



THE **E**uropean **W**orks **C**ouncils

– towards building transnational
industrial relations

BY **Rudolf Traub-Merz**

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Introduction

THE ONGOING DEBATE ON GLOBALISATION covers a wide range of economic, social and political issues, few of which have been finally settled to the satisfaction of a majority. Critics are linking poverty levels and social inequality indicators, which have been on the increase over the last decades both inside societies and between countries, to globalisation. Others blame on-going political interference in market affairs for any negative social outcome. Arguments in many cases sound like manifestations of 'ideologically pre-fixed positions' while empirical evidence on positive or negative linkages of globalisation with social indicators is often not convincing or even forthcoming (Brown, 2000).

Since the 3rd WTO Ministerial Conference in Seattle in 1999, globalisation has assumed a new political dimension. There is now hardly any international meeting of political leaders that is not challenged by a global campaign against the world trade regime. A radical transformation is requested, with demands however, which are contradictory and hardly fit into a uniform concept. Some groups go as far as to call for the abolition of the International Monetary Fund (IMF) and the removal of the World Trade Organisa-

tion (WTO). Turning back on history, re-empowering national governments, or at least moving primarily through regional trade blocks are presented as alternative paths. Their common denominator is the re-use of protective policies.

The social debate on globalisation takes place in two different arenas with one focusing on developing countries and the other on the fate of the welfare state in developed countries. Despite the different origins, the arguments are guided by similar questions: can social policy still be financed at the national level when economies open up for international competition? How will a global marketplace impact on the national capacity to improve or maintain social standards?

What matters most for developing countries, however, is the erosion of their comparative advantage if labour standards are imposed. A positive linkage, so it is feared, will negatively impact on their share in international trade. Labour standards are thus equated as protective measures from the developed world to keep them out of trade.

The ILO Declaration on Fundamental Principles and Rights at Work of 1998 takes these fears into consi-

deration. Instead of a wide spectrum of measures for labour protection, they include only so-called core labour standards whose universality is justified on both humanitarian grounds and fair competition in international trade. They relate to basic human rights and fair play and can be established without regards to level of economic development.

Indeed, a look at the core labour standards reveals that they do not contain any obligation for a re-distributive social policy financed through budgetary means. In the same manner, minimum wages have never been part of the proposal. The core labour standards are of social-regulatory character and grant organisational and collective bargaining rights as well as requesting the policing of the territory against exploitation of child labour and the use of forced labour. The compliance with the ILO's core labour standards should leave the developing countries with a reasonable advantage in labour costs.

In developed countries, the debate focuses stronger on a paradigm shift from the welfare state to the competition state. In deregulating domestic economies and opening it up for international trade, capital flow, and workers movement, individual governments are not only giving up on policy choices in the economic field but at the same time, reducing their capacity to socially regulate their societies. One of the consequences, critics point out is that national employment strategies are largely reduced to offer favourable conditions for foreign investors. The argument of neo-classical economists becomes even more feasible: reduce labour protection to increase employment. Domestic firms are buying in, seeking lower labour standards and threatening to relocate production else-

where. Competition develops between national states due to cross-country variations in labour protection. Strategies to gain comparative advantages by offering cheaper labour will ultimately lead to a race to the bottom.

What is at the ground of both debates is the asymmetry in opening up different sectors of society to globalisation. While economies are integrated internationally, social policy is left behind and continues to be the domain of national states. National governments are caught in a dilemma: either to push for economic success and leave the social sector to deteriorate or defend social achievements and loose out in the economic front. The call for 'globalisation of social justice' tries to bring this asymmetry back into balance. Maintain economic globalisation but with a human face. Global economic competition rules must be regulated within a global framework for social rights.

Globalising social justice raises a lot of new questions. Economic globalisation is in many regards a process of negative integration, bringing down national barriers and doing away with regulations. Social policy, however, is based on positive integration. New institutions will have to be built and sovereignty will have to be transferred to international levels. International bodies will have to be equipped with sufficient resources and wield powers to enforce implementation even inside national territories. Co-ordination rules in power sharing between national governments and supranational institutions will have to be agreed. The same goes for all social rights based on contractual agreements between social partners.

The process of regional integration in Europe is a special case of this de-

bate. While it has its own uniqueness, many of the issues are nevertheless pointing to the same structural contradictions of globalisation. Within its territory, the European Union (EU) is the most radical project ever undertaken in breaking down national borders and creating a single market. At the same time, the EU has been criticised as becoming an economic project with devastating social consequences.

In recent years, some progress has been made to transfer the economic union into a social union. While there is a broad-based understanding that a European welfare state is not on the political agenda and any redistribution policy will remain – at least for the foreseeable future – a national or sub-national affair, social-regulatory interventions are increasingly being called for. The European legislature has started to rule on workers rights that are granted beyond the national states and are transnational in character. There is no doubt that legislation on social

rights at the European level is still hampered by the very nature that the European legislature is constituted (see special chapter on The EU; Streek, 1998). It is nevertheless clear that the EU is currently the most advanced region to search for social answers to economic deregulation beyond the national state.

This brochure undertakes an analysis of the so far most radical attempt to protect labour with an institution that cuts across borders. The European Works Council (EWC) is a model to regulate the power of transnational companies through an EU-wide system of employees' interest representation. Success or failure of the EWC will, to a great extent, influence how other components of industrial relations are transformed from a national to a European level. Trade unions have entered into a strategic partnership with EWCs. Their alliance will also impact on how they go about their own core business, that is giving collective bargaining a European face.

1 Industrial relations and the treaty on the European Union

THE TREATY ON THE EUROPEAN UNION (TEU-Maastricht Treaty) which came into force on 1st November 1993 is widely seen as a turning point for the integration process of Europe. The earlier focus of uniting Europe along the Single Market and the Economic and Monetary Union (EMU) was complemented with an agreement on social policy, thereby raising hopes that Europe would move beyond the economic platform and develop into a social union. The Social Protocol of Maastricht¹ introduced two essential innovations which opened legal and political space to push, in certain areas, for the Europeanisation of industrial relations.

The first innovation refers to the process of political decision-making within the Community. A number of social policy areas were moved from unanimous voting in the Council of the European Union (The Council) to qualified majority decision. This limited the practice of blocking social progress through a national veto whenever a proposal did not fully correspond to the views of a single Member State. The second major change increased the

leverage of the social partners at the Community level. The European associations of employers and employees were given the right to enter into contractual agreements. This created the possibility of legally acknowledging the results of collective bargaining at European level.

Leaving aside the wider field of social policy and looking more closely at issues concerned with workplace conditions and representation of workers' interest, the Social Protocol effectively distinguishes four categories of European interest in industrial relations. First of all, it draws a strict dividing line between aspects of industrial relations, which are given a European legal platform, and those which stay outside the competencies of the EU lawmaker and continue to be under exclusive national jurisdiction. The Social Protocol further qualifies industrial relations according to the political voting mechanism through which national authority is replaced by European legislation. Items transferred to majority voting in the Council are separated from those, still being subjected to unanimous decision-making.

¹ The Social Protocol was first only annexed to the Maastricht Treaty due to the opt-out of the UK but few years later integrated into the Amsterdam-Treaty with the return of the UK.

Furthermore, it creates a new category by applying the principle of subsidiarity. The social partners at European level, under due legitimacy from their national constituencies, may conclude community-wide rules for handling their own affairs. However, while the Council is expected to just acknowledge such bilateral agreements, it still holds veto power and may prevent them from becoming legally binding.

The four categories of Community-involvement in industrial relations under the treaty on the European Union (TEU, Art. 137-140) are the following:

Social legislation: Arena I

Mode of transfer to European jurisdiction: The Council adopts through qualified majority voting and the European Parliament (EP) approves under the co-decision procedure.

Fields of social legislation:

- "...improvement in particular of the working environment to protect workers' health and safety;
- working conditions;
- the information and consultation of workers;
- the integration of persons excluded from the labour market, without prejudice to Article 50;
- equality between men and women with regard to labour market opportunities and treatment at work" (Treaty of the European Union, Art. 137 [1])².

Social legislation: Arena II

Mode of transfer to European jurisdiction:

The Council holds legislative powers through unanimous voting with the Parliament having consultation rights only.

Fields of social legislation:

- "...social security and social protection of workers;
- protection of workers where their employment contract is terminated;
- representation and collective defence of the interests of workers and employers, including co-determination..." (Art. 137 [3]).

Social legislation: Arena III

Mode of transfer to European jurisdiction:

Not existing. The Community is effectively barred from social legislation in the labour policy areas contained on a negative list.

Fields of exclusive national legislation:

The Treaty explicitly states: "The provisions of this Article shall not apply

- to pay,
- the right of association,
- the right to strike or the right to impose lock-outs" (Art. 137 [6])³.

Social legislation: Arena IV

Mode of transfer to European jurisdiction:

European social partners conclude agreements between themselves.⁴ The Council adopts the agreement as a European law.

² The numbering refers to the new numbering after the incorporation of the Social Protocol into the Treaty of Amsterdam. See European Union, 1999, p.206.

³ The Treaty of Amsterdam makes a mild concession to this harsh refusal, by declaring in Art. 140, that the Commission shall encourage cooperation between the Member States in regards to "the right of association and collective bargaining", the instruments of cooperation however being limited to making studies, delivering opinions and arranging consultations.

⁴ "Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreement" (Art. 139 [1]).

Fields of social legislation:

Employers and employees have the right to negotiate cross-sectoral as well as sectoral European framework agreements.

The new arrangement in class four of allowing social partners to conclude bilateral agreements and make them binding through a European law, which is adopted by the Council, depends very much on the goodwill of both sides. No instruments of pressure such as concerted actions are applicable. Some have called this new right to industrial self-governance at the European level “a restoration of the veto in social policy, wielded not by nation-states but, primarily, by organised employers” (Streek, 1998, p. 25).

Indeed, since the Social Protocol was passed, employers proved to be very reluctant to conclude on anything of European-wide relevance. So far, the social partners, represented by the European Trade Union Confederation (ETUC),⁵ the Union of Industrial and

Employers’ Confederation of Europe (UNICE; private sector)⁶ and the European Center of Enterprises with Public Participation (CEEP; public sector)⁷ have signed only three cross-sector European framework agreements on parental leave (1996), part-time work (1997) and temporary employment (1999), a figure the ETUC considers by far too low.

The ETUC, hold back by an unwilling counterpart, has long called on the European legislature, to provide statutory provisions, where employers resist negotiation. The Social Protocol sets the tone: issues of workers interest, deemed to be of lower relevance, like information and consultation, were handed to the Council for majority voting; issues of middle-ranked relevance, including co-determination, are subjected to unanimous voting; and those ranked highest like bargaining on wages and the right to strike continue to remain outside the competency of the European legislature.

⁵ ETUC represents 74 national trade union confederations as well as 11 industry (sector) federations from 34 countries.

⁶ UNICE has as members the 33 principal business federations from 27 European countries.

⁷ The full name is “European Center of Enterprises with Public Participation and of Enterprises of General Economic Interest”. CEEP lists as members 354 enterprises and groups of enterprises from 17 countries.

The legal framework for the establishment of EWCs

2

THE MAASTRICHT TREATY AND THE annexed Agreement on Social Policy proved to be a decisive step to finally give reality in 1994 to the EWC-Directive. It was the first time in the field of social policy that European legislation created a European institution. This first legislation on any transnational institution of industrial relations was unique in several ways:

- (a) EWCs antedated the passing of the EWC law. The first Europe-wide company council was set up in 1985 at the French undertaking, Thomson. Other French companies followed before Volkswagen in 1990 introduced this new concept to Germany. Nevertheless, the practice of establishing EWCs was not yet on a broad track and the law did not just formalise what had already become an unstoppable trend. EWCs were still scattered between a few multinational companies and it was the legal act itself, or the threat of it, which brought the breakthrough on a wide scale. The Commission, under pressure from critics for the one-sided European market project, needed a success story on the social front and played the role of a lobbyist for EWCs (Lecher, Nagel, Platzer, 1999, Chapter 5).
- (b) Attempts to provide a legal base for workplace representation go back to 1970, but never materialised under the objections of employers' associations and some EU-Member States to any form of statutory rights. It was the opening of the track through qualified voting that gave birth to the legal instrument. Sidelineing the more vigorous procedure of unanimous voting in the Council did not come without a political prize: participatory rights at board level, including co-determination, had to be struck out (see chapter on European Company Statute).
- (c) The EWC-Act did not come as a Regulation but through the 'milder' legislative instrument of a Directive. A Regulation lays down the same law throughout the Community; it is binding in its entirety, directly applicable, and puts down a unified set of rules to be followed by all Member States in the same manner. A Directive is binding as to the objective to be achieved but leaves it to the national authorities to choose the form and method. It does not supersede the laws of the Member States but places the countries under the obligation to transpose their Community obligation

into domestic law. Instead of leading to the unification of laws, it provides for harmonisation of objectives while maintaining diversity in form. Giving birth to the EWC-Act as a Directive instead of a Regulation was the second political prize that had to be paid in order to reach consensus in the Council. In transposing the Directive into national law, the Member States had the freedom to insert national preferences. This resulted in a wide range of rules, in particular, the mode of selecting workers' representatives and brought with it a large variety of different EWCs.

