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CISL SEMINAR ON INVOLVEMENT OF THE SOCIAL PARTNERS IN EUROPE IN THE TRANSPOSITION OF DIRECTIVE 2009/38/EC INTO NATIONAL LAW

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The European works councils recast directive was adopted by the European Parliament at the end of 2008 and by the Council in April 2009. It came into force on 5 June 2009.

Contrary to European employers, ETUC did not agree to negotiate on the revision of the EWCs 94/45/EC directive. Nevertheless, the quick adoption of the recast directive 2009/38/EC was the consequence of social partner involvement through their joint advice to the Council and the European Parliament.

What are the main changes?

In a nutshell, the recast directive:

- Introduces a definition of “information”;
- Expands the definition of “consultation”;
- Provides for a definition of “transnational”;
- Requires that all EWC agreements define how European-level and national-level information and consultation processes are to be coordinated, and state how such agreements are to be revised in the event of organisational changes;
- Gives EWC members an entitlement to training;
- Recognises EWCs as the European-level legal representatives of all European employees;
- Sets out new requirements for the SNB process;
- Introduces an adaptation clause;
- Provides new and enhanced protection for Article 13 agreements;

Since 2009, company negotiations have occurred. The directive allows adopting or revising an article 6 EWC agreement in accordance with the 94/45/EC directive and without being bound to the new provisions of the recast directive.

In parallel, Member States have initiated national processes to transpose the recast directive in their national legal orders. Transposition is already finalised in Portugal, the UK, Belgium, Austria and Norway. By contrast, the transposition work is ongoing in a majority of EU Member States. It is likely that a number of them will need more time to conclude the transposition after the deadline of 5 June 2011 stated in the directive.



Social partners are closely involved in the transposition of the recast directive in a vast majority of countries. Nevertheless, their role varies. In some countries like in Belgium and in Norway, the recast directive is transposed by national collective agreements. In a majority of Member States, transposition is done by law with the close involvement of the social partners, typically through a tripartite working group of experts.

The transposition work at national level is influenced in a number of ways.

The European Commission has established a group of national experts which has produced a report on implementation of the recast directive at the end of 2010.

Moreover, given their role in the legislative process, European social partners were invited to participate to this work. We clarified a number of issues such as the way in which European social partners are to be informed about the launch of new company negotiations; or the status of existing agreements, in particular in relation to the adaptation clause in the recast directive.

Beyond this, European employers and trade unions and national governments may have different opinions on the correct interpretation of the recast directive, which may lead to different national transposition measures.

As for any European directives, Member States have to implement fully its provisions. Beyond this, they are free to adopt more detailed rules at national level or not. This is to be assessed by each Member State in consultation with national social partners, keeping in mind the fact that the directive aims to give priority to negotiated solutions at company level.

More concretely, several issues have emerged during the transposition process. A number of misconceptions need to be clarified to avoid that national transposition measures unduly reflect these misconceptions.

For example, it has been argued that:

- The new definitions of “information” and “consultation” would apply to all agreements after the transposition deadline of 5 June 2011, even where pre-existing EWCs agreements are still valid;
- Likewise, article 6 agreements concluded between 1996 and 2009 and not revised during the two-year period between 2009 and 2011 would be subject to the recast directive after 2011.

One of the key principles set out in recital 41 of the recast directive is that “the agreements in force should be allowed to continue in order to avoid their obligatory renegotiation when this would be unnecessary”. The directive gives priority to company solutions. This means that the definitions included in existing agreements will remain applicable until a new agreement is adopted. Likewise, the EWCs recast directive will only apply to article 6 agreements signed before 2009 when these agreements will come to an end, e.g. at the end of their validity if fixed-term, when new negotiations are



launched to adapt existing agreements in the case of restructuring, or if one of the two sides rejects the agreement and asks for new negotiations.

- The notion of “means required” in article 10.1 of the recast directive would include the possibility for worker representatives to take legal action against a company decision at the cost of the company;

Member States have some margin to interpret the notion of “means required to apply the rights stemming from this directive”, which was not clearly defined in the directive. However, article 10.1 cannot be interpreted as including a right on the part of EWCs to demand that companies fund legal challenges by EWCs where they believe that companies have failed to follow the procedures set in EWCs agreements. Rather, a reasonable interpretation of that provision would be to consider that the company should provide EWC members with the logistics necessary to exercise their duty (office space, computer, etc.).

To conclude, let me recall that the Commission’s aim, when launching the legislative process for the revision of the directive in 2008, was to make EWCs more effective in practice. Employers agreed with that aim. We consider that the EWC recast directive should be seen as a means to facilitate social dialogue at company level between employees and management. It is for each Member State to decide how best to achieve this goal in their respective countries.

Thanks for your attention.
