management and labour at European level, the Commission submitted, on 4 April 2000, a report on the application of Directive 94/45/EC to the European Parliament and to the Council.

(4) Pursuant to Article 138(2) of the Treaty, the Commission consulted management and labour at Community level on the possible direction of Community action in this area.

(5) Following this consultation, the Commission considered that Community action was advisable and again consulted management and labour at Community level on the content of the planned proposal, pursuant to Article 138(3) of the Treaty.

(6) Following this second phase of consultation, management and labour have not informed the Commission of their shared wish to initiate the process which might lead to the conclusion of an agreement, as provided for in Article 138(4) of the Treaty.

(7) It is necessary to modernise Community legislation on transnational information and consultation of employees with a view to ensuring the effectiveness of employees' transnational information and consultation rights, increasing the proportion of European Works Councils established while enabling the continuous functioning of existing agreements, resolving the problems encountered in the practical application of Directive 94/45/EC and remedying the lack of legal certainty resulting from some of its provisions or the absence of certain provisions, and ensuring that Community legislative instruments on information and consultation of employees are better linked.

(8) Pursuant to Article 136 of the Treaty, one particular objective of the Community and the Member States is to promote dialogue between management and labour.

(9) This Directive is part of the Community framework intended to support and complement the action taken by Member States in the field of information and consultation of employees. This framework should keep to a minimum the burden on undertakings or establishments while ensuring the effective exercise of the rights granted.

⁽¹⁾ Opinion of 4 December 2008 (not yet published in the Official Journal).

⁽²⁾ Opinion of the European Parliament of 16 December 2008 (not yet published in the Official Journal) and Council Decision of 17 December 2008.

⁽³⁾ OJ L 254, 30.9.1994, p. 64.

- (10) The functioning of the internal market involves a process of concentrations of undertakings, cross-border mergers, take-overs, joint ventures and, consequently, a transnationalisation of undertakings and groups of undertakings. If economic activities are to develop in a harmonious fashion, undertakings and groups of undertakings operating in two or more Member States must inform and consult the representatives of those of their employees who are affected by their decisions.
- (11) Procedures for informing and consulting employees as embodied in legislation or practice in the Member States are often not geared to the transnational structure of the entity which takes the decisions affecting those employees. This may lead to the unequal treatment of employees affected by decisions within one and the same undertaking or group of undertakings.
- (12) Appropriate provisions must be adopted to ensure that the employees of Community-scale undertakings or Community-scale groups of undertakings are properly informed and consulted when decisions which affect them are taken in a Member State other than that in which they are employed.
- (13) In order to guarantee that the employees of undertakings or groups of undertakings operating in two or more Member States are properly informed and consulted, it is necessary to set up European Works Councils or to create other suitable procedures for the transnational information and consultation of employees.
- (14) The arrangements for informing and consulting employees need to be defined and implemented in such a way as to ensure their effectiveness with regard to the provisions of this Directive. To that end, informing and consulting the European Works Council should make it possible for it to give an opinion to the undertaking in a timely fashion, without calling into question the ability of undertakings to adapt. Only dialogue at the level where directions are prepared and effective involvement of employees' representatives make it possible to anticipate and manage change.
- (15) Workers and their representatives must be guaranteed information and consultation at the relevant level of management and representation, according to the subject under discussion. To achieve this, the competence and scope of action of a European Works Council must be distinct from that of national representative bodies and must be limited to transnational matters.
- (16) The transnational character of a matter should be determined by taking account of both the scope of its potential effects, and the level of management and representation that it involves. For this purpose, matters which concern the entire undertaking or group or at least two Member States are considered to be transnational. These include matters which, regardless of the number of Member States involved, are of importance for the European workforce in terms of the scope of their potential effects or which involve transfers of activities between Member States.
- (17) It is necessary to have a definition of 'controlling undertaking' relating solely to this Directive, without prejudice to the definitions of 'group' or 'control' in other acts.
- (18) The mechanisms for informing and consulting employees in undertakings or groups of undertakings operating in two or more Member States must encompass all of the establishments or, as the case may be, the group's undertakings located within the Member States, regardless of whether the undertaking or the group's controlling undertaking has its central management inside or outside the territory of the Member States.
- (19) In accordance with the principle of autonomy of the parties, it is for the representatives of employees and the management of the undertaking or the group's controlling undertaking to determine by agreement the nature, composition, the function, mode of operation, procedures and financial resources of European Works Councils or other information and consultation procedures so as to suit their own particular circumstances.
- (20) In accordance with the principle of subsidiarity, it is for the Member States to determine who the employees' representatives are and in particular to provide, if they consider appropriate, for a balanced representation of different categories of employees.
- (21) It is necessary to clarify the concepts of information and consultation of employees, in accordance with the definitions in the most recent Directives on this subject and those which apply within a national framework, with the objectives of reinforcing the effectiveness of dialogue at transnational level, permitting suitable linkage between the national and transnational levels of dialogue and ensuring the legal certainty required for the application of this Directive.
- (22) The definition of 'information' needs to take account of the goal of allowing employees representatives to carry out an appropriate examination, which implies that the information be provided at such time, in such fashion and with such content as are appropriate without slowing down the decision-making process in undertakings.

