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New version of the EU Works Council Directive

Selected Aspects of their Interpretation and National Implementation

(published in August 2009, updated in November 2009)

After long and hard negotiations[1] the new Directive for European works councils[2] (referred to in the following as: EWC Directive) was passed before the end of the year of French EU presidency! The new version of the "old" Directive 94/45/EC,[3] which has been pending revision since 1999 and which was fought for fiercely in the interim ten years, was passed in the plenary session of the European Parliament (EP) on December 16, 2008 with 411 votes in favour, 44 against and 181 abstentions. The unexpected large number of yes-votes came through the initiative of the European Social Democrats[4] and Greens[5] – with additional votes from the conservative EVP faction. Early this month a compromise was found among Parliament and Council members with the EU Commission taking part in a so-called trialogue. Because of this agreement, no further reading was necessary in parliament, which would have made the passing of the Directive under the Czech presidency questionable. Since the representatives of the council (the so-called "Coreper" as the ambassadors of the Member States) had passed this agreement – with the exception of the British Labour Government – the Council of Employment and Social Affairs Ministers merely acknowledged it in its meeting on December 17, 2008.[6] The subsequent revision by lawyer-linguists to produce identical content in 22 language versions took until mid-April 2009 so that the formal resolution in the EU Council of Ministers – with British abstention – first took place on April 23, 2009. After it was signed by the EU Parliament on May 6, 2009, it was published in the Official Journal of the EU on May 16, 2009.[7] According to Art. 18 of the newly revised Directive, it came into effect on the 20th day after publication, June 5, 2009. According to Art. 16 of this Directive, the Member States must implement it as national law within two years – by June 5, 2011.

The following article presents the most important reforms of the revision, especially those referring to the exertion of influence and rights of participation of European works councils (Unless otherwise stated, references to articles or recitals, refer to the revised EWC Directive). Comments will be made on selected legal problems posed by the revision of the EWC Directive. This raises the question of the implementation requirements of the new Directive under German law, which should also be followed in an exemplary manner.

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[1] Cf. Hayen, Euro-Betriebsräte-Richtlinie – Das zähe Ringen um ihre Revision, AiB 2008, p. 499 ff.; the extended online version, aib-web.de: http://www.arbeitsrecht.de/aib/2008/10/Zusatzinfos/RPH-EBR-Richtlinie-Online-Fassung

[2] Directive 2009/38/EG of May 6, 2009 on the establishment of a European Works Council or a procedure for information and consultation of the employees of companies or Groups that work on a Community-scale (new version), OJ L 122/28 of 16.05.2009, p. 28ff.; to download under:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:122:0028:0044:DE:PDF

[3] Council Directive 94/45/EG of 22. September 1994 on the establishment of a European Works Council or a procedure for information and consultation of the employees of comopanies or Groups that work on a Community-scale, OJ L 254 of 30.09.1994, p. 64 ff.; to the extent that the following relates to the "old" Directive, this applies equally to Council Directive 97/74/EG of December 15, 1997 to extend Directive 94/45/EG to include the United Kingdom, OJ L 10 of 16.01.1998, p. 22, and Council Directive 2006/109/EG of November 20, 2006 to adjust Directive 94/45/EG on the occasion of the accession of Bulgaria and Romania, OJ L 363 of 20.12.2006, p. 416, which according to Art. 17 of the new version would be abrogated, effective as of 06.06.2011.

[4] Cf. the PR of the SPE delegate Karin Jöns: http://www.spd-europa.de/presse/pressemitteilungen/news-anzeige/news/karin-joens-sozialdemokratischer-erfolg-auf-der-ganzen-linie/53/neste/31.html

[5] Cf. the PR of the Green delegate Elisabeth Schrödter: http://www.greens-efa.org/cms/pressreleases/dok/288/288964.europaeische_betriebsraete@de.htm

[6] Cf. the statement of the French European Council Presidency: http://www.ue2008.fr/PFUE/lang/de/accueil/PFUE-12_2008/PFUE-17.12.2008/resultats_Conseil_EPSCO_volet_social.html

[7] Cf. OJ L 122/28 of 16.05.2009: http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2009:122:SOM:DE:HTML

The revised text of the Directive takes into account the joint declaration with the demands of the European Trade Union Confederation (ETUC) and the European employers' associations, which they published on August 29, 2008.[8] However, the improvements that the EP was able to put through go beyond them: The improvements concern, for one, the deletion of a regulation on a new threshold that had been planned by the EU Commission. This stipulated that the representatives from Member States, in which a certain company or group of companies has less than 50 employees, would not be accorded a seat in the special negotiating body (BVG) or in the EWC.[9] Further, "recitals" that allow a positive interpretation in the interest of the EWC [10] were formulated in the introduction of the new Directive. These related to responsibility for the EWC-relevant definition of "transnational concerns" (Art. 1 Par. 4) and the regulation of sanctions[11] for violations against the Directive (especially employers' disregard for the provisions governing information and consultation), which remained "untouched" by the Commission. These three improvements were pursued by the German Trade Union Federation (DGB) in the final phase of the legislative procedure as the "key points" for their agreement to the intended Directive. The successful anchoring of the above-mentioned **recitals** is important because they will serve as **aids to interpreting** the Directive so that these innovations have an impact on judicial practice.[12]

In the following section all of the significant innovations of the revised Directive will be listed in context (for reference purposes with the recital or article number).

