The New EWC Directive (2009/38/EC)
An Initial Overview for EFFAT Trade Unions

Simon Cox,
EWC/TNC Coordinator

Version 1.1 (28 July 2009)

Contents

GENERAL OVERVIEW

Introduction

In December 2008, nine years after the deadline for revision promised by the 1994 Directive, a political agreement was reached on the content of a new European Works Council Directive*. It was formally adopted by the Council of Ministers on 6 May 2009 and was published in the Official Journal of the European Community 10 days later with the following full title:

DIRECTIVE 2009/38/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 6 May 2009

on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees

(Recast)

Directive 2009/38/EC, as all European Directives do, came into force 20 days after being published in the Journal: in this case, 5 June 2009. Member States of the EU and EEA have two years starting from this date to put its provisions into their national laws. It is these national laws that are binding on companies, not the Directive itself which applies to national governments. So, for the full legal effect of the new directive to be felt we will still have to wait a while. However, there are a number of important clarifications to existing law (especially on the nature of transnational information and consultation) that can be taken from the new directive right away. It is EFFAT's experience that many EWCs operate below the standards set out by exiting law under the 1994 Directive, mainly because key concepts in that Directive were drafted too vaguely and thus left open to misinterpretation. The new Directive creates a good opportunity for all EWC members to re-examine their agreements and their practices right now in order to see if they are really making use of everything the law provides to maximise the benefits of EWCs for employees.

Furthermore, even those entirely new obligations in the 2009 Directive which will not have any legal force on companies before 2011 do still have a moral force which we can draw upon straight away. Remember that all these new obligations have been agreed by the European Commission, the European Parliament, and by every single national government in the EU. Most of them derive from joint positions of the ETUC and Business Europe (the European Employers organisation). Furthermore, employers know they will have to comply with all the new laws in a couple of years anyway. If employers do insist on waiting until the last minute before they allow EWCs to comply with these new minimum standards, they should at least be made to explain why.

I hope this overview will be a useful contribution to the creation and positive renewal of EWCs, as well as an aid to the work that trade unions must do with governments in

*For the full text - http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2009:122:SOM:EN:HTML

transposing the Directive. It is designed to be read by trade union officers of EFFAT affiliates with an interest in and background knowledge of EWCs and who want a quick guide to the important changes and additions to previous law that can be found in the 2009 Directive. References to the 1994 and 2009 Directives are given at the beginning of each topic. None of the analysis contained in the summaries given by topic below is made lightly or on weak grounds and I feel confident that we have got it right. However, all law is subject to interpretation and European law more than most. The provisions in the new Directive will become more concrete over time with practice and precedent as well as through the transposition process. We all have an interest in ensuring this happens in the right way.

Political Overview

EFFAT has been a very active participant in fighting for a better EWC Directive over the last decade. We took strong positions and committed ourselves firmly to achieving positive results on the issue. We have worked assiduously with the ETUC, other European trade union Federations, politicians and other core actors taking up much of the significant political and the technical workload that was required to achieve a new Directive in such a difficult political environment. We are therefore pleased to see some concrete results from this work. However, we certainly didn't get everything we wanted. Frankly, that was never going to be the case when strong opposition to a number of our demands was being expressed by important employers, national governments, MEPs and European Commissioners. So before going into the content of the 2009 Directive, it seems right to take a look at some of the trade union demands that remain outstanding.

Unmet demands: We could even start by saying that technically our demand for a 'revision' of the 1994 Directive has still not been met. The process for drafting the new Directive was in fact designated as a 'recast', not a 'revision', by the Commission. This technical legislative devise meant that the European Parliament could not introduce changes in areas where there was no proposal made by the Commission. This effectively ensured that some of the changes we wanted were never going to be possible this time round. The absence of any change to the definition of 'controlling undertaking' to take account of problems with 50-50 joint ventures and managed hotels and restaurants is one example of this and a particular disappointment for EFFAT. It is also to be seriously regretted that not all agreements will have an automatic right to renegotiate under the terms set out in the new directive and that nothing was done to speed up SNB negotiations. Other important issues we pressed for, but didn't get, include a reduction in the employee threshold, additional topics (in the annex), removal of the limitation to a single paid expert, an automatic entitlement for European trade union federations to attend all EWC meetings and a requirement that all EWCs must have a minimum of two meetings a year (although arguably some progress has been made on the last two of these issues). It goes without saying that we will continue to argue for these improvements. We are scheduled to get another review of the directive in seven years time and the case for these changes remains entirely valid.