- (d) Subsidiarity is not only manifest in the selection of the legislative instrument; it is in the same manner expressed in the preference of contractual rights to statutory rights. To further overcome political resistance from employers and some Member States, priority had to be given to voluntary agreements bet-

ween labour and management, and statutory rights became applicable only as a fallback option after negotiations failed.

The Directive was adopted by the Council of Ministers on 22nd September 1994. The UK originally opted out of the agreement but later joined in 1997. The Directive was extended to include Iceland, Liechtenstein, and Norway in 1995.

The Commission set September 1996 as the deadline for transposing the Directive into national law – September 1999 for the UK – but more than half of the Member States delayed the process. It was only in 2000 when the last two countries, Portugal and Luxembourg, finally succeeded. Adoption through an act of parliament was the preferred approach for transposition (12 Member states); two countries settled for social partner agreements (Belgium, Italy) and one decided by presidential decree (Greece) (ETUC, 2001).

The European Works Council (EWC)

3.1.

Three ways of establishing EWCs

a. ARTICLE 13

The Directive offers three approaches for establishing EWCs. The first possibility was nothing more than an acknowledgement of existing EWCs. As the Directive became legally binding on 22nd September 1996, all agreements concluded between management and employees before that date remained valid. Article 13 mentions that the EWC-agreement must cover the entire workforce of the European undertaking and must provide for transnational information and consultation of employees but remains silent on any further provision. In particular, no criteria was attached on the negotiation procedure or the coverage and content of information and consultation. On expiry, the agreement was open for joint renewal. If renewal failed, the Directive became applicable. This generous rule of placing EWCs outside the legal provisions of the Di-

rective proved to be popular with employers. At no other period was the rush for management to initiate the establishment of EWCs greater than in the years from 1994 to 1996.

b. ARTICLE 6

The second path for establishing EWCs is outlined under Article 5 and 6. Priority is again given to negotiated settlements and the Directive is short of substantive provisions for the functioning of EWCs. Instead, a special negotiating body (SNB) is created to represent workers' interest and to negotiate terms and conditions of the EWC with central management. The Directive lays down procedural requirements for the elections of SNB members and the assignment of powers to the parties. On its own initiative or on the written request of at least 100 employees, the central management has to initiate discussions with the SNB, consisting of three to 17 workers' representatives. Members of the SNB are elected or appointed according to national law.⁸ The central

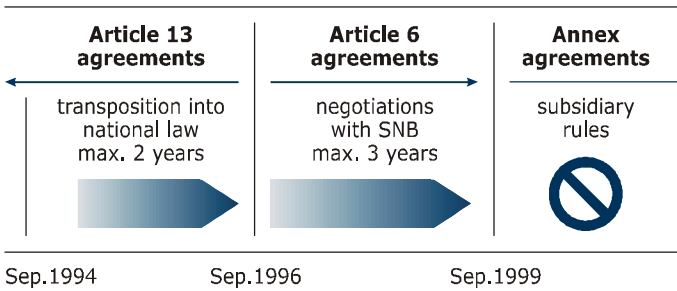
⁸ The transposition of the Directive into national law has led to a wide variety of rules, applied in deciding on membership in SNBs. Three procedures are dominant. Membership is either decided through secret balloting, selection by works councils or nominations from Trade Unions in cases, where they have a formal role in workplace representation, such as in Italy. National provisions further vary according to whether they include clauses on gender equity (Germany and Austria) and representation for manual and white-collar workers (Luxembourg) as well as participation of experts.

management and the employees' SNB then negotiate on the scope, composition, function and procedure, financial resources, and terms of office of the EWCs. No material standards are set as minimum for the outcome and the parties are given freedom to reach agreement at whatever level they feel fit.

c. ANNEX: subsidiary requirements (minimum standards)

If however negotiations fail – that is, if central management does not commence negotiations within six months after employees' request or that negotiations are not concluded within three years, the third path becomes compulsory. EWCs are established automatically through 'subsidiary requirements' outlined in the Annex.

Chart 1.
TIMETABLE FOR THE ESTABLISHMENT OF EWCs
AS OUTLINED IN THE DIRECTIVE



It is true that the Directive does not set any minimum standards and gives prominence to voluntary agreements 'at whatever level'. The existence of default provisions however exerts pressure. The SNB 'owns' the fall-back position as a threat to be followed automatically after three years of failed negotiations, thereby pushing management into a voluntary agreement 'close-by'. In this regard, the subsidiary requirements work as a rallying line for

both employers and employees and create minimum standards for Article 6 agreements.

The Default provisions contain a definition on the right of information and consultation, spell out minimum requirements for meetings, and specify the funding of the EWC. They are specified as follows:

- The EWC will be composed of a minimum of three and a maximum of 30 members. The composition has to reflect the number of countries where the companies have subsidiaries as well as the workforce of the respective establishments;
- EWC members have to be employees of the company. They will be elected or appointed according to national law or practice;
- The EWC has the right to meet with central management once a year. In the case of exceptional circumstances, the EWC is entitled to call for an extra-ordinary meeting;
- The central management has to inform on "...the structure, economic and financial situation, the probable development of the business and of production and sales, the situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies";

- The EWC has the right to deliver an opinion "...at the end of the meeting or within a reasonable time";
- The central management has to meet the operating expenses of the EWC. This includes funding of one expert.

3.2.

EWC coverage

EWCs have to be established in "community-scale undertakings" with two workforce-size thresholds: Transnational companies should have at least 1,000 employees in the EU and at least 150 employees each in two Member states. Companies, having headquarters outside the EU are covered as well. The Directive thus stretches out to all US, Japanese and other non-European multinational companies meeting the threshold numbers with their EU-business.

The most comprehensive data available on the number of companies and workers which fall under the EWC-Directive is available from the 'Multinationals Database 2000' of the European Trade Union Institute (ETUI). ETUI lists 1835 transnational companies that are affected by the new legislation. In view of the recent wave of mergers and acquisitions, it is however not easy to establish an exact figure and to keep proper accounts on all the changes in the corporate sector.⁹

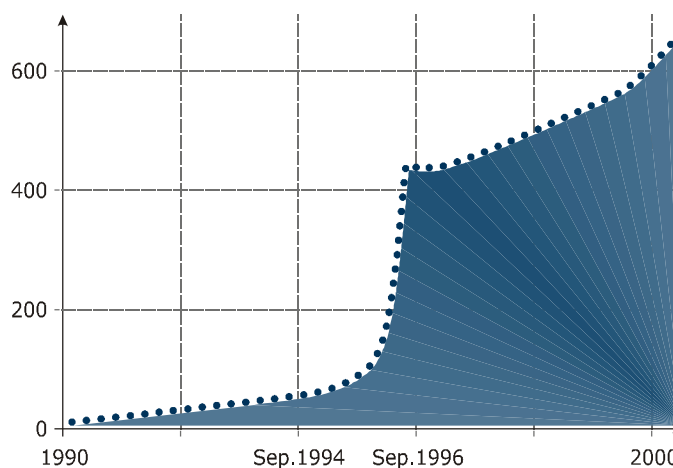
The figure of 1835 companies may look modest if compared to the world-wide count of TNCs, which UNCTAD puts at 63.000. The EWC-Directive, however, focuses however on bigger conglomerates. It is not too farfetched to assume that a majority of the 1000 largest TNCs world-wide do have at least two large business outlets in the EU. All of them are now faced with installing a new model of workers' interest representation.

The EWC-Directive is in the same way impressive if it is assessed against the number of workers concerned. Total employment in the companies affected reaches some 16 million workers. This represents about 10% of the whole workforce in the EU (Kerckhofs, 2001, p.143).

The development of European Works Councils since the early 1990s is shown in the following Chart. The number has risen from an insignificant few in 1990 to 600 by the end of 2000.

Chart 2.

DEVELOPMENT OF EUROPEAN WORKS COUNCILS
numbers up to the present day



Source: Lecher et. al., 2001, p. 46

⁹ Between 1990-1998, some 6000 to 7000 mergers and acquisitions (M&A) took place annually, involving an enterprise of the EU. In 1998, 50% of the 7600 M&A operations were of national character, 16,5% were cross-border investments involving only European companies while the remainder was shared between European enterprise investing in non-European companies (16%) and companies from outside the EU targeting European businesses (17%). (European Commission, 1999)

The big jump in the middle of the decade shows the impact of the legal pressure.

Before the EU passed legislation, only a few companies had voluntarily settled for an EWC. Then came the Directive with its policy of stick and carrot. The generous rule of Article 13 of placing EWCs outside the legal provisions of the Directive proved to be popular with employers. Some 322 agreements were concluded in 1996 alone (Kerckhofs, 2001, p. 137). At no other period was the rush by management to initiate the establishment of EWCs greater than during this phase. When the door for Article 13 agreements was closed in September 1996 and new bodies had to be negotiated under Article 6, the structure expanded on a considerably lower pace.

The same legal pressure is confirmed by comparing the types of agreements. Altogether some three-quarters of all EWCs concluded up to 2000 and documented by the European Trade Union Institute (ETUI) represent Article 13 agreements. Only a quarter was finalised through negotiations between management and an elected body of workers' representatives under Article 6.

While the number of EWCs installed is impressive, the number of companies defaulting is even higher. Chart 3 indicates that two-thirds of all the companies covered still have to comply. Judging from this high rate, it may take many more years for the Directive to be fully implemented.

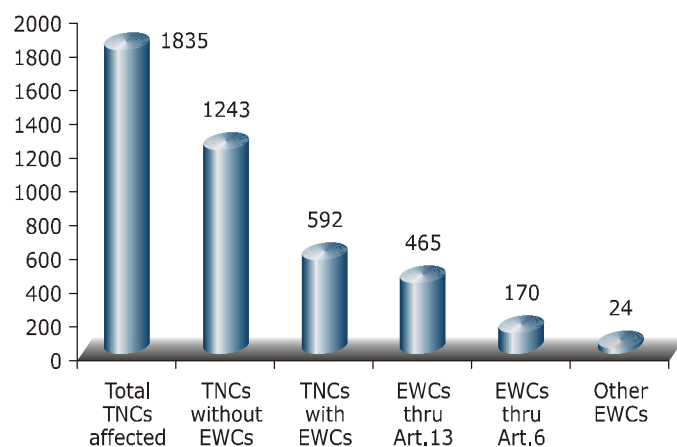
No empirical study has yet been made to explain the high rate of non-

compliance. The following reasons may have some relevance:

- EWCs do not have to be established if the concerned SNB declares with a vote of two-thirds that workers have no interest. This is not likely to be a frequent case;
- Management may argue that the delay in transposing the Directive into national law implies an extension of the deadline. This argument may be applicable to those cases where negotiation has just been initiated;
- Workers in some countries may be unfamiliar with works councils and/or feel discouraged by their Government or their employers to press for them;
- The sanctions for non-compliance set by the individual countries may be too low to be a deterrent to all employers.

