2
Procedure for the establishment and adaptation of a European Works Council or an information and consultation procedure

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1. Introduction

Establishing EWCs under the original Directive 94/45/EC entailed a number of problems. The main obstacle that workers' representatives encountered early in the process was collecting information from management about the company's workforce and its distribution. Without this data it was often hardly possible to get the process of setting up an EWC under way. This basic problem led to three lawsuits[1] that made it all the way to the Court of Justice of the European Union.

These legal problems and their importance for EWC practice made them core candidates for amendments in the new EWC Recast Directive. As a result, regarding the procedure for the establishment and adaptation of a European Works Council or an Information and Consultation Procedure, the Recast Directive made a few improvements. In this chapter we follow the order of these improvements. First, the preliminary right to information is now included in the Recast Directive which has integrated the solutions of the ECJ. Second, the role of trade unions in negotiations is now recognised. Finally, the Recast Directive provides a solution to the lacuna concerning the 1994 Directive, which rapidly became apparent: the absence of any provision addressing the frequent occurrence of changes in the structure of Com-

1 The case of Kühne & Nagel dragged on for many years, from the German labour court of first instance up to the Court of Justice of the European Union (C-440/00) and back to national labour tribunals in the member states (Norway, Slovakia and Austria). Similar difficulties have characterised other cases before the Court of Justice of the European Union since 1998 (Bofrost C-62/99 and ADS Anker C-349/01).

munity undertakings' (or groups of undertakings). As a remedy to this problem an adaptation clause was introduced in the Recast Directive (the new Art. 13).

All these modifications were aimed at the general objective of 'ensuring the effectiveness of employees' transnational information and consultation rights, increasing the proportion of European Works Councils established while enabling the continuous functioning of existing agreements, resolving the problems encountered in practical application and remedying the lack of legal certainty resulting from some of its provisions or the absence of certain provisions', as defined in Recital 7 of the Preamble of the Recast Directive.

The new information right and the involvement of European trade unions has the potential of facilitating the establishment of new EWCs and improving the quality of agreements to ensure their effective functioning.

2. Enhanced access to the information required for commencing negotiations

As already mentioned, all three EWC-related court cases that made it to the Court of Justice of European Union (CJEU)[2] raised the issue of access to the information required to set up a Special Negotiating Body (SNB). The information required was necessary to determine whether a given undertaking (or group of undertakings) had Community-wide scale of operations and/or whether its workforce was of the size required by the 1994 EWC Directive to make a valid claim for establishing an EWC. The new Recast Directive incorporated the solutions proposed by the ECJ in its case law. Henceforth, Art. 4.4 provides that the management of every undertaking belonging to the Community-scale group of undertakings and the central management or the deemed central management of the Community-scale undertaking or group of undertakings shall be responsible for obtaining and transmitting to the parties concerned by the application of this Directive the information required to open negotiations, in particular, 'the information concerning the structure of the undertaking or the group and its workforce'. Recital 25 adds that

> 'the responsibility of undertakings or groups of undertakings in the transmission of the information required to commence negotiations must be specified in a way that enables employees to determine whether the undertaking or group of undertakings where they work is a Community-scale undertaking or group of undertakings and to make the necessary contacts to draw up a request to commence negotiations.'

The Recast Directive provided a very important addition that establishes a dual (or joint) responsibility of the central management and the management of every undertaking belonging to the group to provide the necessary information for negotiations to be opened.[3] Art. 4.4 is not as clear concerning whom this information

2 C-62/99 *Bofrost*; C-440/00 *Kühne and Nagel* and C-349/01 *Anker*.

3 It is a direct aftermath of the strategy applied in the *Kühne + Nagel* case in which a strategy of endless shifting of responsibility between the central management and its national counterparts was adopted and resulted in an evident practical paralysis with regard to implementation of the ECJ's ruling.