- (23) The definition of 'consultation' needs to take account of the goal of allowing for the expression of an opinion which will be useful to the decision-making process, which implies that the consultation must take place at such time, in such fashion and with such content as are appropriate.
- (24) The information and consultation provisions laid down in this Directive must be implemented in the case of an undertaking or a group's controlling undertaking which has its central management outside the territory of the Member States by its representative agent, to be designated if necessary, in one of the Member States or, in the absence of such an agent, by the establishment or controlled undertaking employing the greatest number of employees in the Member States.
- (25) The responsibility of undertakings or groups of undertakings in the transmission of the information required to commence negotiations must be specified in a way that enables employees to determine whether the undertaking or group of undertakings where they work is a Community-scale undertaking or group of undertakings and to make the necessary contacts to draw up a request to commence negotiations.
- (26) The special negotiating body must represent employees from the various Member States in a balanced fashion. Employees' representatives must be able to cooperate to define their positions in relation to negotiations with the central management.
- (27) 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. In order to enable them to monitor the establishment of new European Works Councils and promote best practice, competent trade union and employers' organisations recognised as European social partners shall be informed of the commencement of negotiations. Recognised competent European trade union and employers' organisations are those social partner organisations that are consulted by the Commission under Article 138 of the Treaty. The list of those organisations is updated and published by the Commission.
- (28) The agreements governing the establishment and operation of European Works Councils must include the methods for modifying, terminating, or renegotiating them when necessary, particularly where the make-up or structure of the undertaking or group of undertakings is modified.
- (29) Such agreements must lay down the arrangements for linking the national and transnational levels of information and consultation of employees appropriate for the particular conditions of the undertaking or group of undertakings. The arrangements must be defined in such a way that they respect the competences and areas of action of the employee representation bodies, in particular with regard to anticipating and managing change.
- (30) Those agreements must provide, where necessary, for the establishment and operation of a select committee in order to permit coordination and greater effectiveness of the regular activities of the European Works Council, together with information and consultation at the earliest opportunity where exceptional circumstances arise.
- (31) Employees' representatives may decide not to seek the setting-up of a European Works Council or the parties concerned may decide on other procedures for the transnational information and consultation of employees.
- (32) Provision should be made for certain subsidiary requirements to apply should the parties so decide or in the event of the central management refusing to initiate negotiations or in the absence of agreement subsequent to such negotiations.
- (33) In order to perform their representative role fully and to ensure that the European Works Council is useful, employees' representatives must report to the employees whom they represent and must be able to receive the training they require.
- (34) Provision should be made for the employees' representatives acting within the framework of this Directive to enjoy, when exercising their functions, the same protection and guarantees as those provided to employees' representatives by the legislation and/or practice of the country of employment. They must not be subject to any discrimination as a result of the lawful exercise of their activities and must enjoy adequate protection as regards dismissal and other sanctions.
- (35) The Member States must take appropriate measures in the event of failure to comply with the obligations laid down in this Directive.
- (36) In accordance with the general principles of Community law, administrative or judicial procedures, as well as sanctions that are effective, dissuasive and proportionate in relation to the seriousness of the offence, should be applicable in cases of infringement of the obligations arising from this Directive.