Looking at EWC-coverage from the size of a company reveals an interesting though not surprising trend. Large companies have a significantly higher compliance-rate than smaller establish-

Chart 3.
EUROPEAN WORKS COUNCILS INSTALLED
IN TRANSNATIONAL COMPANIES

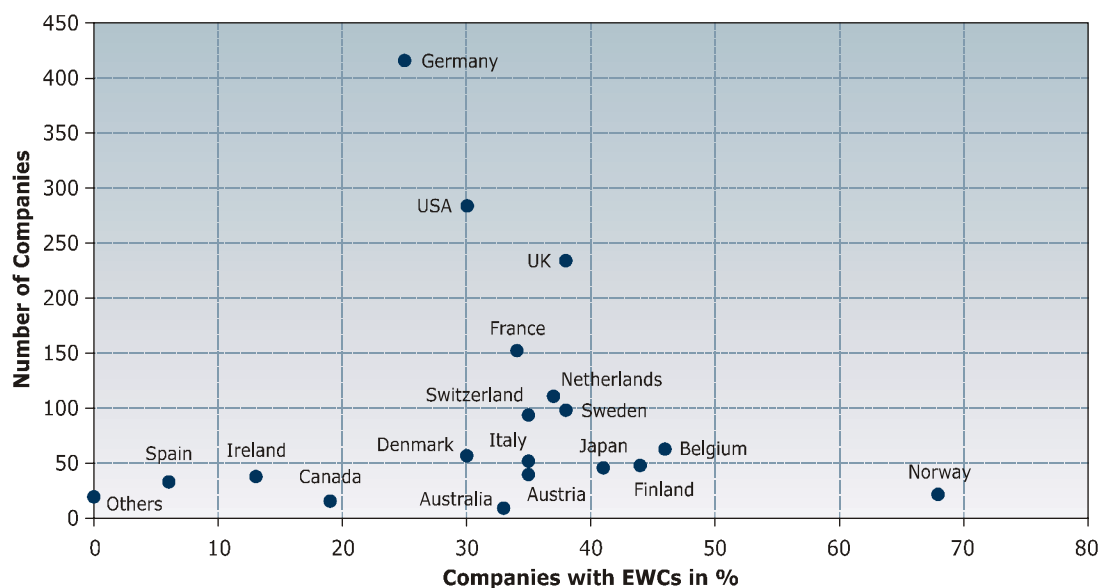


Note: No summing up possible as some TNCs may have more than one EWC, especially if constituted through merger.

Source: European Trade Union Institute (ETUI), Multinationals, database 2000.

Chart 4.

EWCs INSTALLED IN TRANSNATIONAL COMPANIES BY COUNTRIES



Note: Others include Portugal, Liechtenstein, South Africa, South Korea, Hongkong, Malaysia, Kuwait, Bahrain. Luxembourg is not listed.

Source: Own computation based on European Trade Union Institute (ETUI), Multinationals, database 2000.

ments. Of TNCs with less than 3000 employees, only 20% have installed an EWC. On the other side, companies with more than 10000 workers are mostly following the order of the Directive. In early 2000, 62% had already signed an agreement (Kerckhofs, 2001, p.143). It is reasonable to assume that within a few years, the largest players within the TNC-sector will reach a near-complete coverage.

The high compliance rate of companies with large-scale employment changes the overall picture dramatically. Together, the EWCs that were installed in early 2000 represent some 10 million employees. The compliance rate of companies may have been a mere third; the compliance rate if expressed in workers covered was already a high 60%.

It is clear that the EWC-law impacts in particular on the leading economies. A look at the distribution of companies by countries reveals the following picture: European enterprises are the dominant group making up some 80%

of the conglomerates. Germany, UK, France and Netherlands are the big players, sharing between them some 70% of the multinational companies of European origin.

The US-based undertakings are by far the strongest group of the non-European segment, followed with some distance by the Japanese. Companies from Africa, Arabia and Asia (excluding Japan) have found their way to the single European market but their joint share, however, is below one percent.

Chart No 4 groups the countries according to their performance in implementing the Directive. A listing of countries into "good performers", "average performers" and "bad performers" gives the following pattern. Only Norway is doing remarkably well, having established EWCs in two of every three companies. Belgium, Finland and Japan could be added to the group of above-average or "good performers", having installed EWCs in 40% or more of their companies.

On the negative list (“bad performers”: 20% and below) are Canada, Spain and Portugal from South Europe, Ireland (who has attracted foreign direct investment with a liberal economic policy) and finally, all the transnational companies with headquarters in Africa, Arabia and Asia (excluding Japan). The latter group, together with Portugal, may be better called zero-performers as none of their companies have installed any EWC. However, their overall weight is marginal due to the very limited number of companies.

All the big countries with high numbers of enterprises belong to the group of “average performers” (20-40%). Germany is on the lower end of this middle segment with a performance rate of only 25%. This is somehow surprising as Germany’s companies would appear to be best prepared for new structures in industrial relations, having half a century of experience with national works councils and practising a highly sophisticated system of co-determination. The German delay may point to some reluctance at the level of central management if not outright opposition.

There is no significant difference in attitude if Europe is distinguished from other regions. US and Japanese companies are dominating the group of non-European investors and they have followed the same path as their European competitors.

3.3.

Rights on information and consultation

The Directive defines an EWC as “a procedure for information and consulting employees” (Article 1.2). The EWC receives information from management for employees to ensure that

decisions made by the company in one state, affecting the workers of the company in another country, are communicated to the whole workforce. The rights, associated with EWCs, are limited to information and consultation. The Directive does not confer rights of co-determination or collective bargaining.

The Directive does not contain a definition on information but outlines the meaning of consultation. “‘Consultation’ means the exchange of views and establishment of dialogue between employees’ representatives and central management or any more appropriate level of management” (Article 2f). Some clarifications on content and form are written into the Annex (Sect. 2 and 3), thereby leaving it to the transposition rules of the Member States or the negotiating parties of voluntary agreements as to how far to follow these guidelines. A majority of countries appears to have leaned towards these formulations (ETUC, 2001).

The meaning of the right to receive information and to be consulted in the EU-Directive is rather vague. Information can be of general character and it can be released at a time when the use of it is meaningless. Consultation usually implies that the right to forward one own position is granted, even though there is no obligation for management, that the points raised by workers representatives have to be taken into consideration and become part of the decision.

While the practical relevance of these procedures mostly depends on the openness and interest of management, to have employees’ structures participating, some conditions are decisive in regard to the quality of the exercise.

a. TIMING AND CONTENT OF INFORMATION

The timing of information, the flow and the material content of it easily becomes a matter of dispute in a situation when it matters most. These situations arise, when a company decides on employment issues, be it to lay off workers, to re-structure the workforce, to merge with competitors, or to relocate parts or the whole of its business to another country. Putting the EWC into the proper picture at an early stage may allow workers to mount a defence if necessary. Releasing only partial information, releasing it at late time or keeping employees completely unaware, are tempting management strategies when it comes to decisions impacting heavily on employment affairs.

b. INTERNAL WORKING STRUCTURE OF EWC

In transposing the Directive into national law most countries concluded on single annual meetings as a minimum requirement. They only give allowance to additional sessions where urgent matters arise. In most cases it is left to negotiations to approve on two main elements for the internal division of labour: preparatory meetings of all EWC-members ahead of the annual meeting with management and the setting up of an executive committee. The advantage of both structures are obvious: an executive committee will handle the affairs between annual events, provide management and workers with a permanent communication platform and may be used as a substitute body in cases, where information and consultation is required but a meeting can not be held with the full EWC due to time or other constraints.

Preparatory meetings ahead of the plenary session can make the meeting with management much more focused and considerably reduce the time needed for workers' representatives to come up with a joint position.

c. ACCESS TO EXTERNAL EXPERTISE AND EDUCATION

The right to information implies, as some may argue, the right to understand. EWCs consisting of elected representatives of the workforce are at a disadvantage when it comes to analysing information of a complex, legal, economic or technical nature. Training in the relevant fields is needed as much as cultural and language training is needed to cope with the diverse background of its members (see below). In the same way, EWCs need access to expertise – internal, from company and external from independent parties and individuals – in further clarifying on issues and developing sound counter proposals.

d. CONSULTATION DURING PLANING STAGE

Consultation becomes only meaningful if it goes beyond reverse information. Voicing an opinion by workers' representatives after management has taken its final decisions is not substantially different from remaining silent. The right to consultation must be linked to the planning stage, when the decision process still allows new options to be considered and proposals from the EWC can still make an impact.

e. LINKING EWC WITH WORKFORCE

Becoming a consultative body means more than being the recipient of information and sharing views with management, even if this is done in

good time and at competent levels. An EWC, in order to develop from a purely information forum to a consultative body must attain autonomy from management and put forward demands which have been collectively elaborated within the EWC but are linked through the national EWC members into the national council structures and the workforce. If no bottom-up approach of voicing concerns and arriving at positions is developed, the EWC will not acquire the status of a legitimate industrial relations actor that is able to add an additional European component of workers interest representations to those existing at national level.

3.4.

In-built imbalances due to different industrial relations and linguistic backgrounds

EWCs have built-in imbalances due to the fact that their members act within different industrial relations systems at home and come from different socio-cultural and linguistic background. Creating cohesion and a common work culture may not be easy and these difficulties can impact negatively on its capacity as a consultative body. These internal imbalances may be less articulate in undertakings based primarily on nearby cross-border investments but can be major obstacles in those stretching out widely within Europe.

EWCs, in most cases meet annually, have the right for preparatory meetings and, where special circumstances arise, for additional sessions. While meetings can rotate between the various parts of the undertaking, they are more likely to take place in the country where the HQ is located and/or where

the largest segment of the total workforce is employed. There is mostly always a home-team inside the EWC that enjoys various advantages such as supplying the rules of business and the mother tongue for communication. Such factors of tensions must be overcome to avoid the formation of factions and rivalries.

The majority of EWCs are faced with a language problem. In most cases, the national language or English is used for oral and written communication. Translation is usually provided, the extent of which may depend on the agreement or the interest of the management, but members not fluent in the language of communication are at a disadvantage, in particular during informal contacts. A lot of US-American and Scandinavian companies request sufficient command of English and are threatening to ease out translation services after an initial period. Language training and the resources provided for it are major ingredients for the smooth operations of EWCs.

There is as well an imbalance in the urgency to which the EWC is needed. In many cases, home-teams have an established relationship to central management through national representational arrangements, thus relying less on EWC-procedures than those members coming from foreign subsidiaries. They are at a structural advantage as they are less in need of information and consultation and less dependent on translation services and language training. Meetings close to the workplace allow for considerable savings in time and financial resources, and they may show less interest in bargaining with management for sufficient EWC-funding. Creating a productive working atmosphere between the members can only be achieved by overcoming

this asymmetry. This depends to a great extent on the home-team of not assuming the role of the dominant player. It is the majority group which must be in particular conscious to guide EWC-dealings by developing mutual trust based on consensus (Lecher, Nagel, Platzer, 1999: Part IV: Case Studies, and. p.221-3).

3.5.

Sanctions for non-compliance

The legislative instruments of the EU vary considerably in the way they are enforced. While a Regulation is immediately binding and the Commission is in charge of enforcing compliance, the very nature of a Directive diffuses the responsibility for using sanctions. A Directive only outlines a framework within which rules and regulations are defined according to national law or practice. Consequently, the application of sanctions becomes primarily a matter of each Member State.

The EWC-Directive, indeed, lists no sanctions for non-compliance with laid-down procedures. It only calls on Member States to ensure that management and employees abide by the obligations and instructs national governments to “provide for appropriate measures in the event of failure to comply” (Article 11). Enforceability is delegated to the Member States which have to ensure that “adequate administrative or judicial procedures are available” to ensure enforcement. A material definition for “appropriate measure” is not given.

THE RENAULT CASE:

The now famous Renault decision in 1997 of closing down its Belgian plant and moving production to Spain became the first case, when the right on information and consultation was tested even in the court rooms. The case did not just lead to an outcry of workers at the Belgian plant when they got knowledge of the relocation plan, long after the decision had been taken. Renault workers in other countries mounted a sympathy strike, in what some have called the first European strike action. The case was in particular embarrassing for the EU-Commission, as two Directives on EWCs and on Collective Redundancies were ignored and furthermore, Renault’s motive turned out to be one of aid-shopping. The company had applied for subsidies from the Community’s Regional Fund for its new production site in Spain, and it looked as if European funds were creating incentives for relocation moves, destroying employment in a profitable plant. The Belgian, Spanish and French governments got evolved into a political battle over the case.

