



A juridical analysis about the Directive's application

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In all speeches given so far we have somehow considered the Directive's good qualities, that is how many agreements were signed and how the established European Works Councils work: today's discussion will essentially consider this, that is, it will be a seminar in which each one will talk about the problems highlighted by the EWC he/she belongs to.

I will instead make a complementary statement to those just made, that will try to especially stress the European Works Councils' functioning faults – when explaining their “light and shade” – that is what doesn't work in the EWCs and their crucial points, from my most congenial point of view, of course - the legal one – pertaining to the binding mechanisms provided for by the Directive, in other words how the Directive on the establishment of the European Works Councils will be applied.

First of all I think that – more than from “light and shade” on the Directive's application – this statement should start from the fact pointed out by the European Commission's representative and by Claudio Stanzani too, namely about 700 agreements establishing the European Works Councils have been signed so far, representing about one third of the total companies or corporation groups included in the Directive's sphere of application. What about the other two thirds?

Let's suspend for an instant the discussion on the 700 EWCs already established and started up – which are supposed to work somehow – and let's consider about those which have not been established yet. Let's face it: from a certain point of view, trade unions too probably have troubles in starting negotiations with reluctant companies or corporation groups having a parent company we are not sure about, for the establishment of a special negotiating delegation. A short while ago, Claudio too said that in some cases it's difficult to track the mutability of corporation groups and companies selling their assets, divesting, restructuring. Therefore, it's very difficult to follow the evolution of the companies' structure and identify their core, their parent company, the one obliged by the Directive to establish the special negotiating delegation and to start the negotiations aiming at the signature of the agreement establishing a European Works Council, autonomously or on demand of the employees representatives or – for Italian groups – the trade unions who signed the collective agreements.

Already 9 years have passed since the Council Directive 94/45/EC of 22 September 1994 was approved, and 7 years since it came into force: therefore, enough time is passed, enabling us to critically examine the Directive. At the beginning, the voluntary method for the Directive's

application was pointed out because it was provided to preserve the agreements initialed either before the Directive's approval – as happened many times – or in the period between the Directive's approval and its transposition by the member States – before September 1996, then -, which could be active in an unregulated space; nowadays, after 1996, that space is not free anymore, and I remind everybody – maybe most of you already know – that the Directive is a binding juridical instrument, it's not a wish or a recommendation that the European Community addresses to the member States. It is a prescriptive act binding the member States above all, which are obliged to impose regulations for the Directive's national transposition (last year, Italy eventually somehow issued the Directive's transposition law, considerably late). But this act also binds those included in the Directive's sphere of application, that is companies or groups with more than 1,000 employees in the Community countries and at least 150 in two different member States, therefore the transnational ones, having branches in at least two different member States. Those companies are obliged to start negotiations with the special negotiating delegation in order to establish a European Works Council. Let's always keep in mind that the companies with those size thresholds are obliged to establish a European Works Council under the Directive. This latter provides sanctions for those who don't fulfill the obligations provided for by the Directive.

My few and quick remarks concern exactly this aspect: how to put into force the employees' or their representatives' rights provided by the Directive. Remember that the Directive's main aim is to improve the employees' information and consultation rights.

How can employees or their representatives call for the Directive's application? Firstly, on establishment of the EWC, as they have to call for it when the company is indisposed, or when it's not sure the company is included in the Directive's sphere of application because of its employees number, or when the company or group has a particular and complex structure which is not vertical, meaning with a well defined mother company and a number of clearly identified controlled branches.

We know sometimes it's very difficult to map the several changes in the corporation groups' structure: the Court of Justice intervened here, pronouncing a decision in one case – and it's going to in one more case. One of the two cases – both raised by German labor judges - is the Bofrost case, in which the group's structure was unclear because it was an horizontal group – with no parent company – in which all companies were equal parts of a corporative network, therefore it was difficult to identify the company in charge of the negotiation and the EWC establishment. The European Court of Justice – the European judge – stated than any company belonging to the group is obliged to provide the employees' representatives with the information about the group's structure they request.