- (37) For reasons of effectiveness, consistency and legal certainty, there is a need for linkage between the Directives and the levels of informing and consulting employees established by Community and national law and/or practice. Priority must be given to negotiations on these procedures for linking information within each undertaking or group of undertakings. If there are no agreements on this subject and where decisions likely to lead to substantial changes in work organisation or contractual relations are envisaged, the process must be conducted at both national and European level in such a way that it respects the competences and areas of action of the employee representation bodies. Opinions expressed by the European Works Council should be without prejudice to the competence of the central management to carry out the necessary consultations in accordance with the schedules provided for in national legislation and/or practice. National legislation and/or practice may have to be adapted to ensure that the European Works Council can, where applicable, receive information earlier or at the same time as the national employee representation bodies, but must not reduce the general level of protection of employees.
- (38) This Directive should be without prejudice to the information and consultation procedures referred to in 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⁽¹⁾ and to the specific procedures referred to in Article 2 of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies⁽²⁾ and Article 7 of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses⁽³⁾.
- (39) Special treatment should be accorded to Community-scale undertakings and groups of undertakings in which there existed, on 22 September 1996, an agreement, covering the entire workforce, providing for the transnational information and consultation of employees.
- (40) Where the structure of the undertaking or group of undertakings changes significantly, for example, due to a merger, acquisition or division, the existing European Works Council(s) must be adapted. This adaptation must be carried out as a priority pursuant to the clauses of the applicable agreement, if such clauses permit the required adaptation to be carried out. If this is not the case and a request establishing the need is made, negotiations, in which the members of the existing European Works Council(s) must be involved, will commence on a new agreement. In order to permit the information and consultation of employees during the often decisive period when the structure is changed, the existing European Works Council(s) must be able to continue to operate, possibly with adaptations, until a new agreement is concluded. Once a new agreement is signed, the previously established councils must be dissolved, and the agreements instituting them must be terminated, regardless of their provisions on validity or termination.
- (41) Unless this adaptation clause is applied, the agreements in force should be allowed to continue in order to avoid their obligatory renegotiation when this would be unnecessary. Provision should be made so that, as long as agreements concluded prior to 22 September 1996 under Article 13(1) of Directive 94/45/EC or under Article 3(1) of Directive 97/74/EC⁽⁴⁾ remain in force, the obligations arising from this Directive should not apply to them. Furthermore, this Directive does not establish a general obligation to renegotiate agreements concluded pursuant to Article 6 of Directive 94/45/EC between 22 September 1996 and 5 June 2011.
- (42) Without prejudice to the possibility of the parties to decide otherwise, a European Works Council set up in the absence of agreement between the parties must, in order to fulfil the objective of this Directive, be kept informed and consulted on the activities of the undertaking or group of undertakings so that it may assess the possible impact on employees' interests in at least two different Member States. To that end, the undertaking or controlling undertaking must be required to communicate to the employees' appointed representatives general information concerning the interests of employees and information relating more specifically to those aspects of the activities of the undertaking or group of undertakings which affect employees' interests. The European Works Council must be able to deliver an opinion at the end of the meeting.
- (43) Certain decisions having a significant effect on the interests of employees must be the subject of information and consultation of the employees' appointed representatives as soon as possible.

⁽¹⁾ OJ L 80, 23.3.2002, p. 29.

⁽²⁾ OJ L 225, 12.8.1998, p. 16.

⁽³⁾ OJ L 82, 22.3.2001, p. 16.

⁽⁴⁾ Council Directive 97/74/EC of 15 December 1997 extending, to the United Kingdom of Great Britain and Northern Ireland, 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 (OJ L 10, 16.1.1998, p. 22).

- (44) The content of the subsidiary requirements which apply in the absence of an agreement and serve as a reference in the negotiations must be clarified and adapted to developments in the needs and practices relating to transnational information and consultation. A distinction should be made between fields where information must be provided and fields where the European Works Council must also be consulted, which involves the possibility of obtaining a reasoned response to any opinions expressed. To enable the select committee to play the necessary coordinating role and to deal effectively with exceptional circumstances, that committee must be able to have up to five members and be able to consult regularly.
- (45) Since the objective of this Directive, namely the improvement of the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (46) This Directive respects fundamental rights and observes in particular the principles recognised by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for the right of workers or their representatives to be guaranteed information and consultation in good time at the appropriate levels in the cases and under the conditions provided for by Community law and national laws and practices (Article 27 of the Charter of Fundamental Rights of the European Union).
- (47) The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive change as compared with the earlier Directives. The obligation to transpose the provisions which are unchanged arises under the earlier Directives.
- (48) In accordance with point 34 of the Interinstitutional Agreement on better law-making ⁽¹⁾, Member States are encouraged to draw up, for themselves and in the interests of the Community, tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.
- (49) This Directive should be without prejudice to the obligations of the Member States relating to the time limits set out in Annex II, Part B for transposition into national law and application of the Directives,

HAVE ADOPTED THIS DIRECTIVE:

SECTION I

GENERAL

Article 1

Objective

1. The purpose of this Directive is to improve the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings.
2. To that end, a European Works Council or a procedure for informing and consulting employees shall be established in every Community-scale undertaking and every Community-scale group of undertakings, where requested in the manner laid down in Article 5(1), with the purpose of informing and consulting employees. The arrangements for informing and consulting employees shall be defined and implemented in such a way as to ensure their effectiveness and to enable the undertaking or group of undertakings to take decisions effectively.
3. Information and consultation of employees must occur at the relevant level of management and representation, according to the subject under discussion. To achieve that, the competence of the European Works Council and the scope of the information and consultation procedure for employees governed by this Directive shall be limited to transnational issues.
4. Matters shall be considered to be transnational where they concern the Community-scale undertaking or Community-scale group of undertakings as a whole, or at least two undertakings or establishments of the undertaking or group situated in two different Member States.
5. Notwithstanding paragraph 2, where a Community-scale group of undertakings within the meaning of Article 2(1)(c) comprises one or more undertakings or groups of undertakings which are Community-scale undertakings or Community-scale groups of undertakings within the meaning of Article 2(1)(a) or (c), a European Works Council shall be established at the level of the group unless the agreements referred to in Article 6 provide otherwise.
6. Unless a wider scope is provided for in the agreements referred to in Article 6, the powers and competence of European Works Councils and the scope of information and consultation procedures established to achieve the purpose specified in paragraph 1 shall, in the case of a Community-scale undertaking, cover all the establishments located within the Member States and, in the case of a Community-scale group of undertakings, all group undertakings located within the Member States.

⁽¹⁾ OJ C 321, 31.12.2003, p. 1.

7. Member States may provide that this Directive shall not apply to merchant navy crews.

Article 2

Definitions

1. For the purposes of this Directive:

(a) 'Community-scale undertaking' means any undertaking with at least 1 000 employees within the Member States and at least 150 employees in each of at least two Member States;

(b) 'group of undertakings' means a controlling undertaking and its controlled undertakings;

(c) '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;

(d) 'employees' representatives' means the employees' representatives provided for by national law and/or practice;

(e) 'central management' means the central management of the Community-scale undertaking or, in the case of a Community-scale group of undertakings, of the controlling undertaking;

(f) 'information' means transmission of data by the employer to the employees' representatives in order to enable them to acquaint themselves with the subject matter and to examine it; information shall be given at such time, in such fashion and with such content as are appropriate to enable employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare for consultations with the competent organ of the Community-scale undertaking or Community-scale group of undertakings;

(g) 'consultation' means the establishment of dialogue and exchange of views between employees' representatives and

central management or any more appropriate level of management, at such time, in such fashion and with such content as enables employees' representatives to express an opinion on the basis of the information provided about the proposed measures to which the consultation is related, without prejudice to the responsibilities of the management, and within a reasonable time, which may be taken into account within the Community-scale undertaking or Community-scale group of undertakings;

(h) 'European Works Council' means a council established in accordance with Article 1(2) or the provisions of Annex I, with the purpose of informing and consulting employees;

(i) 'special negotiating body' means the body established in accordance with Article 5(2) to negotiate with the central management regarding the establishment of a European Works Council or a procedure for informing and consulting employees in accordance with Article 1(2).

2. For the purposes of this Directive, the prescribed thresholds for the size of the workforce shall be based on the average number of employees, including part-time employees, employed during the previous two years calculated according to national legislation and/or practice.

Article 3

Definition of 'controlling undertaking'

1. For the purposes of this Directive, 'controlling undertaking' means an undertaking which can exercise a dominant influence over another undertaking (the controlled undertaking) by virtue, for example, of ownership, financial participation or the rules which govern it.

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

(a) holds a majority of that undertaking's subscribed capital;

(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.

3. For the purposes of paragraph 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.

4. Notwithstanding paragraphs 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 Article 3(5)(a) or (c) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ⁽¹⁾.

5. 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.

6. 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.

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.

7. Where, in the case of a conflict of laws in the application of paragraph 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.

SECTION II

ESTABLISHMENT OF A EUROPEAN WORKS COUNCIL OR AN EMPLOYEE INFORMATION AND CONSULTATION PROCEDURE

Article 4

Responsibility for the establishment of a European Works Council or an employee information and consultation procedure

1. The central management shall be responsible for creating the conditions and means necessary for the setting-up of a European Works Council or an information and consultation procedure, as provided for in Article 1(2), in a Community-scale undertaking and a Community-scale group of undertakings.

