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The EWC Directive and the Capacity of the EU to Develop European Social Dialogue within Multinational Companies

Abstract: *European economic integration and EU enlargement have enhanced transnational restructuring in multinational companies (MNCs). This allows MNCs to benefit more from local competitive advantages in their production and in their access to consumer markets and labor markets. When the central management of MNCs decides to restructure their operations and eventually close a plant, this demonstrates their impact on local workplace developments. The EU Directive on European Works Councils (EWC Directive) can thus be assessed as a case of European social policy-making providing a corrective mechanism for the democratic deficit in MNC decision-making.*

Introduction

The EWC Directive[1] allows employee representatives from the different European countries in which MNCs have their operations to meet with central management and with their colleagues representing employees from other countries. During EWC meetings, these representatives are informed and consulted by central management on transnational issues of concern to the company's employees. By this means, EWCs aim to bridge a representation gap

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[1] 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; OJ L 254, 30.09.1994, p. 64-72.

between international corporate decision-making and employees' nationally defined information and consultation rights.

Fifteen years after the adoption of the first EWC Directive in 1994, better representative rights were provided in the new 2009 EWC Directive.[2] Simultaneously, the financial and economic crisis eroded significant parts of the trust and efficiency in the European single market, which is illustrated by the high unemployment rates caused by the lack of job-creating investments.

This article analyses how the European Union has economically integrated, and what impact this had had on MNCs and their European workforce. Furthermore, it analyses the capacity to develop a European legal framework for social dialogue in multinational companies in the changing economic and political context. Finally, the new 2009 EWC Directive is evaluated on the basis of practical and political learning processes, as well as relevant court rulings. The new EWC Directive 2009/38/EC entered into force on 6 June 2011.

1. Economic integration and its impact on employment

European economic integration and enlargement have enforced the transnational interdependence of companies operating in Europe.[3] This interdependence is measured in terms of Foreign Direct Investments (FDI). FDI are investments to acquire a lasting management interest in an enterprise. This can involve transfer of technology and expertise, but also influence from the mother company, or even control over strategic decision making in the foreign subsidiary.

1.1. FDI flows illustrate the increasing economic integration in the EU

These developments were already going on well before Poland joined the EU in 2004. Since 1992, the European Single Market has brought tremendous benefits and created new opportunities with its principles of the free movement of goods, services, capital and people.[4] The table below shows how entry into the European Single Market enhanced inward FDI in Poland from 2004 to 2007. For the EU as a whole, FDI flows reached a high in 2000, after which it declined until the 2004 enlargement made it rise again.

[2] 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); OJ L 122, 16.05.2009, p. 28-44.

[3] M. Kahancova, *One Company Diverse Workplaces, The Social Construction of Employment Practices in Western and Eastern Europe,* ed. M. Palgrave, Houndmills 2010.

[4] http://ec.europa.eu/internal_market/smact/index_en.htm (last visited 03.12.2011).

Table 1. Inward and outward FDI[5]

Year	2002	2003	2004	2005	2006	2007	2008	2009	2010
FDI in PL	4131	4123	6159	10293	19603	23561	14839	13698	9681
FDI outflow	230	196	806	3406	8864	5405	4414	5219	4701
EU Inward	420433	338678	216440	496075	581719	850528	487968	346531	304689
EU Outward	384549	372400	279830	605515	690030	1199325	906199	370016	407251

All these FDI flows into Poland brought about a gradual improvement on the labour market. Unemployment rates, for example dropped form 20 per cent in January 2005 to 12.3 per cent by December 2010.[6] Besides quantitative effects, FDI can also have qualitative effects on employment, both directly and indirectly. The potential effects of FDI may be different for the employees of the mother-company, the foreign subsidiaries, or the local labour markets in which they operate.

1.2. FDI impact on employment in the home country of the MNC

From the home-country perspective, FDI or subcontracting can mean delocalisation of production[7] and eventually also technological enrichment of the home-based production.[8] This may result in a combination of positive and negative effects on both the quantity and the quality of employment. Shifting the mother-company to a more innovative role, based upon a highly skilled and motivated workforce, entails positive effects on the quality of employment and industrial relations, while the jobs of lower-skilled workers may be threatened when parts of production are relocated to foreign subsidiaries.

In Poland there are many more subsidiaries of foreign-owned multinational companies[9] than Polish companies with operations abroad. This is illustrated by the larger FDI inflows than outflows. Therefore, the FDI impact on for-

[5] UNCTAD Division on Transnational Corporations and Investment (UNCTAD-DTCI), *World Investment Report 2011,* United Nations, New York 2011.

[6] http://www.msp.gov.pl/portal/en/71/2076/Background_information.html#ad8#ad8 (last visited 03.12.2011).

[7] J. Arthuis, *Les délocalisations des activités industrielles et des services hors de France*, "Problèmes Economiques" Vol. 2/1993, No. 338.

[8] UNCTAD Division on Transnational Corporations and Investment (UNCTAD-DTCI), *World Investment Report 1994,* New York 1994.

[9] S. Contrepois, V. Delteil, P. Dieuaide, S. Jeffreys, *Globalizing Employment Relations, Multinational Firms and Central and Eastern Europe Transitions,* ed. M. Palgrave , Houndmills 2011.

eign subsidiaries of multinational companies is more relevant for Poland than the impact of FDI on employment in the home country.