Overview of the Significant Revisions of the EWC Directive

- Explanation of the definition **"transnational matters"** (Art. 1 Par. 4) in Recital 16
- Explanation of the obligation of Member States to take "appropriate measures" against violations (Art. 11 Par. 2) in Recital 35a (applying **sanctions**)
- First-time definition of the term "**Information**" in Art, 2 lit. f/Recital 22
- Supplementary definition of the term **"Consultation"** in Art. 2 lit. g/Recital 21 and 23
- **Provision of information** by the (central) management for the commencement of negotiations to form a special negotiating body (BVG) according to Art**.** 4 Par. 4
- Revision of the composition of the BVG in Art. 5 Par. 2 lit. b and Annex I (Subsidiary Requirements) No. 1 lit. c, but
- **Deletion of the seats/representatives threshold** of 50 employees, which was planned by the EU-COM as a concession to the employers, in Art. 5 Par. 2 lit. b and Annex I (Subsidiary Requirements) no. 1 lit. c
- **Obligation to provide information on the results of EWC negotiations** to social partners in accordance with Art. 5 Par. 2 lit. c
- BVG is entitled in Art. 5 Par. 4 (not for EWC "by law") to hold pre- and post-processing meetings
- Recognition of the role of the unions as experts in the BVG by consultation and eligibility in an advisory capacity according to Art. 5 Par. 4
- Balanced composition of the BVG according to gender, category and activities in accordance with Art. 6 Par. 2 lit. b
- Determination of the **provisions/linking of Information and Consultation (IaC) level** between EWC and individual national employee representation in accordance with Art. 6

[8] Cf. Hayen, I.c.(Fn. 1), p. 502 f.
[9] On the reasons why this limitation of representation is unacceptable, cf.: Hayen, I.c. (Fn. 1), p. 502.
[10] See also Siebens/Lemcke (2009), Praxis und Perspektiven der Europäischen Betriebsräte, in: Hexel (Publisher.), Never change a winning system – Erfolg durch Mitbestimmung, Schüren Publishers, p. 120 ff.
[11] The “Recast”-(New Version)- procedure adopted by the Commission for legislation limited the Parliament’s freedom to alter/supplement provisions in the main part of the guidelines to the the adaptation suggested by the Commission: see Hayen, I.c. (Fn. 1), p. 505.
[12] Cf.Thüsing/Forst, Europäische Betriebsräte-Richtlinie: Neuerungen und Umsetzungserfordernisse, NZA 2009, p. 408 ff., 409.

Par. 2 lit. c; if there is no agreement IaC will take place on the European and national level according to Art. 12 Par. 3

- Determination of the **provisions for the amending/terminating/renegotiating** (duration) of agreements according to Art. 6 Par. 2 lit. g
- **EWC collective representation** and **means to apply rights** according to Art. 10 Par. 1
- **Obligation of EWC members to inform** national interest groups according to Art. 10 Par. 2
- **Rights to training for EWC members** without loss of wages and salaries according to Art. 10 Par. 4
- **Right to renegotiate** when there are significant changes in structure (Recital 28 and 40) or agreement inconsistencies **due to adaptation clauses** in Art. 13
- Regulations on **continued validity** of Art. 13 **agreements** of the old version (generally) and Art. 6 agreements (in special cases) with follow-up regulations in Art. 14
- **Revision clause** in Art. 15 (report after five years)
- Expansion of the **EWC competency catalogue** in Annex I (Subsidiary Requirements) No. 1 lit. a
- Improvement of the **consultation rights of the EWC "by law"** to "response with reasons for that response to any opinion they might express" in accordance with Annex I (Subsidiary Requirements) No. 1 lit. a
- Improved working conditions for a five- (instead of three-)member **select committee of the EWC** enabling it to exercise its duties on a regular basis in accordance with Art. 6 Par. 2 lit. e/Recital 30 and Annex I (Subsidiary Requirements) Nr. 1 lit. d

Overview of Significant Deficits in the Revision of the European WC Directive

The following central union demands, which were compiled by the ETUC and the DGB for a revision of the EWC Directive, remained partly or completely unfulfilled in the course of the revision of this Directive:

- Lowering of the threshold for application of the Directive (500 instead of 1,000 employees)
- Increased sanctions when obligations are violated (in the main part of the Directive)
- Definition of the dominant company in joint ventures
- Renegotiation of Art. 13 agreements upon request (generally)
- Raising the number of regular sessions to at least two per year
- Post-processing meetings on the employee side for the EWC "by law" (Annex)
- Duration of negotiations shortened from the present 36 to 12 months (plus six months when an extension is agreed upon)
- Reducing the confidentiality rule (for certain Member States)
- Eligibility and remuneration of more experts (Annex/Subsidiary Requirements)
- Expanding the EWC catalogue of subjects beyond the revised scale
- No legal right of union representatives to participate in sessions of the special negotiating body and, above all, of the EWC "by law"

Evaluation of Selected Revisions from the Union Perspective

Even if the revision is not "the great innovation"[13] and does not fulfil the unions' "wish list",[14] compared to the current legal situation the new Directive contains significant clarification and improvement on several important points. This will have a positive effect when put to practice – especially for the establishment of new businesses but also in the day-to-day work of the

[13] On this issue cf. Helmer, Mehr war nicht drin, Mitbestimmung, Issue 3/2009, p. 36 ff.

[14] On the key ETUC demands on the revision of the EWC Directive, cf.: Greif (2009), Der Europäische Betriebsrat – Gewerkschaftliches Handbuch, ÖGB Publishers Vienna, p. 41 ff.; Hayen, l.c. (Fn. 1), p. 500 f.

EWC.[15] These revisions are described and evaluated in the following. The "vague legal terms" throughout the document have an exponential effect and are an expression of its compromising character and the decision makers' struggle for all-acceptable formulations. In cases of dispute, they will be more closely defined and detailed through the interpretation of national courts.

Competence of EWC: New Definition of "Transnational"

Art. 1 Par. 3 limits the scope of the Directive and thus the competence of the European works councils to "transnational matters". In the guidelines suggested by the Commission for the revision, the definition that is now in Art. 1, Par. 4 was consciously moved from the annex of the "old" Directive 94/45/EC (Par. 1 lit. a of the “Subsidiary Requirements”) to the main part of the new Directive. This gives the provision an obligatory character and so that it is no longer a matter of negotiation between the parties to the agreement.[16] This was originally the wish of the European employers' associations in order to limit the scope of influence of the EWC.

If the formulation of the definition in the main part of the Directive[17] creates the impression that a matter (for instance, a decision by the central management) must always have consequences in at least two Member States, Recital 16, which was anchored in the introduction to the Directive only after pressure from the EP, clarifies: In determining the transnational character of a matter, both the scope of its possible effects and the affected management and representative level should be taken into account. Matters are considered transnational if they affect EU-wide operating companies, EU- wide operating Groups or at least two of the enterprises or companies belonging to a Group in two different Member States. This includes matters that, **regardless of how many Member States are involved,** are important for European employees in terms of the extent of their possible effects, or that affect the relocation of activities between Member States.[18]

Under the prerequisites mentioned, it is thus sufficient for the competence of the EWC if the central management makes a business decision that affects a business in another member state (example: Nokia in Bochum, Germany). This is confirmed by Recital 12, according to which Member States are to take suitable measures to ensure that employees of EC-wide companies or Groups are appropriately informed and consulted when decisions affecting them are made outside of the Member State in which they work.

