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What are the European Works Councils and the new Directive 2009/38?

1. WHAT ARE THE EUROPEAN WORKS COUNCILS (EWC)

EWC are employees' representation bodies in multinational companies with the restricted scope of information of employees in multinational companies and consultation with central management of the multinational company.

Existing EWCs have been established according to the provisions of Directive 94/45 EC (in the case of Greece according to Presidential Decree 40/96). Already there is the recast Directive 2009/38 EC.

The recast Directive is based on article 27 of the Charter of Fundamental Rights of the European Union. The purpose of this Directive is "to improve the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings" (article 1 paragraph 1 of the new Directive).

A EWC is established in the case a multinational company (Community- scale undertaking) employs at least 1000 employees in two Member states and at least 150 employees in each of at least two Member states.

As a general approach, in order that a EWC is established, this has to be asked by the employees' representatives of at least 2 Member states. Following that, there is a negotiation procedure between the employees' representatives and the central management aiming at concluding to an Agreement that will establish the EWC. The Agreement refers to the way

the EWC operates (e.g. the number of times the EWC meets with the central management per year, the kind of subjects that are discussed in the meetings etc.). In the case that the central management does not conclude with the representatives with the employees on the establishment of a EWC, then the EWC is established following the subsidiary requirements of the Directive.

In the case that the Community- scale multinationals are situated in another Member-state except Greece, Greek representatives are called to participate in the procedures of establishing the EWC (in the Special Negotiating Body, which negotiates with the employer the agreement of establishment of the EWC), or after the establishment of the EWC, to participate in it (participation in the meetings, consultation with central management etc.)

2. TRANSPOSITION OF DIRECTIVE 2009/38 IN THE GREEK LAW

Most European Works Councils (EWC) have been established following the Directive 94/45 that has been transposed to the Greek Law through the Presidential Decree 40/97.

The Directive 94/45 has been recast with Directive 2009/38 that is more employee-friendly.

Two years or so ago, the Greek Ministry of Employment has established a Committee with the aim to prepare the transposition of Directive 2009/38 in the Greek Law. The draft Presidential Decree prepared had numerous anti-employee provisions.

Finally, the Ministry of Employment has proceeded to the submission of a bill (not a Presidential Decree) to the Greek Parliament. The bill has been voted by the Parliament and its provisions are included in the law 4052/2012 (articles 49-76). The final text of the law is very different from the initial text of the Presidential Decree.

OBES timely and in a valid way has emphasized on the issues to which the ministry had to pay attention to during the transposition to the Greek Law. Then it has underlined the anti-employee clauses in the draft Presidential Decree and its Managing Board has proceeded to the steps needed. Finally, it has underlined the points that have to be changed in order to improve the provisions of the transposition Law, following the spirit of the Directive.

The whole history of the transposition of Directive 2009/38 to the Greek Law and related documents are available on the site www.obes.gr.

3. EUROPEAN UNION AND EWCs

After ten years' operation of the institution of the EWC since 2005, the European Union (European Parliament and Commission) has studied in depth the institution and made changes to Directive 94/45 by introducing the new Directive 2009/38 in order to modernize the European legislation and making the exercise of the rights of workers on information and consultation more effective, as it is mentioned in recital 7 of the introduction of the new directive.

As shown in the following many institutions have promoted the recasting of Directive 94/45.

In particular, in the resolution A5-0282/2001 the European Parliament stated that "whereas the interests and concerns of employees can only be taken into account at a time of restructuring if the information and consultation is in good time and adequate; whereas there has been a number of highly-publicised cases in recent months where this was not the case, and workers learnt of a major restructuring in their company through the press and/or after decisions on restructuring were already taken; whereas employees must be able to exercise their rights to information and consultation at the appropriate stage of the process"

In the opinion of the European Economic and Social Commission on 4/12/2008 entitled "Proposal for a European Parliament and the Council establishing a European Council Workers or a procedure in Community-scale undertakings Community scale for the purpose of informing and consulting the employees "it is stated that:

"In order to make EWCs work more efficiently and enable them to better fulfill their function in undertakings, a recast EWC Directive should at least encourage an increase in options for holding meetings; it should explicitly recognise that the legal standards are to be considered as minimum standards and that states can therefore, on any point, always set better ones when transposing the Directive into their national laws.. "