1.3. FDI impact on employment in the foreign operations of an MNC

Employment growth in one foreign subsidiary or its subcontractors may be the result of, or for that matter the source of, some degree of delocalisation away from the mother-company or from other foreign subsidiaries. Increased efficiency can sometimes also lead to overproduction, in which case the central management then needs to decide how to reduce production. This reduction of production can take place in the home country operations of the MNC or in its foreign operations.[10] Such events depend on the integration of the production of multinational companies' subsidiaries,[11] which can either be horizontally or vertically integrated, or even not integrated at all. Horizontal integration encompasses similar products being produced at different locations, which may result in internal competition within a company. Vertical integration increases the interdependence of the different production units because the output of one subsidiary is the input for another.

From the point of view of the foreign-owned subsidiaries, green-field investment means additional jobs, unless this employment disappears elsewhere within or beyond the company. The appearance of MNCs will have only surrogate effects if the newly created jobs end up finally ousting existing employment generated by local employers. When the production of a multinational's subsidiary manages to be more productive and less labour intensive by transferring technology, this could shrink overall employment in the foreign subsidiary, even though at the same time working conditions may improve in the first instance. In the end, increased competition for available jobs may once again decrease the qualitative terms of employment.[12]

Brown-field investments translate only into a change of ownership, with no immediate impact on the workforce size. After some time, double functions resulting from mergers and take-overs will have to be cut away to realise synergy effects.[13] The combination of a take-over followed by restructuring and

[10] U. Rehfeldt, *Der Renault-Vilvoorde-Konflikt und seine Bedeutung für die europäischeGewerkschaftspolitik*, "WSI-Mitteilungen" No. 7/1998, p. 450–459; M. Bartmann, *General Motors Europe, Facing tough decisions at the European Works Council*, "Mitbestimmung" No. 51(8) 2005.

[11] B. Hancké, *European Works Councils and Industrial Restructuring in the European Motor Industry,* "European Journal of Industrial relations" Vol. 6/2000, No. 1, London.

[12] S. Beechler, A. Bird, S. Raghuram, *Linking Business Strategy and Human Resource Management Practices in Multinational Corporations, A Theoretical Framework,* "Advances in International Comparative Management" No. 8/1993.

[13] W. Ruigrok, R. Van Tulder, *The logic of international restructuring*, ed. Routledge, London 1995.

disinvestments may create feelings of confusion, uncertainty, and erosion of corporate identity among the workforce.[14] With regard to the quality of employment, FDI may also include the introduction of undesired techniques of production or management.[15]

Table 2. Effects of FDI on employment[16]

FDI effects on employment	Directly Positive	Negative	Indirectly Positive	Negative
Quantitative	Job-creation	Rationalisation and job-cuts	Multiplication effect on local economy	Replacement of local enterprises
Qualitative	Increasing productivity and high salaries	Introduction of undesired practices	Spill-over of high productivity and improved working conditions	Increased competition on the labour market, eroding labour conditions

1.4. EWCs and the democratisation of European economic integration

Mergers, acquisitions, relocations and restructuring plans are strategic decisions taken by the central management of the MNC at its headquarters, far away from the workplace of the employees, and usually outside their workplace representation structures. While EWCs cannot entirely prevent these developments from happening, they are nonetheless instruments to channel information and generate consultation between transnational decision-making bodies and workplace employee representation structures.[17] Viewed in this light, the establishment of EWCs can be regarded as a question of voice or exit.[18] The voice option includes direct communication between employee

[14] D. Corteel, G. Le Blanc, *Cross-border mergers and employee participation, Franco-German case studies, the importance of the national issue in cross-border mergers*, paper presented at the "Cross-Border Mergers and Employee Participation in Europe" conference, Ecole des Mines, Paris 09.03.2001.

[15] W. Müller-Jentsch, H.J. Sperling, *New Technology and Employee Involvement in Banking: A Comparative View of British, German and Swedish Banks* in: *Organised Industrial Relations in Europe: What Future?,* ed. C. Crouch, F. Traxler, Aldershot 1995.

[16] UNCTAD-DTCI, *World Investment Report 1994,* op.cit.

[17] T. Huzzard, P. Docherty, *Between Global and Local: Eight European Works Councils in Retrospect and Prospect ,* "Economic and Industrial Democracy" No. 26/2005, p. 541–568.

[18] C. Crouch, *Exit or Voice: Two Paradigms for European Industrial Relations after the Keynesian,* "European Journal of Industrial Relations" No. 1/1995.

representatives and central management. Without an opportunity to voice their opinion on important changes affecting their working conditions, the exit option might stand for rejection of such decisions, impeding employees' loyalty towards central management.

The information that central management gives a EWC helps employees to understand the strategy behind central management's decisions, and thus gain acceptance of them and facilitate their implementation.[19] The development of EWCs is, in this context, a test of the performance of the democratic system in the EU, to correct or gain acceptance for the distorting effects of European economic integration.[20] Having understood this challenge, the EU legislated the EWC Directive, with the aim of sustaining democratisation of its European economic integration policy.[21] In the preamble of the EWC Directive it is stated that:

'Whereas the functioning of the internal market involves a process of concentrations of undertakings, cross-border mergers, take-overs, joint ventures and, consequently, a transnationalization of undertakings and groups of undertakings; whereas, 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 that are affected by their decisions'.[22]

For employee representatives, the EWCs offer a European-level information and consultation process, in addition to offering the possibility of direct communication with central management. Of equal importance are the cross-border meetings of employee representatives and the opportunities these bring for European trade union co-operation and solidarity. For the management, EWCs offer no fewer opportunities. First of all, the EWC can serve central management in finding a balance between internationalised and decentralised strategic approaches in human resource management. The principle of thinking globally and acting locally can be fine-tuned and eventually monitored through a EWC. It can also be a vehicle for the development of an international corporate identity, and an instrument for internal communication, stimulating social harmony and cohesion within diversified multinational companies.