EWC Participation: Improvement in Information and Consultation

The lack of or the incomplete and imprecise definition of information (instruction) and consultation (hearing) in EWC Directive 94/45/EG is a weakness that European works councils have regularly complained about and that has been examined scientifically.[19] According to the majority of EWC players asked, their (central) management has never even fulfilled the Directive's minimum requirements on information and consultation (hereafter IaC). [20] An improvement of this core element of the EWC Directive by clarifying the terms was

[15] According to Greif, I.c. (Fn. 14), p. 50.
[16] Also according to Thüsing/Forst, I.c. (Fn. 12), p. 410.
[17] Matters are considered transnational if they affect EU-wide operating companies, EU- wide operating Groups or at least two of the enterprises or companies belonging to the Group in two different Member States.
[18] Therefore inapplicable, Thüsing/Forst, I.c.(Fn. 12), those that – without reference to the said recital – assume a necessary impact on the “welfare” of at least three involved Member States.
[19] Cf. Siebens/Lemcke, I.c.(Fn. 11), p. 122 f. With further evidence.; on the request for IaC: p. 124, Fn. 10.
[20] Cf. Waddington (2005), The Views of European Works Council Representatives: http://www.euro-workscouncil.net/pdf/waddington.pdf; id. (2003), What do Representatives Think of Practices of European Works Councils? Views from six countries, European Journal of Industrial Relations, Vol. 9, No. 3, pp. 303–325; on delayed information and consultation of EBC in respect to restructuring reported by: A. Hoffmann, Europäische Betriebsräte und Umstrukturierung, AiB 2007, p. 200 ff., 291 f.

thus one of the goals of the revision, as is expressed in Recital 21, namely, improving the efficacy of dialogue on the transnational level, to make a suitable coordination between the national and transnational level of dialogue possible and to ensure the necessary legal certainty in applying this Directive.
The revised Directive now includes, for the first time, a definition of information[21] of employee representatives in Art. 2 Par. 1 lit. f, and a more concrete definition of their consultation[22] in Art. 2 Par. 1 lit. g, which conforms with the definitions in the Directive with the by far highest standard in reference to employee participation, the European Company Directive.[23]
These definitions are made even more concrete in Recitals 22 and 23.

According to the definitions, the information of employee representatives must occur early enough to allow consultation in the EWC and a subsequent position statement to the management body before a decision is taken on the matter in question.[24] Employee representatives should be involved in the decision-making process.[25] Thus the Directive-maker places the information of the EWC on matters with significant impact on employee interests (Section 6 Par. 3, third sentence or Par. 1 lit. a, second sentence of the Subsidiary Requirements in Annex I) chronologically ahead of informing the works council about "planned operational changes" in accordance with Section 111 (1) of the Works Constitution Act (BetrVG).

In the future, it will not be possible to maintain the practice of presenting the financial situation in a two-hour slide presentation [26] during the annual plenary session or to simply provide the EWC with publicly available information.[27] A detailed evaluation of the operational situation by the EWC – along with disclosure of calculations by the (central) management – requires in this respect, rather, operationally founded pre- and post-processing – if necessary with consultation of the appropriate experts. [28] In the opinion of the French courts, a special session of the EWC should be held no sooner than 15 days after the disclosure of the above-mentioned information (EWC examination deadline) to make it possible to make a well-founded statement.[29]
Consultation must be timely, adequate and take place at an appropriate management level to allow a possible position statement by the EWC on proposed measures to be taken into consideration by the employer. For the consultation includes the right to receive an answer with grounds on a submitted statement (Recital 44). This results in a far broader understanding of the term "consultation" than is used – for example – in the German Works Constitution Act, namely in the sense of the continuous cooperation between the EWC and

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[21] Within the context of these directives, the expression "information" refers to the transfer of information through the employer to the worker's representatives to give them the opportunity to inform themselves and investigate the issues in question; the information takes place at a time, in a manner and form appropriate to the purpose and enables the employee representatives to assess the possible impact and as appropriate to prepare for consultation with the responsible organ of the Community-wide operating company or group.
[22] Within the meaning of this Directive, the term "consultation" refers to the establishment of a dialogue and exchange of opinions between the employee representatives and central management or an appropriate management level at a point in time, in a manner, with appropriate content and within a reasonable time frame so that, on the basis of the information provided, without prejudice to the competence of the company management, it is possible for the representative to deliver an informed statement on the proposed measures that are the subject of consultation, which can be taken into account within the Community-wide operating company or Group.
[23] Cf. Council Directive 2001/86/EC of October 8, 2001 to supplement the status of European society in respect to employee participation, OJ L 294 of 10.11.2001.
[24] In agreement, Thüsing/Forst, since otherwise (belated) information in acknowledgement of EWC rights is useless: I.c.(Fn. 12), p. 409.
[25] And also Gohde, Endlich in Kraft – Zur Reform der Richtlinie über Europäische Betriebsräte, dbr 2009, p. 22 ff., 22.
[26] Cf. Altmeyer, Entwurf für eine neue EWC Richtlinie, Personalführung 2008, p. 142 ff., 143; and Düwell, Änderung der EWC Richtlinie, juris PR Labour law 9/2009 Anm. 6;
[27] Cf. Gohde, I.c.(Fn. 25), p. 22
[28] Cf. Altmeyer, I.c. (Fn. 26), p. 143; and also Funke, Die neue EU- Richtlinie über den Europäischen Betriebsrat, p. 564 ff., 564.
[29] Cf. Düwell, Neufassung der EWC Richtlinie, FA 2009, p. 39 ff., 40, with reference to the provisions of the *Tribunal de Grande Instance de Paris* of 27.04.2007, File ref. 07/52509 in the case *Alcatel-Lucent* on meeting the right to information; see Altmeyer, Europäische Betriebsräte – die aktuellsten Gerichtsurteile, AiB 2007, p. 503 ff., 504 f.

the employer[30], pursued by European legislators through to an institutionalised exchange in consultation talks[31] as we know them (monthly conferences) from Section 74, Par. 1 of the Works Council Constitution Act (BetrVG).

