



The New EWC Directive 2009/38/EC: Draft recommendations on negotiating during the transposition period (from 5th June 2009 to 5th June 2011)

These recommendations do not replace any existing guidelines or checklists. They deal purely with additional issues that may arise concerning EWC agreements signed during the transition period from 5 June 2009 to 5 June 2011. In particular, they are intended to provide guidance on how to anticipate the changes in the Directive; how to ensure that new and renegotiated agreements benefit from all the improvements in the new Directive; and how to support colleagues faced with management attempts to fast-track negotiations or renegotiations in order to circumvent the new obligations

The new EWC Directive 2009/38/EC entered into force on 5th June 2009. From that date Member States have 2 years to transpose the recast EWC Directive into their national law. The current laws (based on the 1994 Directive) will continue to apply during the transposition period. The new provisions will only come into force after this implementation into national law. In other words the improvements introduced by the recast EWC Directive will be directly and automatically applicable from 6th June 2011.

The new Directive has introduced some special arrangements for this transposition period which require particular attention from trade unions and workers' representatives. **Any new agreement or article 6 agreement formally revised/renegotiated¹ during the transposition phase will continue to operate on the basis of the legal obligations arising from the old 1994 Directive, even after the new laws come into force.**

Consequently, it is advisable to be very cautious about signing any EWC agreement during this transposition period. From a strictly legal point of view the safest option is to avoid signing any new agreements or renegotiated agreements before 6th June 2011. Of course the negotiation or the renegotiation process can always start earlier. It is the date of signature that is important.

However, it might not always be possible or desirable to avoid signing new or renegotiated agreements during this period. So, if and when there are clear reasons to sign an agreement before 6th of June 2011, we should try to ensure that the agreement is worded in such a way that it becomes fully covered by Directive 2009/38/EC in due course.

Furthermore, whenever negotiation or renegotiation takes place during the transposition period the parties should be working with the provisions of the new EWC Directive. The vast majority of the improved provisions have been agreed by the European social partners (ETUC and BusinessEurope) and taken on board by the EU Commission in its

¹ A formally **revised or renegotiated** agreement has to be understood as a signed amendment to the existing agreement



legal proposal. So, there is no reason to further delay their integration into ongoing negotiations or renegotiations or to limit their application to existing EWC agreements.

Trade union role in assisting EWC negotiations or renegotiations

Trade unions have a clear role in supporting and training employee representatives in EWCs. The new Directive underlines the fact that SNBs or EWCs involved in a renegotiation process can be assisted by trade union representatives. It is important that the involvement of trade unions is explicitly demanded by those involved in negotiating or renegotiating agreements.

Information and consultation rights are better defined by the new Directive.

EWC agreements are for setting out how transnational information and consultation should be carried out in big companies. Of course, they can include good practice that goes beyond the minimum standards laid out in the EWC Directive. They cannot decide what the terms 'transnational', 'information' and 'consultation' actually mean in law. Nevertheless, it is strongly recommended that negotiated and renegotiated agreements should include the definitions set out in the new Directive in their text, as they provide clarity for all concerned.

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

Consultation: means the establishment of dialogue and exchange of views between employees' representatives and central management or any more appropriate level of management, at such time, in such fashion and with such content as enables employees' representatives to express an opinion on the basis of the information provided about the proposed measures to which the consultation is related, without prejudice to the responsibilities of the management and within a reasonable time, which may be taken into account within the Community-scale undertaking or Community-scale group of undertakings. Consultation should be conducted in such a way that the employees' representatives can meet with the central management and obtain a response, and the reasons for that response, to any opinion they might express.

Transnational matters: matters shall be considered to be transnational where they concern the Community-scale undertaking or Community-scale group of undertakings as a whole, or at least two undertakings or establishments of the undertakings or group situated in two different Member States.

According to recital nr. 12 of the new Directive (which is also in the preamble to the 1994 Directive), such matters include decisions which are taken in a Member State other than that in which the effected workers are employed and, according to recital nr. 16, they also include matters which, regardless of the number of



Member States involved, are of importance for the European workforce in terms of the scope of their potential effects.

WARNING: employers might try to alter information, consultation and transnationality definitions. This is unlawful. However improved practice going beyond minimum standards of the Directive is always possible.