[19] J. Lamers, *The added value of European Works Councils*, Haarlem 1998; S. Nakano, *Management Views on European Works Councils: A Preliminary Survey of Japanese Multinationals'*, "European Journal of Industrial Relations" No. 3/1999.

[20] R. Rezsohazy, *Pour comprendre l'action et le changement politiques,* ed. Duculot, Louvain-la-Neuve 1996.

[21] R. Erne, *Organised labour – an agent of a more democratic EU?,* paper presented at the European Conference on Organised Labour "An Agent of EU Democracy? Trade Union Strategies and the EU Integration Process", Dublin 2004.

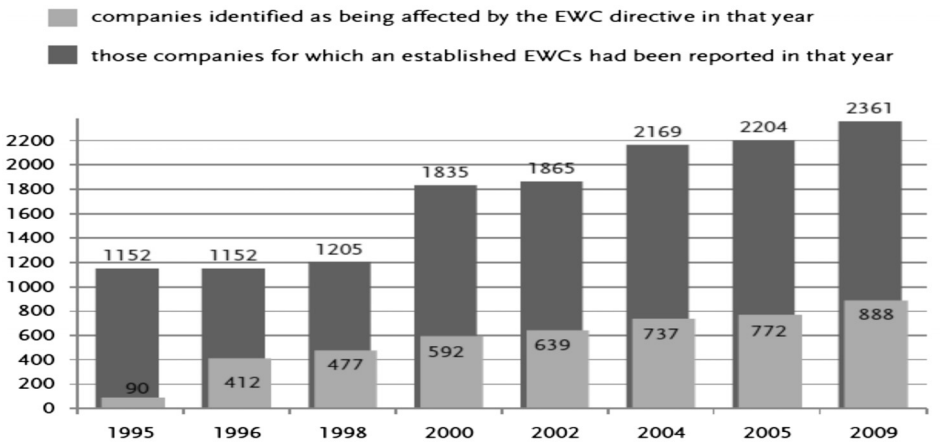
[22] Recital 9 of Directive 94/45/EC.

2. The European Directive on European Works Councils

Directive 94/45/EC, as well as Directive 2009/38/EC, applies to companies that have at least 1,000 employees in the European Economic Area (EEA) and 150 or more employees in at least two Member States. Consequently, these companies have to establish a European Works Council if employee representatives of at least two EU member states so request. The establishment of a EWC is done through negotiations with employee representatives from the European operations of the MNC, which results in a EWC agreement establishing the terms of operation of the EWC.

Over the years, the number of companies with more than 1000 employees and more than 150 in at least two countries has increased, due to increasing FDI flows and EU enlargement. At the time the EWC Directive entered into force in 1996, there were 1152 companies affected, of which 412 had established a EWC. Over the years both numbers have doubled,[23] leaving the compliance rate of companies with a EWC between 30 and 40 per cent of the total number of affected MNCs. These figures point out that the right to a EWC is a right that needs to requested and is implemented for each company by an agreement. It is not automatically imposed.[24]

Figure 1. The number of companies affected by the EWC Directive[25]



[23] P. Kerckhofs, *Europejskie Rady Zakładowe. Fakty i liczby 2006 (EWC facts and figures),* Brussels 2006. http://www.emcef.org/committees/EWC/Trace/EWC-FF2006-PL.pdf

[24] M. Martinez Lucio, S. Weston, *European Works Councils and 'Flexible' Regulation: The Politics of Intervention*, "European Journal of Industrial Relations" No. 6/2, p. 203–216.

[25] P. Kerckhofs, op.cit.

2.1. The political history of transnational employee representation

The implementation of the 1974 European Commission's action programme resulted in the first European Directives providing for information and consultation rights within companies in certain circumstances. These covered collective redundancies (Directive 75/129/EEC) and transfers and mergers of companies (Directive 77/187/EEC). In the 1970s, two other proposals appeared on the political agenda, providing, in addition to EWCs, for participation of employee representatives in company supervisory boards. These concerned a draft European company statute regulation and a proposal for a fifth company law Directive. Revised versions of both proposals were resubmitted for adoption in the 1980s. While they were not adopted, nevertheless these revised versions, as well as the very fact that they were not acceptable for adoption owing to certain reasons, yielded important information and lessons which were incorporated into the draft Vredeling Directive on transnational information and consultation.[26]

Unlike the EWC Directive, the Vredeling proposal was not limited to transnational companies. It also concerned national enterprises with complex structures. The Vredeling proposal required local management to provide information and consultation through the existing workplace representation structures, based on information received from central management.

Even though Sir Richard Ivor, the new Commissioner for social affairs who had taken the place of Henk Vredeling, issued a revised version of the draft Vredeling Directive in 1983, it too was never adopted. Business lobbyists successfully countered it, while trade unions were unable to convince Commissioners of the importance of this proposal. In the debates in the September and October 1983 meetings of the 'social questions working group' of the Council, resistance occurred first from the Thatcher government. Reservations also came from Germany, which feared an erosion of its co-determination practice. Finally, the French presidency of the Council did not make the revised Vredeling proposal a priority for the first half-year of 1984. In the end, probably the most important contribution of the Vredeling proposal in the political process which eventually enabled the adoption of the EWC Directive was the growing awareness it engendered that the then-required unanimity had to be replaced by qualified majority voting for the adoption of such proposals.