Disregard for EWC: New Definition of "Sanctions"

According to the "old" Directive 94/45/EC, implementation of the Directive required only that the Member States provide "appropriate" measures for the event of non-compliance with the Directive and that they make administrative and legal proceedings available for fulfilment of the obligations resulting from the Directive (Art. 11 Par. 3). This Directive includes no regulation of sanctions for violation of the Directive, such as that for example in Art. 8, Par. 2 – in reference to minimum standards in the Member States – of the Directive on information and consultation (IaC-D)[32].

As such, in cases of infringement, for example the absence of or belated employer information and consultation with the EWC in relation to cross-border restructuring, employers only had to reckon (with the exception of France and Greece) with penalties or fines that could be paid out of "petty cash".[33] Without the threat of "palpable" legal consequences for corresponding Directive violations, any improvement to the Directive – particularly the regulations on information and consultation of the EWC – is ineffectual although Recital 14 attempts to ensure the effectiveness of the provisions of the Directive. For this reason the, EP passed the revised Directive in the final phase of legislation – with vehement support from the DGB and its member unions – with an additional Recital, No. 36., which in connection with Recital 35 requires the Member States to guarantee the following: According to the general principles of community law, in the case of a violation of obligations resulting from this Directive, administrative or legal procedures as well as **sanctions will be applied that are effective, deterrent and appropriate to the severity of the violation.** This means that in such cases the German legislator needs to provide for injunctive relief in national law in order to prevent measures adverse to participation from being carried out.[34] In France, courts have approved injunctive relief for the EWC in several such cases.[35]

New Rights to Form a Special Negotiating Body (BVG)

According to Art. 4 Par. 4 and Recital 25 of the revised Directive, the local or central management is obligated to voluntarily obtain and transmit the information necessary for beginning negotiations on the constitution of a special negotiating body (Art. 5 Par. 1), required for the establishment of an EWC. This is especially information in relation to the structure of a company (such as corporate relations) and the work force (e.g. the number of employees).

According to the new, uniform formula for the composition of the BVG, each 10% of all the employees in each member state will be accorded one seat in the BVG (Art. 5 Par. 2, lit. b/No. 1 lit. c of the Subsidiary Requirements in the Annex). At the same time, this will mean that the BVG will be bound to a minimum membership of at least 10 members. Since a seat must be provided for every fraction of a 10% of all employees (that is per every started

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[30] See also Funke, I.c. (Fn. 28), p. 565.
[31] See also Düwell, I.c. (Fn. 29), p. 41.
[32] Cf. RL 2002/14/EC of 11. March 2002 for the establishment of a general framework for the information and consultation of employees in the European Community, OJ L 80/29 of 23.03.2002.
[33] To date it has been possible to penalise infringements of the obligation to provide information under the German EWC Act as a regulatory offence with a fine of up to EUR 15,000 (Section 45, Subsection 2 EWC Directive).
[34] Cf. Düwell, I.c. (Fn. 29), p. 41; id., I.c. (Fn. 26); Gohde, I.c. (Fn. 25), p. 23; Altmeyer, I.c. (Fn. 26), p. 143.
[35] So Düwell, ibid (Fn. 35) with reference to the *Tribunal de Grande Instance Nanterre* of 04.04.1997 – N° B.O. 97/00992; *Cour d'Appel de Versailles of 07.05.1997,* AuR 2001, 299; *Cour d'Appel de Paris* of 21.11.2006*,* confirmed by *Cour de Cassation* of 16.01.2008, N° P 07-10.597, e-europnews of 18.01.2008, No. 080044.

fraction), this means that a Member State receives a seat even if there is only one employee working there.[36] The mandate threshold of 50 employees[37] that was originally planned, and that opposed this idea of an open pan-European employee representation, both for the establishment of special committees for the formation of an EWC by means of negotiation (BVG) and the constitution of an EWC through a catch-all clause, was discarded. The European Parliament reasoned that this representational threshold, which the EU Commission planned at the request of the employers, "discriminated" against the smaller Member States as these would have difficulty in reaching the threshold.

By means of an insertion in Art. 5 Par. 4, in contrast to the "old" Directive 94/45/EC, the BVG has the right to confer in absence of the employer side, using necessary means of communication (e.g. with interpreters) not only before but also after the meeting with the central management (right to post-processing meetings). This right only applies, however, to an EWC that is formed by means of negotiation in accordance with Art. 5. For the EWC, which was formed based on Art. 7 ("by law"), the subsidiary provisions according to Article 7 in Annex I of the new Directive do not provide for a "post-processing meeting".

Recognised Role of Trade Unions in the Agreement Process

"Competent European trade union organizations", which are consulted by the EU Commission in accordance with Art. 138 of the EC treaty, are now recognized for their frequent participation in the negotiation and renegotiation of constitutive EWC agreements. First, since these trade unions – and the corresponding European employer associations – must be informed about the constitution of the BVG as well as the beginning of EWC negotiations (Art. 5 Par. 2 lit. c) so that they can follow and support the formation of the EWC (Recital 27). Secondly trade union experts may be called in as consultants for support by the BVG and upon request by the BVG may also participate in the negotiations as advisers[38] (Art. 5 Par. 4).

New Regulations for the Agreement According to Art. 6 of the Directive

A new clause (Art. 6 Par. 2 lit. b) was added as binding content to the EWC agreement that was to be negotiated between central management and the BVG. This stipulated that the composition of the EWC must reflect, as closely as possible, the composition of the work force (in reference to gender, activity or employee categories: compare Recital 20).

Where a select committee is agreed upon, the agreement must also include regulations on its composition, appointment and competence and its working methods (Art. 6 Par. 2, lit. e).

It is of extreme importance for practice that the guidelines on minimum content of the EWC agreement are followed in respect to the formal and dynamic regulations of the agreement itself: The agreement should include the date on which it comes into effect, its duration, the regulations for termination and the modalities and reasons for revision and the process to be applied in case of a renegotiation, especially in the event of structural changes (Art. 6 Par. 2, lit. g; Recital 28).

