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The Draft European Works Council Directive: Facts and Fiction

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Introduction

On 22 June the Social Affairs Council of Ministers reached political agreement on the draft Council Directive on the establishment of European Works Councils.[1] This is the latest stage in an already long and complicated saga which has been continuing for the last 20-odd years.[2] Previous Council discussions on an earlier proposal were bedevilled by strong disagreement from the UK on the need for such a Directive. The UK also argued that the proposal would require companies to put in place a rigid consultation structure and so impose unnecessary costs and bureaucracy on them. This issue was resolved in November last year when the other eleven Member States agreed to proceed under the new procedure set out in the Maastricht Agreement on Social Policy ("the Agreement"). The resulting proposal is the first to go forward under the new procedure and has consequently triggered a high degree of political interest.

The long history of the proposal has resulted in a tangled web of facts and fiction surrounding the Directive. This article attempts to leave the emotive and political issues to one side and to place the current legislative initiative in a legal context and demonstrate its potential effects on UK companies.

The Background to the Proposal

The current proposal, which was technically a new initiative under the Agreement, must be viewed against the background of the earlier proposal for a European Works Council put forward in February 1991.[3] This was followed by an amended proposal at the end of that year.[4] This initiative was based on Article 100 of the EC Treaty, which requires unanimity amongst the twelve Member States for adoption under the Maastricht version of the EC Treaty. The proposal met opposition from several quarters but, eventually, after much debate, a compromise text was prepared by the Belgian presidency, for discussion at the 12 October 1993 Social Affairs Council meeting. However, Portugal, France and the UK continued to oppose the draft Directive. Following ratification of the Maastricht Treaty by Germany on the same day, the eleven Member States (except the UK) announced that the proposal would be discussed after 1 November, the day on which the Treaty entered into force, in accordance with the new Maastricht Agreement on Social Policy.

The Maastricht Treaty includes a Protocol on Social Policy which provides that the twelve Member States authorise all the Member States except the UK to use EC institutions and procedures to continue along the path set out in the Social Charter. The intentions of the "Eleven" are set out in an Agreement on Social Policy attached to the Protocol.

The new procedure requires a two-stage consultation with the Social Partners, that is employees' representatives and management. At the end of the initial stage in January the Commission took the views of the Social Partners into consideration and on 3 February 1994 unveiled its consultation paper on the contents of the envisaged proposal for a Directive concerning mechanisms for informing and consulting employees in Community-scale undertakings or groups of undertakings.

There followed, as required by the procedure, a further six-week consultation period with the Social Partners, at the end of which the Partners delivered to the Commission an opinion setting out the points of agreement and disagreement on the draft text. Under the new procedure if the Social Partners are in agreement they can also include a recommendation setting out their joint position on a draft text. However, in this case, no joint position was established. The new procedure also allows the Social Partners to proceed, if they so wish, at the end of the second stage of the consultation period, to a process of negotiation which can lead to a direct agreement between the parties. The second consultation phase ended on 31 March without the Social Partners, in this case UNICE (Union of Industrials and Employers Confederation of Europe), ETUC (European Trade Union Confederation) and CEEP (Employers in Public Enterprises) finding a basis for negotiation despite serious attempts to do so.

It is unfortunate that the new procedure broke down on the first attempt to use it, but this may reflect the long history and the entrenched positions of the parties on this proposal, rather than any failure in the procedure. The previous proposal reached an advanced stage under the earlier procedure and both parties were unwilling in a negotiated agreement to concede any points that they believed were likely to be

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[1] The full title of the Directive is Council Directive on the establishment of European Works Councils or procedures in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (more usually known as the Works Council Directive). A formal common position on the Directive will be adopted as an 'A' point at a forthcoming Council meeting.

[2] The earliest proposal, the Vredeling proposal on procedures for informing and consulting the employees of undertakings with complex structures in particular transnational undertakings, was put forward in 1980 and is still on the legislative timetable. OJ 1990 C 297/3; amended OJ 1993 C 217.

[3] OJ 1991 C 39/10.

[4] OJ 1991 C 336/11.

included in any legislation finally adopted by the Commission.

Following the breakdown in the negotiations between the Social Partners the Commission, under Article 2(2) of the Agreement, put forward the current proposal for a Directive[5] to establish a framework arrangement for the information and consultation of workers on transnational matters in pan-European companies. This reflected the principles and essential elements of the text prepared by the Belgian presidency but, *inter alia*, incorporated more flexibility, ensured a greater provision for the autonomy of the parties concerned, strengthened the confidentiality provisions and modified the Annex. The Annex contains a minimum structure for a European works council if central management and the special negotiating body fail to reach agreement. The Commission believes that the proposed legislation will fill a vacuum, because existing procedures for informing and consulting employees often take place on a very decentralised basis and at a national level despite the fact that many EC-based companies have pan-European operations. Hence decisions taken by a head office or controlling undertaking located outside the Member State in which they are employed are outside the scope of any national information and consultation procedures. It recognises that it is difficult to gauge whether or not this causes a real problem, but that transnational issues can only be addressed by Community not national legislation. The proposal does not address the issue of the scope of the information and consultation, which the Commission believes is better left to Member States' legislation.