Realized demands: However, these disappointments should not retract from the fact that we have managed to gain some very real improvements, meeting long term trade union demands, in Directive 2009/38/EC. We have got much clearer definitions of 'information' and 'consultation', an 'adaptation clause' to allow EWCs to stay in place while negotiating their replacements following structural changes, an entitlement to be provided with training without loss of wages, a recognition of the role of trade unions in SNBs, the resources to do the job and the means and rights needed to collectively defend EWC agreements before the law. In addition, the 2009 Directive now states that sanctions should be "effective, proportionate & dissuasive", there are new SNB & EWC composition formulas that give us more seats, more fairly distributed and the annex also now includes the right to a response from management to any counter-proposals put forward by employee representatives.

Unsolicited changes: Most of the limited number of innovations which did not originate with trade union demands have also ended up being largely to our advantage. The potentially dangerous limitation of the competence of EWCs to transnational matters has been dramatically offset by a very helpful clarification of what 'transnational' means in law. New rules on the linking of European and national information and consultation processes have real potential to strengthen the role and status of some EWCs. An obligation on EWC members to transmit the outcomes of information and consultation to colleagues at the national level will be helpful in underlining the need for communication tools and avoiding overuse of 'confidentiality'. Even new language emphasising the need not to slow down management decision making can be put to use in pressing employers to ensure that information is complete and timely. The one predominantly negative innovation is a new two year period for making agreements which will not automatically benefit from the new Directive (for as long as they remain valid). However, this need not cause us serious problems if we work to ensure that the transpositions are fair and correct and above all if we are very careful about what new or modified agreements we sign.

In summary: So, while it is not perfect, if we use this new Directive effectively it will offer many EWCs a serious prospect of strengthening their rights and playing a more active role in companies. Faced with an unprecedented economic crisis it is more important than ever for EWCs to have effective information and consultation rights which give them the opportunity to exert influence on management decision making and limit negative consequences on employment. The 2009 Directive is a big, if not an entirely sufficient, step in the right direction.

Caution: Remember that we must now be very careful about the content of all agreements negotiated or renegotiated before 5 June 2011. The precise wording used could effect whether or not an EWC will be excluded from benefiting from the new Directive for an unlimited period of time. Therefore, it is vital to check with the EFFAT Secretariat before signing any new or amended agreements.

The Importance of Transposition

Member States now have until 5 June 2011 to adopt national laws that comply with the new Directive. This time is known as the 'transposition period' because it is for the Member States to 'transpose' the Directive into national law. During the transposition period the current laws (based on the 1994 Directive) will continue to apply. The new legal obligations on companies (and employee representatives) arising from the 2009 directive will only be legally binding when the national transposition laws come into force in 2011.

Our analysis of the law in this document has been produced with care and is the result of much study and discussion with lawyers, practitioners and policy makers. However, as stated above, all law is subject to interpretation and European law more than most. We know that there are employers, lawyers and politicians who are already looking for areas where they can create and exploit ambiguity to their advantage. This will not only happen at a company level where some employers will certainly try to minimise the impact of the new Directive on their operations. It will also happen at national level where lobbyists will try to influence governments during the transposition process.