Regulations on Information and Consultation on Various Levels

The inclusion of various regulations on so-called "level linkage" is one of the key points of the revised Directive. They are to ensure that employee representatives on various levels do not

[36] See also Thüsing/Forst, I.c. (Fn. 12), p. 411.
[37] For arguments against the exclusion of "small companies", cf.: Hayen, I.c. (Fn. 1), p. 502.
[38] For employer association criticism of "statutory guaranteed access rights" of unions with access to (internal) company information: Funke, I.c. (Fn. 25), p. 565; Altmeyer, I.c. (Fn. 26), p. 144; Thüsing/Forst argue for a limited application of this new regulation without union seats in the BVG, I.c. (Fn. 12), p. 412.

receive different information at different points in time on one and the same issue. [39] In accordance with the aims expressed in Recital 21, the **modalities for the coordination** between the national level (national employee representation) and the transnational level (EWC) must be laid down in the content of the EWC agreement (Art. 6 Par. 2 lit. c; Recital 29). The principles in Art. 1 Par. 3 are referred to for this purpose; they stipulate that, depending on the issue, information and consultation should take place on the relevant management and representational level (Recital 15). These regulations will presumably most affect the structure of employee representation of those EU Member States that have no institutionalized operating system for employee participation with employee representation committees at trans-operational and trans-company levels, which could guarantee such a coordinated exchange of information and consultation with the transnational-level EWC. [40]

Information and consultation should be coordinated between the European and national levels without endangering the autonomy of either level. Thus the rights of the national employee representatives remain untouched[41] (Art. 12 Par. 1). On the **order of the coordinated information,** Recital 37 states explicitly that the **EWC should be informed if necessary before or at the same time** as the individual employee representative bodies.[42] If the coordination modalities are not stipulated in the agreement and decisions which could involve substantial changes to the organization of work or employment contracts have been planned, the process must take place **simultaneously** on the national and European level taking into account the competence and scope of action of each of the employee representative bodies. Thus, Recital 37 increases the precision of the order of the Directive-maker in this respect in Art. 12, Par. 3 of the Directive's main body.

New Rights, Duties and Special Protection for EWC Members

The Directive establishes that the members of the European Works Council have the necessary means to exercise the rights arising from this Directive, in order to collectively represent the interests of employees of Community-scale companies or groups (Art. 10 Par. 1). To date, the (collective) legal entity of the EWC and its right of action as an organ – in place of the individual member's right of action – has been controversial; the revision clarifies the legal capacity of the EWC. [43]

According to the revised Directive EWC members have the task of reporting to the works councils on the national level as representatives of employees at the various locations – or the employees of companies without works councils – on the content and results of the information and consultation and EWC work (Art. 10 Par. 2). To do so, the Member States must meet certain conditions (such as the right of access of the EWC members to the individual sites, possibility of communication). On this basis, an improved practice of communication should be established between the EWC and national employee representative bodies[44] to anchor the work of the EWC in the local and national representation of employee interests.

For the first time a foundation was provided for the rights of EWC and BVG members to be trained to exercise their representative duties in an international context without loss of wages or salary (Art. 10 Par. 4). This right to training through language courses, courses in

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[39] Cf. Greif, I.c. (Fn. 14), p. 52, 90 f.
[40] Similar Altmeyer, I.c. (Fn. 26), p. 144.
[41] According to Greif, I.c. (Fn. 14), p. 52, 90 f.
[42] The fixing of this order by the legislators of the Directive is obviously not recognised by Altmeyer, I.c. (Fn. 26), p. 144; see also Düwell, I.c. (Fn. 29), p. 42.
[43] Appropriate, Gohde, I.c. (Fn. 25), p. 24; and Greif, I.c. (Fn. 14), p. 90; and also Funke, I.c. (Fn. 28), p. 566; for a contrary view, see Thüsing/Forst, I.c. (Fn. 12), p. 410, who do not recognise that the formulation of the Directive takes into account the fact that many EWC chairpersons come from the employer side.
[44] According to Greif, I.c. (Fn. 14), p. 91.

intercultural communication, labour law and the practical handling of information and consultation[45] will lead to a clear expansion of the competence of EWC members. [46] The fact that there is no regulation of who offers these training courses, determines their content and leave of absence procedures, bears the cost, and to what extent limits exist on the utilization of training courses indicates that these issues should be clarified, if necessary, through case law following the regulations of national labour law. For the scope of the German European Works Council Act, the literature has accepted a claim to training with costs carried by the employer.[47]

Right to Renegotiation through Adaptation Clauses

The newly regulated possibility of an adaptation of "old agreements" (renegotiation process) through Art. 13 in the case of significant changes in the structure of the company/group of companies or in the event of conflict between the regulations of two or more valid agreements (concurrence of regulations) is very important for the approximately 820 European works councils, which represent 14.5 million employees. In these cases the central management will initiate negotiations (for instance in accordance with the regulations of the valid agreement: Art. 6 Par. 2 lit. g or through a written application from the employee side)[48] in accordance with Article 5 (BVG-establishment).

Fusion, take-over and the division of companies or groups are mentioned (Recital 40) as examples of "significant" structural changes that require an adjustment of the EWC(s). These include all of the processes covered by the German Conversion Law.[49] The change in the size of the company/group of companies is given the same weight as the change in structure (Recital 28), whereby the (actual) acquisition of majority shares of and by the company is considered structural change.[50]

With that – against the bitter resistance of European employers – at least the restriction of policy protection was achieved for "old agreements" from the time prior to 1996 (so-called "Art. 13 agreements", which according to old law were excluded from binding guidelines for the content of agreements and obligatory regulations of the old EWC Directive 94/45/EC).[51] The adaptation clause of the new Art. 13 applies under the conditions specified there – in the absence of differentiated regulation – both for "old" Art. 13 agreements and for existing Art. 6 agreements.[52] Art. 13, Sentence 1 refers both "types of agreement" to Art. 5 if the negotiation preconditions for an adjustment are met. According to Art. 5, a special negotiation body (BVG) is formed for the purpose of constituting a European Works Council, whose purpose and aim it is, in accordance with Art. 5 Par. 3 and 4 in turn, to conclude an agreement according to Art. 6. With the signing of a new agreement, the previously founded works councils must be dissolved and the their formation agreements must be ended (Recital 40). In these cases, the old Art. 13 agreements also lose their validity.
Because of the order of legal consequences in Art. 13, Sentence 1, the subsidiary requirements find application to Art. 5, analogous to Art. 7 if, for example, the central management refuses to initiate negotiations within six months after the request for adaption (analogous Art. 7 Par. 1, second alternative) or when within three years of this request no