The summary of the Impact Assessment of European Commission to the European Parliament COM (2008) 419 final SEC (2008) 2166 stated:

" The effectiveness of transnational information and consultation rights is not ensured, particularly as existing EWCs are not properly informed and consulted in over half of restructuring cases and, moreover, the take-up rate of EWCs is still relatively low and has not increased in recent years;

- There are legal uncertainties giving rise to shortcomings in the application of the Directive and entailing costs and delays, particularly in cases of mergers and acquisitions and as regards the interplay between the national and European levels of information and consultation,

- The concepts of information and consultation in the 1994 EWC Directive differ from those contained in the most recent Directives in the field of workers' information and consultation, and there are no clear rules for the interplay between these directives."

Also in the same document, the revised Directive on the EWC following objectives:

"To ensure the effective exercise of rights to information and consultation of workers across borders to existing EWCs;

to increase the pace of establishing European Works Councils (the percentage of newly created EWCs in relation to the number of firms fall within the scope of the Directive);

to ensure legal certainty regarding the establishment and operation European Works Councils;

to ensure greater consistency and better coordination between Community legal instruments in the field of employee information and consultation with them. "

4. IMPROVEMENTS IN THE NEW DIRECTIVE

The new Directive 2009/38 has the following advantages for employees compared with the old one.

1. **Definition of the term “information”** The old Directive did not have any definition of the term information. The new Directive says *‘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.* It is obvious that, with the new Directive information get substantial and has to cover specific requirements, which is beneficial for employees.

2 **The definition of the term “consultation” is much improved.** Consultation means according to the Directive *“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”.*

Following the new definition there are two serious issues. First when consultation starts and second how (that is whit which procedure) consultation takes place.

As far as the first issue is concerned, consultation has to **start before the management makes a decision** that is adverse for employees. In simple words to give a characteristic example, if the management declares its decision to close two companies in two countries or to transfer production from one country to another and after that calls employees for consultation, then this procedure is not legal according the Directive. **Consultation has to precede decisions.**

Usual employer practice though is first to decide and then say to the employees “come to consultation”. This is a very critical point and trade union movement should concentrate on it in order to ask courts to declare these decisions made without prior proper consultation void. We will revisit this issue later when we will examine sanctions imposed to employers when violating the Directive.

A second issue is how to perform consultation. It is obvious that employers seek a “superficial” consultation. In practice during consultation, they seek to present to the employees a generic powerpoint presentation, to distribute them a balance sheet and to tell them that there are problems to the company due to crisis. This kind of consultation, though, is against the spirit and the letter of the Directive. What should be done is first to give to the

employees appropriate data, then to allow them sufficient time to examine these data in depth, possibly with the assistance of experts, and finally to express their opinion, which **may be taken into consideration during decision making**. On this matter, that is to say which data should employees ask and how should consultation take place there is still much to do. Additionally, we have to stress the fact that except the Directive 2009/38 there is also the Directive 2002/14 (P.D. 240/2006) that refers to the obligation of employers to undertake consultation with employees at national level. Article 4 of the Directive 2002/14 (P.D. 240/2006) says that consultation takes place “with a view to reaching an agreement on decisions within the scope of the employer's powers”. If the way it is applied, consultation either at European or at national level becomes a typical and inefficient procedure as far as the interests of employees are concerned, then the impact on employees will be negative. OBES assists its trade union members providing them with specialized help on this matter.

On the other hand, substantial consultation procedure is one of the provisions of the subsidiary requirements of the new Directive as well. Subsidiary requirements are applied in the case employer and employees do not conclude to an agreement on the establishment and the way the EWC will work. In this case the EWC is established following the subsidiary requirements, regardless the will of the employer. The new Directive in its subsidiary requirements has three provisions:

a) the subjects on which employees **should be informed**

b) the subjects on which employees **should be informed and consulted** by their employer

and c) the right of employees to take a **justified answer on the questions they raise to their employer**.

In paragraph 1 a) of the subsidiary requirements it is preview:

“The information of the European Works Council shall relate in particular to the structure, economic and financial situation, probable development and production and sales of the Community-scale undertaking or group of undertakings. The information and consultation of the European Works Council shall relate in particular to the situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies.