Table 7 **Responsibility for providing the necessary information to commence negotiations**

	Providers of the information	Content of the information	Who is informed?
Austria	As in the Recast Directive	As in the Recast Directive	Parties to which the Directive applies and management of the other undertakings
Belgium	As in the Recast Directive	As in the Recast Directive	Parties concerned and other undertakings
Bulgaria	As in the Recast Directive	As in the Recast Directive	Members of the special negotiating body
Croatia[58]	As in the Recast Directive	As in the Recast Directive	Employees' representatives
Cyprus	As in the Recast Directive	As in the Recast Directive	Parties concerned
Czech Republic	Central management	As in the Recast Directive	Employees or their representatives
Denmark	Central management	As in the Recast Directive	Employees
Estonia	As in the Recast Directive	As in the Recast Directive	Employees or their representatives and central management (of a request to start negotiations)
Finland	As in the Recast Directive	As in the Recast Directive	Parties preparing the establishment of an ICP
France	As in the Recast Directive	As in the Recast Directive	Employees or their representatives
Germany	As in the Recast Directive	As in the Recast Directive	Employee representative body
Greece	As in the Recast Directive	As in the Recast Directive	The interested parties
Hungary	As in the Recast Directive	As in the Recast Directive	Employees or their representatives
Ireland	As in the Recast Directive	As in the Recast Directive	Parties concerned
Italy	As in the Recast Directive	As in the Recast Directive	Parties concerned
Latvia	As in the Recast Directive	As in the Recast Directive	Parties concerned
Lithuania	As in the Recast Directive	Same as in the Directive and the undertaking's legal status, the procedure for representation, information on employee representatives that will represent the employees of the undertakings or the undertakings controlled by them. The information must be given within 30 days, free of charge and in writing.	Employee representatives and the information shall be given to the requesting management
Luxembourg[60]	Central management	As in the Recast Directive	Employee representatives from Luxembourg or if there are none, workers
Malta	As in the Recast Directive	As in the Recast Directive	Parties concerned
Netherlands	As in the Recast Directive	As in the Recast Directive	Employees or their representatives

4 Based on the draft Bill of 11 November 2011.

Table 7 **Responsibility for providing the necessary information to commence negotiations (cont.)**

	Providers of the information	Content of the information	Who is informed?
Norway	Management in each establishment	As in the Recast Directive	Employees' representatives
Poland	As in the Recast Directive	As in the Recast Directive	Special negotiating body
Portugal	No provision	No provision	No provision
Romania	As in the Recast Directive	As in the Recast Directive	Employees or their representatives, central management
Slovakia	As in the Recast Directive	As in the Recast Directive	Parties concerned
Slovenia	As in the Recast Directive	As in the Recast Directive	Workers concerned or their representatives
Spain	As in the Recast Directive	As in the Recast Directive	Parties concerned
Sweden	As in the Recast Directive	As in the Recast Directive	Employees
United Kingdom	As in the Recast Directive	As in the Recast Directive	Employees or their representatives

Source: Author's compilation, 2015.

should be addressed to. However, the 'parties concerned' are supposed to be those who are at least entitled to request the opening of negotiations, namely employees and their representatives. According to the trade union guide to Directive 2009/38/EC, based on Art. 5.2 c) and 5.6, the relevant European industry federation may also be regarded as a 'party concerned' by the application of the Directive, 'as they are to be now informed of the composition of the SNB and the start of negotiations' (Picard 2010a).

How is this obligation to provide information about workforce distribution and company structure, which is necessary for commencing negotiations, transposed? Analysing national legislations, it is particularly important to examine who is defined as the party responsible for providing the necessary information for negotiations to be opened, what the extent of the information to be provided is, who is entitled to ask for and receive information and the timing.

Portugal is the only country without direct transposition of the provisions of Art. 4.4 of the Directive. There is only one very general statement in the legislation according to which 'the central management shall promote negotiations for the establishment of a European Works Council or an information and consultation procedure'. Portuguese law No. 696/2009 of 3 September 2009 also adds that 'the employees or their representatives may express the wish to initiate negotiations to the central management or to the managements of the establishments or undertakings in which the employees are employed, who will in this case forward this to the central management'. Of course in light of the ECJ cases, national law should be interpreted in a way that authorised employees or their representatives to ask their management for the necessary information for commencing negotiations. However, on this point the Portuguese legislation is not in conformity with the Recast Directive as it does not explicitly oblige the management to provide such information to workers.