In the course of their dastardly exertions such people will be looking for ammunition from our side to use against us and we must take great care not to provide it to them. However, this alone will not be enough to ensure that we don't 'shoot ourselves in the foot'. If we do not also take care to assert our rights and reject any attempts to retrospectively weaken the directive by misinterpreting its provisions, then important ground that we have gained in this long and difficult process may be lost quite quickly and easily. Remember that even the weakest counter-arguments could become strong if they go unchallenged and are allowed to become established as consensus. If this happens during transposition into your national law the process required to challenge it and get it changed may be very long and difficult. We would therefore like to emphasise the importance of trade union lobbying on and monitoring of your national transposition processes before mistakes or omissions are set into national law. We hope this document will help you to do that.

INNOVATIONS IN THE 2009 EWC DIRECTIVE BY TOPIC

Topic A: Definitions of 'information' & 'consultation'

References: Recast - Article 2f & 2g

Proper definitions of 'information' and 'consultation' were always at the top of the EFFAT list of priorities for a new directive. Too many EWCs have been confronted with vague last minute presentations (or copious but irrelevant documents) followed by meagre verbal exchanges or 'dialogue'; often after decisions have already been finalized. We have repeatedly questioned how this can possibly be considered to be the 'information and consultation of employee representatives' that is envisioned in the legislation.

Unfortunately, many companies still get away with such unacceptable standards of disclosure and integration of their EWCs into decision making. This is partly due to the fact that the 1994 Directive gives no definition of 'information' at all and the definition it gives of 'consultation' is very poor - simply stating that "'consultation' means the exchange of views and establishment of dialogue". This lack of clarity in the Directive has allowed some employers along with their lawyers and 'advisors' to exploit doubt and confusion about what transnational information and consultation actually is.

The new definitions of information and consultation in the Recast Directive, which can be found in article 2f & 2g respectively, should go a long way to rectifying these problems. Given their importance we reproduce them here in full:

- *"information" means 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*

We have underlined parts of these definitions to point out the features that we think are especially important. In particular, please note that for management to consult an EWC they must give them the opportunity to express an opinion on 'proposed measures' which may then be taken into account within the company. This underlines the point that EWCs

must be consulted before decisions are finalized. Furthermore consultation can only take place after EWC members have been provided with information "in such fashion and with such content as are appropriate to enable employees' representatives to undertake an in-depth assessment of the possible impact". In short these definitions support EFFAT's long held assertions about what 'information' and 'consultation' really mean (and have always meant) at the European level, bringing the language in the new EWC Directive much closer to that in other directives dealing with 'information' and 'consultation'. It will now be up to us to ensure that they are followed in practice.

When rethinking the implementation of information and consultation in EWCs in the light of the 2009 Directive it is also important to be aware of the change to the 'subsidiary requirements' which now gives EWCs set up under its provisions the right to "obtain a response, and the reasons for that response, to any opinion they might express" as part of the consultation process (see Topic J). One should also note, that although there is no explicit requirement in the 2009 Directive for more than one plenary meeting per year, these clarifications strengthen our argument that in most cases one meting will not be sufficient for the employer to meet its information and consultation obligations.

Topic B: The transnational limit
References: 1994 Directive – Annex (Subsidiary Requirements);
2009 Directive - Article 1.3, Article 1.4, Recital 12 & Recital 16

One of the most serious problems faced by EFFAT EWCs in the past has come from management refusing information and consultation on certain issues on the grounds that these issues are not transnational. Of course, EWCs are not the appropriate bodies to deal with issues that are fully and genuinely local. However, the division between national and transnational can be tricky.

The 2009 Directive can have restrictive as well as enhancing impacts on existing EWCs in this area. EWCs are not automatically subject to any restrictions on their scope or competence *vis a vis* 'transnationality' by the 1994 Directive. The Subsidiary Requirements (in the Annex) state: "The competence of the European Works Council shall be limited to information and consultation on the matters which concern the …[multinational] … as a whole or at least two of its establishments … situated in different Member States". However this does not apply to EWCs unless they operate without an agreement (and almost none of them do) or such limitations have been negotiated into their agreements (much more common). This will change with the 2009 Directive. Articles 1.3 & 1.4 limit the competence of all EWCs and the scope of all EWC information and consultation procedures to 'transnational issues' along similar lines to the current subsidiary requirements. Transnational issues in the main body of the 2009 Directive are defined using the language taken from the Subsidiary Requirements of the 1994 Directive. So, EWCs that operate under agreements that give them entitlements to information and consultation ranging beyond strictly transnational matters may find that

the competence of their EWC and the potential scope of information and consultation procedures they are involved in are diminished by the new law.