Renault had an EWC established under Article 13 and the agreement did not foresee extraordinary meetings in case of relocation. Nevertheless, one Belgian and two French courts found the French carmaker guilty for not providing information ‘in good time’ and consulting in advance. (Lecher, Nagel, Platzer, 1999, Chapter 4; EIRO 1997). While these court rules may be seen as precedence for a European jurisdiction on the meaning of the right to information and consultation, they did not prevent Renault from finally re-directing its investment. Compensation for damages of 15 thousand French francs, as fixed by one court, were not a deterrent to change Renault plans. Sanctions for non-compliance at the Community-level may have been more efficient.

3.6.

The Volkswagen-Group-EWC

Volkswagen (VW) belongs to the group of transnational companies, which are very supportive for a social dialogue with its workforce. The company introduced the EWC in 1990, years before the EU-Directive made the establishment obligatory. When it took off as the first council in the automobile industry in Europe, it was composed of 17 members coming from three countries (Germany: Volkswagen, Audi; Spain: SEAT; Belgium: VW-Bruxelles). Since then, Volkswagen has undergone several major expansion projects prompting the VW-Group-EWC to adapt accordingly. Since the amendment of the agreement in 1999, the EWC comprises now eight countries. The 25 members reflect the two criteria for representation: one each from any major business site or country and the others in relation to the workforce-size (Volkswagen, 1992; Steiert, 2000).

The EWC has set up two specialised committees to give more meaning to the flow of information and consultation. They care for the needs of AUDI and issues related to the financial services and sales companies. An Executive Committee, made up of a president and general secretary, coming from the headquarters of Volkswagen-Germany, and with representation from all car brands or countries, handles the business between the plenary sessions.

EWC-membership is restricted to employees of the company. Selection is done in accordance with national laws or practice. While non-members have no

automatic right of attendance, the Executive Committee can resolve to invite internal or external consultants to the sessions. It is in this regard that a trade union representative sits in both, the EWC and the Executive Committee in an advisory capacity. His 'duties' include to linking council matters to the national trade union bodies.

The agreement between management and the EWC acknowledges the need "for jointly solving any conflicts

Chart 5.

EUROPEAN VOLKSWAGEN GROUP WORKS COUNCIL

Structure according to EU-Directive and respective (German) legislation



Source: Adopted from Steiert, 2000, p.7.

which may arise" (Volkswagen, 1992: §1.1). Management has to provide information on subjects like job security, work organisation, production technologies and occupational health. Consultation procedures focus on planned cross-border transfers of production "which may have a substantial adverse effect on the interests of employees" (Volkswagen, 1992: §4.1). Management has to inform the EWC or the Executive Committee in 'good time' and to provide sufficient space for consultation, emphasising in particular the right to comment within a specified period of time. "These consultations shall take place early enough for the views of the Volkswagen European Group Council to be taken account of in the decision-making process" (Volkswagen, 1992: §4.3)

Over the years, the scope of issues dealt with in the EWC has widened. So has the number of meetings. While the agreement requests 'at least one meeting per year', the practice has gone beyond with two meetings of the Executive Committee and two plenary sessions a year.

The EWC has not limited its role to information and consultations but is occupied as well in developing principles of conflict resolution. It adopted a position to refuse a take-over of production, if any manufacturing plant is on strike. In the same manner, it is

involved in co-ordinating workers interest on working hours and engages central management in agreeing to VW-Group-wide minimum standards.

Management has supported the work of the EWC by shouldering the expenses of its activities. The annual budget is at the disposal of the council and contains provisions on funding of the following: (a) translation into major languages; (b) accommodation and travel for EWC-members; (c) costs of more than one expert; (d) costs for participation of a trade union representative; (e) separate budget for the Executive Committee; and (f) Secretarial/technical assistance for EWC. Management has further agreed to training schemes including vocational training. These schemes are not only open to EWC-members but also accessible to trade union shop stewards.

Volkswagen holds considerable investment in overseas countries like Brazil, Mexico and South Africa. Plants from these countries are not represented in the EWC. Central management first engaged in a global social dialogue with its workforce by supporting so-called 'World employee conferences'. In 1999 it signed an agreement, to establish the 'Volkswagen Group Global Works Council'. The World Works Council is modelled closely after the European Works Council (Steiert, 2000, chap. 4).

4 Relationship between EWCs and trade unions: Co-operation or competition?

IN ASSESSING THE RELATIONSHIP BETWEEN EWCs and Trade Unions, three issues are of major importance: formal membership of Trade Unions in EWCs; co-operation between Trade Unions and EWCs; and the functional division between workplace representation and collective bargaining.

4.1.

Formal membership of trade unions in EWCs

Voluntary agreements concluded under Article 13 do not have to follow legal stipulations that qualify membership. While they can basically allow (and in a few cases do so) to have full-time trade union officials sitting in EWCs (ETUC, 2001) among the overwhelming majority, they contain clauses which are restricting ordinary membership to company employees.

Negotiated settlements under Article 6 have to follow the transposition rules. In a majority of countries, election or nomination of members takes place through the national structures at the workplace. In countries with a dual system, which separate works councils from Trade Unions, such as Germany and Austria, the agents of collective bargaining are excluded from the

selection process. In countries, where trade unions play a formal role at the workplace, such as in Italy, France or the UK, they hold nominating powers and can arrange for their lowest tier of trade union officials (shop stewards, delegates) to be included in EWCs.

In all, the influence of Trade Unions exerted on EWCs through ordinary membership is rather low. This picture changes, by looking at informal channels. The large majority of EWC-members are holding membership of Trade Unions at the same time.

4.2.

Cooperation between trade unions and EWCs

During the initial period, when EWCs were concluded on a voluntary base, the ETUC and the European industry federations were in many cases involved in setting up the information and consultation procedures. According to its own estimate, the ETUC participated in 75% of all agreements, partly as the sole bargaining agent, and partly joining national works councils.

Since the introduction of SNBs, the negotiating role of trade union bodies has been significantly reduced. It is now the policy of the ETUC to parti-

cipate in EWC affairs with trade union officers as external experts. Member States have widely followed the suggestion of the Directive, to give external experts access to the SNB and the EWC. A good number of agreements do explicitly mention trade union representatives to fall under the category of experts, while there appears to be hardly any case, where advisory status for trade unions is fully rejected. Experts mostly have access to preparatory meetings as well and the costs, usually to be agreed in advance, are covered through the EWC budget, provided by the central management. The ETUC, in pressing for the amendment of the Directive, is now demanding, that trade union representatives should receive acknowledged expert status in all EWCs.

A second approach for Trade Unions to build a service network is through training, seminars and projects. Efforts are made to train EWC representatives to 'become experts on their own' and to establish guidelines on negotiations and minimum standards. Co-ordinating the flow of information between different EWCs is another area of concern. European industry federations like the European Metalworkers's Federation (EMF) are trying to focus the EWC attention beyond the corporate company context into a sector perspective (EMB, 2000). Organising multi-employer platforms helps in the search for best practice models to set standards. And it serves to prevent tensions that arise between company and sector focus. Trade Union strategy towards EWCs is indeed twofold: assisting them to function better as a company-based system of interest representation while at the same time, not allowing employers to use EWCs as a major force in fighting

trade union influence on company or sector matters.

Financing a strong service network for EWCs stretches the trade union resources to the limit. While a sector outlook becomes ever more important, this implies a major shift in the support base from national unions to the European industry federations. National unions have to release more resources to their European superstructure, a particularly difficult task in times of declining membership at home.

4.3.

The functional division between workplace representation and collective bargaining

EWCs are the first Europeanised structure of workers interest representation based on legislation. While this pilot law can be seen as a front-runner of a future European industrial relations system, with other legal initiatives in the pipeline (like the European Company Statute and proposed Directive on information and consultation) there is nothing soon to follow in those areas considered as key elements by Trade Unions. The social policy protocol of the Maastricht Treaty explicitly excludes the Council of Ministers of dealing with collective bargaining on wages and the right to strikes and the employers associations are resisting or are without mandate from their national members, to enter into European-level negotiations. With no support from the political Executive – the Commission and the Council – and without the traditional multi-employer counterpart for negotiations, arrangements for putting cross-border components into bargaining is left to individual employers, EWCs and trade unions.

There is uncertainty as to the future division of duties between EWCs and trade unions under the asymmetry of building European structures of workplace representation while holding back on collective bargaining. There are already a few notable exceptions of EWCs, reaching beyond consultation and getting involved with their counterpart on negotiations about training, prevention of discrimination and occupational health and safety issues. While these items still belong to the 'soft group' of bargaining and do not yet touch the 'hard group' of wages and working conditions, there is no reason

to believe that central management of international corporations would always, and for principal matters, exclude hardcore items from a European-wide company agreement.

Within Euro-company level, benchmarking is becoming an ever more important technique to effect changes in subsidiaries. The three step process of comparing company sites, and possibly those of competitors, identifying best practice and agreeing on a set of target between central and local management while leaving the details of implementation to the subsidiary, is still focusing on issues beyond collective bargaining

Europeanisation of collective bargaining

The Europeanisation of industrial relations is not likely to lead in the foreseeable future to joint collective bargaining at central European level but rather to cross-border co-ordination of national bargaining.

While co-ordination of wage policies may have some relevance at the central, multi-sector level, influenced in particular from macro-economic considerations under the European Monetary Union to curb inflation pressure, it is the sector level where cross-border trade union cooperation has the best chance to succeed. The pace with which it develops is likely to vary considerably between sectors and regions, leading to multi-speed Europeanisation.

The European Metalworkers' Federation (EMF) has been in the forefront in pushing for sector co-ordination. In June 1988, it adopted a European charter on working time in which the EMF affiliates agreed on a maximum time of 1750 hours per year as a European minimum standard. In December 1998, the EMF agreed to the "new European coordination rule" for national bargaining in the metal sector. Referring explicitly to the need to prevent downward competition between countries on wages and to eliminate wage dumping, the resolution states: "The key point of reference and criterion for trade union policy in all countries must be to offset the rate of inflation and to ensure that workers' incomes retain a balanced participation in productivity gains".

While productivity-oriented wage policy is at the heart of the coordination rule the trade unions keep their full autonomy in respect to how they share these gains between the improvement of wages and employment-related issues, such as reduction of working time, early retirement or other benefits.

The construction workers organized under the European Federation of Building and Wood Workers (EFBWW) are following a different path, encouraging cross-border bargaining partnership in sub-regions and emphasising coordination on working conditions. As this is the sector with the most significant numbers of cross-border movement of workers, their cooperation reaches out to joint transnational trade union membership.

Literature: Marginson, Schulten, 1999; Schulten, 2000; Sisson, Marginson, 2000; Transfer, 2000.

agreements. But initiatives exist to include aspects related to workers compensation. Working time flexibility, such as overtime corridors and annual working hours, fixing of wage groups, wages linked to productivity and/or company profits and the like, are in some countries seen as the prerogative of trade union bargaining. These initiatives may become areas of Euro-wide company standardisation through social benchmarking. Management, entertaining such extended bargaining with their respective works councils, may be seen as piloting a crash course against traditional trade union interests.

While there is need to resolve the question if EWCs should be empowered to negotiate and conclude agreements with group management at European level, the trade unions concerned exhibit wide discrepancies in their strategic positions. The differences are partly explained through the dominant collective bargaining systems at home.¹⁰ Trade unions from countries with strong company bargaining, like in the UK, appear to be more favourable to EWCs acquiring a bargaining status than those where industry-wide settlements are dominant. Within the

group of 'sector-minded' unions, there are differences between those who want to keep EWCs out from concluding any agreement and those who are supporting the transfer of negotiating powers to EWCs, under the condition that they are linked to agreements concluded at sectoral levels and do not enjoy a life of their own. There is further distinction between trade unions, whose geographical or industrial scope embraces many multinationals and therefore would lose a substantial part of their national bargaining arena once EWCs become a European negotiating forum, and those who do not see their national power base being effected at all¹¹.

Whether or not trade unions will finally push to empower EWCs for collective bargaining, is likely to be decided by how strong they will advance their own European agenda for industry-wide bargaining (see special box – Europeanisation of collective bargaining). If they fail in pushing for European wage co-ordination along sectors, they may settle for 'the smaller package' of empowering EWCs under the condition that they can play a dominant role inside them.

¹⁰ For an overview on collective bargaining in the EU-Member States, see: Schulten, Stueckler, 2000.

¹¹ For a short discussion of Trade Union positions in France, Italy, Germany and UK, see Lecher, Nagel, Platzer, 1999, p.232-4.