All the other member states have implemented Art. 4.4 of the Recast Directive, often by means of reproducing its wording, without taking the opportunity to refine how this information should be given, in what form (what documents, data and so on), to whom and whether, for example, employee representatives have the right to request additional data or documents. For example, Belgium, Cyprus, Italy, Malta, Slovenia and Spain merely copied Art. 4.4.

With regard to identifying the party obliged to provide the information, in most countries the central management and the management of each undertaking belonging to a group of undertakings are identified as the entities in charge of obtaining and transmitting the information to workers and/or their representatives. Some countries, however, such as Denmark, designate central management as the only body responsible for obtaining and conveying the information. Such a limitation (omission of provisions imposing a similar duty on local managements) of the obligation to provide information is unjustified and has consequences for the practical effectiveness of the exercise of workers' rights. Therefore it cannot be considered a proper transposition.

The situation is even more complex regarding the definition of who is entitled to ask for and receive the information. As in other instances, many countries merely reproduce the wording of Art. 4.4 and indicate the '*parties concerned*' without further definition as those eligible to request this information from management. On one hand, it leaves this category open and thus, potentially, inclusive; however, at the same time such undefined terms decrease legal clarity and certainty. In this sense, the lack of definition of 'parties concerned' does not contribute to the clarity of the text for the national employees and workers' representatives who will claim its application and might even prevent them from pursuing their rights in court altogether. On the other hand, it is not sure that the interpretation of this category will be the same in every country, which exposes the Directive to incoherent application, which is a particularly acute problem in the case of *transnational* rights to information and consultation.

Those countries that have specified the 'parties concerned' have not transposed this provision in exactly the same manner. For most of them, the information can be requested by the employees of the group of undertakings and their representatives. Regrettably (and contrary to the spirit of Art. 5.2 (c) of the Recast Directive), no member state has explicitly granted trade union organisations – either national or European trade union federations – the right to request information from management. In some countries, such as Sweden and Denmark, only employees seem to be entitled to request the information. In others, only employees' representatives are mentioned, which seems far too restrictive and unjustified or unfounded by the Directive itself. Only in Luxembourg may employees receive the information directly if there are no employees' representatives. National legislation in Bulgaria and Poland seems not to have understood the meaning of Art. 4.4 at all. In these two countries, the special negotiating body is designated to receive the information concerning the structure of the undertaking or the group and its workforce, which contradicts the basic idea that information on workforce distribution and company operations is necessary *prior* to setting up of an SNB at the very early stage of considering preparation of a request for negotiations. The purpose of Art. 4.4 of the

Recast Directive is to find a solution to a practical problem raised in the course of applying the 1994 Directive. Experience has shown that it may be difficult to know whether an undertaking is covered by the Directive or not. Therefore Art. 4.4. allows '*the parties concerned*' to ask for information in order to analyse whether a group of undertakings within the meaning of the Directive exists. In that respect, requests for information and requests to initiate negotiations must be distinguished and differentiated by national law. At the point of making an enquiry about workforce distribution and company structure, the SNB has not yet been constituted. To restrict the right of information to the SNB is thus against the sequence of actions in practice as well as against logic and not in line with the Directive.

Regarding the extent of the information to be provided, despite the varying wording of the various legislations, all member states require the management of the undertakings of the Community-scale group to provide information on the structure of the undertaking or the group and its workforce. Only Lithuania specifies in more detail the obligation to provide information and extends the management's duty to deliver it in the form of a detailed list. Lithuania also specifies the procedure to be followed by the management. According to the Lithuanian law,

> 'at the request of employee representatives, the central management or any other level of management must, within 30 days, submit information on the structure of the European Union-scale undertaking or European Union-scale group of undertakings, the undertaking's legal status, the procedure for representation, information on employee representatives that will represent the employees of the undertakings or the undertakings controlled by them.'

The information shall be made available to employees' representatives free of charge and in writing. A delay of 60 days is also given where the central management is located in Lithuania and must answer a request from an undertaking outside Lithuania.

3. Role of the social partners

The Recast Directive for the first time in the history of EWCs recognises the role played, in practice, by EU-level trade union organisations,[5] which have often been indispensable actors in setting up EWCs. According to Recital 27 'Recognition must be given to the role that recognised trade union organisations can play in negotiating and renegotiating the constituent agreements of European Works Councils, providing support to employees' representatives who express a need for such support. In order to enable them to support workers in the establishment of new European Works Councils and promote best practice in course of negotiations, competent trade union and employers' organisations recognised as European social partners shall be informed of the commencement of negotiations.