While the proposed Vredeling Directive was abandoned, three different events in France influenced the formulation of a proposal for a EWC Direc-

[26] R. Blanpain, P. Windey, *European Works Councils: the European Directive (94/95 EEC) of September 22, 1994 – Information and Consultation of Employees in Multinational Enterprises in Europe,* ed. Peeters, Leuven 1994.

tive. First, France adopted the so-called Auroux laws. The second Auroux law, of 28 October 1982, strengthened the consultation rights of works councils and introduced group works councils.[27] One of such group works councils, within the glass-producing company Saint-Gobain, invited foreign workers' representatives in 1983 and became the first *de facto* EWC.

Second, in the French state-owned Thomson Group the first EWC was created based upon a formal written agreement between central management and trade unions. The management of this company granted the French trade unions this first EWC agreement in return for political support at the EU level to obtain anti-dumping measures against Asian TVs entering Europe, which eroded Thomson's potential market shares. The content and structure of this first formal written EWC agreement was copied in several other companies in the second half of the 1980s, and became the template for the creation of EWCs according to the draft EWC Directive in 1990.

Third, within days of taking office, the French president of the European Commission, Jacques Delors, launched European social dialogue talks at the Val Duchesse Priory.[28] In this way the European Commission mobilised trade union support for the adoption of the Maastricht Treaty in return for the Social Protocol annexed to it. This was formalised in the European social partner joint letter of 31 October 1991, which asked the Inter-Governmental Conference (IGC) to adopt the proposal for a new Article 118b. This was done, and the proposal was integrated in Protocol number 14 to the Maastricht Treaty, and later on integrated, as Articles 137, 138 and 139 of the Treaty Establishing the European Community (TEC). In the current Treaty on the Functioning of the European Union (TFEU) they are now articles 153–155.

In this manner, the social partner summits initiated by Jacques Delors resulted in an agreement institutionalising European social dialogue. This opened up the possibility of negotiated agreements of the European social partners that would be enforced through Directives (Article 155), as well as the legal basis to issue Directives in certain policy domains by qualified majority instead of the previously required unanimity (Article 153). Both of these new decision-making procedures were used for the first time in the adoption process of the EWC Directive.

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[27] M. Coffineau, *Les Lois Auroux dix ans après,* Paris 1993.

[28] Val Duchesse is a castle on the outskirts of Brussels that was the location for European social partners summit meetings in January 1985 and in November 1985. In May 1987 the meeting was held at the Egmont palace in the centre of Brussels. That period, as well as the actors involved, were however continuously referred to by the symbolic place of 'Val Duchesse'. See: Z. Tyszkiewicz, *The European Social Dialogue 1985–1998 – a personal view* in: *European Trade Union Yearbook 1998*, ed. E. Gabaglio, R. Hoffmann, Brussels 1999.

2.2. The adoption of the EWC Directive

The adoption process of the EWC Directive is an interesting case study in European social policy- making, because it runs through three different types of decision-making procedures. At present, it also demonstrates the important capacity of the country holding the presidency to set priorities and seek compromises over proposed EU legislation.

In the first phase, the decision-making procedure in place at that time required unanimity in the Council of Ministers. As was the case with the Vredeling draft, it was the unanimity requirement which obstructed the adoption of the draft EWC Directive. The Maastricht Treaty, signed on 7 February 1992, included a Social Protocol (hereinafter referred to as the 'Maastricht Social Protocol') that opened up two new procedures for European policy-making on the issues of information and consultation:[29]

- The possibility for the European social partners to make an agreement that is enforced under a Directive, and
- The possibility for Council adoption of a Directive by qualified majority.

Until the Maastricht Treaty entered into force in November 1993,[30] the required unanimity continued to obstruct the adoption of the EWC Directive. In the meantime, the political willingness to legislate a Directive on EWCs resulted in the creation of a budget line for financing meetings of employee representatives to prepare them for the establishment of EWCs.[31] With the help of this budget line, 47 European Works Councils were established even before the EWC Directive was adopted in 1994.[32] This rather large and increasing number of voluntarily established EWCs constituted a strong argument in the decision-making process concerning the Directive.

2.2.1. Unanimity required in the Council of Ministers

The European Commission issued the first draft of the EWC Directive on 5 December 1990, which was presented to the Council meeting of 12 December 1990. The views of the social partners were given through the opinion of the

[29] G. Falkner, *European Works Councils and the Maastricht Social Agreement: Towards a New Policy Style*, "Journal of European Public Policy" No. 2/1996, p. 192–208.

[30] The Maastricht Treaty was only approved in Denmark in the second referendum of 02.06.1993 (the first referendum of 18.5.1992 did not permit Danish ratification). The French referendum of 20.9.1993 was positive, although only with a slight majority. Germany was the last Member State to complete the ratification process (following the judgment of the Constitutional Court of 12.10.1993 which allowed the ratification). Following German ratification the Maastricht Treaty and its Social Protocol entered into force on 01.11.1993.

[31] S. Cox, *Your new EWC agreement: What's in – what's out. A guide for workers' representatives*, Brussels 2005.

[32] P. Kerckhofs, op.cit.