Exceptional circumstances:

On the basis of the subsidiary requirements and the new definitions, EWC agreements should state that where there are exceptional circumstances or envisaged measures potentially affecting the employees' interests to a considerable extent (particularly in the event of relocation, 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 meet the central management, at its request, so as to be informed and consulted (in the sense of the new definitions).

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

The information meeting should take place at the earliest possible moment on the basis of a written report drawn up by the central management. The information provided must enable workers' representatives to conduct an in-depth assessment of the envisaged measures. During that meeting, workers' representatives and management will agree on a consultation process (timing, experts' role with regard to helping the workers' representatives develop their opinion).

On the basis of the agreed timing, the consultation meeting should take place with a view to allow workers' representatives to deliver their opinion and engage in discussions with management. Following the consultation meeting, an additional meeting should take place in order to allow management to respond to the EWC opinion.

WARNING: Some employers may try to incorporate a limited time for consultation in the agreement. This is not acceptable. Appropriate information and consultation processes should be decided on a case by case basis depending on the scale of the envisaged measures. It is also important that consultation should not be treated as an obstacle to the decision-making process but as a contribution to effective company decision-making. This is made clear by the new Directive.

Entitlement to training

New agreements should contain clear rules for the training of EWC members (and SNB members in case there is a new negotiation process following a significant change of structure). The new EWC Directive gives EWC members the right to receive training and be released from work to follow training. Training and related costs should be borne by management. Employee representatives should be able to determine the content of the



training, choose the trainers, and decide how the training session will be organised (individually, at national level or at the EWC level).

Obligation to inform workers and other employee representatives

Each EWC member has the duty to report back at national level. Consequently management must provide each member with the appropriate means of communication with national worker representative structures. In the absence of such structures, access to company sites will have to be organised on a regular basis, including access to the represented workforce via electronic communication that should be made available for each EWC member where this exists.

Linking national and European levels of information and consultation processes

The EWC agreement should ensure that national and European levels of information and consultation are linked. More precisely, it is important to note that the new EWC Directive states that the information process at European level should start before or at least at the same time as national processes, in order to guarantee the effectiveness of these processes.

Adaptation clause

The adaptation clause foreseen by article 13 of the EWC Directive 2009/38/EC will apply to all agreements including article 13 agreements of the 1994 Directive and article 6 agreements which are signed or revised during the transposition period once national laws apply. This clause gives the opportunity for renegotiation of those agreements under the terms of the new Directive but it only applies if those agreements do not already contain provisions dealing with the change of structure or if those provisions are conflicting.

WARNING: While renegotiating article 13 or 6 agreements or negotiating new agreements some employers may try to incorporate clauses on the change of structure in order to permanently remove the possibility to renegotiate those agreements under the new Directive. This is unacceptable, and should be avoided by including an adaptation clause equivalent to the wording of the new Directive.



How to ensure that agreements negotiated or renegotiated during the transposition period benefit fully from the new Directive 2009/38/EC:

The general principles or the preamble to the agreement should contain a clear reference to the application of the new laws once in force. It should be made clear that the agreement is signed or revised in full awareness and knowledge of the new EWC Directive 2009/38/EC and that it sets out to define the rights and obligations of parties to the agreement as intended by that Directive.

Furthermore, in order to reaffirm the intention to apply the new laws, the agreement could contain a **renegotiating clause** worded as follows:

1. This agreement will be renegotiated within 6 months following the entry into force of the Directive 2009/38/EC transposition laws with a view to integrating the obligations arising from Directive 2009/38/EC.
2. If the renegotiated agreement is not in place one year after the entry into force of the national laws, the EWC will operate under the rules set out in the subsidiary requirements of the EWC Directive which is in force at that time, until the renegotiated agreement is in place.
3. This agreement will continue to be valid and applicable during the renegotiation period, until the new agreement enters into force.

WARNING: Remember, in making agreements during the transposition period, employees and employers must always be guided by the provisions in Directive 2009/38/EC. Be aware that from a strictly legal point of view the safest way to ensure that an EWC agreement benefits from all the improvements in the new Directive is to sign after 6th June 2011.