2. Where the central management is not situated in a Member State, the central management's representative agent in a Member State, to be designated if necessary, shall take on the responsibility referred to in paragraph 1.

In the absence of such a representative, the management of the establishment or group undertaking employing the greatest number of employees in any one Member State shall take on the responsibility referred to in paragraph 1.

3. For the purposes of this Directive, the representative or representatives or, in the absence of any such representatives, the management referred to in the second subparagraph of paragraph 2, shall be regarded as the central management.

4. The management of every undertaking belonging to the Community-scale group of undertakings and the central management or the deemed central management within the meaning of the second subparagraph of paragraph 2 of the Community-scale undertaking or group of undertakings shall be responsible for obtaining and transmitting to the parties concerned by the application of this Directive the information required for commencing the negotiations referred to in Article 5, and in particular the information concerning the structure of the undertaking or the group and its workforce. This obligation shall relate in particular to the information on the number of employees referred to in Article 2(1)(a) and (c).

Article 5

Special negotiating body

1. In order to achieve the objective set out in Article 1(1), the central management shall initiate negotiations for the establishment of a European Works Council or an information and consultation procedure on its own initiative or at the written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States.

2. For this purpose, a special negotiating body 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.

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.

⁽¹⁾ OJ L 24, 29.1.2004, p. 1.

The second subparagraph shall be without prejudice to national legislation and/or practice laying down thresholds for the establishment of employee representation bodies.

(b) The members of the special negotiating body shall be elected or appointed in proportion to the number of employees employed in each Member State by the Community-scale undertaking or Community-scale group of undertakings, by allocating in respect of each Member State one seat per portion of employees employed in that Member State amounting to 10 %, or a fraction thereof, of the number of employees employed in all the Member States taken together;

(c) The central management and local management and the competent European workers' and employers' organisations shall be informed of the composition of the special negotiating body and of the start of the negotiations.

3. The special negotiating body shall have the task of determining, with the central management, by written agreement, the scope, composition, functions, and term of office of the European Works Council(s) or the arrangements for implementing a procedure for the information and consultation of employees.

4. With a view to the conclusion of an agreement in accordance with Article 6, the central management shall convene a meeting with the special negotiating body. It shall inform the local managements accordingly.

Before and after any meeting with the central management, the special negotiating body shall be entitled to meet without representatives of the central management being present, using any necessary means for communication.

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.

5. The special negotiating body may decide, by at least two-thirds of the votes, not to open negotiations in accordance with paragraph 4, or to terminate the negotiations already opened.

Such a decision shall stop the procedure to conclude the agreement referred to in Article 6. Where such a decision has been taken, the provisions in Annex I shall not apply.

A new request to convene the special negotiating body may be made at the earliest two years after the abovementioned decision unless the parties concerned lay down a shorter period.

6. Any expenses relating to the negotiations referred to in paragraphs 3 and 4 shall be borne by the central management so as to enable the special negotiating body to carry out its task in an appropriate manner.

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 6

Content of the agreement

1. The central management and the special negotiating body must 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 provided for in Article 1(1).

2. Without prejudice to the autonomy of the parties, the agreement referred to in paragraph 1 and effected in writing between the central management and the special negotiating body shall determine:

(a) the undertakings of the Community-scale group of undertakings or the establishments of the Community-scale undertaking which are covered by the agreement;

(b) the composition of the European Works Council, the number of members, the allocation of seats, taking into account where possible the need for balanced representation of employees with regard to their activities, category and gender, and the term of office;

(c) the functions and the procedure for information and consultation of the European Works Council and the arrangements for linking information and consultation of the European Works Council and national employee representation bodies, in accordance with the principles set out in Article 1(3);

(d) the venue, frequency and duration of meetings of the European Works Council;

(e) where necessary, the composition, the appointment procedure, the functions and the procedural rules of the select committee set up within the European Works Council;

(f) the financial and material resources to be allocated to the European Works Council;

(g) the date of entry into force of the agreement and its duration, the arrangements for amending or terminating the agreement and the cases in which the agreement shall be renegotiated and the procedure for its renegotiation, including, where necessary, where the structure of the Community-scale undertaking or Community-scale group of undertakings changes.

3. 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.

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

4. The agreements referred to in paragraphs 2 and 3 shall not, unless provision is made otherwise therein, be subject to the subsidiary requirements of Annex I.

5. For the purposes of concluding the agreements referred to in paragraphs 2 and 3, the special negotiating body shall act by a majority of its members.