European Economic and Social Committee (EESC) of March 1991. Considering this, as well as the amendments contained in the opinion of the European Parliament (EP) of July 1991, the European Commission presented a revised version of the draft in September 1991. This was subject to a political debate in the social and labour affairs Council on 3 December 1991. The UK opposed this draft, which at that time still required unanimous approval for adoption.

Table 3. Three stages in the adoption process of Directive 94/45/EC

Phase 1 **Unanimity of** **12 Member States** **in Council**	**Phase 2** **Consultation** **of Social Partners** **& possibility to make** **social partner agreement**	**Phase 3** **Qualified Majority** **of 11 in Council**
05/12/90 => 31/10/93	**01/11/93 => 30/03/94**	**01/04/94 => 22/09/94**
Legal Basis = Art. 100 of the Treaty establishing the European Community	Article 3 §2 and §3 of Maastricht Social Protocol[33]	Article 2§2 of the Maastricht Social Protocol[34]

The Presidencies of the Council of Portugal in the first half-year of 1992, and of the UK in the second half-year of 1992, both blocked the proposal, while intensive diplomatic efforts of the subsequent Danish and the Belgian Presidencies consolidated support for the draft of the text in 1993.[35] This political willingness to negotiate over legislation is illustrated by the fact that the draft EWC Directive was discussed at fourteen meetings of the working group social questions of the Council, at five meetings of the committee of permanent representatives (COREPER), and at five meetings of the Council of Ministers.[36]

[33] This is now Article 154 and 155 of the Treaty on the Functioning of the European Union (TFEU).

[34] This is now Article 153 of the TFEU.

[35] For a detailed analysis of the role and impact of the provisions in the draft EWC Directive, based upon interviews with members of COREPER and the working group social questions, see P. Kerkchofs, *La Directive sur les comités d'entreprise européens*, "Courier Hebdomadaire du CRISP" No.1579/1997.

[36] Council activities take place at three levels:

– The working group social questions, composed of heads of administration, dealing with juridical-technical questions;

– COREPER, the committee of permanent representatives, preparing political agreement on the proposal (Ambassadors of the Member States to the EU are referred to as permanent representatives);

– The Council of ministers of work and social affairs.

2.2.2. Social partners' opportunity to legislate by agreement

When the Maastricht Treaty entered into force in November 1993, its Social Protocol enabled the adoption of the EWC Directive with a qualified majority consisting of eleven Member States. Since the UK had opted out of the social protocol until 1997, the large support mobilised during the Danish and Belgian Presidencies of the Council enabled a speedy adoption.

The Maastricht Social Protocol, however, prescribed a double consultation round of the European Social Partners. In the first round the desire for, and the general orientation of, a legislative proposal were discussed. A second consultation period debated the content of the proposal and an eventual commitment of the European Social Partners to negotiate an agreement on a text for a Directive.

The first consultation round took place from 18 November to 13 December 1993, subsequent to which the European Commission issued a new draft version for the EWC Directive on 7 February 1994, the so-called Flynn proposal, named after Commissioner P. Flynn.

Two exploratory meetings were held on 23 February and 9 March 1994. On 15 March, UNICE and CEEP, the European organisations of public sector employers, offered negotiations without preconditions. UNICE and CEEP reviewed their position twice, first on 23 March and secondly on 28 March. As such, there seemed to be a basis for negotiations at the opening of the final meeting on 30 March 1994. At that occasion the Confederation of British Industry (CBI) found UNICE's position unacceptable and rejected it as a basis for negotiations. Consequently, the European Social Partners could not launch negotiations on the establishment of a legal framework for EWCs.[37]

2.2.3. The adoption of the EWC Directive by qualified majority

The European Commission presented a new draft Directive on 13 April 1994 based upon the 12 October 1993 draft that received large support during the Belgian Presidency. The EP and the EESC each issued an opinion, which were taken into consideration in the revised draft presented by the European Commission on 3 June 1994. On 18 July the Council of Ministers reached a common position which was transmitted to the EP for the second reading.

The EP proposed 12 amendments, on which the European Commission had to give its opinion a few days later. Commissioner Padraig Flynn's position was

[37] J.E. Dølvik, *Redrawing boundaries of solidarity? ETUC, social dialogue and the europeanisation of trade unions in the 1990s*, Oslo 1997; R. Hoffmann, *European trade union structures and the prospects for labour relations in Europe* in: ed. J. Waddington, R. Hoffmann*, Trade Unions in Europe, Facing challenges and searching for solutions*, Brussels 2000.

that certain amendments could be considered, if the Council was unanimous on the same line. This appeared not to be the case.[38] On 22 September 1994, the Council of Ministers unanimously adopted the common position of 18 July, without any changes. Portugal abstained, and the UK did not participate in the vote since it had opted out of the Maastricht Social Protocol.

The speed in which the draft Directive was passed – from April to September 1994 – reflects the broad political consensus to adopt a legal framework for EWCs. Even though this had not been possible throughout the negotiations with ETUC, UNICE and CEEP, the implementation of the EWC Directive brought a new impetus for European social dialogue.

2.3. The Polish implementation of the EU Directive 2002/14/EC

Both the 94/45/EC EWC Directive as well as the 2002/14/EC Directive on national level information and consultation were transposed into Polish law by the Act of 5 April 2002. Before the implementation of these Directives, trade unions were the only existing channel of employee representation. The introduction of a dual system, combining trade unions with their collective bargaining role and works councils with competences limited to information and consultation, led to a Polish court case over the role of trade unions in the appointment of works council members.