[45] The importance of this training is stressed by Siebens/Lemcke, I.c. (Fn. 11), p. 123, 128.
[46] So Greif, I.c. (Fn. 14), p. 90.
[47] In agreement, Düwell, I.c. (Fn. 29) with further evidence, p. 42; also Thüsing/Forst, I.c. (Fn. 12), p. 410; Funke, I.c. (Fn. 28), p. 566; on the former legal position, also Blanke (2006), Europäische Betriebsräte-Gesetz, Kommentar, Second Ed., Part B, Section 40 No. 3.
[48] The application must be submitted by at least 100 employees or their representatives in a least two companies or operational units in at least two Member States.
[49] In agreement, Thüsing/Forst, I.c. (Fn. 12), p. 412.
[50] Cf. Thüsing/Forst, I.c. (Fn. 12), p. 411
[51] In agreement, Altmeyer, I.c. (Fn. 26), p. 144.
[52] In agreement, Büggel, Was nun? – Zu den Auswirkungen der neuen EBR Directive auf bestehende EBR Vereinbarungen, dbr 2009, p. 20 ff., 21.

agreement has been reached in accordance with Art. 6 and the BVG has not made a decision in accordance with Art. 5 Par. 5 (Art. 7 Par. 1, third alternative).[53] Otherwise the revised regulation of Art. 13 would be idle despite the existence of significant structural changes, if central management could circumvent and eliminate adaptations by refusing to negotiate or reach agreement following an employee-side request.[54]

During negotiation on the adaption of the EWC agreement, the Directive-giver orders a complete representation of interests (EWC "interim seat" due to the functionally limited duration of agreement): During the negotiations, the current European Works Council or the current European Works Councils will continue to exercise their duties according to any agreements between them and the central management.

Special Provisions for Valid Agreements

"**Without prejudice**" to Art. 13 of the newly revised Directive, Art. 14 Par. 1 Sentence 1 contains exceptions to the validity of the new Directive (regulations on policy protection) for companies/groups of companies in which

- so-called "**Article 13**" agreements according to current Directive law were **concluded before September 22, 1996 or were adjusted** because of changes to the structure of the company/group of companies, insofar as these agreements apply to all employees of the company/group of companies and – as was already stipulated in Art. 13 Par. 1 of the "old" Directive 94/45/EC – provide for transnational information and consultation (Recital 39)
- so-called "**Article 6**" agreements, which were concluded according to current Directive law, **were either signed or revised during the two-year implementation phase** of the newly revised Directive (June 5, 2009 until June 05, 2011); in accordance with Art. 14 Par. 1 Sentence 2 valid **national law**, in Germany the European Worker Council Act (EBRG), at the time of signing or revising the agreement continues to apply.

When the agreements in the above-mentioned two cases/scenarios expire (which requires a regulation on duration – such as that provided in Art. 6 Par. 2 lit. g) the EWC and the central management may decide together to continue to use them or to revise them; if this is not the case the new Directive applies (Art. 14 Par. 2).

This complicated revision has called forth the greatest uncertainty among the practitioners, such as the trade union consultants to the EWC, about an appropriate interpretation and the necessary course of action.

According to the terms of the first special provision case (Art. 14 Par. 1 lit. a), the "old agreements" are accorded an "eternity guarantee" according to Art. 13 of Directive 94/45/EC unless:

- They do not provide for transnational information and consultation or they do not apply to all employees of the company/group of companies, since according to the earlier no law-supplanting effect can be applied to them, so that the employee may request the formation of a BVG at any time[55]

or

- They are adjusted under application of the revised Directive – following their translation into national law – in accordance with the preconditions of Art. 13 (in cases of change of structure or concurrence in agreements; cf. previous paragraph). The validity/applicability of the adaptation clause in Art. 13 of the revised Directive for "old agreements" according

[53] For a contrary view, see Greif, I.c. (Fn. 14), p. 93.
[54] So Recital 41 assumes that the valid agreement can remain in force (only then) when the adaptation clause in Art. 13 finds **no** application.
[55] Cf. Blanke, I.c. (Rn. 47), Section 41 No. 24; also in agreement Büggel, I.c. (Fn. 52), p. 21.

to Art. 13 of Directive 94/45/EC, which are excluded from application of the new Directive under Art. 14 Art. 1, is confirmed by the introductory sentence of Art. 14 Par 1. ("Without prejudice to Article 13, … do not apply…").

The old Art. 13 agreements that were adapted to the standards of the new Directive according to Art. 13 through processes according to Art. 5 expire (this also applies to the current Art. 6 agreements, which – after the two-year implementation phase – will be adjusted according to the newly revised Art. 13) after a new agreement has been signed and thus lose their validity (cf. explanations to the aforementioned paragraph); this is the intention of Recital 41, which aims to avoid an "obligatory" renegotiation of "valid" agreements to which this adjustment clause does not apply.

According to the second special provision case (Art. 14 Par. 1 lit. b) not only do the obligations resulting from the newly revised Directive not apply to formation agreements signed during the implementation period, up to June 5, 2011, or to the adjustment agreements according to Art. 6 of the previous Directive law signed during this period, the Member States must also find interim regulations for these agreements, according to which the current national law of implementation of Directive 94/45/EC continues to be valid (parallel validity of EBRG regulations in Germany). This special provision is intended to allow employers a two-year window of opportunity within the framework of the negotiations on "social partner recommendations"[56] – and in keeping with the aims of the Directive to raise the number of EWCs (Recital 7) – in order to cooperate in the founding of EWCs or to adjust current deficient agreements within the implementation period on the basis of the still valid, low participation level.