Article 7

Subsidiary requirements

1. In order to achieve the objective set out in Article 1(1), the subsidiary requirements laid down by the legislation of the Member State in which the central management is situated shall apply:

— where the central management and the special negotiating body so decide,

— where the central management refuses to commence negotiations within six months of the request referred to in Article 5(1),

or

— where, after three years from the date of this request, they are unable to conclude an agreement as laid down in Article 6 and the special negotiating body has not taken the decision provided for in Article 5(5).

2. The subsidiary requirements referred to in paragraph 1 as adopted in the legislation of the Member States must satisfy the provisions set out in Annex I.

SECTION III

MISCELLANEOUS PROVISIONS

Article 8

Confidential information

1. Member States shall provide that members of special negotiating bodies or of European Works Councils and any experts who assist them are not authorised 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.

That obligation shall continue to apply, wherever the persons referred to in the first and second subparagraphs are, even after the expiry of their terms of office.

2. 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 authorisation.

3. Each Member State may lay down particular provisions for the central management of undertakings in its territory which pursue directly and essentially the aim of ideological guidance with respect to information and the expression of opinions, on condition that, at the date of adoption of this Directive such particular provisions already exist in the national legislation.

Article 9

Operation of the European Works Council and the information and consultation procedure for workers

The central management and the European Works Council shall work in a spirit of cooperation with due regard to their reciprocal rights and obligations.

The same shall apply to cooperation between the central management and employees' representatives in the framework of an information and consultation procedure for workers.

Article 10

Role and protection of employees' representatives

1. Without prejudice to the competence of other bodies or organisations in this respect, the members of the European Works Council shall have the means required to apply the rights arising from this Directive, to represent collectively the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings.

2. Without prejudice to Article 8, 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 Directive.

3. Members of special negotiating bodies, members of European Works Councils and employees' representatives exercising their functions under the procedure referred to in Article 6(3) shall, in the exercise of their functions, enjoy protection and guarantees similar to those provided for employees' representatives by the national legislation and/or practice in force in their country of employment.

This shall apply in particular to attendance at meetings of special negotiating bodies or European Works Councils or any other meetings within the framework of the agreement referred to in Article 6(3), and the payment of wages for members who are on the staff of the Community-scale undertaking or the Community-scale group of undertakings for the period of absence necessary for the performance of their duties.

4. In so far as this is necessary for the exercise of their representative duties in an international environment, the members of the special negotiating body and of the European Works Council shall be provided with training without loss of wages.

Article 11

Compliance with this Directive

1. Each Member State shall 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 this Directive, regardless of whether or not the central management is situated within its territory.

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

3. Where Member States apply Article 8, they shall make provision for administrative or judicial appeal procedures which the employees' representatives may initiate when the central management requires confidentiality or does not give information in accordance with that Article.

Such procedures may include procedures designed to protect the confidentiality of the information in question.

Article 12

Relationship with other Community and national provisions

1. Information and consultation of the European Works Council shall be linked to those of the national employee representation bodies, with due regard to the competences and areas of action of each and to the principles set out in Article 1(3).

2. The arrangements for the links between the information and consultation of the European Works Council and national employee representation bodies shall be established by the agreement referred to in Article 6. That agreement shall be without prejudice to the provisions of national law and/or practice on the information and consultation of employees.

3. Where no such arrangements have been defined by agreement, the Member States shall ensure that the processes of informing and consulting are conducted in the European Works Council as well as in the national employee representation bodies in cases where decisions likely to lead to substantial changes in work organisation or contractual relations are envisaged.

4. This Directive shall be without prejudice to the information and consultation procedures referred to in Directive 2002/14/EC and to the specific procedures referred to in Article 2 of Directive 98/59/EC and Article 7 of Directive 2001/23/EC.

5. Implementation of this Directive shall not be sufficient grounds for any regression in relation to the situation which already prevails in each Member State and in relation to the general level of protection of workers in the areas to which it applies.

*Article 13***Adaptation**

Where the structure of the Community-scale undertaking or Community-scale group of undertakings changes significantly, and either in the absence of provisions established by the agreements in force or in the event of conflicts between the relevant provisions of two or more applicable agreements, the central management shall initiate the negotiations referred to in Article 5 on its own initiative or at the written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States.

At least three members of the existing European Works Council or of each of the existing European Works Councils shall be members of the special negotiating body, in addition to the members elected or appointed pursuant to Article 5(2).

During the negotiations, the existing European Works Council(s) shall continue to operate in accordance with any arrangements adapted by agreement between the members of the European Works Council(s) and the central management.