In the Bofrost case, a German corporative trade union (Betriebsrat) asked the company for information about the total number of its employees in Europe and about its relations with other European companies, even if that was an horizontal group, with no parent company and no controlled companies, but all companies equally participated in the group. This is a typical strategy companies use for backing out of the obligation to implement the Directive. In the labor summon before the German judge the Bofrost company stated it wasn't the group's parent company, on the contrary there was no parent company because the various companies had equal contractual relationships. The group didn't have the traditional pyramidal structure, then.

The European Court of Justice – when delivering its judgment in 2001 – specified that any company belonging to a network (not vertical) group is obliged to provide information about the group's structure to the employees' representatives requesting it in order for the establishment of a European Works Council, the necessary documents – that is information not consisting in an exchange of words like, I ask you to give me information, you answer you are not obliged to – and information about the total number of the group's employees in Europe, either the group is horizontal or a network one.

This judgment is important because it can be appealed to by any employees' representative asking a company for useful information in order to know if it's possible to establish a European Works Council and getting a refusal from the above mentioned company.

It's clear that the Court of Justice's judgment integrates the Directive's provisions, in other words it's not like the opinion of any judge, which can be contradicted by any other judge. Now the Directive on the establishment of the European Works Councils has to be read in the light of the Court of Justice's judgment, which integrates the Directive's provisions on the preliminary information about the group's structure, to be given to the employees' representatives in order for the establishment of a European Works Council.

A similar case - raised by a German judge – is still pending at the Court of Justice.

On this question I would like to stress out that the employees' representatives of other countries are more able to call for the implementation of the European Community's Directives before the Community judge. Here in Italy, maybe because we didn't understand that we can call for the implementation of this Directive on a voluntary basis, we think that the implementation depends on a relation of forces. Please know that the Directive is not applicable in that way anymore, maybe it used to be so in an earlier phase, when it used to have a promotional function, and was aimed at encouraging companies to voluntarily establish European Works Councils. Now, after 7 years since the national transposition laws came into force, starting from 1996 we have the inter-union agreement implementing the Directive on the establishment of the European Works Councils, but we

have to admit that our national implementing rules turned out to be barely effective, that is not capable to ensure all that's provided by the Directive as the rights for the employees and their representatives.

As regards the implementing instruments' effectiveness, I remind you about the dispute settlement procedures provided by the 1996 implementing agreement and then reaffirmed by Law N. 74 of 2 April 2002, putting the Directive into effect. The social partners – employees' and employers' trade unions – claimed an important role as to the sanctioning procedures in case of non-fulfillment of the obligations provided by the Directive.

It's essential that they actively call for the execution of this Directive, because in any moment an employees' representative – even a foreign one – of an Italian group can ask a judge to assess the obligation for an Italian-parented company to establish a European Works Council or to grant for its functioning. I lingered over the EWCs' establishment but of course the sanctions must be applied to grant for their functioning too, therefore to undertake as much preventive information as possible because the Directive's aim is to be ahead the changes and not to give an account of what already happened. On this matter, we can ask ourselves how involved the EWCs have been before big changes occurred to big Italian companies which had already established a European Works Council. Secondly, consultation should take place by summoning a special meeting or the executive committee – when the European Works Council have a steering committee – or the whole European Works Council: every time a big change occurs, having a strong impact on employees – like collective redundancies, relocations, transfers or closure of establishments – consultation must occur shortly. The Directive was rather equivocal on this matter too, but the judiciary explained that consultation is effective only if it occurs shortly. If it occurs later, there is no way it can have any practical effect, like foreseeing the European Works Council's opinion on the consultation matter.

Let's remember that preventive information and early consultation – as stated by the Italian Directive transposition law – must be effectively urged before a company's decisions are taken or become definitive, precisely because the employees' representatives – the European Works Councils – need to be enabled to influence those decisions. Now, this is possible only if the EWC is preventively informed and consulted about the issue's exact terms.

I'll put aside all the far too evident problems concerning the information which must be complete and detailed, even if many EWC delegates complain about being overwhelmed by some companies with information in some cases and not being able to handle them all. Unfortunately, not all companies have this inclination.