5 Expanding workplace representation

5.1.

Review of the EWC Directive

Article 15 of the Directive set “not later than 22 September 1999” as the date to review its operation. The ETUC has made its areas of criticism known to the Commission. According to the ETUC, central management in many companies does not co-operate with EWCs in good faith but rather use it as a body for acclamation and confront it with a *fait accompli*. The right to information and consultation must be strengthened by including in the definition timing, form and content. It further requests to lower the workforce size threshold for the purpose of covering more companies. A special call by the ETUC is to apply sanctions at the Community-level for non-compliance with laid down procedures (see special box: ETUC Proposals on Amending of the EWC’s Directive).

While the ETUC is pressing for its demands, there currently appears not much interest by the Commission nor the employers for a fast process of amending the Directive. The European Commission, in particular, holds the view that the EWCs need more time to develop its potential before a final assessment can be drawn on its shortcomings.

It is therefore likely that the legal and political emphasis for workers rights will shift to two other Directives: The European Company Statute and a separate Directive on Information and Consultation. Amendments to the EWC-Directive are likely to take shape only when the fate and the practical implications of these two other Directives become clearer.

5.2.

The European Company Statute (*Societas Europaea*) and the scope for co-determination

When the debate on workers participatory rights at European level took off in the 1960s, it originally did not center around the Directive on European Works Council (EWC) but had a much wider and more comprehensive approach in the conceptualisation of the European Company Statute. Since the legal instrument of an European Company – known by its Latin name of ‘*Societas Europaea*’ (SE) – was first proposed in 1970, it got into a political deadlock and it took three decades of constant revising and compromising. It was only the EU’s Council of Ministers meeting in Nice December 20, 2000 that an agreement was finally reached.

ETUC proposals on amending the EWC Directive

- The workforce size threshold for companies covered should be lowered to 500 employees;
- The respective European industry federation and external experts should have the right to participate in the negotiations for an agreement;
- EWCs should be opened to workers' representatives from Non-EU-countries;
- The following definition should be applied for information:

"the written and comprehensive information of the employee representatives, given in good time and on a continuous basis. Information is given at a time and with a content, which allows the employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare consultations with central management or any other more appropriate level of management. Information and documents shall be given in languages that are understandable for the employee representatives";

- The following definition should be applied for consultation:

"consultation takes place in good time before decision-making by central management or any other more appropriate level of management, so that the opinion of employees' representatives can still be considered during planning. The employee representatives shall be given an adequate delay for delivering an opinion. If they deliver their opinion in writing, they have the right to be consulted orally";

- Decisions by management affecting workers should be without legal effect if the information and consultation procedure was not followed. The company should as well be excluded from the awarding of public contracts and from financial support in the context of an European measure.

Source: ETUC, 2000; ETUC 2000 b.

After formal adoption during 2001, it will become a reality three years thereafter in 2004. The new Community law will allow companies established in more than one Member State to operate throughout the EU on the basis of a single set of rules, therefore avoiding the need to set up subsidiaries governed by different national laws. Unified operation throughout the EU would also apply to management and report systems. Substantial savings on administrative costs and a speedier way to react on investment opportunities in other countries are envisaged for companies under SE-registration.

The SE-project for decades came never close to adoption as Member States made it a case for labour regime competition. The original concept of a European Company gave workers representatives full rights of information, proposed the establishment of works councils and required the inclusion of employee representatives at board level. The early drafts were close to the German model of workplace representation and co-determination, thus calling for one of the best models of workers rights to become the European standard (Streek, 1996).

One of the fundamental, if not the most fundamental disagreement between Member States, was on the presence of employee representatives in the decision making structures of the company. Some countries were completely set against any participation of workers representatives while others, under pressure from their national trade unions, would not agree to any statute without employee involvement. The wide gap between national industrial relation systems is shown by the fact that there are only seven EU member states having national legislation on workers involvement in

management or supervisory boards.

Changes of articles of European Treaties, dealing with representation of the interest of workers and employers, including co-determination, are subject to unanimous decision. Proposals for lowering the standards of workers role at board level did not break the deadlock. Whenever a new initiative was started, rules on unanimous voting were effectively applied to block any progress on harmonising national differences. After two decades of virtual standstill, the EU commission, eager to see at least partial progress, changed its strategy and used a two-track approach thereon. Issues more agreeable to Member States were separated from the European Company Statute and dealt with separately by the 1994 Directive on European Works Council, which focused only on a procedure for information and consultation and kept board level participation of workers representatives excluded.

Since replacing disparities of national systems with a uniform set of provisions at whatever level of participatory rights completely failed, the harmonisation approach through statutory rights had to be abandoned. The new approach was to give prominence to contractual rights. Employer and workers representatives were to negotiate an agreement without any consideration for minimum rules. Only in cases of failure would a reference provision apply. For such a fallback, the Davignon report (1997) recommended 20% of seats at board level should be taken up by workers' representatives.

Despite wide-shared enthusiasm for the compromise – voluntary agreement in the first degree, harmonisation on a second degree – the Davignon recommendations were held hostage to Spanish veto. The Council only consented to a breakthrough after the uniform set of rules in the reference provisions were skipped as well with “a flexible formula that would leave the essential features of the different national systems intact” (European Commission, 2001). It included the option for Member States to not transpose into national law the fallback reference provisions and still having, under certain criteria, their companies getting SE-registration.

The European Council agreement in Nice (December 2000) can be summarised as follows:

a. VOLUNTARY AGREEMENT WITH NO MINIMUM STANDARD

The creation of a European Company¹² requires negotiations on the involvement of employees with a body representing all employees of the companies concerned. No minimum standard is set for these negotiations. If no agreement is reached, the reference provision in the Annex of the proposed Directive shall apply.

b. RIGHTS ON INFORMATION AND CONSULTATION

The provisions in the Annex allow for two different forms of workers involvement. Essentially, the principles oblige SE management to provide to a

¹² There will be four ways of forming a European company (SE): merger, formation of a holding company, formation of a joint subsidiary, or conversion of a public limited company previously formed under national law. The SE must have a minimum capital of 100 000 Euro. SE registration must take place in the country where it has its central administration.

body of employees' representatives regular reports on company business on the basis of which consultation shall take place. In this regard, the Annex covers the same ground like the EWC Directive for a slightly different group of companies, using however, definitions that increase workers rights on information and consultation.

c. RIGHTS ON BOARD LEVEL PARTICIPATION OF WORKERS

If companies involved in the creation of a SE were previously covered by board level participation of workers, the Annex attempts to safeguard these workers rights as follows:

- In the case of a holding company or a joint venture, participatory rights will apply to all employees, if prior to SE registration, the majority of the employees in the companies concerned were entitled to such rights;
- In the case of conversion from a National to a European company, the participatory arrangement prior to conversion shall continue to apply;
- In the case of a SE created by merger, participatory rights would be extended to all employees, when at least 25% of employees had such rights before the merger.

d. SPECIAL RIGHT OF NON-COMPLIANCE

The Spanish veto was withdrawn after a clause was introduced that the Council could authorise a Member State not to implement the Directive on participatory rights in the case of SEs formed by merger. SE registration would still be possible, if none of the

companies involved has been previously governed by board-level arrangements for workers

The Annex will largely impose the highest form of participatory rights available in some parts of the SE to all other parts of the company. However, it will not harmonise the practice between different undertakings but will allow diversity between companies to be maintained according to differences of the national industrial relations systems. The proposed Directive can thus be assessed from two opposing angles. It will not be the legal instrument to spread workers co-determination across Member States. No harmonisation was achieved, no minimum standard was applied, no new and unified European practice will take off.

On the other hand, it is an instrument in reducing regime competition for lower labour standards. It closes the door for companies which opt for a SE registration for the purpose of getting rid of social standards at home. By forcing companies to take along their co-determination practice when applying for SE registration, the new Directive will contribute to safeguard higher social standards in some Member States.

5.3.

A new Directive on the right to information and consultation

The Directives on EWCs and the European Company Statute are focusing on transnational companies. The threshold numbers effectively keep a sizeable portion of TNCs outside their realm. The same is the case with national enterprises. They are covered by national law alone and no European legal instruments sets a framework for the right of workers on information

and consultation. A new Directive, proposed by the Commission in 1998, tries to bring some change. As is the case with other legal instruments on social rights, the initiative is hotly debated.

The Commission proposes that the new Directive applies to all companies with at least 50 employees. For the trade unions, this threshold would still exempt some 97% of companies and about 50% of the workforce in the EU. They demand a lowering to 20 employees, to make the new legal instrument relevant for small and medium-sized companies. They also request the application of the Directive to the Public Sector (ETUC, 2001b).

A definition of information and consultation is not easily agreeable. Existing national provisions are very uneven. While the right on information and consultation is granted in almost all the Member States, it is very restrictive in the Mediterranean (Spain, Portugal, Greece) and Anglo-Saxon countries (United Kingdom, Ireland). Access to investment documents in a systematic manner is limited to a few countries (e.g. France and Germany). While some states provide consultation at the plant or company level, less are doing so at the level of the group of undertakings (France, Germany, the Netherlands, Austria). The list of significant distinctions could be extended by the right to be assisted by an economic and financial expert, the protection of workers representatives, the right to training, and many more.

The debate on the relationship between a new European framework and existing national provisions reproduces the three main groups of proponents:

- The first group rejects the proposed Directive outrightly by challenging the legitimacy of the European community to set guidelines or principles for companies that operate within national boundaries. Europe should get involved only on business issues of cross-border nature;
- The second group wants to avoid 'upward pressure' by agreeing to a Directive which establishes minimum requirements at the lower end and gives preference to voluntary agreements;
- The third group tries to maintain high standards in some countries and to avoid 'downward pressure'. Their members push for a Directive, which establishes minimum requirements while at the same time, maintaining legal provisions at national levels if they are more advantageous for employees.

At the time of writing this study, the Council reached an agreement by softening the Directive on two points: (a) countries will be allowed to delay implementation of the Directive for smaller-sized companies (150 employees and below) for a few years; (b) provisions on sanctions will not be included into the Directive. It will be left to the Member States to clarify if company decision can take legal effect in cases where an employer has not complied with provisions of the Directive (EIRO 2001).

The Directive falls under the co-decision procedure with the European Parliament having the power of demanding substantive changes or finally dissenting on the measure. After formal adoption, Member States will have three years to transpose the European law into national law.

Summary and conclusions

6

- ◆ The EWC is a procedure in a transnational company for the purpose of informing and consulting employees on matters which concern business in at least two Member States of the EU. It is a cross-border workplace representation that covers the rights of workers where decisions at company headquarters impact on company employees in other countries. The EWC procedure complements national systems of workplace representation without replacing them.
- ◆ The EWC is the first transnational institution of industrial relations based on legislation. Its legal origin is unique in so far as Member States have ceded some of their sovereign rights to the EU and have conferred on it powers to act independently. The EU can thus come up with Community law and override national law.
- ◆ While transnational works councils do not have to be based on legislation – and in a number of cases were indeed created long before the Directive was passed – it was the ‘shadow of (the coming) law’ and later, the compliance with the legal act, which explains their impressive growth. Fewer companies would have opened up for a new social dialogue with workers had they not been under the pressure of law.
- ◆ As is mostly the case with national structures of workplace representation, management shoulders the expenditures of the EWC. It would have been difficult, if not impossible, to otherwise meet costs for meetings such as for travelling, accommodation, translation and secretarial services, and the expenses for external experts.
- ◆ The international trade union movement, during the 1960s and 1970s, pushed with limited success for ‘World Company Councils’ of multinational enterprises. They were composed of trade unions only and although some 50 bodies were established, they were never recognised by employers and finally failed in taking up a role in collective bargaining and in securing funding. With the EWCs in place, initiatives in building company structures for workers representation on a global scale are more promising. In the coming years, we are likely to see more ‘World Works Councils’ established and modelled after the EWC.
- ◆ In coming-up with the new legal instrument, the European legislature was caught in its own contradictions with individual Member States in the Council applying veto over veto and watering down minimum standards to safeguard their home

models. To build consensus, the EWC-law did not come as a Regulation but as a Directive. It gave priority to contractual rights against statutory rights. And it came without sanctions for non-compliance, leaving enforcement exclusively to individual governments. In the consequence, the EWCs vary considerably between countries and companies. Instead of bringing European harmonisation, the law tries to balance between fixing minimum standards and justifying national practice.