*Article 14***Agreements in force**

1. Without prejudice to Article 13, the obligations arising from this Directive shall not apply to Community-scale undertakings or Community-scale groups of undertakings in which, either

(a) an agreement or agreements covering the entire workforce, providing for the transnational information and consultation of employees have been concluded pursuant to Article 13(1) of Directive 94/45/EC or Article 3(1) of Directive 97/74/EC, or where such agreements are adjusted because of changes in the structure of the undertakings or groups of undertakings;

or

(b) an agreement concluded pursuant to Article 6 of Directive 94/45/EC is signed or revised between 5 June 2009 and 5 June 2011.

The national law applicable when the agreement is signed or revised shall continue to apply to the undertakings or groups of undertakings referred to in point (b) of the first subparagraph.

2. Upon expiry of the agreements referred to in paragraph 1, the parties to those agreements may decide jointly to renew or revise them. Where this is not the case, the provisions of this Directive shall apply.

*Article 15***Report**

No later than 5 June 2016, the Commission shall report to the European Parliament, the Council and the European Economic and Social Committee on the implementation of this Directive, making appropriate proposals where necessary.

*Article 16***Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Article 1(2), (3) and (4), Article 2(1), points (f) and (g), Articles 3(4), Article 4(4), Article 5(2), points (b) and (c), Article 5(4), Article 6(2), points (b), (c), (e) and (g), and Articles 10, 12, 13 and 14, as well as Annex I, point 1(a), (c) and (d) and points 2 and 3, no later than 5 June 2011 or shall ensure that management and labour introduce on that date 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.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. They shall also include a statement that references in existing laws, regulations and administrative provisions to the directive repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 17***Repeal**

Directive 94/45/EC, as amended by the Directives listed in Annex II, Part A, is repealed with effect from 6 June 2011 without prejudice to the obligations of the Member States relating to the time limit for transposition into national law of the Directives set out in Annex II, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex III.

*Article 18***Entry into force**

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 1(1), (5), (6) and (7), Article 2(1), points (a) to (e), (h) and (i), Article 2(2), Articles 3(1), (2), (3), (5), (6) and (7), Article 4(1), (2) and (3), Article 5(1), (3), (5) and (6), Article 5(2), point (a), Article 6(1), Article 6(2), points (a), (d) and (f), and Article 6(3), (4) and (5), and Articles 7, 8, 9 and 11, as well as Annex I, point 1(b), (e) and (f), and points 4, 5 and 6, shall apply from 6 June 2011.

Article 19

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 6 May 2009.

For the European Parliament

The President

H.-G. PÖTTERING

For the Council

The President

J. KOHOUT

ANNEX I

SUBSIDIARY REQUIREMENTS

(referred to in Article 7)

1. In order to achieve the objective set out in Article 1(1) and in the cases provided for in Article 7(1), the establishment, composition and competence of a European Works Council shall be governed by the following rules:

(a) The competence of the European Works Council shall be determined in accordance with Article 1(3).

The information of the European Works Council shall relate in particular to the structure, economic and financial situation, probable development and production and sales of the Community-scale undertaking or group of undertakings. The information and consultation of the European Works Council shall relate in particular to the situation and probable trend of employment, investments, and substantial changes concerning organisation, 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.

The consultation shall be conducted in such a way that the employees' representatives can meet with the central management and obtain a response, and the reasons for that response, to any opinion they might express;

(b) The European Works Council 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.

The election or appointment of members of the European Works Council shall be carried out in accordance with national legislation and/or practice;

(c) The members of the European Works Council shall be elected or appointed in proportion to the number of employees employed in each Member State by the Community-scale undertaking or Community-scale group of undertakings, by allocating in respect of each Member State one seat per portion of employees employed in that Member State amounting to 10 %, or a fraction thereof, of the number of employees employed in all the Member States taken together;

(d) To ensure that it can coordinate its activities, the European Works Council shall elect a select committee from among its members, comprising at most five members, which must benefit from conditions enabling it to exercise its activities on a regular basis.

It shall adopt its own rules of procedure;

(e) The central management and any other more appropriate level of management shall be informed of the composition of the European Works Council;

(f) 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 or to continue to apply the subsidiary requirements adopted in accordance with this Annex.

Articles 6 and 7 shall apply, *mutatis mutandis*, if a decision has been taken to negotiate an agreement according to Article 6, in which case 'special negotiating body' shall be replaced by 'European Works Council'.