This question of the status of the works councils and their relation to trade union organisations was ruled upon by the Polish Constitutional Court in a landmark judgment of 1 July 2008.[39] Following a complaint lodged by the Confederation of Polish Employers,[40] the Court analysed whether the provisions of the Act of 7 April 2006 on informing and consulting employees,[41] which laid down the mode of election and dismissal of works councils, were compatible with Article 59 paragraph 1 in connection with Article 32 paragraph 3 of the Polish Constitution of 1997.[42]

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[38] *Richtlijn ondernemingsraden ongewijzigd goedgekeurd, amendementen europees parlement verworpen, (Directive on works councils adopted, amendments of the European Parliament rejected),* "De Tijd", 20.09.94.

[39] Judgment of the Polish Constitutional Tribunal of 01.07.2008, file ref. K 23/07, Dziennik Ustaw (Journal of Laws), No. 120/2008, item 778.

[40] In June 2010 the Confederation of Polish Employers officially announced it was changing its name to Employers of Poland, See: *Major national employer organisation changes name* http://www.eurofound.europa.eu/eiro/2010/07/articles/pl1007019i.htm (last visited 03.12.2011).

[41] Ustawa z dnia 07.04.2006 o informowaniu pracowników i przeprowadzaniu z nimi konsultacji *(Act of 07.04.2006 on informing and consulting employees),* Dziennik Ustaw (Journal of Laws), No. 79/2006, item 550.

[42] J. Unterschütz, E. Podgorska-Rakiel, *Rady pracowników po nowelizacji – wybrane zagadnienia (Works Councils after the revision – selected issues),* „Praca i Zabezpieczenie Społeczne" (PiZS) No. 3/2010, p. 17–21.

In its 2008 judgment the Polish Constitutional Court noted that the Act of 7 April 2006 transposing Directive 2002/14/EC provided for three modes of election of works council representatives: (i) only by trade unions, (ii) by all employees, and (iii) mixed. The Act gave the priority to the first mode: accordingly, as a general rule only trade union organisations were entitled to elect the employees' representatives. The second mode, election of the representatives by all employees, was only subsidiary and applied as an exception to that general mode, i.e. it was provided for only in cases where no trade union organisation existed in the enterprise, or in cases where, if there were more than one trade union in the enterprise, the trade unions could not manage to agree on the election of the representatives. This was in line with the recommendations of the Working group of labour ministries officials that looked after the harmonised national transposition measures, ruling out the provision of additional rights that could have stimulated MNCs to undertake regime shopping.[43]

The Court noted that the same Act provided that a works council, elected in an enterprise in which no trade union organisation existed at the time but one was subsequently formed, should be dissolved and the mandate of its members would expire six months after the day on which an employer is notified about formation of a trade union organisation. As a consequence, the employees previously elected to the works council can not oppose the dismissal of its representatives whenever a trade union organisation is created in a given enterprise. After having analysed the Act of 2006 in the context of the principle of trade unions' negative freedom and the principle of equality of workers, the Court found that Article 4 paragraphs 1, 3 and 5 of the Act of 2006 was unconstitutional to the extent that it specified the mode of selection and dismissal of the employees' representatives depending on whether the workers in a given enterprise belonged to a trade union organisation or not. Following this judgment the Polish legislature has derogated all the provisions questioned by the Court and laid down only one procedure to create work councils, by employees' election.[44]

The relevance of this judgement seems to be limited only to the question of the transposition of Directive 2002/14/EC. So far several other laws transposing the social *acquis communataire* in which the Polish legislature granted company trade union organisations a monopoly to elect employees' representatives have not been questioned by either the employers or the employees. In particular, this right is currently enshrined in the provisions concerning the se-

[43] G. Barisi, *L'Evolution des Comités d'Entreprise Européens: Enquête auprès des groupes francais,* "Travail et Emploi" No.79/1999.

[44] J. Unterschütz, E. Podgorska-Rakiel, op.cit.

lection of employees' representatives for a special negotiating body in the Act on European Works Councils[45] and the Act on the *Societas Europaea*.[46]

3. The recast of the EWC Directive in 2009

European Works councils continued to develop over the years, based upon learning effects and improved cooperation between EWCs. According to its Article 15, the EWC Directive was supposed to be revised in 1999, however this only happened ten years later, in 2009. The difficulties which gave rise to this significant delay are presented below, together with the rulings of the European Court of Justice (ECJ) that illustrated the need for the revision. Finally, an assessment is made of the extent to which the new EWC Directive incorporates the lessons from the ECJ rulings.[47]

3.1. The difficult process of revising the EWC Directive

The developments concerning the revision of the EWC Directive can be grouped in a similar way as the stages in which the EWC was adopted in the first instance, i.e. in the first half of the 1990s. In the first period the actors took positions: the ETUC formulated its demands, UNICE opposed revision, and the European Commission decided to prioritise two other Directives, withholding the revision of the EWC Directive until these two other Directives, in the field of European Industrial Relations, were adopted, which they finally were, as 2001/86/EC and 2002/14/EC.

In the second period, from 2003 to 2005, the European social partners were given the opportunity to legislate a revised EWC Directive by agreement. This turned out to be not possible, as was previously the case in the adoption process of the first EWC Directive. Finally a third period, beginning in 2006, reflected an increased political willingness to legislate a revised EWC Directive. In that year the European Parliament called for a revision in its Cottigny Report, and in resolutions on restructuring and closures this need for revision was repeated.