*The consultation shall be conducted in such a way that the employees’ representatives can meet with the central management and **obtain a response, and the reasons** for that response, to any opinion they might express”.*

3. A better definition of what is a “**transnational matter**”. The new Directive previews, as did the old Directive before it, that EWCs handle only matters. Transnational are the matters that concern employees in at least two countries. However, the new Directive in its recital 16, defines as transnational as well matters “*which, regardless of the number of Member States involved, are of importance for the European workforce in terms of the scope of their potential effects or which involve transfers of activities between Member States*”. Conclusions

are reasonable. It has to be noted here that although in the text of the bill recital 16 was included in the definition of consultation, this has been erased in the final text of Law 4052.

4. Obligation of the EWC members to inform trade unionists and employees of each country on the results of information and consultation with the employer (article 10 paragraph 2 of the Directive). The employer is also obliged to provide EWC members with the means “the means required to apply the rights arising from this Directive, to represent collectively the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings” (article 10 paragraph 1 of the Directive). This may be interpreted that the EWC may even go to court the employer, if he does not follow the law, and the legal costs have to be covered by the employer. It is clear that the EWC members have more rights with the recast Directive. Additionally it is noteworthy that the new Directive previews that in the EWC agreement should be stated the link between information and consultation at European level between the EWC and the employer and information and consultation at the national level between the national trade union and the national employer (article 12 of the new Directive). The recast Directive in recital 37 previews that the EWC has to be informed at the same time as the national employee representation bodies about changes that concern the employees.

5. Possibility to the Member states to preview, “**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 arising from this Directive” (recital 36 of the new Directive). Correctly the European Commission urges the Member States to adopt serious sanctions for employers that infringe the agreement. Unfortunately Member states have not done so. OBES had proposed that the following two paragraphs are included in the respective article of the transposition law, which however have been omitted in the text of Law 4052/12.

“In the case the central management does not provide the members of the EWC or the members of the selective committee the necessary information to fulfill the obligation for information and the preparation of potential consultation, or it provides wrong or incomplete information or refuses the obligation to conduct consultation, the EWC legally represented or the members of the selective committee have the right to appeal before the First Instance Court of the central administration office and request through an application is discussed at the time of interim measures, to be provided with the information required on specific transnational issues and ask that the implementation of any decisions of the central management, concerning these transnational matters are suspended until the central management fulfils properly its obligation to consultation. The above application for interim measures is discussed in priority within fifteen (15) days. The central management has the burden of proving that it has properly fulfilled its obligation to information and consultation

In the case the central management infringes the requirement for an appropriate consultation and proceeds to the implementation of decisions relating to transnational matters, such decisions are subject to be void and can not be enforced against employees for modification or termination of individual contracts of employment. Similarly, those decisions do not constitute a legitimate reason for terminating collective bargaining agreements”.

If a similar provision was adopted in the PD 240/2006, which constitutes the transposition of EU Directive 200/14 " establishing a general framework for informing and consulting employees in the European Community ", which states that the sanctions must be "effective, proportionate and dissuasive", then the position of workers, would be stronger in terms of information and consultation with the employer in today's difficult times.

6. Possibility of training of EWC members without their losing their payment.

The recast Directive has other improvements, as the possibility to renegotiate standing agreements, the continuation of EWCs even in the case of serious organisational changes, as mergers etc., the participation of federations in the procedure of establishing the EWC etc.

5. OBES AND EWCs

Our Federation has members, company-based trade unions of big companies such as SIEMENS, HEINEKEN, SELMAN, BIKH, Kreas Thraki, EBZ, AKRITAS, ΤΟΣΟΗ ΚΑΜΠΙΑΣ, AGET HERAKLIS, AVEX, EAS(EBO), MARMARA KYRIAKIDI etc. During the past years OBES tries to improve the legislation about the EWCs and to inform and train Greek trade unionists through its publications, its site www.obes.gr, conferences, training workshops for trade unionists and interventions to the Ministry of Employment. Aim of this effort is that trade unionists know the possibilities and constraints of the institution of EWC, in order that they are able to defend and promote better the interests of employees at a European level.

In order to improve communication, exchange of experiences and collaboration between trade unionists, OBES has organised recently in the framework of the project "New EWC Directive- New perspectives", financed by the European Commission, conferences and training of trade unionists in Greece and Romania and is going to organise a conference and training in Bulgaria.

The actual economic crisis, international context and globalisation demand close cooperation of employees and trade unions.