However, thanks to some hard work by EFFAT and other European union organizations, as well as the tireless support of some key MEPs, the 2009 Directive also gives us a new tool to help resolve disputes about what is or is not transnational. Getting the correct definition of 'transnational' is important, especially when (as has happened on far too many occasions) the HQ of a company decides to restructure first in one country, then another, then another … while claiming that this is actually a series of national issues which are outside the scope of the EWC. Some employers have even insisted that matters must have a serious and negative affect on jobs in two countries at the same time in order to meet the requirement. EFFAT always rejected such claims by referring to the preamble of the 1994 Directive (now recital 12 of the Recast) which indicates that any proposal involving decision making in one country which affects workers in another (within the European Economic Area) is rightly within the scope of an EWC. However, the 2009 Directive adds a new Recital (16), which makes it clear that transnational matters also include other issues that "regardless of the number of Member States involved, are of importance for the European workforce in terms of the scope of their potential effects". Workers' representatives on the EWC are surely best placed to determine whether a matter is of importance for the European workforce. This then should not only help EWCs with a broad scope to ensure that the new limitation on EWCs to transnational matters is not too restrictive but, more significantly, it should also **help EWCs that have previously taken too narrow a view on the concept of 'transnationality'** (or had such a view imposed upon them by management) to correct it.

Topic C: European and national information & consultation
References: 2009 Directive - Article 6.2(c), Article 10.2, Article 12 & Recital 37

One of the reasons that the European Commission introduced the 'transnational' limitation into the body of the Recast Directive was that they wanted to better define the different but complementary roles played by national and European information & consultation bodies and the way they interact. On the second point, two other issues have been addressed by the 2009 Directive. Firstly, article 10.2 of the new Directive makes it a legal obligation for EWC members to inform national level employee representatives (or in their absence, the workforce as a whole) of the "the content and outcome" of any information and consultation procedure carried out with the EWC. This can be very helpful to support EWC members who need better access to communication tools. It could also be helpful in preventing employers from over-using confidentiality.

Secondly, employers were complaining that some court cases had given contradictory rulings about how to prioritise European and national information and consultation and were asking for some clarity on what should take precedence. The 2009 Directive solves this in article 6 and article 12 by making EWC agreements responsible for setting out

how national and European information and consultation should be linked. However, this new obligation can't be used to weaken existing information and consultation rights or protection of workers in Member States. For companies where the linkage is not set out by agreement (as will be the case for most old agreements negotiated under the 1994 Directive) Member States have to make their own new rules to ensure that information and consultation are conducted in the European Works Council as well as in the national employee representation bodies whenever transnational matters envisage decisions "likely to lead to substantial changes in work organisation or contractual relations". Recital 37 sets out that these rules should ensure that the European Works Council can receive information **"earlier or at the same time as the national employee representation bodies".**

Topic D: The 'Adaptation Clause'
Reference: 2009 Directive - Article 13

What happens when a company with an EWC is bought out by another company, when a company with an EWC splits up into two halves, or perhaps when a less significant structural change takes place but without provision in the EWC agreement to deal with it? Questions of this sort have often been a headache for all concerned because the 1994 Directive has nothing to say on such matters and most agreements don't have the provisions to cope with them. Furthermore, this could potentially lead to situations where EWCs disappear at precisely the time when they become most important (during a major transnational change in the company). The 2009 Directive finally offers a sensible solution for such cases.