- ◆ In the absence of a strong regulatory framework, which puts more than a few minimum provisions in place, the support for the company workforce from national and international trade union bodies is of utmost importance. Trade unions were the main force in the initial phase in negotiating agreements with management. While this role is now turned over to the elected 'special negotiating body' (SNB), trade unions are still influencing the direction of the EWC in providing expertise, training and networking with other EWCs. The European Commission, eager to see the first European cross-border institution based on its own intervention succeed, provided funds for European industry federations to develop their support infrastructure for EWCs.
- ◆ One of the biggest challenges for the EWCs lies in the variety of national industrial relations and cultural and linguistic backgrounds from where its members are coming. Overcoming such disparities is a major task in developing cohesive structures and an efficient working atmosphere. Some 15,000 workers representatives are currently involved in building the new institution. With full coverage, the number will ultimately increase to some 50,000. This may sound small compared to the 200,000 works councillors for the German national system alone. Nevertheless, it is a critical mass and will positively impact on a European workers consciousness.
- ◆ The establishment of EWCs brings the growing importance of the European reality home to national trade unions and opens them for closer cross-border cooperation. In the same way, the EWC-project has visibly strengthened the European industry federations in taking the lead to push for further Europeanisation of industrial relations along sector lines.
- ◆ Despite the impressive growth, there are serious shortcomings. About two-thirds of companies had not yet installed EWCs when the deadline set in the Directive run out in September 1999. The delay in implementation is likely to be linked to three major reasons: low level of sanctions at national level, defensive behaviour by many management groups and little resources available on the side of trade unions.
- ◆ While there are differences in compliance between individual countries with Norway representing the best case, and Spain and Portugal featuring on the negative side, the 'big countries' in terms of numbers of companies all fare the same. In particular, there is no significant difference in coverage between Anglo-Saxon countries and those with a strong tradition in corporate management like Germany, Austria or Netherlands. US and Japanese companies, the dominant Non-European players, are adjusting themselves to be 'average performers'.

- ◆ Of the EWCs installed so far, a significant number – some say up to 50% – are not (yet) performing in a satisfactory manner. Some are restricting their activities to the legal minimum and are mere symbolic. Even where they act as service provider, handing information from management down the line to national representative bodies or the workforce, they hardly engage in developing a common policy. Their role in consultation is negligible (Lecher et al., 2001).
- ◆ The other EWCs belong in different stages to the participatory councils. They use preparatory meetings, select committees and external expertise to process information and to improve on dissemination. They develop early warning systems, consult 'lower' structures, work towards a common position between the EWC members by balancing conflicting interest of different national workforces. And they present counterproposals to the management, which can not easily be dismissed, as they are based on expertise and a mandate from the workforce.
- ◆ ETUC call for a review of the Directive to further strengthen the EWCs. Some of the demands like stronger definitions of the meaning of information and consultation and a recognition of the role of trade unions by granting them EWC membership, may be easier to agree than others. Two new draft-Directives on European Company Statute and on a framework for workers right on information and consultation at national level already contain stronger definitions. A lowering of the workforce threshold to include more companies and the application of sanctions for non-compliance are likely to meet more resistance from the Commission, the Council and the employers.
- ◆ With the Directive on the European Company ('Societas Europaea'-SE), co-determination will reach European level and workers representatives will have voting powers in supervisory boards of transnational companies. While it is not yet clear how co-determination in SE-companies will be linked to other representative structures of employees – negotiations take priority again – and how it will impact on the work of EWCs, it will create an additional momentum to press for further Europeanisation of industrial relations.
- ◆ The involvement of EWCs in collective bargaining is possibly a major factor in deciding about the future profile of European industrial relations. A significant number of trade unions, possibly a good majority, want to maintain sector bargaining and will not allow their core business to slide in more substance down to company level. They opt for a dual structure of keeping the decisive levels of wage negotiations to themselves while allowing elected workforce representatives to care for other company affairs. A few EWCs have already gone beyond consultation and have successfully concluded negotiations with management. These are however dealings on 'softer issues' and not entering the hard terrain of bargaining on wages with the right to strike. If EWCs take up these subjects with management while trade unions are pushing for European wage co-ordination along sectors, their strategic alliance may come to an abrupt end.

The European Union – some explanatory notes

THE EUROPEAN UNION (EU) HAS COME A LONG way. Preserving peace and creating a better Europe through closer economic ties were the two original cornerstones, to which was added later the will of building a political union. The EU has no constitution written down in a single document. It grew out of the European Coal and Steel Community (Treaty of Paris, 18th April 1951, entry into force 23rd July 1952), the European Atomic Energy Community and the European Community (Treaties of Rome, 28th March 1957, entry into force 1st Jan. 1958). The three founding Treaties were amended and supplemented with various instruments, chiefly the Single European Act (1987), the various accession treaties and the Treaties of the European Union (Treaty of Maastricht, 7th Feb. 1992, entry into force 1st Nov. 1993 and the Treaty of Amsterdam, 2nd Oct. 1997, entry into force 1st May 1999). Currently under way is the ratification process in the Member States to make the Treaty of Nice (December 2000) legally binding.

More than an association of states...

The EU is to be distinguished from other types of association of States in "that the Member States have ceded some of their sovereign rights to the EU and have conferred on it powers to act independently. In exercising these powers, the EC is able to issue sovereign acts which have the same force as laws in individual States" (European Commission, 2000, p.7). The EU is thus an autonomous

entity to which the Member States as well as their citizens are subject. In exercising this jurisdiction, the Community law is directly applicable within the area of national law and, in cases of conflicts, Community law overrides national law (see European Commission, 2000, p. 94).

... but less than a state

While the EU has acquired areas of competencies, which constitute elements of statehood, vast powers enjoyed by sovereign states continue to lie beyond its reach. The Treaties usually do not confer on the Community and its institutions any general power to take all measures necessary to achieve the objectives, "but lay down in each chapter the extent of the powers to act (principle of specific conferment of powers)" (European Commission, 2000, p.27). The EU can not establish additional responsibilities, as it holds no 'jurisdiction over jurisdiction'. This is in particular expressed through the subsidiary principle which "debars the Community institutions from extending their powers to the detriment of those of the Member States" (European Commission, 2000, p. 28)

The EU is more than an international organisation, an intergovernmental conference or an association of states, but less than a federal State of Europe. Political scientists are using now the term 'supranational organisation'. But the EU is still in the process of evolving and its final form can not be predicted. Current debates on its future focus on new forms of

cooperation between essentially sovereign Nation-States on the one side, and more elements of statehood, if not a full fledged federal state for the EU, on the other hand. The key to any structural change is held by the European Council, where the governments of the Member States meet to agree on the structures and responsibilities of the Community and its institutions.

The tasks of the EU: More economic than social

The range of matters covered by the specific conferment of powers varies from sector to sector. At the center is the single market, built around the four freedom principles (free movement of workers, goods, services and capital). To this was added the Economic and Monetary Union (EMU), with its two main pillars: Single European currency, the Euro, administered through the European Central Bank and a stability pact on fiscal policy, putting ceilings on national budget deficits and public debts.

While the Community institutions hold far-reaching powers on economic and monetary policies, aiming for gradual approximation of national policies, the scope is far less pronounced in the social area. Some progress has been achieved, when the social protocol, originally only annexed to the Maastricht Treaty – due to the 'opt-out' of the UK – was finally integrated into the revised Treaty of Amsterdam, and a chapter on European employment policy was added. But despite the creation of Community responsibilities for policies on employment, social welfare and social cohesion, national policies continue to play the principal role (On European employment policy, see: Keller, 1999).

If social policy is looked upon as compensation for the uneven results of market activities through budgetary spending, the EU hardly qualifies for any social impact. The EU budget is kept at a low level of 1,27% of overall Union GDP, where financing of welfare programmes or major employment initiatives remain out of question. If social policy is ap-

proached from the viewpoint of collectively empowering the weaker actors in the markets by strengthening their bargaining position, the instruments turned over to the Community's jurisdiction are still wanting. Works councils' rights on information and consultation have been added to the list of EU competencies, as is the right of co-determination. However, their mode of transfer to EU-legislation is leaving them vulnerable to individual national governments controlling influence. Furthermore, the Community is still completely barred from dealing with collective bargaining and the right to cross-border strikes.

The Parliament and the Council: No equal footing yet

The European Parliament (EP) was first constituted as Common Assembly of the European Coal and Steel Community in 1951. The 1957 Rome Treaty granted the EP very limited rights of participation in the legislative process. The Commission drafted, the Council adopted, and the EP was confined to a single consultation procedure.

Subsequent amendments to the Treaty, in particular the 1986 Single European Act – introducing the co-operation and assent procedures – and the 1992 Treaty on European Union – introducing co-decision – have significantly reinforced the EP's role in Community legislation. Since co-decision establishes veto rights to reject Council proposals, and the conciliation committee provides for sorting out differences between the two institutions, the EP has been empowered to act as co-legislator on an equal footing with the Council. However, in areas not open for co-decision a major imbalance remains between the two legislative bodies.

The Council meets in two forms: as European Council, comprising the Heads of States or Governments of the Member States, and the President of the Commission, who come together at least twice a year. And as Council of the European Union, made up of Ministers of the Member States, which assemble according to ministerial portefeuilles, the four most

important groupings of which are the General Affairs Council (Foreign Ministers), the Economic and Financial Affairs Council, the Transport Council and the Agriculture Council.

Over time, decision-making inside the Council has moved from unanimous voting to majority voting, making the latter now the general rule. In most cases of majority voting, the Treaty provides for qualified voting, giving larger Member States greater influence through vote weighting. When it is not further specified, simple majority is sufficient. Nevertheless, the earlier practice of granting Member States the right to veto a Community measure in cases where its vital national interest is at stake (The Luxembourg Agreement), remains a political force. Unanimity is still required for the Council's decisions such as taxes, the free movement of workers, or certain rights and obligations of employees.

Looking at the power balance between the EP and the Council, there is still a gap between the responsibilities already transferred to the Community level and the efficacy of the parliament to control and have oversight functions over them. The non-elected Council remains the dominant legislative chamber. Even so, the EP has closed down the gap through acquiring additional responsibilities such as the right of co-decision. No law can be passed if the Council does not consent. In certain sensitive sectors, the Council remains to play the role of monopoly legislature.

The EU-institutions, governed by the Treaties, including the EP, play no prominent role in transferring additional sovereignty rights from Member States to the Community level. This sovereignty transfer is left to the intergovernmental conference of the European Council whose

dealings, despite being formally an EU institution, remains largely outside the Treaty. It is the summit of the Head of States which holds the constitution-making powers. Intergovernmentalism remains to be the prevailing mode in decision-making and the avenue through which national concerns are safeguarded in the making of the EU.

Legislative instruments: Regulations and Directives

The Treaties provide the Community with five legislative instruments that impact on the national legal systems to varying degrees: regulations, directives, decisions, recommendations and opinions. The two most important forms are regulations and directives.

Regulations have general application. They lay down the same law throughout the Community, are binding in its entirety and directly applicable – without national legislation – in all Member States. Regulations confer rights or impose duties on the Community citizen in the same way as national law.

Directives are 'milder' legislative instruments as they try to reconcile the need for uniformity of Community law with the diversity of national traditions and structures.

A directive is binding as to the objective to be achieved but leaves it to the national authorities to choose form and method. It does not supersede the laws of the Member States but places the Member States under an obligation to transpose their Community obligation into domestic law. A Directive is thus a two-stage law-making process. It does not lead to the unification of law, but to the harmonisation of objectives while maintaining diversity in form.

Main source:

European Commission (2000), *The ABC of Community Law*, by Dr. Klaus Dieter Borchardt. Luxembourg: Office for Official Publications of the European Communities, Fifth Edition, ISBN 92-828-7803-1.

Maurizio Foraci (1996), *The role of the European Parliament in decision-making process in the European Union*, Florence: European University Institute, June 28.

Appendix A

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*

M E N U

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* Downloaded from the European Union at www.europa.eu.in; download does not include preamble to the Directive.