5 Mainly sectoral, the so-called European trade union federations that have been providing extensive organisational, expert and practical support in the process of setting up EWCs, as well as throughout their operation.

With regard to eligible actors acknowledged by the Recast Directive it stipulates that 'Recognised competent European trade union and employers' organisations are those social partner organisations that are consulted by the Commission under Art. 154 of the Treaty. The list of those organisations is updated and published by the Commission' (Recital 27). Two provisions of the Recast Directive concretise the role of trade unions in setting up an EWC. First, Art. 5.2.c. provides that '[t]he central management and local management and the competent European workers' and employers' organisations shall be informed of the composition of the special negotiating body and of the start of the negotiations'. The information of both employers' and workers' organisations at the starting of new negotiations to establish EWCs has been introduced to improve the monitoring of the constitution of EWCs via the social partners, instead of an administrative registration mechanism. This information should also allow the social partners to promote the dissemination of the best practices they have identified to the parties starting negotiations to establish new EWCs (European Commission 2008). In order to achieve this objective and respect the spirit of the Directive it is obvious – but worth mentioning – that information about the commencement of negotiations should be provided prior to launch; otherwise, it will have a purely informative or symbolic value, but will be meaningless from the point of view of practice. Second, Art. 5.4. of the Recast Directive explicitly recognises that the experts, who can be freely chosen by the SNB to assist it during the negotiations, can be trade unions representatives from a competent recognised Community-level trade union organisation.[6] Central management cannot oppose the presence of experts as long as they have been invited by the SNB. Here again, the idea is that trade union experts can provide advice and guidance in the negotiations and contribute to the establishment of an EWC.

If we look at the national legislations transposing the Recast Directive at first it seems that transposition of Art. 5.4. did not raise any problems for the member states. Most member states have explicitly recognised the right of the SNB to call in experts, who can be representatives of a competent recognised European trade union organisation. Only Sweden and Norway do not make any reference to trade unions among the experts the SNB can choose. In Germany, trade union representatives are designated as possible experts, but the German law does not indicate that they could be European trade union representatives, although it does not seem to exclude the latter. The fact that national laws in any case offer the possibility for the SNB to choose the expert they want leaves it open for the SNB to opt for trade union experts. However, the aim of Art. 5.4 of the Recast Directive is also to give an incentive for the SNB to include European trade unions representatives in the negotiations, implicitly, for the sake of improving the right to information and consultation (Art. 1 of the Directive). This element is missing in these three countries.

In all the other member states, Art. 5.4 seems to have been correctly transposed; in other words, it has respected the minimum requirements of the Directive. Only

6 Art. 5(4) states that 'For the purpose of the negotiations, the special negotiating body may request assistance from experts of its choice which can include representatives of competent recognised Community-level trade union organisations. Such experts and such trade union representatives may be present at negotiation meetings in an advisory capacity at the request of the special negotiating body'.

Table 8 **Right to information about company structure and the launch of negotiations**

	Who is to communicate the start of negotiations?	To whom?	Information	Experts
Austria	Central management	Competent European workers' and employers' organisations and the competent Austrian statutory body representing the interests of employees	Composition of the SNB and start of the negotiations (without delay)	As in the Directive
Belgium	Central management	Local managements and the competent European workers' and employers' organisations	Composition of the SNB and start of the negotiations at the latest when the first meeting with the SNB is convened	As in the Directive
Bulgaria	SNB	Central management, management of the undertakings belonging to the group and competent European-level employees and employers' organisations	Composition of the SNB and start of the negotiations	As in the Directive
Cyprus	Not specified	Central and local managements, competent European workers' and employers' organisations	Composition of the SNB and start of the negotiations	As in the Directive
Czech Republic	Central management	Competent European workers and undertakings' organisations with which the European Commission discusses matters pursuant to Art. 154 of the TFEU	Composition of the SNB and start of the negotiations	As in the Directive
Denmark	Not specified	Central management, local management and the competent European workers' and employers' organisations	Composition of the SNB and start of the negotiations	As in the Directive
Estonia	SNB	Central management, the competent European workers' and employers' organisations (list is published by the EC), the undertaking whose employees are represented by the member	no	yes
Finland	SNB	Central and local managements, competent employee and employer organisations at European level	Composition of the SNB	Experts of its choice, for example representatives of competent employee organisations at European level