Although the Directive will not apply to any undertaking in the territory of the United Kingdom, some UK multinational companies will be affected by legislation adopted by the Eleven despite the UK's opt-out from the Agreement on Social Policy. Under this particular Directive those companies with their central management in the UK but with continental operations meeting the threshold requirements will be required to set up information and consultation bodies for their continental employees and it may prove impossible in reality to exclude UK employees from such a body. Estimates suggest that approximately 75–100 British companies with extensive business interests in continental Europe will be affected by the legislation.[6]

The Content of the Envisaged Proposal

Unlike previous draft proposals on worker consultation, which set out stringent mandatory provisions, the underlying objective is to provide a legal framework within which a voluntary agreement can be concluded between central management and representatives of the employees if a sufficient number of employees make such a request. Central management and the employees, through a discussion forum referred to as a special negotiating body, are free to set up the information and consultation mechanism most suited to their needs. This need not necessarily require the setting up of a transnational structure if national structures can achieve the Directive's objective. Alternatively, the special negotiating body may decide not to open negotiations to establish an information and consultation mechanism, or to terminate negotiations already opened. It is only if an agreement to proceed in one of these ways cannot be reached that the Annex, which sets out the minimum requirements for an information and consultation body, will apply. The Annex, however, provides the special negotiating body with a strong negotiating tool since it provides the fallback position which will apply if a more favourable agreement cannot be reached with central management. If the special negotiating body agrees to terminate the negotiations or not to open negotiations the Annex will not apply and a new request to convene the special negotiating body may be made at the earliest in a further two years' time. The main points of interest in the draft Directive are set out below:

- The Directive only applies to Community-scale undertakings or groups of undertakings which are defined as follows:
  Community-scale undertaking: an undertaking with at least 1,000 employees within the Member States; and with at least 150 employees in at least two of the eleven Member States.
  Community-scale group of undertakings: a group of undertakings which has at least 1,000 employees within the Member States; and with at least two group undertakings in different Member States; and at least one group undertaking having at least 150 employees in one Member State and another group undertaking having at least 150 employees in another Member State.
  Part-time employees must be included when calculating whether there are sufficient employees to reach the thresholds.
  "Member States" is defined, for the purposes of this Directive, in the recitals as the eleven Member States, excluding the UK. A group of undertakings is defined as a controlling undertaking and its controlled undertakings, the meaning of which is further defined in Article 3. Once the thresholds are met all European employees in the eleven Member States must be involved in the discussions.
  The thresholds will be reviewed as part of a general review of the Directive six years after its entry into force.
- The Directive also covers cases where Community-scale undertakings or groups of undertakings have their headquarters outside the territory of the eleven Member States directly concerned by the proposed Directive. Community-scale undertakings and groups of undertakings with their central management in the UK will be subject to the same obligations as are imposed on undertakings and groups of

[5] OJ 1994 C 135/8.
[6] *The Times*, 23.6.94.

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undertakings from countries other than the eleven Member States. This is a change from the previous draft, in which the threshold was set at 1,000 employees within the European Community not just the eleven Member States, thus potentially catching many more UK-based companies within its ambit.

- Article 4(2) is of particular note for companies with their headquarters in the UK or outside the eleven Member States. It provides that where the central management of a company is not situated in one of the eleven Member States who are party to the Agreement on Social Policy, its designated representative agent shall assume responsibility for setting up an information and consultation body if so required by the employees. In the absence of a nominated representative the responsibility falls to the management of the group undertaking employing the highest number of employees in any one of the eleven Member States. It is the responsibility of the representative agent or the management of the group with the most employees to negotiate an agreement with employees through the forum of the special negotiating body.
- Central management is required to initiate negotiations for the establishment of a European Works Council or an information and consultation procedure 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. It can also start negotiations on its own initiative, but it is not obliged to do so and if no request is made by the employees an information and consultation body need not be set up.
- During the negotiations the special negotiating body may be assisted by experts of its choice, although Member States may lay down budgetary rules limiting the funding to cover one expert only.
- The members of the special negotiating body are entitled to the same guarantees and protection provided by Member States legislation to other employees' representatives.
- Article 6(1) requires both sides to negotiate in a spirit of cooperation, but Article 8 of the Directive obliges Member States to allow management to withhold information the disclosure of which could be seriously prejudicial to the undertakings concerned. Member States shall also provide that members of special negotiating bodies, or of European Works Councils, and any experts who assist them are not authorised to reveal confidential information. This requirement also extends to employees' representatives in the framework of an information and consultation body.