Frustrations over the lack of developments in the process of revision of the EWC Directive simultaneously raised the expectations associated with its

[45] Ustawa z dnia 05.04.2002 o europejskich radach zakładowych *(Act of 05.04.2002 on European Works Councils)*, Dziennik Ustaw (Journal of Laws), No. 62/2002, item 556.

[46] Ustawa z dnia 22.07.2006 r. o spółdzielni europejskiej *(Act of 22.07.2006 on the Societas Europaea)*, Dziennik Ustaw (Journal of Laws), No. 149/2006, item 1077.

[47] The political process leading to the adoption of Directive 2009/38/EC is described by R. Jagodziński in: *Review, revision or recast, the quest for an amended EWC Directive* in: *Social developments in the European Union 2008,* ed. C. Degryse, Brussels 2009.

revision.[48] From 1999 to 2007, this revision process had not yet resulted the presentation for adoption of any draft. Media attention given to transnational restructuring stimulated political actors to revitalise the revision process in 2008. In the meantime, case law illustrated the need for additional safeguarding of the effectiveness of the information and consultation rights provided by the EWC Directive. With EU enlargement, the inclusion of the UK into the process, and the extension of the EWC Directive to the EEA, its geographical scope was enlarged from 11 to 30 countries. Enlarging the European Single Market also enhanced transnational restructuring[49] and increased both the expectations associated with EWCs[50] as well as the number of countries represented in EWCs.[51] In addition, lessons learned from existing EWCs caused participants to project solutions for the difficulties they saw in the functioning of their own EWCs into the ongoing revision process of the EWC legal framework.[52] The resulting Directive 2009/38/EC is thus no longer referred to as a 'revision' but a 'recast' of the earlier Directive 94/45/EC.[53]

3.2. Deficiencies leading to court cases, reflecting the need for a revision

As the above-mentioned process unfolded, deficiencies in the implementation of the earlier Directive resulted in the rulings by the European Court of Justice that not only safeguarded the effectiveness of the EWC Directive but also provided lessons for its ongoing revision process.[54] These rulings concerned the EWCs of Renault, Bofrost, Kühne & Nagel, and Anker. Each of these four cases is described below.

The first court case involving EWCs arose from the decision of the French central management of Renault to close its plant in Vilvoorde, resulting in the collective dismissal of almost all of the approximately 3,000 workers there. This decision was taken by management, and announced to the press before

[48] W. Buschak, *Review of the EWC Directive* in: *European Trade Union Yearbook 1999,* ed. E. Gabaglio, R. Hoffmann, Brussels 2000.

[49] M. Carley, M. Hall, *European Works Councils and transnational restructuring,* Luxembourg 2006.

[50] P. Morvannou, *Methodological guide on the informing and consulting of European Works Councils in the case of restructuring,* Paris 1999; V. Pulignano, *EWCs' cross-national employee representative coordination: A case of trade union cooperation?,* "Economic and Industrial Democracy" No. 3/2005, pp.383–412.

[51] E. Vos, *The experience of European Works Councils in New EU Member States,* European Foundation for the Improvement of Living and Working Conditions, Luxembourg 2006.

[52] V. Telljohann, *European Works Councils, a role beyond the EC Directive*, "Transfer", Brussels 2005.

[53] R. Jagodziński, op.cit.

[54] E. Pichot, *Ce que la Cour de justice nous apprend sur la Directive relative aux CE européens*, "Liaisons Sociales Europe" No. 107/2004.

employee representatives were informed or consulted. A Belgian court issued a judgment condemning Renault's decision as being in breach of Belgian regulations on information and consultation. In parallel a court case was initiated in France to defend the EWC and its information and consultation rights, because the simultaneous start of a new production line in Spain clearly proved the transnational character of the closure. The French court of first instance,[55] as well as the court in higher appeal,[56] judged that the effectiveness of the information and consultation rights of the EWC Directive were not sufficiently guaranteed by the Renault EWC agreement. The ruling however assessed a penalty of only 5000 French Francs (approximately 750 Euro or £500), which for such a large company was hardly a deterrent.[57]

In the Bofrost court case[58] the ECJ received a reference for a preliminary ruling from a German court, concerning the request of workers to receive information on the organisation, structure, and workforce numbers of the company. The Bofrost defence claimed that the individual establishments were independent, as they were parts of a joint venture, without a central management or a controlling undertaking. Consequently, the German management claimed it was not required to provide this information, according to the German law transposing the EWC Directive. The ECJ decided that the provision of this information was essential for the effectiveness of the EWC Directive and ruled that not only central management, but any management is obliged to provide this information if it is requested to do so by a EWC.

Two other ECJ court cases concerning Swiss-based multi-nationals followed. In the Kühne & Nagel case[59] the largest workforce was situated in Germany, which, according to the ECJ, made the German management the substitute for the Swiss central management. The ECJ obliged the German management of Kühne & Nagel to provide information on its operations in other EEA countries. In the Anker case,[60] German employee representatives obtained the same result. This Swiss company had a Dutch subsidiary which held all the shares of the concern, and the largest workforce was situated in the UK. Thus the management of the Anker operations in the Netherlands or in the UK would hold the responsibility of central management in terms of the EWC Directive, though they did not acknowledge this when German employee representatives requested information to prove that their company fell with-

[55] Le Tribunal de Grande Instance de Nanterre, ordonnance de référé du 4.04.1997.