Table 8 **Right to information about company structure and the launch of negotiations (cont.)**

	Who is to communicate the start of negotiations?	To whom?	Information	Experts
France	Central management	Local management, employee and employer organisations consulted by the Commission	Composition of the SNB and start of the negotiations	Experts of its choice, among others the representatives of European employees' organisations consulted by the Commission
Germany	Central management	Competent European trade unions and employers' organisations	Composition of the SNB and start of the negotiations	Experts and trade union representatives
Greece	Not specified	Central and local managements, competent European workers' and employers' organisations	Composition of the SNB and start of the negotiations	As in the Directive
Hungary	Central management	Leaders of all undertakings of the group, representative organisations of employees and competent European organisations of employees and employers (e-mail addresses published on the website of the government)	Names, addresses of the members of the SNB, commencement of negotiations	As in the Directive
Ireland	SNB	Central and local management	Composition of the SNB and start of the negotiations, in writing as soon as possible	As in the Directive
Italy	Trade unions	Competent European workers and undertakings' organisations with which the European Commission discusses matters pursuant to Art. 154 of the TFEU	Composition of the SNB and start of the negotiations	As in the Directive
Latvia	SNB Central management (or SNB if agreement)	Central management Local management and relevant European employers' and workers' organisation	Composition (immediately)	As in the Directive
Lithuania	Employees' representatives Central management	Employees representatives	Name, surname of the member of the SNB, name of its undertaking, position and contact address Composition of SNB	As in the Directive
Luxembourg[7]	Not specified	Central and local management and relevant European employers' and workers' organisations	Composition of the SNB and start of negotiations	As in the Directive

7 Based on the draft Bill of 11 November 2011.

Table 8 **Right to information about company structure and the launch of negotiations (cont.)**

	Who is to communicate the start of negotiations?	To whom?	Information	Experts
Malta	– Ballot supervisor – Not specified	Central and local management and the competent European workers' and employers' organisations Central and local management and the competent European workers' and employers' organisations	Formal results of the process of nomination and ballots held to appoint the SNB, as soon as possible within the month after the composition of the SNB Start of the negotiations	As in the Directive
Netherlands	Central management	Authorised and recognised employee organisations at Community level, as provided for in Art. 154 of the Treaty	Composition of the SNB and start of negotiations	Experts of its choice including representatives of competent recognised Community-level trade union organisations (as provided for in Art. 154)
Norway	SNB	Central management	Composition of the board	No reference to trade unions
Poland	SNB Central management	Central management European workers' and employers' organisations which the European Commission consults under Art. 154	Elected members of SNB	Experts of its choice, including representatives of Community-level trade union organisations
Portugal	SNB	Competent European workers' and employers' organisations and central management which shall inform the local management	Composition	Experts of its choice, particularly representatives of corresponding workers' organisations recognised at Community level
Romania	Not specified Central management	Central management Local managements and competent European organisations of employees and employers which are consulted by the European Commission pursuant to Art. 154	Composition of SNB and start of the negotiations	Experts of its choice including representatives of competent recognised

Table 8 **Right to information about company structure and the launch of negotiations (cont.)**

	Who is to communicate the start of negotiations?	To whom?	Information	Experts
Romania (cont.)				(cont.) Community-level trade union organisations (as provided for in Art. 154)
Slovakia	SNB Central management	Central management and employers concerned Relevant European organisations of employees and employers which are consulted by the European Commission pursuant to Art. 154	Composition of the SNB Composition of the SNB and start of the negotiations	Experts including representatives of recognised European organisations of employees
Slovenia	SNB Central management	Central management	Name, addresses of the members of the SNB, their establishment, start of the negotiations	Expert of its choice including representatives of trade unions at member state level
Spain	SNB Central management and SNB	Central management Local managements and the competent European employees' and employers' organisation	Composition of SNB Composition of SNB and start of negotiations	As in the Directive
Sweden	Undertaking	Local undertakings and competent European employees' and employers' organisation	Composition of the SNB and when the negotiations are to be initiated	Experts of its choice
United Kingdom	SNB	Central and local management and the European social partner organisation	Composition of the SNB and the date they propose to start the negotiations	Experts of its choice which may include representatives of European trade union organisations