THE COUNCIL OF THE EUROPEAN UNION...
HAS ADOPTED THIS DIRECTIVE

SECTION I

GENERAL

Article 1

OBJECTIVE

1. The purpose of this Directive is to improve the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings.
2. To that end, a European Works Council or a procedure for informing and consulting employees shall be established in every Community-scale undertaking and every Community-scale group of undertakings, where requested in the manner laid down in Article 5 (1), with the purpose of informing and consulting employees under the terms, in the manner and with the effects laid down in this Directive.
3. Notwithstanding paragraph 2, where a Community-scale group of undertakings within the meaning of Article 2 (1) (c) comprises one or more undertakings or groups of undertakings which are Community-scale undertakings or Community-scale groups of undertakings within the meaning of Article 2 (1) (a) or (c), a European Works Council shall be established at the level of the group unless the agreements referred to in Article 6 provide otherwise.
4. Unless a wider scope is provided for in the agreements referred to in Article 6, the powers and competence of European Works Councils and the scope of information and consultation procedures established to achieve the purpose specified in paragraph 1 shall, in the case of a Community-scale undertaking, cover all the establishments located within the Member States and, in the case of a Community-scale group of undertakings, all group undertakings located within the Member States.
5. Member States may provide that this Directive shall not apply to merchant navy crews.

Article 2

DEFINITIONS

1. For the purposes of this Directive:
 - (a) 'Community-scale undertaking' means any undertaking with at least 1,000 employees within the Member States and at least 150 employees in each of at least two Member States;
 - (b) 'group of undertakings' means a controlling undertaking and its controlled undertakings;
 - (c) 'Community-scale group of undertakings' means a group of undertakings with the following characteristics:
 - at least 1 000 employees within the Member States,
 - at least two group undertakings in different Member States, and
 - at least one group undertaking with at least 150 employees in one Member State and at least one other group undertaking with at least 150 employees in another Member State;
 - (d) 'employees' representatives' means the employees' representatives provided for by national law and/or practice;

- (e) 'central management' means the central management of the Community-scale undertaking or, in the case of a Community-scale group of undertakings, of the controlling undertaking;
 - (f) 'consultation' means the exchange of views and establishment of dialogue between employees' representatives and central management or any more appropriate level of management;
 - (g) 'European Works Council' means the council established in accordance with Article 1 (2) or the provisions of the Annex, with the purpose of informing and consulting employees;
 - (h) 'special negotiating body' means the body established in accordance with Article 5 (2) to negotiate with the central management regarding the establishment of a European Works Council or a procedure for informing and consulting employees in accordance with Article 1 (2).
2. For the purposes of this Directive, the prescribed thresholds for the size of the workforce shall be based on the average number of employees, including part-time employees, employed during the previous two years calculated according to national legislation and/or practice.

Article 3

DEFINITION OF 'CONTROLLING UNDERTAKING'

1. For the purposes of this Directive, 'controlling undertaking' means an undertaking which can exercise a dominant influence over another undertaking ('the controlled undertaking') by virtue, for example, of ownership, financial participation or the rules which govern it.
2. The ability to exercise a dominant influence shall be presumed, without prejudice to proof to the contrary, when, in relation to another undertaking directly or indirectly:
 - (a) holds a majority of that undertaking's subscribed capital; or
 - (b) controls a majority of the votes attached to that undertaking's issued share capital; or
 - (c) can appoint more than half of the members of that undertaking's administrative, management or supervisory body.
3. For the purposes of paragraph 2, a controlling undertaking's rights as regards voting and appointment shall include the rights of any other controlled undertaking and those of any person or body acting in his or its own name but on behalf of the controlling undertaking or of any other controlled undertaking.
4. Notwithstanding paragraphs 1 and 2, an undertaking shall not be deemed to be a 'controlling undertaking' with respect to another undertaking in which it has holdings where the former undertaking is a company referred to in Article 3 (5) (a) or (c) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings⁶.
5. A dominant influence shall not be presumed to be exercised solely by virtue of the fact that an office holder is exercising his functions, according to the law of a Member State

Note: Footnotes 1 to 5 are contained in the preamble and are not shown in this print

⁶ OJ No L 395, 30. 12. 1989, p. 1.

relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings.

6. The law applicable in order to determine whether an undertaking is a 'controlling undertaking' shall be the law of the Member State which governs that undertaking.

Where the law governing that undertaking is not that of a Member State, the law applicable shall be the law of the Member State within whose territory the representative of the undertaking or, in the absence of such a representative, the central management of the group undertaking which employs the greatest number of employees is situated.

7. Where, in the case of a conflict of laws in the application of paragraph 2, two or more undertakings from a group satisfy one or more of the criteria laid down in that paragraph, the undertaking which satisfies the criterion laid down in point (c) thereof shall be regarded as the controlling undertaking, without prejudice to proof that another undertaking is able to exercise a dominant influence.

SECTION II

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

Article 4

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

1. The central management shall be responsible for creating the conditions and means necessary for the setting up of a European Works Council or an information and consultation procedure, as provided for in Article 1 (2), in a Community-scale undertaking and a Community-scale group of undertakings.
2. Where the central management is not situated in a Member State, the central management's representative agent in a Member State, to be designated if necessary, shall take on the responsibility referred to in paragraph 1.

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

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

Article 5

SPECIAL NEGOTIATING BODY

1. In order to achieve the objective in Article 1 (1), the central management shall initiate negotiations for the establishment of a European Works Council or an information and consultation procedure on its own initiative or at the written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States.
2. For this purpose, a special negotiating body shall be established in accordance with the following guidelines:

- (a) The Member States shall determine the method to be used for the election or appointment of the members of the special negotiating body who are to be elected or appointed in their territories.

Member States shall provide that employees in undertakings and/or establishments in which there are no employees' representatives through no fault of their own, have the right to elect or appoint members of the special negotiating body. The second subparagraph shall be without prejudice to national legislation and/or practice laying down thresholds for the establishment of employee representation bodies.

- (b) The special negotiating body shall have a minimum of three and a maximum of 17 members.

- (c) In these elections or appointments, it must be ensured:

- firstly, that each Member State in which the Community-scale undertaking has one or more establishments or in which the Community-scale group of undertakings has the controlling undertaking or one or more controlled undertakings is represented by one member,
- secondly, that there are supplementary members in proportion to the number of employees working in the establishments, the controlling undertaking or the controlled undertakings as laid down by the legislation of the Member State within the territory of which the central management is situated.

- (d) The central management and local management shall be informed of the composition of the special negotiating body.

3. The special negotiating body shall have the task of determining, with the central management, by written agreement, the scope, composition, functions, and term of office of the European Works Council(s) or the arrangements for implementing a procedure for the information and consultation of employees.
4. With a view to the conclusion of an agreement in accordance with Article 6, the central management shall convene a meeting with the special negotiating body. It shall inform the local managements accordingly.

For the purpose of the negotiations, the special negotiating body may be assisted by experts of its choice.

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

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

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

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

In compliance with this principle, Member States may lay down budgetary rules regarding the operation of the special negotiating body. They may in particular limit the funding to cover one expert only.

Article 6

CONTENT OF THE AGREEMENT

1. The central management and the special negotiating body must negotiate in a spirit of cooperation with a view to reaching an agreement on the detailed arrangements for implementing the information and consultation of employees provided for in Article 1 (1).
2. Without prejudice to the autonomy of the parties, the agreement referred to in paragraph 1 between the central management and the special negotiating body shall determine:
 - (a) the undertakings of the Community-scale group of undertakings or the establishments of the Community-scale undertaking which are covered by the agreement;
 - (b) the composition of the European Works Council, the number of members, the allocation of seats and the term of office;
 - (c) the functions and the procedure for information and consultation of the European Works Council;
 - (d) the venue, frequency and duration of meetings of the European Works Council;
 - (e) the financial and material resources to be allocated to the European Works Council;
 - (f) the duration of the agreement and the procedure for its renegotiation.
3. The central management and the special negotiating body may decide, in writing, to establish one or more information and consultation procedures instead of a European Works Council.

 The agreement must stipulate by what method the employees' representatives shall have the right to meet to discuss the information conveyed to them.

 This information shall relate in particular to transnational questions which significantly affect workers' interests.
4. The agreements referred to in paragraphs 2 and 3 shall not, unless provision is made otherwise therein, be subject to the subsidiary requirements of the Annex.
5. For the purposes of concluding the agreements referred to in paragraphs 2 and 3, the special negotiating body shall act by a majority of its members.

Article 7

SUBSIDIARY REQUIREMENTS

1. In order to achieve the objective in Article 1 (1), the subsidiary requirements laid down by the legislation of the Member State in which the central management is situated shall apply:
 - where the central management and the special negotiating body so decide, or
 - where the central management refuses to commence negotiations within six months of the request referred to in Article 5 (1), or
 - where, after three years from the date of this request, they are unable to conclude an agreement as laid down in Article 6 and the special negotiating body has not taken the decision provided for in Article 5 (5).
2. The subsidiary requirements referred to in paragraph 1 as adopted in the legislation of the Member States must satisfy the provisions set out in the Annex.

SECTION III

MISCELLANEOUS PROVISIONS

Article 8

CONFIDENTIAL INFORMATION

1. Member States shall provide that members of special negotiating bodies or of European Works Councils and any experts who assist them are not authorized to reveal any information which has expressly been provided to them in confidence.

The same shall apply to employees' representatives in the framework of an information and consultation procedure.

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

2. Each Member State shall provide, in specific cases and under the conditions and limits laid down by national legislation, that the central management situated in its territory is not obliged to transmit information when its nature is such that, according to objective criteria, it would seriously harm the functioning of the undertakings concerned or would be prejudicial to them.

A Member State may make such dispensation subject to prior administrative or judicial authorization.

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

Article 9

OPERATION OF EUROPEAN WORKS COUNCIL AND INFORMATION AND CONSULTATION PROCEDURE FOR WORKERS

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

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

Article 10

PROTECTION OF EMPLOYEES' REPRESENTATIVES

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

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

Article 11

COMPLIANCE WITH THIS DIRECTIVE

1. Each Member State shall ensure that the management of establishments of a Community-scale undertaking and the management of undertakings which form part of a Community-scale group of undertakings which are situated within its territory and their employees' representatives or, as the case may be, employees abide by the obligations laid down by this Directive, regardless of whether or not the central management is situated within its territory.
2. Member States shall ensure that the information on the number of employees referred to in Article 2 (1) (a) and (c) is made available by undertakings at the request of the parties concerned by the application of this Directive.
3. Member States shall provide for appropriate measures in the event of failure to comply with this Directive; in particular, they shall ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced.
4. Where Member States apply Article 8, they shall make provision for administrative or judicial appeal procedures which the employees' representatives may initiate when the central management requires confidentiality or does not give information in accordance with that Article.

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

Article 12

LINK BETWEEN THIS DIRECTIVE AND OTHER PROVISIONS

1. This Directive shall apply without prejudice to measures taken pursuant to Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies⁷, and to Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses⁸.
2. This Directive shall be without prejudice to employees' existing rights to information and consultation under national law.

Article 13

AGREEMENTS IN FORCE

1. Without prejudice to paragraph 2, the obligations arising from this Directive shall not apply to Community-scale undertakings or Community-scale groups of undertakings in which, on the date laid down in Article 14 (1) for the implementation of this Directive or the date of its transposition in the Member State in question, where this is earlier than the abovementioned date, there is already an agreement, covering the entire workforce, providing for the transnational information and consultation of employees.

⁷ OJ No L 48, 22. 2. 1975, p. 29. Regulation as last amended by Directive 92/56/EEC (OJ No L 245, 26. 8. 1992, p. 3).

⁸ OJ No L 61, 5. 3. 1977, p. 26.

2. When the agreements referred to in paragraph 1 expire, the parties to those agreements may decide jointly to renew them.

Where this is not the case, the provisions of this Directive shall apply.

Article 14

FINAL PROVISIONS

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 22 September 1996 or shall ensure by that date at the latest that management and labour introduce the required provisions by way of agreement, the Member States being obliged to take all necessary steps enabling them at all times to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof.
2. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Article 15

REVIEW BY THE COMMISSION

Not later than 22 September 1999, the Commission shall, in consultation with the Member States and with management and labour at European level, review its operation and, in particular examine whether the workforce size thresholds are appropriate with a view to proposing suitable amendments to the Council, where necessary.

Article 16

ADDRESSING OF THIS DIRECTIVE

This Directive is addressed to the Member States.