  The provision is particularly important given the wide range of information that companies must make available to the information and consultation body. It may also lead to a conflict of interests between the two sides and Member States must provide for administrative or judicial appeal procedures which the employees' representatives may initiate when management requires confidentiality or does not give information in accordance with Article 8.
- Article 6(2) of the draft Directive provides that the agreement arising from the negotiations between central management and the special negotiating body must specify detailed arrangements for implementing the information and consultation procedure, including: the member undertakings which are covered by the agreement; the composition of the Works Council, the number of members, the allocation of seats and the term of office; the functions and powers and the procedure for information and consultation of the Works Council; the venue, frequency and duration of meetings; the financial and material resources to be allocated to the Works Council; and the duration of the agreement and the procedure for its renegotiation. The agreement must also stipulate by what method the employees' representative shall have the right to meet to discuss the information conveyed to them. Alternatively, the two parties may decide to establish one or more information and consultation procedures instead of a Works Council should this be more appropriate.

Should the central management refuse to commence negotiations within six months of a request to do so, or in the event that the representatives of the employees and employer failed to reach agreement within three years of the initial request, or the employees and employer immediately so agree, the subsidiary requirements laid down by the law of the Member State in which the central management is situated will apply. These minimum requirements for a European Works Council are set out in the Annex to the Directive:

- The European Works Council can be composed of 3–30 members who are employees of the Community-scale undertaking or group, or appointed from their number by employees' representatives or, in the absence thereof, by the entire body of employees. Members must be elected or appointed from each Member State where the company has an establishment. Additional representatives may be appointed in proportion to the number of employees of the establishments or group undertakings as laid down by the legislation of the Member State in the territory where the central management is situated. The election or appointment of members of the body must be carried out in accordance with national legislation and/or practice. A select committee of three members can also be appointed.
- The information and consultation is limited to those matters which concern the company as a whole or at least two of its establishments or parts of the group situated in at least two Member States. The information and consultation structure has a right to meet with central management once a year. Operating

expenses of the structure will be borne by central management.

- The European Works Council has the right 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 undertaking or group and its prospects. The members of the European Works Council must report back to the employees they represent on the content and outcome of the discussions, while respecting the confidentiality of the information they receive. A wide range of information must be provided, subject to the confidentiality provisions, including the structure, economic and financial situation; the probable development of the business and of production and sales; the employment situation and probable trend; investments; and substantial changes concerning the organisation; the introduction of new working methods or production processes; transfers of production, mergers, cutbacks or closures of undertakings, establishments or important parts thereof, or collective redundancies.
- The select committee or, if none, the European Works Council, also has an additional right to be informed and consulted in 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. Representatives from the undertaking and/or establishments concerned by the measures in question also have the right to participate in these consultation meetings.
- The European Works Council can negotiate a new structure with the central management after four years, or it will continue under the basic structure provided for in the Annex.

Exception from the Directive for Agreements already in Force

The Directive does not apply to undertakings or groups which at the date of transposition of the Directive or the date of implementation in the Member State already have transnational information and consultation agreements. This should encourage companies to put in place arrangements prior to implementation of the Directive at which point they will be required to abide by the legal framework provided for by the implementing legislation. When these agreements expire the parties may decide jointly to renew them, in which case the provisions of the Directive will not apply. However, if the agreements are not renewed the provisions of the Directive will apply. Agreements for transnational information and consultation of employees are already quite common in France and Germany. This provision is likely to cause some confusion and uncertainty since depending on whereabouts in Europe a company has its headquarters or, where this is situated outside the territory of the Eleven its designated representative agent for the purposes of the Directive, a company may have more or less time to put in place a voluntary agreement. It will have less time in a Member State which implements the Directive quickly and more time in a dilatory Member State. In any event a voluntary agreement must be in place by the time the Directive is implemented in all the Member States where a company has operations, or the date for implementation has passed, because after this time the employees can commence the procedure under the Directive and call for the assembly of a special negotiating body.

An estimated five years is likely to have passed before the provisions in the Annex could be imposed on a company. Time has to be allowed for the Directive to be transposed and then a company can negotiate with a special negotiating body for a maximum of three years. It is only if it is unable to reach an agreement at the end of this time that the minimum provisions in the Annex apply.

Conclusion

The Directive will now go before the new European Parliament for a second reading. The German presidency of the Council is very keen to see the Directive adopted before the end of its term and it is thought that final adoption of the Directive will occur at the 6 December Social Affairs Council meeting.

Transposition into national law in the eleven Member States may result, as ever, in variations between the wording of the Directive and the implementation of the Directive in national law, which will lead companies to wonder what they must implement prior to the Directive coming into force to benefit from the derogation. This problem could only have been overcome by introducing legislation by means of a Regulation thus giving greater clarity and legal certainty, but the Agreement on Social Policy only provides for the adoption of legislation by means of Directives.

Once the Directive is adopted the Commission will examine further draft Directives containing worker consultation procedures, notably the European Company Statute and the Fifth Company Law Directive proposals, to evaluate the impact of the Directive on them.

Forward-looking multinational companies in all Member States will consider commencing negotiations with unions and other representatives of employees now to implement an information and consultation body thus obtaining a derogation from the Directive when it is eventually implemented. Some may consider it worthwhile allowing UK employee representatives to participate as a method of enhancing industrial relations, although there is no legal obligation to do so.