[56] La Cour d'Appel de Versailles, 07.05.1997.

[57] U. Rehfeldt, op.cit.

[58] C-62/99, *Betriebsrat der Bofrost*, [2001] ECR I-02578.

[59] C-440/00 *Gesamtbetriebsrat der Kühne & Nagel AG & Co. KG v Kühne & Nagel AG & Co*. KG [2004] ECR I-787.

[60] C-349/01 *Betriebsrat der Firma ADS Anker v. ADS Anker* [2004] ECR I-6803.

in the scope of the EWC Directive. In this case the ECJ ruling obliged management to provide information enabling workers' representatives to prove that their company fell within the scope of the EWC Directive.

Hence, it can be concluded that the effectiveness of the EWC Directive is enforced by these ECJ rulings.

3.3. The new EWC Directive 2009/38/EC

To assess the impact of Directive 2009/38/EC on EWC developments, the overall question to be answered is whether the new EWC Directive will bring about more – and more effective – EWCs in response to participants' expectations.[61] In order to increase the number and proportion of established EWCs, Directive 2009/38/EC provides help and stimuli for the setting up of new EWCs, as well as an upgrading of the legal framework for the existing EWCs.

3.3.1. Help for setting up new EWCs

In line with the Bofrost, Kühne & Nagel, and Anker court rulings, Article 4 §4 of Directive 2009/38/EC provides help in the process of collecting information on the scope of a company by making local management responsible to disclose this information within each workplace.

Another legal incentive to start setting up EWCs in companies where they are absent is provided in Article 14, which replaces Article 13 of the former 94/45/EC Directive. It discharges companies from their obligations arising from this Directive if they reach a EWC agreement on the basis of Article 6 of Directive 94/45/EC before the 6th of June 2011. This is the date the national transposition measures of Directive 2009/38/EC entered in force. If the obligations of Directive 2009/38/EC raised fears, they could be avoided by voluntarily setting up a EWC before the 6th of June 2011. The impact of this provision was not, however, significant.

Further help for the Special Negotiation Bodies (SNBs) employed in the process of establishing new EWCs is given in terms of: employee-only SNB preparation meetings; training for SNB members; notification of ongoing negotiations to European trade unions and their expert assistance in SNB meetings.

3.3.2. Legal upgrading of existing EWCs

The legal upgrading of the rights of existing EWCs is provided in Articles 1, 2 and 10 of the new EWC Directive 2009/38/EC. This involves both better

[61] J. Waddington, *Views on the agenda of EWCs and on the revision of the Directive: a perspective from five countries* in: *European Trade Union Yearbook 2001*, ed. E. Gabaglio, R. Hoffmann, Brussels 2002.

defined information and consultation rights and improvements in the means that have to be provided to allow EWC members to exercise their rights and fulfil their duties.

New in Article 1 is that it sets out the objective to define information and consultation in such a way as to ensure their effectiveness, while simultaneously limiting the competence of EWCs to transnational issues. These are defined as matters that concern the company as a whole or at least two different countries (Article 1 §4). This does not reflect the court ruling on the closure of a Renault plant in a country different from that in which the company's headquarters were located, where the closure was decided upon.[62] According to recital 12 of the 2009/38/EC Directive, which was previously included in the 94/45/EC Directive as well, EWCs need to be properly informed and consulted on decisions taken in another European country from where they will have an impact on employees. Neither the Renault court ruling nor this prescription in the preamble of the Directive is reflected in the transnational competences given to EWCs by the 2009/38/EC Directive.

The definition of information is new (Article 2 §1f), and to the definition of consultation is added that it needs to take place in such a time, in such fashion, and with such content, as to allow EWC members to express an opinion based upon the information provided. The information, the consultation and the expression of the EWC opinion also need to happen within a reasonable time, and sufficiently in advance that it can be taken into account in the company's decision-making process.

Also the role of EWC members is legally upgraded in Article 10 of Directive 2009/38/EC. This Article gives EWC members the right to obtain the means necessary to fulfil their EWC rights and duties (Article 10 §1). It is their duty to pass on information to local workplace representatives, or if there are no local workplace representatives, to the entire workforce (Article 10 §2). In order to develop the skills, knowledge and competences needed to exercise their representative duties, EWC members are entitled to training during their working time (Article 10 §4).

Conclusions

The EWC Directive illustrates the capacity of the European Union to develop a legal framework for European social dialogue in MNCs. On several occasions lessons were learned from the potential negative impacts of transnational restructuring and from the impossibility to legislate on this matter

[62] U. Rehfeldt, op.cit.

through unanimous decision-taking. Thus a joint letter of the European Social Partners of 31 October 1991 was included as a Social Protocol to the Maastricht Treaty, opening up two new possibilities for social policy making: by European Social Partner Agreement enforced by a Directive, or by a Directive adopted in the Council by qualified majority instead of unanimity. With voluntarily-established EWCs serving as good examples and a driving force, and political consensus mobilised by some ministers for employment during their countries' presidency, the draft EWC Directive was adopted in 1994. The innovative character of this Directive brought with it some imperfections that resulted in several rulings of the ECJ, some of which are reflected in the new 2009 EWC Directive. This article demonstrates that the new EWC Directive is a good example of European social policy making, bringing together and responding to developments in the economic, political, juridical and industrial relations fields. Despite the difficult and lengthy decision-making process, it illustrates the capacity of European policy-making to adopt a legal framework for European social dialogue structures within multinational companies.