Various German national trade unions (like IG Metall, ver.di, IG BCE) but also European industry trade unions (such as the European Metalworkers' Federation – EMF) have pointed out to the EWCs they supervise the dangers that signing a foundation agreement or a revised agreement in the aforementioned implementation period might have for their legal position and their work. Insofar as the conclusion of the agreements can/ought not be delayed until after June 5, 2011, the improved revisions must be used vigorously as a guiding principle when negotiating new or renegotiating current EWC agreements before the end of the implementation period. A possible alternative could also be to limit the term of these agreements till the end of the implementation period, or to include a corresponding adaptation clause of agreement with the new EWC legislation in the final contract clauses.[57]

Changes in Annex I (Subsidiary Requirements)

The contents of the subsidiary requirements, which are to be applied as legally binding minimum standards in the absence of an agreement on an "EWC by law" and which serve as "reference provisions" in negotiations, have also been adapted.

This applies – in accordance with the competence regulation in Art. 1 Par. 3, which is referenced – for one for its catalogue of information on the annex to the old Directive 94/45/EC, which was divided up into areas of (only) information and (additional) consultation (cf. Recital 44); "consultation" was specified to include the right of employee representatives to receive a well-founded answer to their representations (Par. 1 lit. a). Under some conditions, this can raise the possibility of a second – if necessary also extraordinary (Par. 3) – meeting in the consultation process.

[56] Cf. citation reference in Fn. 8.
[57] See also Greif, The new Eropean Works Council in Questions and Answers, GPA-djp/Österreich, March 2009, http://www.worker-participation.eu/european_works_councils/

Here too, a new, uniform formula on the composition of the EWC "by law" applies – corresponding to the regulation on the composition of the special negotiating body in Art. 5 Par. 2 lit. b – namely at least 10 EWC members, one member per 10% portion of the entire workforce, with one basic seat per country (Par. 1 lit. c).

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The election of a select committee (executive body) from the midst of the EWC is mandatory and it is increased from three to five members; it has the right to meet regularly (Par. 1 lit. d). This includes that it must have the necessary means to exercise its duties at its disposal (e.g. travel costs, interpretation, communication).

Adjustment Requirements in EWCG and the German Works Constitution Act (BetrVG)

The revision of the EWC Directive has produced many new and altered regulations (including clarified recitals), which must also be implemented by the German national government before the two-year deadline on June 5, 2011 of Art. 16 Par. 1. This implementation is likely to go beyond an adjustment or revision of the European Works Council Act (EBRG). This is largely due to the pending new regulation of voting requirements between the EWC and national works constitutional bodies (BR, GBR, KBR), but also because of possible repercussions for national works participation (for example, due to a claim to forbearance or a necessary increase in the administrative fine limits in Section 23 Par. 3 of the Works Constitution Act (BetrVG)) so that a need for adjustment of the works constitution is also probable.

A detailed description of the implementation requirements[58] requires an initial comparative analysis of the revised Directive regulations and the regulations of the EBRG of October 28, 1996,[59] which came into effect on November 1, 1996. Such an analysis is beyond the scope of this article. Though the following are only exemplary and in note form, the following points from the areas of regulation discussed above should be emphasised for implementation:[60]

- Clear definition of the competence of the EWC through the definition of "**transnational matters**" in Art. 1 Par. 4 and through the explanations in Recital 16. The codification of competence in Section 31, Par. 1 EBRG is inadequate and too restrictive.
- Supplement and clear definition of the terms "**information**" and "consultation" in accordance with Art. 2 lit. f and g, and Recitals 22 and 23. A statutory definition of "**Information**" is currently lacking. The definition of "**consultation**" in Section 1 Par. 4 EBRG is inadequate.
- Ensuring the observation of participatory rights according to the Directive by means of effective and deterrent **sanctions**: The anchoring of a claim of forbearance[61] against the carrying out of measures that require consultation, which was also demanded by previous Directive law, is now more strongly demanded in the literature with regard to Recital 35a. [62]
- Adoption of the regulation on the responsibility of management for the **acquisition of information** according to Art. 4 Par. 4 on initiating negotiations. This could be achieved by supplementing Section 5 EBRG.
- Revision of the **composition of the special negotiating body (BVG)** in accordance with Art. 5 Par. 2 lit. b. Anchoring BVG's obligation to inform management and the European social partners in accordance with Art. 5 Par. 2 lit. c. With regard to the revision of Art. 5 Par. 4, Subparagraph. 3, the valid EBRG already provides the possibility of consulting

[58] The provisions of the new version that must be formally implemented according to the main section of the Directive are listed in Art. 16.
[59] BGBl. I, p. 1548, last amended by the fourth Euro Introduction Act of 21.12.2000 (Fed. Gazette. I, p. 1983, 2011).
[60] Cf. indications of the need for implementation, Thüsing/Forst, I.c. (Fn. 12), p. 412; Funke, I.c. (Fn. 28), p. 567; Greif, I.c., p. 89.
[61] Cf. Blanke, I.c. (Fn. 47), Section 32 Rz. 32 ff.
[62] Cf. Düwell, I.c. (Fn. 29), p. 41; Altmeyer, I.c. (Fn. 26), p. 41; Gohde, I.c. (Fn. 25), p. 24.

trade union experts. This should be extended to allow trade union representatives to take part in BVG and EWC meetings.

- Adoption of the new **content for the EWC by agreement** (in accordance with Art. 6 of the Directive), especially on the modalities of level linkage (Recital 37!) and the modalities of duration, change, cancellation and renegotiation. The content of Section 18 of the EBRG requires supplement in this respect.
- The revision on the (collective) **legal capacity of the EWC and procurement of the funds** to assert rights (Art. 10 Par. 1) have no great significance for implementation in the face of the comprehensive regulation in Sections 25–30 EBRG on the costs of the EWC management, which are to be borne by the employer.[63] However, the limitation of the obligation to bear the cost of one expert in Section 30, Sentence 2 EBRG should be rescinded.
- Addition of the regulation on the EWC members' **right to training** in Art. 10 Par. 4. Implementation should be achieved by the appropriate application of Paragraphs 6 and 7 of Section 37 of the Works Constitution Act (BetrVG), which should be elaborated in Section 40, Par. 1 EBRG.[64]
- Assurance of **parallel voting requirements** and cooperation between the EWC and individual national employer representatives in accordance with Art. 12 Par. 3. This must be followed by the adjustment of national law and/or practice as required to ensure that the European Works Council is appropriately informed before or at the same time as the national employee representative bodies (Recital 37). This certainly difficult implementation requirement could begin with the different competencies of the representatives and require coordinated regulations in the EBRG and Works Constitution Act (BetrVG) .
- Revision of the regulations on **adaptation/renegotiation of agreements** for structural changes and the conflict of regulations in Art. 13. To this end, the term "change of structure" should first be defined (if necessary, in connection with Section 36 Par. 2 EBRG), taking into consideration Recitals 40 and 28. Due to the functionally limited duration of the agreement according to Art 13 Subparagraph 3, the EWC interim seat could be linked to the interim regulation of Section 20 EBRG (EWC according to Art. 6) or respectively Section 41 Par. 6 EBRG (EWC according to Art. 13, old version).