I would like to give you a suggestion on this matter too: as in the Italian EWC model – that we think we should support at the European level too – the European Works Councils have a trade-union

background or at least they are more unionized than other countries' EWCs, it would be good for trade-union organizations to have a pool of experts in order to assist the European Works Councils. It's provided that each EWC can apply to an expert salaried by the company in order to read the information or to have his/her assistance during the consultation phases, which are highly critical phases in which a technically wise opinion is needed about the issues raised by the company. Maybe the idea of external assistance and support to EWCs by trade-union organizations wouldn't be wrong.

The last thing to do is to call for the Directive's application by having an active role in endorsing the establishment of dispute settlement technical commissions or arbitration committees provided for by the Italian law, as this latter primarily allows different methods for the Directive's application than can be called for in any case the Directive is not observed, for example when the company doesn't give the preliminary information for the establishment of a European Works Council – that is: they don't say how many employees they have, how many branches they have abroad, etc. – or it gives useless information to the EWC – once it is established – or it delays calling for it, or it doesn't consult it in the cases provided for by the Directive, etc. There are different ways for requiring the Directive's application. The easiest way would have been to appeal to a judge but, according to the Italian law, an arbitration committee must be interposed, that is a dispute settlement technical commission must be set up as the first instance in order to study the debated question in case the EWC contests the way the company provides or doesn't provide the information, or rates them as confidential, so that the EWCs – the recipients of these information – cannot transmit them to third parties; or - straight away - , the company doesn't allow the transmission of information which could severely harm the company itself.

What can EWC delegates do? They can encourage the establishment of a dispute settlement commission. Remember that this commission must be established in the EWC's same location and it is composed by three members: the first one is chosen by the European Works Council, the second one is chosen by the company's management and the last one is chosen by mutual consent. This commission has 15 days of time to study the debated question and to try to reconcile the social partners, then it can decide about the diligent conduct as to the Directive's application.

If the dispute settlement commission doesn't solve the question by not clarifying the company's obligations, it's possible to appeal to the Director General for Labor Relations at the Ministry of Labor, who has a quasi arbitral function, because he/she will be the one who will assess the facts and then direct the company to provide the information within 30 days and, in case of the company's non-fulfillment, will inflict an administrative sanction.

I remind you that timeliness is important, because information and consultation are useful only if they are quick; if they occur six months later, they are not useful anymore, they just are a moral satisfaction a posteriori. Hence, the respect for the deadlines is extremely important, so it would be useful to make sure whether the dispute settlement commissions – within 15 days – and the Director General for Labor Relations at the Ministry of Labor – within 30 days – are able to decide and assess how the company must behave.

Trade unions must clearly understand that the administrative sanction can have an important function, it can be a way to impose a fulfillment, but it cannot replace the company's fulfilling conduct. Therefore, when these procedures turn out to be uselessly stressful and don't succeed in imposing the company the conduct provided by the Directive, the last solution is an appeal to the labor judge through the procedure provided by Article 28 of the Workers' Statute of Rights, that is the repression of the anti-union conduct, which is the only measure assuring a short time for the issue of the judge's decision.

Timeliness is extremely important for the achievement of the conduct imposed by the Directive: in the Fiat case, if the EWC – which was not informed and consulted shortly but was called for a consultation when decisions were already taken and conveyed by newspapers to everybody including the EWC – carried out a conciliatory procedure and then a arbitration one, then again before a judge, it would undoubtedly risk having certainty of its rights and obtaining a favorable sentence many months later, that is when it's completely useless.

Please remember that these mechanisms are little and badly focused in this Directive, but better put into perspective in the 2002 Directive N. 14 on information and consultation in the national framework. We must not justify our weak activity by stating that the Directive on the establishment of the European Works Councils is rather weak as to sanctions: this is certainly true, but the 2002 Directive – to be implemented before March 2005 – will be much stronger. By that time it will be easier to have a coherent reference frame, because it would be odd if information and consultation in the national framework were made more pressing and imperative by powerful mechanisms and procedures, whereas they are left to the discretion of those who are obliged to fulfill those obligations at a transnational level.