Source: Author's compilation, 2014.

one difference can be noticed among the countries. Most of them have just copied Art. 5.4, which makes reference to the 'representatives of competent recognised Community-level trade union organisations' without providing any more precision or detail on their characteristics. Only Romania and the Netherlands specify that those competent organisations are the ones consulted by the Commission under Art. 154 of the Treaty on the Functioning of the European Union.

The transposition of Art. 5.2.c has left more room to member states, particularly with regard to designation of the entity obliged to communicate to the competent European workers' and employers' organisations the composition of the SNB and the start of the negotiations. The origin of this interpretational freedom is the imprecise wording of Art. 5.2.c ('shall be informed of the composition of the special negotiating body and of the start of the negotiations'), which, by using a passive form, does not indicate precisely who should be responsible for providing this information to the specified addressees (nor when the information should be provided – before or after the launch of negotiations). One group of countries has merely reproduced – copy-pasted – the formulation of the Recast Directive (Cyprus, Denmark, Greece, Luxembourg, Malta, Romania). It could be questioned whether this can be qualified as proper transposition of the Directive and whether such transposition really meets the criterion of effectiveness with regard to the involvement of European organisations. Who is going to give this information when the national law does not clearly identify who shall be responsible for transmission? Against whom will the violation of this right be enforceable if no entities have been indicated by law? Of course, one might consider that if the information must be given to the central and local management and to the European organisation, only the SNB could give the information, but such an interpretation entails many practical problems, such as whether the means necessary to comply with this obligation are available to the SNB. In any case, clear identification of the entity responsible for the information in the Recast Directive would have contributed to better effectiveness of this provision. Under the current circumstances the responsibility is on national authorities to be specific and clarify the meaning of this provision so that it is usable in practice and not just an unclear legal provision.

In a second group of countries, it is the SNB that is made legally responsible for the transmission of the information to the management and to the competent European workers' and employers' organisations (Bulgaria, Estonia, Finland, Ireland, Norway, Portugal and the United Kingdom).

For a third group of countries, the information shall be provided by the central management (Austria, Belgium, the Czech Republic, France, Germany, Hungary and the Netherlands).

Finally, in the fourth group of countries a distinction is made depending on the information and/or the entity that will receive the information. For example, in Italy trade unions must inform the central management of the composition of the SNB and of the start of the negotiations and it is up to the central management to transfer this information further to European employees' and employers' organisations. In Latvia, the SNB must inform the central management of its composition immediately before its constitution. Then, the central management shall inform the local managements of the establishment and composition of the SNB and of the start of the negotiations. The central management shall also provide this information to the relevant European employers' and workers' organisations unless the central management and the SNB have agreed that the latter will provide it. Some similar, yet slightly differentiated configurations exist in Lithuania, Malta and Poland.

The transposition of Art. 5.2.c of the Recast Directive highlights some shortcomings and lacunas of the Recast Directive itself reflected in the above varying interpretations of this provision by national transposition laws. First, because the central management is responsible for the constitution of the SNB and it shall negotiate with it why should it then be the recipient of the information on the composition of the SNB and of the start of the negotiations? Second, the Article does not specify which competent European workers' and employers' organisations are to be informed. Only Recital 27 indicates that these organisations are those social partner organisations that are consulted by the Commission under Art. 154 of the Treaty. However, most countries merely reproduce Art. 5.2.c without giving any more indication of which organisations are at issue. In practical terms, the entity obliged to transmit the information could find it difficult to identify those to whom they should address the information[8] and, consequently, in respecting the *effet utile* and standard of the Directive. Some countries, such as the Czech Republic, the Netherlands, Poland, Romania and Slovakia, have transposed Recital 27. Finally, only Hungary mentions in the law that the minister responsible for employment policy shall publish the e-mail addresses to which the information must be provided on the official government website.