The phrasing of article 13 of the 2009 Directive (not to be confused with article 13 of the 1994 Directive) is a bit complicated but essentially it states that when the structure of a one or more groups of companies with an EWC changes significantly, and the relevant EWC agreement(s) **doesn't have provisions** for dealing with this, or **if two or more relevant EWC agreements are in conflict** as to what should happen**, then negotiations with a Special Negation Body (SNB) can be triggered** either by the central management deciding on its own accord that this is what they want or by written request from representatives of at least 100 employees based in at least two EU/EEA Member States. If SNB negotiations are triggered in this way, at least three members of the existing EWC or EWCs must be members of the new SNB, in addition to the members elected or appointed as usual. During the negotiations, the existing EWC(s) must continue to operate in accordance with any arrangements agreed between the EWC members and central management.

This can be an important opportunity for EWCs, especially those with article 13 agreements, to benefit fully from the new directive (see Topic E).

Topic E: Existing agreements
Reference: 2009 Directive - Article 14

While EFFAT and the ETUC wanted all EWCs to be able to benefit immediately from the new obligations arising from the 2009 Directive, this was not possible to achieve. There are two types of EWCs that won't benefit in such a concrete way from the new law. The first type are those agreements covering the entire workforce which provide transnational information and consultation and were signed before 22 September 1996 (or 15 December 1999 in the UK) – these are what are often called 'article 13' agreements because they take advantage of the exemption provided by article 13 of the 1994 Directive. In most circumstances these agreements remain exempt from the obligations arising from the new law, even when they are subsequently adjusted because of changes in structure.

The second group of agreements that will not be subject to obligations in the new law are those agreements signed or revised between the entry into force of the Directive (5 June 2009) and the transposition date two years later. For these agreements, only the obligations in the national laws based on the 1994 Directive will apply, even when those laws have been superseded by the new national transpositions. Furthermore, when these agreements expire, the parties may decide jointly to renew or revise them and, if they do, those renewed or revised agreements will also be tied to the old EWC laws. If they are not renewed or revised, the provisions of the new Directive will apply to that employer once they expire but, of course, you may be left with no EWC and the prospect of a long negotiation before you can get another one. So, in effect the old EWC laws will 'stick' to such EWCs like an unwanted piece of old chewing gum for the rest of their existence. We will need to be very careful in order to avoid this **'sticky law'** effect. This will depend on the exact wording of agreements signed in this two year period and so it is very important to **ensure that such agreements have been checked with the EFFAT Secretariat before they are signed.**

Finally, a very important exception to the rule set out by article 14 is that the 'adaptation clause' (see topic D) still applies to all agreements including the otherwise exempted types outlined above. This means that when the structure of a multinational with such an agreement changes significantly, the employees can trigger the negotiation of a new EWC under article 5 of the 2009 Directive. But this can only happen if the agreement doesn't have other provisions dealing with this issue. This means that it is very important that 'article 13' agreements are not modified so as put such provisions in place without a good reason. By making such a modification it **is possible to permanently remove the opportunity of employee representatives to renegotiate under the terms of the 2009 Directive while keeping their EWC in place.**

Topic F: The involvement of trade unions
References: Article 5.2(c), Article 5.4, Article 5.6 & Article 4.4

It was always a great disappointment that the 1994 Directive so carefully avoided any mention of trade unions. EFFAT has long stressed a number of problems that this has caused when employers do not want to cooperate with European trade union federations like ours. The 2009 Directive grants three new rights which are directly related to European trade union federations:

Firstly, under Article 5.2(c) the 2009 Directive says that the competent European workers' and employers' organisations **must be informed of the creation of a new SNB** at the start of negotiations. This will give us a chance to ensure that relevant EFFAT affiliates are informed (this is not always the case now) and that employee representatives know their rights and can be informed of good practice before they negotiate.

Secondly Article. 5.4 makes it very explicit that **SNBs have the right to be supported by European trade union federations**. In most cases this happens anyway but in some anti-union and largely unorganised companies it has caused problems in the past. It is important that this has been resolved and, in this context, we should also remember that article 5.6 says that any expenses relating to SNB negotiations shall be borne by the central management.