Done at Brussels, 22 September 1994.
For the Council
The President
N. BLUEM

ANNEX

SUBSIDIARY REQUIREMENTS REFERRED TO IN ARTICLE 7 OF THE DIRECTIVE

1. In order to achieve the objective in Article 1 (1) of the Directive and in the cases provided for in Article 7 (1) of the Directive, the establishment, composition and competence of a European Works Council shall be governed by the following rules:
 - (a) The competence of the European Works Council shall be limited to information and consultation on the matters which concern the Community-scale undertaking or Community-scale group of undertakings as a whole or at least two of its establishments or group undertakings situated in different Member States.

In the case of undertakings or groups of undertakings referred to in Article 4 (2), the competence of the European Works Council shall be limited to those matters concerning all their establishments or group undertakings situated within the Member States or concerning at least two of their establishments or group undertakings situated in different Member States.

- (b) The European Works Council shall be composed of employees of the Community-scale undertaking or Community-scale group of undertakings elected or appointed from their number by the employees' representatives or, in the absence thereof, by the entire body of employees.

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

- (c) The European Works Council shall have a minimum of three members and a maximum of 30.

Where its size so warrants, it shall elect a select committee from among its members, comprising at most three members.

It shall adopt its own rules of procedure.

- (d) In the election or appointment of members of the European Works Council, it must be ensured:

- firstly, that each Member State in which the Community-scale undertaking has one or more establishments or in which the Community-scale group of undertakings has the controlling undertaking or one or more controlled undertakings is represented by one member,
- secondly, that there are supplementary members in proportion to the number of employees working in the establishments, the controlling undertaking or the controlled undertakings as laid down by the legislation of the Member State within the territory of which the central management is situated.

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

- (f) Four years after the European Works Council is established it shall examine whether to open negotiations for the conclusion of the agreement referred to in Article 6 of the Directive or to continue to apply the subsidiary requirements adopted in accordance with this Annex.

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

2. The European Works Council shall have the right to meet with the central management once a year, to be informed and consulted, on the basis of a report drawn up by the central management, on the progress of the business of the Community-scale undertaking or Community-scale group of undertakings and its prospects. The local managements shall be informed accordingly.

The meeting shall relate in particular to the structure, economic and financial situation, the probable development of the business and of production and sales, the situation and probable trend of employment, investments, and substantial changes concerning organization, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies.

3. Where there are exceptional circumstances affecting the employees' interests to a considerable extent, particularly in the event of relocations, the closure of establishments or undertakings or collective redundancies, the select committee or, where no such committee exists, the European Works Council shall have the right to be informed. It shall have the right to meet, at its request, the central management, or any other more appropriate level of management within the Community-scale undertaking or group of undertakings having its own powers of decision, so as to be informed and consulted on measures significantly affecting employees' interests.

Those members of the European Works Council who have been elected or appointed by the establishments and/or undertakings which are directly concerned by the measures in question shall also have the right to participate in the meeting organized with the select committee.

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

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

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

Before any meeting with the central management, the European Works Council or the select committee, where necessary enlarged in accordance with the second paragraph of point 3, shall be entitled to meet without the management concerned being present.

5. Without prejudice to Article 8 of the Directive, the members of the European Works Council shall inform the representatives of the employees of the establishments or of the undertakings of a Community-scale group of undertakings or, in the absence of representatives, the workforce as a whole, of the content and outcome of the information and consultation procedure carried out in accordance with this Annex.
6. The European Works Council or the select committee may be assisted by experts of its choice, in so far as this is necessary for it to carry out its tasks.
7. The operating expenses of the European Works Council shall be borne by the central management.

The central management concerned shall provide the members of the European Works Council with such financial and material resources as enable them to perform their duties in an appropriate manner.

In particular, the cost of organizing meetings and arranging for interpretation facilities and the accommodation and travelling expenses of members of the European Works Council and its select committee shall be met by the central management unless otherwise agreed.

In compliance with these principles, the Member States may lay down budgetary rules regarding the operation of the European Works Council. They may in particular limit funding to cover one expert only.

Appendix B

VOLKSWAGEN

CONTENTS:

Agreement of 7 February 1992

AGREEMENT ON COOPERATION BETWEEN THE MANAGEMENT OF THE VOLKSWAGEN GROUP AND THE VOLKSWAGEN EUROPEAN GROUP WORKS COUNCIL*

PREAMBLE

With this agreement concerning the Volkswagen European Group Works Council, the Management of the Volkswagen Group and the elected employee representative bodies of the Group companies wish to establish a social dialogue at European level.

They seek in this way to make an active contribution to future understanding and structuring within the framework of the development of Europe into a political union of European states with a single market.

With its European marques of Volkswagen, Audi, SEAT and Skoda, and the setting up of new European production facilities, the Volkswagen Group has accepted responsibility in the development of Europe which includes the social obligation towards the workforces and locations on the basis of active collaboration with employee representatives and unions.

The signatories to this document are agreed that a successful social development is dependent on international competitiveness achieved through a high level of productivity and flexibility, making constantly increasing demands in respect of the quality and environmental acceptability of the products.

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The following agreement is entered into between the Management of the Volkswagen Group and the Volkswagen European Group Works Council which was set up on 30th August 1990 by the elected employee representative bodies of Volkswagen AG, Audi AG, SEAT SA and Volkswagen Bruxelles SA on a voluntary basis:

1. PRINCIPLES

1. The Management of the Volkswagen Group shall collaborate with the Volkswagen European Group Works Council in accordance with the provisions of this agreement.

* Downloaded from European Foundation for the Improvement of Living and Working Conditions – European Works Council Database at www.eurofound.ie/ewc.

Both parties regard this agreement as a basis within the Volkswagen Group for working together at European level in the spirit of constructive dialogue and cooperative surmounting of economic, social and ecological challenges and for jointly solving any conflicts which may arise.

2. The statutory rights and duties of the individual national employee representative bodies are not affected by this.

2. ORGANISATION

1. The individual companies represented in the Volkswagen European Group Works Council and the number of employee representatives in the Volkswagen European Group Works Council and in its executive committee are laid down in a statute of organisation (rules of procedure). The same applies to purview and location of headquarters. These provisions of the statute of organisation in the draft of 30th August 1990 shall be recognised by the Management of the Volkswagen Group (Appendix 1: Members of the Volkswagen European Group Works Council; Appendix 2: Statute of organisation).
2. Should alteration become necessary to the statute of organisation or the scope of companies represented, both parties shall declare after joint deliberations whether this alteration is to become a part of the agreement. Until such time the existing provisions shall continue to apply.
3. The special protection afforded by the mandate and the obligation to observe confidentiality in connection with company and business secrets apply, in conformity with the national law applicable, to membership of the Volkswagen European Group Works Council.
4. The members delegated to the Volkswagen European Group Works Council by the employee representative bodies of the Group companies represented must be re-nominated after every new election of a company's employee representative body.

3. EXCHANGE OF INFORMATION

1. The Management of the Volkswagen Group and the Volkswagen Group Works Council shall meet in session at least once per year. Both parties can designate the participants at this meeting in accordance with the topics to be dealt with. The Managements of the companies represented in accordance with 1.1 and 2.1 above should be represented.
2. The topics to be dealt with at the meetings, to the extent that they are of general importance for the European production plants, shall relate primarily to the following areas:
 - securing of jobs and plants, and plant structures;
 - development of Group structures;
 - productivity and cost structures;
 - development of working conditions (e.g. working hours, wages and salaries, job design);
 - new production technologies;
 - new forms of work organisation;
 - work safety, including plant environment protection;
 - the effects of political developments and decisions on the Volkswagen Group.

3. Discussion of these topics should at the same time serve an exchange of information on development trends and strategies and promote progress to the benefit of all concerned.

4. CONSULTATION

1. The Volkswagen European Group Works Council or its executive committee shall be informed in good time regarding planned cross-border transfers of production (main investment emphases, production scope, essential company functions). This applies to transfers which may have a substantial adverse effect on the interests of employees at production plants of the Volkswagen Group in Europe.
2. The Volkswagen European Group Works Council or its executive committee shall have the right of comment within an appropriate period which shall be agreed upon by both parties in each case immediately on receipt of the information.
3. In its comments the Volkswagen European Group Works Council or its executive committee can require explanation of the planned transfer in the framework of consultations to be jointly laid down. These consultations shall take place early enough for the views of the Volkswagen European Group Council to be taken account of in the decision-making process.
4. The rights and duties of the responsible company bodies in each case remain unaffected.

5. COSTS

The Volkswagen Group undertakes to bear the costs of the work of the European Group Works Council in accordance with the ruling as set out in Appendix 3.

6. FUTURE DEVELOPMENT

Both parties declare their willingness to alter this agreement as required and to adapt it dynamically to new requirements of the social dialogue in Europe in mutual agreement.

Brussels, 7th February 1992

Management of the Volkswagen Group

Dr. Carl H. Hahn
Dr. P. Frerk
D. Goeudevert
Dr. G. Hartwich
Dr. M. Posth
Dr. W.P. Schmidt
Prof. Dr. U. Seiffert
D. Ullsperger
D. Alvarez
Dr. F. Piech

Volkswagen European Group Works Council

K. Volkert	J. Lara
H.-J. Uhl	M. Gallardo
G. Mogwitz	A. Rodriguez
W. Klever	P. Vazquez
K.-H. Mihr	D. Rega
J.-P. Janssen	P. Uyttersprot
H. Buhmann	B. Sudholt
E. Kuballa	
T. Schirmer	
J. Villanueva	

Enclosure 1**Members of the European Volkswagen Group Works Council**

Following companies with number of employee representatives are involved:

- Volkswagen AG 8 members
- Audi AG 2 members
- SEAT SA 5 members
- Volkswagen Bruxelles SA 2 members

Enclosure 2**The statute of Organisation of the European Volkswagen Group Works Council**

As per No. 2 of the Agreement on the European Volkswagen Group Works Council, the following points of business regulations are recognised by the management of the Volkswagen group:

I. NAME, PURVIEW AND LOCATION OF HEADQUARTERS

1. The name of the organisation: "European Volkswagen Group Works Council".
2. The purview of the European Volkswagen Group Works Council comprises of all Volkswagen companies in Europe, which are predominantly owned by VW AG. Exceptions are possible only on consent. The joining to the European Volkswagen Group Works Council is voluntary. The working principles and these business regulations will be recognised by joining the council.
3. The location of headquarters of the European Volkswagen Group Works Council is Wolfsburg.

II. MEMBERS

1. The members of the European Volkswagen Group Works Council can only be freely elected democratic legitimated employee representatives of the company. They should according to existing legal regulations adequately represent the subsidiaries of the VW Group in the respective country.
2. The delegation of members to the European Volkswagen Group Works Council should be regulated by the individual national employee representative bodies of the respective VW Group subsidiaries. To this respect, it may be necessary to constitute national coordinating committees in the subsidiaries of the VW Group.
3. The number of delegates of the individual employee representative bodies will be decided unanimously by the European Volkswagen Group Works Council. Thereby the number of employees will be taken into consideration.
4. Through the resolutions of the Executive Committee, internal or external consultants can be invited to the meetings of the European Volkswagen Group Works Council.

III. STRUCTURES

1. The European Volkswagen Group Works Council elects a president who is at the same time member and Chairman of the Executive Committee.
2. The European Volkswagen Group Works Council elects a general secretary who is at the same time member of the Executive Committee.
3. The European Volkswagen Group Works Council elects an Executive Committee. At least one member must represent each country in this Executive Committee. The Executive Committee can include additional members for consultation.
4. The European Volkswagen Group Works Council shall meet in session at least once a year. The meetings will be called for and organised by the Executive Committee.

Enclosure 3

Cost Sharing

1. BUDGET

The Management of the VW Group undertakes to bear the costs for the work of the European Group Works Council (including the cost of translation and the cost of trade union representative to be nominated by the Executive Committee) and provides an annual budget at the disposal of the council. The extent of cost will be decided by the Management of the VW Group and will be unanimously agreed upon with the European Volkswagen Group Works Council. The cost for meetings will be borne by the guest group companies after prior consultations.

2. TRAVELLING COSTS

The travelling costs of the VW Group employees will be borne by the respective group companies according to their travelling cost regulations.

3. INFRASTRUCTURE

The included group companies are obligated to provide a reasonable infrastructure that is necessary for the members of the European Volkswagen Group Works Council to carry out their functions and duties.

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