Finally, despite the fact that all the member states provide that the European social partners shall be informed of the composition of the SNB and of the start of the negotiations, only a few national laws provide for extended scope of information to be transferred and specify the timing of the information. For example in Estonia and Hungary, the names and contact details of the members of the SNB also have to be given. In Estonia and Slovenia, the information must include the name of workers' undertaking and their position. In Belgium, the information must be given at the latest when the first meeting with the SNB is convened, in Estonia, without delay and in Ireland, in writing and as soon as possible. In other member states it is unclear when and what content (detail) of information should be transmitted to the competent European social partners. Such an omission on the part of the member states goes against the requirement of effectiveness of European law and thus cannot be considered proper transposition of the Directive, both in principle and for practical reasons.

4. Agreements in force and the adaptation clause

Articles 13 and 14 of the Recast Directive deal with the so-called 'adaptation clause' which makes it possible to renegotiate existing agreements in case of significant structural changes in a company. As Recital 40 of the Preamble explains, this 'adaptation clause' was put in place in order to guarantee that in cases of merger, acquisition or division of a European-scale undertaking the existing European Works Council(s) could be adapted and continuity of operations ensured. Because restructuring is a permanent reality of multinational companies EWCs are constantly

8 Admittedly, more precision was provided in the Expert Report on transposition (European Commission 2010a: 10), which gave email addresses and websites. However, this document has no binding value and was drafted not for SNBs or management, but for national authorities responsible for transposing the directive. Therefore it cannot be considered a valid solution to the problem.

confronted with this phenomenon (ETUC and ETUI 2010). Therefore these provisions represent a very important improvement of the Recast Directive and, to achieve their full effectiveness, must be read together.

In the 1994 Directive one lacuna became rapidly apparent: the absence of any provisions to deal with the very frequent occurrence of a change in the structure of a Community undertaking or group of undertakings. Possible adaptations of the EWC caused by, for example, a change in the scope of operations of the undertaking was not foreseen. The new Recast Directive, on the other hand, obliges parties to EWC agreements to introduce a clause on that issue (Art. 6(2)(g)) in order to provide for a procedure for such a possibility. At the same time, in the absence of an agreement, a standard fall-back solution is envisaged: the central management shall initiate negotiations to reach a new agreement (Art. 13). Three cumulative conditions are to be met for Art. 13 to apply :

– a significant change in structure;
– absence or conflicting provisions in applicable agreements to carry out the required adaptation;
– an initiative of central management or a written request by 100 employees or their representatives from two members states establishing the need for it.

In this case, the central management shall initiate the negotiations and at least three members of the existing European Works Council or of each of the existing European Works Councils shall be members of the special negotiating body (SNB), in addition to the other members. Art. 13 of the Recast Directive adds that 'during the negotiations, the existing European Works Councils shall continue to operate in accordance with any arrangements adapted by agreement between the members of the EWC(s) and the central management'.

Concerning transposition of these amendments of the Recast Directive our analysis showed that all the member states concerned have reproduced Art. 13 of the Directive almost without modification. Only the Portuguese legislation does not seem to provide that during the negotiations, the existing European Works Councils shall continue to operate, which again cannot be qualified as proper transposition. Otherwise, the only difference among the legislations is that some countries define or give some examples of what 'significant changes' could mean. For example, in Austria, 'acquisition, closure, limitation or relocation of undertakings, or establishments and the merger with other groups of undertakings, undertakings or establishments shall be regarded as significant changes, provided that they have a significant influence on the overall structure of the undertaking or group of undertakings'. Some examples of significant changes could also be found in Bulgaria (takeover, merger, division of the activity, change of ownership), Germany (merging of undertakings or groups of undertakings, division of undertakings or groups of undertakings, the relocation of an undertaking or group of undertakings to another member state or to a third country, or the closure of establishments where such action may have an impact on the composition of the EWC), Hungary (merger, acquisition of dominant influence or division), Latvia (merger, division, transformation) and Slovakia (merger, division).