Lastly, Article 4.4, reflecting European case law, states that central management "shall be responsible for obtaining and transmitting to the parties concerned by the application of this Directive … information concerning the structure of the undertaking or the group and its workforce." As European trade union federations are now explicitly recognized as being concerned by the application of this Directive, it is clear that **multinationals must send this information to us if we request it**.

Topic G: Other changes to SNBs
References: Article 5.2(b) & Article 5.4

Apart from ensuring that European trade union federations are informed of the creation of all new SNBs and strengthening our right to send coordinators to advise them, there are two other innovations in the 2009 Directive that will have a significant impact on SNBs.

The first of these - article. 5.2(b) - is a new rule for the **division of seats in the SNB**. This new formula allocates a certain number of seats to the employees of the multinational in each Member State where it operates based on the proportion of the total number of employees (in all the EEA Member States taken together) that work there. It applies the formula as follows:

% of EEA Workforce	Number of Seats
10% or less	1
Over 10% but less than 20%	2
Over 20% but less than 30%	3
Over 30% but less than 40%	4
Over 40% but less than 50%	5
Over 50% but less than 60%	6
Over 60% but less than 70%	7
Over 70% but less than 80%	8
Over 80% but less than 90%	9
Over 90%	10

(Note: this same formula is also to be found in the 2009 Subsidiary Requirements giving the rules for setting up an EWC if the SNB fails to reach an agreement with management after three years.)

The other is **follow-up meetings**: the 2009 Directive – in article. 5.4 - entitles SNBs to meet without representatives of the central management before and after any meeting with the central management with all the necessary means for communication.

Topic H: Training, means & representation
References: 2009 Directive - Article 10.1 & Article 10.4

Article 10.4 gives a new right for EWC members "to be provided with **training without loss of wages**". In 2005 over half of all EWC agreements gave members no entitlement to training. So, this is a significant improvement.

Article 10.1 gives EWC members an entitlement to "the means required to apply the rights stemming from this Directive, to collectively represent the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings".

One aspect of this is to underline that **EWCs must be given all the means they need in order to carry out their work**. However, it also means that Member States must ensure that **EWC members have the financial means and legal status that they need in order to pursue collective legal action** in defence of their rights. This might be done by obliging the company to fund such costs or by providing access state funded legal support. While EFFAT would not encourage an overly litigious approach, it is clearly important for employers to know that EWC members have the means to take legal action in the last resort. However, we expect some hard lobbying from employers on this issue

during the transposition stage in certain Member States - who will try to argue different interpretations of article 10.1.

Topic I: Content of agreements
Reference: 2009 Directive - Article 6. 2

Article 6.2 of the 2009 Directive sets out the issues that have to be resolved by EWC agreements negotiated by SNBs. This list of issues has been expanded from that of the 1994 Directive.

Article 6.2 (b) now adds that agreements will have to take "the need for balanced representation of employees with regard to their activities, category and **gender**, and the term of office" into account where possible when dealing with the allocation of seats. This is not an obligation to have any kind of quota or proportionality but it does mean that they must be taken into consideration.

Article 6.2 (c) states that agreements must also set out the arrangements for linking information and consultation of the European Works Council and national employee representation bodies (see above).

Under Article 6.2 (e) agreements must also define "the composition, the appointment procedure, the functions and the **procedural rules of the select committee** set up within the European Works Council" where necessary.

Finally, Article 6.2 (g) adds to the existing requirement for agreements to state their duration by also requiring them to state the date of their entry into force, the **arrangements for amending or terminating the agreement**, **the cases in which the agreement should be renegotiated** and the procedure for its renegotiation, including, where necessary, when this is triggered by structural changes (see above).