2. 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 managements shall be informed accordingly.

3. Where there are exceptional circumstances or decisions affecting the employees' interests to a considerable extent, particularly in the event of relocations, the closure of establishments or undertakings or collective redundancies, 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.

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 circumstances or decisions in question shall also have the right to participate where a meeting is organised with the select committee.

This information and consultation meeting shall take place as soon as possible on the basis of a report drawn up by the central management or any other appropriate level of management of the Community-scale undertaking or group of undertakings, on which an opinion may be delivered at the end of the meeting or within a reasonable time.

This meeting shall not affect the prerogatives of the central management.

The information and consultation procedures provided for in the above circumstances shall be carried out without prejudice to Article 1(2) and Article 8.

4. The Member States may lay down rules on the chairing of information and consultation meetings.

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.

5. The European Works Council or the select committee may be assisted by experts of its choice, in so far as this is necessary for it to carry out its tasks.
6. The operating expenses of the European Works Council shall be 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 organising 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 II

PART A

Repealed Directive with its successive amendments
(referred to in Article 17)

Council Directive 94/45/EC	(OJ L 254, 30.9.1994, p. 64)
Council Directive 97/74/EC	(OJ L 10, 16.1.1998, p. 22)
Council Directive 2006/109/EC	(OJ L 363, 20.12.2006, p. 416)

PART B

Time limits for transposition into national law
(referred to in Article 17)

Directive	Time limit for transposition
94/45/EC	22.9.1996
97/74/EC	15.12.1999
2006/109/EC	1.1.2007

ANNEX III

Correlation table

Directive 94/45/EC	This Directive
Article 1(1)	Article 1(1)
Article 1(2)	Article 1(2), first sentence
—	Article 1(2), second sentence
—	Article 1(3) and (4)
Article 1(3)	Article 1(5)
Article 1(4)	Article 1(6)
Article 1(5)	Article 1(7)
Article 2(1)(a) to (e)	Article 2(1)(a) to (e)
—	Article 2(1)(f)
Article 2(1)(f)	Article 2(1)(g)
Article 2(1)(g) and (h)	Article 2(1)(h) and (i)
Article 2(2)	Article 2(2)
Article 3	Article 3
Article 4(1)(2) and (3)	Article 4(1)(2) and (3)
Article 11(2)	Article 4(4)
Article 5(1) and (2)(a)	Article 5(1) and (2)(a)
Article 5(2)(b) and (c)	Article 5(2)(b)
Article 5(2)(d)	Article 5(2)(c)
Article 5(3)	Article 5(3)
Article 5(4), first subparagraph	Article 5(4), first subparagraph
—	Article 5(4), second subparagraph
Article 5(4), second subparagraph	Article 5(4), third subparagraph
Article 5(5) and (6)	Article 5(5) and (6)
Article 6(1) and (2)(a)	Article 6(1) and (2)(a)
Article 6(2)(b)	Article 6(2)(b)
Article 6(2)(c)	Article 6(2)(c)
Article 6(2)(d)	Article 6(2)(d)
—	Article 6(2)(e)
Article 6(2)(e)	Article 6(2)(f)
Article 6(2)(f)	Article 6(2)(g)
Article 6(3)(4) and (5)	Article 6(3)(4) and (5)
Article 7	Article 7

Directive 94/45/EC	This Directive
Article 8	Article 8
Article 9	Article 9
—	Article 10(1) and (2)
Article 10	Article 10(3)
—	Article 10(4)
Article 11(1)	Article 11(1)
Article 11(2)	Article 4(4)
Article 11(3)	Article 11(2)
Article 11(4)	Article 11(3)
Article 12(1) and (2)	—
—	Article 12(1) to (5)
—	Article 13
Article 13(1)	Article 14(1)
Article 13(2)	Article 14(2)
—	Article 15
Article 14	Article 16
—	Article 17
—	Article 18
Article 16	Article 19
Annex	Annex I
Point 1, introductory wording	Point 1, introductory wording
Point 1(a) (partly) and point 2, second paragraph (partly)	Point 1(a) (partly)
Point 1(b)	Point 1(b)
Point 1(c) (partly) and point 1(d)	Point 1(c)
Point 1(c) (partly)	Point 1(d)
Point 1(e)	Point 1(e)
Point 1(f)	Point 1(f)
Point 2, first paragraph	Point 2
Point 3	Point 3
Point 4	Point 4
Point 5	—
Point 6	Point 5
Point 7	Point 6
—	Annexes II and III

For all those
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