An important general observation concerning the transposition of the provision on significant structural change is that national legislation provides a few only slightly differing examples, but never a broader – that is, going beyond mergers, acquisitions and take-overs – encompassing or more precise definition. This is regrettable because the catalogue of forms of significant structural change in contemporary companies is much broader than the three examples mentioned in Recital 40 of the Directive. At the same time, one should not forget that Recital 40 is not a closed catalogue (the wording 'for example' is used; see also (Picard 2010a)) and therefore an expectation to provide more precision in course of transposition of the Directive in the member states is by all means reasonable and legitimate.

While the national transposition laws of Art. 13 reproduce the Directive mainly by copy-pasting its exact wording, analysis of implementation laws shows a more specific problem: reconciliation between Art. 13 and Art. 14 of the Directive.

Art. 14 of the Directive concerns application of the Recast Directive to agreements concluded before 5 June 2011, the date of the Directive's entry into force. According to Art. 14, the Recast Directive shall not apply to Community-scale undertakings or group of undertakings in which an agreement has been concluded under Art. 13 of 1994 Directive ('old Art. 13 agreements'), and to agreements concluded or revised between 5 June 2009 and 5 June 2011 ('interim agreements'). For the agreements concluded under Directive 1994 (between 22/09/1996 and 5/6/2009) and which have not been revised during the transposition period (from 5/06/2009 to 5/6/2011), the Recast Directive will govern the functioning of EWCs.

However, all agreements, whatever the date of their conclusion, must respect the adaptation clause.[9] Indeed, if Art. 14 stipulates that the obligations arising from the Recast Directive do not apply to interim agreements and old Art. 13 agreements, this is 'without prejudice to Art. 13'. According to this adaptation clause, the parties may be compelled to renegotiate their agreements. 'The adaptation clause is therefore likely to play a unifying role in the future. As the business environment is constantly changing, one can logically expect that old "Art. 13 agreements" will over time have to be renegotiated under the terms of the new EWC Directive, thereby unifying the applicable regimes to EWCs throughout Europe' (Picard 2010b). Moreover, one can also consider that the new definitions of information and consultation and transnationality also apply to every agreement establishing EWCs or an ICP.

It is obvious that the system defined by the Recast Directive is a complex one and the transposing national legislations are also complex. Many countries have more or less reproduced Art. 14 of the Directive, but only Austria has correctly embraced the logic and ensured the genuine effectiveness of Art. 14 by explicitly providing that the definitions of information, consultation and transnationality shall apply to all agreements concluded, irrespective of their date of conclusion. On the other hand, some countries seem not to have transposed Art. 14 (Bulgaria, Greece, Romania and Slovenia) at all and other member states do not seem to impose the application of the adaptation clause on agreements exempted from the application of the Recast

9 Art. 14 starts with the words 'Without prejudice to Article 13'.

Directive (Malta, Norway), which is contrary to the objective of the Directive. Generally speaking, the national laws on transitional provisions are complex and not easy to understand and they are likely to cause difficulties in practical application and interpretation. Therefore the European Commission needs to evaluate whether such patchwork and potentially problematic implementation of the Directive can be accepted as proper transposition.

5. Conclusions

If one classifies transposition of the Directive as the mere presence or reproduction of the original provisions in national law then it could be concluded that most of the member states have indeed implemented the provisions of the Recast Directive on the establishment and adaptation of a EWC. Of course, some small differences can be found between the European text and the national texts and sometimes the national legislation seems not to conform to the Directive. This is the case, for example, with regard to the Portuguese legislation, which does not explicitly implement Art. 4.4. In most instances, any differences could be resolved by an interpretation of the national text in light of the Directive.

Nevertheless, even if applying only the criterion of the presence or absence of provisions the implementation of the Recast Directive into national systems also highlights some of its defects or lacunae. For example, although the Directive provides that the competent European workers' and employers' organisations shall be informed of the composition of the SNB and of the start of negotiations, it does not specify who should be responsible for providing the information. Many member states have merely reproduced the Directive without clarifying this point. Very often, member states have preferred to copy the text of the Recast Directive, complete with its uncertainties. While it can be justified that the Recast Directive remained general on some points in order not to be too prescriptive and intrude into national legal systems and traditions the same explanation cannot be applied to the implementation laws at national level. The copy-paste approach quite common among the member states in this area has the potential to weaken or impair altogether the effectiveness of the Recast Directive, especially when workers and their representatives are not aware of the European legislation.