Topic J: The next review
References: 2009 Directive - Article 15
1994 Directive - Article 15

After the long wait for a revision of the 1994 Directive, the Commission appeared keen to soften their obligations as regards the next review. The Recast Directive promises that in **2016** five years after the transposition date (5 June 2011) "the Commission shall report to the European Parliament, the Council and the European Economic and Social Committee on the implementation of this Directive, making appropriate proposals where necessary." In 1994 the Directive stated that there would be "consultation with the Member States and with management and labour at European level" in December 1999 – but of course we know what happened then!

Topic K: Subsidiary requirements
References: 2009 Directive - Recital 44 + Annex 1 (a), 1(c), 1(d), 2, 3 & 6

The Subsidiary Requirements in the Annex of the EWC Directive are rarely applied directly. This only happens if an SNB and management agree to do so, if an SNB is not convened within 6 months of a request, or if an SNB and management fail to reach an agreement after three years of negotiation. However, the Subsidiary Requirements have always been very influential on the outcome of negotiated agreements, as it gives a model of how an EWC might work and both sides know that this is what they get anyway if they can't agree. It is a situation sometimes described as 'negotiation within the shadow of the law'. This makes it important and the 2009 Directive makes significant changes to it in four areas:

Firstly, while the list of topics of particular interest to the EWC remains the same, the 2009 Directive now draws a **distinction between topics where only information must be provided and those where the European Works Council is also entitled to consultation**. It states that information should be provided on the structure, the economic and financial situation and the probable development and production and sales of the Community-scale undertaking or group of undertakings. However, additional consultation with the EWC must relate in particular to:

- situation and probable trend of employment,
- investments,
- 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.

In the light of the clearer definitions of transnational information and consultation (above), this may lead to more extensive consultation than many EWCs receive at present.

Secondly, the new subsidiary requirements have **additional rules on how consultation should be conducted**. This should be "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". This brings the Directive closer into line with the European Company (SE) Directive. It is an important development and it is to be hoped that this practice will be taken up by many EWC agreements. It should also be noted here that "exceptional circumstances" has been broadened to specifically include "decisions". This should be read in connection with the definition of "consultation"

which clearly sets out that consultation should take place on "proposed measures" in such a way that the outcome "may be taken into account".

The third area of change is to the composition of the EWC. The Subsidiary Requirements in the 2009 Directive uses the same **new formula** as that for SNBs (see above).

Lastly, in the 2009 Directive EWCs set up under the Subsidiary Requirements are obliged to set up a **select committee** (unlike under the 1994 Directive, where this is only the case "where its size so warrants"). The maximum size of the select committee has also been increased from 3 to 5 members.

Topic L: Other important recitals
References: 2009 Directive - Recital 22 & Recital 36

Recitals in EC law do not have independent legal value and can't restrict the scope of any unambiguous provisions is the main body. However, they can be used to determine the nature of, to amplify and to expand upon ambiguous provisions within the main body of the text. This is why we have underlined the importance of recitals in establishing the nature of the provisions in the 2009 Directive concerning the topics outlined above. There are two other recitals not mentioned above that should also be noted as of importance in assessing the 2009 EWC Directive.

Recital 22 states that "the definition of "information" needs to take account of the goal of allowing employees' representatives to carry out an appropriate examination, which implies that the information be provided at such time, in such fashion and with such content as are appropriate **without slowing down the decision-making process in companies**". It could be argued that this recital adds, rather than removes, ambiguity. However, it is clear that it is the employers and not the employee representatives who control the content of 'information' and time at which it is given. Therefore only members of central management are in a position to ensure that it is given sufficiently in advance and with sufficient content as to avoid slowing down their decision-making processes.

Recital 36 deals with sanctions expanding on Article 11 of the Directive. Article 11 states that Member States must "ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced". Recital 36 adds that 'in line with the general principles of Community law: administrative or judicial procedures, as well as sanctions that are **effective, dissuasive and proportionate** in relation to the seriousness of the offence, should be applicable in cases of infringement of the obligations based on this Directive". We wait to see how this will be taken into account in the transposition process.