The implementation of the revised regulations should be oriented less towards a "one-to-one implementation"[65] than to the goals of modernising the Community regulations in the area of the transnational information and consultation of employees (Recital 7). This includes in particular the assurance of the efficacy of the employee right to transnational information and consultation.

Effects of the Implemented Revised Directive on Existing Agreements following Expiry of the "Transitional Period"

Since according to Art. 19, the revised EWC Directive is aimed at the Member States and EWC claims against companies/groups of companies cannot be derived directly from it, the revised Directive regulations first need to be implemented in national legislation before they can be applied. According to Art. 16, the Member States must achieve implementation by June 5, 2011 at the latest. In agreement with this implementation regulation, **Art. 18 Sentence 2 of the Directive (coming into effect) requires that the revised regulations are effective as of June 6, 2011**, while at the same time in accordance with Art. 17 Directive 94/45/EC (with the two adaptation Directives that refer to it) are rescinded as of June 6, 2011. From this point on, the new procedural regulations are effective for new EWCs as are

[63] According to Düwell, I.c. (Fn. 29), p. 42.
[64] In agreement, Düwell, I.c. (Fn. 29), p. 42, who at least considers clarification necessary.
[65] However the demand by Thüsing/Forst, I.c. (Fn. 12), p. 412.

the new legal entitlements for EWC members and regulations related to the adaptation clause for existing EWCs that experience significant structural change.[66]

However, of great practical significance in this context is the question whether or which regulations of the implemented revised Directive extend "automatically" or by means of mandatory statutory law to existing agreements (according to Art. 6, since agreements under Art. 13 of Directive 94/45/EC are excluded from the validity of the revised Directive by Art. 14 Par. 1 lit. a) without requiring them to be renegotiated.

Some are of the opinion that following implementation, the new legal position does not automatically take effect for all EWCs, but rather only when the EWC agreement is renegotiated for the respective company.[67] Such an apodictic statement can certainly not be made without reference to the regulations. **In any case, those regulations that cannot be changed by the parties to an agreement because they represent legal obligations,** i.e. those that do not have a "dispositive" character, **can claim immediate validity of the implemented revised Directive**: These are specifically the definitions "transnational matters", "information" and "consultation", but it also applies to the regulations on level linkage, the right of information and sanctions. But also the newly regulated employer obligations on the "subjective rights" of EWCs, such as the new right to training, have an immediate and obligatory effect on existing agreements according to Art. 6. For the valid EBRG also knows through the implementation of Directive 94/45/EC in its fifth part, "Principles of Cooperation and Protection Regulations" that are effective by virtue of compulsory statutory validity independent of the acceptance of these regulations into EWC agreements (e.g. the obligation to confidentiality, but also regulations on employee release from duty and dismissal protection).
After the "transitional phase" (June 5, 2009–June 5, 2011) only revised regulations of the Directive, which must be first transformed into an agreement through renegotiation (negotiable content according to Art. 6 new version), remain excluded from immediate and obligatory validity. Otherwise all obligations arising from the revised Directive apply to all existing Art. 6 agreements at the end of the implementation phase (from June 6, 2011), insofar as the exceptions of Art. 14 do not intervene. This **exception** applies in particular to Art. 6 agreements that are signed or revised in accordance with Art. 14 Par. 1 lit. b during the therein specified "interim period", which is why the European industrial trade unions and national trade unions, such as IG Metall, have issued "warning" statements to the EWC bodies and EWC supervisors that it supervises.
If the companies/groups of companies do not take advantage of this opportunity to revise "old" Art. 6 agreements to avoid the application of the provisions of the new Directive, they cannot argue "protection for reliance on existing law" for "old" EWC agreements against the newly implemented Directive after the "transitional phase" has expired.[68]

Conclusion and Outlook

The goals of the EU-COM for a revision of the Directive have only been partly achieved:

- The intended provision for the effective right of the employees to transnational information and consultation faces the problem of the right of continuance of old agreements with low participation levels according to Art. 13.
- The intended increase in the number of European works councils failed for the most part due to the absence of a reduction of the threshold value for forming EWCs.
- The desired increase in legal security is incompatible with the self-created problem of exception regulations in Art. 14, which result in the parallel validity of old and new legislation.

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[66] In agreement Greif, I.c. (Fn. 14), p. 92.
[67] According to Altmeyer, I.c. (Fn. 26), p. 145; and also Funke, I.c. (Fn. 28), p. 566.
[68] In agreement Büggel, I.c. (Fn. 52), p. 22; and also Blanke, Die neue EWC Directive 2009/38/EG, AuR 2009, p. 242 ff., 250.

- The securing of improved coherence/harmonization of the EU labour law Directive in the area of information and consultation has not yet reached every area of regulation, when measured against the standard of employee participation in the SE Directive.

Nevertheless the revision of the EWC Directive contains important improvements for the work of many EWCs (especially in terms of new or clarified definitions, the obligations of management (employer), employee representatives' possibility to work and participatory rights.

When the Directive comes into effect, it must be implemented quickly and completely by the German federal government through revision of the EWC Act and adaptation of the Works Constitution Act (BetrVG). This revision of the EWCA must formulate the new definitions and employer obligations, but also formulate the protective regulations for employee representatives so that they have immediate and obligatorily validity and do not first attain validity through the renegotiation of existing Art. 6 agreements.

Irrespective of the desire to implement the regulation in Germany with the aim of effectively securing employee rights to transnational information and consultation, good practice and policy is demanded of the EWC and is in end effect decisive for the effectiveness and success of employee representation.