

I. GENERAL PROVISIONS

STATE GOVERNMENT

**8777** *Law 10/2011 of 19 May amending Law 10/1997 of 24 April on the right of employees in Community-scale undertakings and groups of undertakings to information and consultation*

JUAN CARLOS I

KING OF SPAIN

To all those who read and hear this text

Let it be known: That the *Cortes Generales* (Parliament) has approved and I have sanctioned the following law.

PREAMBLE

I

The approval of Council Directive 94/45/EC of 22 September 1994 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 was the culmination of a chapter in the development of social Europe marked by a desire to make employees better equipped to participate in undertakings. The extraordinary importance of this Directive lies in the fact that it was intended to provide a social response to the reality of the internal market, one of the highest-profile aspects of which is the transnational presence of economic operators, as shown by and in a multitude of legal forms, such as concentrations or groupings of undertakings, cross-border mergers or takeovers and others, which demonstrate ever more clearly that strategic decisions by these transnational economic operators, which clearly have repercussions at national and local levels, are taken at decision-making centres elsewhere than the location of the traditional machinery for representing employees. Directive 94/45/EC was drafted and approved with the aim of adapting the procedures for informing and consulting employees laid down in national legislation and practice to this transnational structure for undertakings and harmonising the new legal and economic realities facing those undertakings with the right of employees to be informed and consulted. The achievements of the Directive, transposed into national law by Law 10/1997 of 24 April on the right of employees in Community-scale undertakings and groups of undertakings to information and consultation, were significant: for the first time, it declared the right of employees to the setting up of tools for information and consultation in a transnational context, as shown primarily by the establishment of one or more European Works Councils, the natural partner for which will be the central management of the Community-scale undertaking or group of undertakings; in addition, in transposing the Directive, Law 10/1997 focused on setting procedural standards to be followed in order to exercise this right, through a technique combining the literal transposition of the Directive with references to Spain's own institutions, rooted in Spanish law, as set out in the text.

Directive 94/45/EC made provision for machinery for its review and set a time limit of five years from the date of entry into force for carrying it out. Experience with information and consultation deriving from the application of the Directive is therefore of particular significance, as it has shown that application has not been as straightforward or as effective as was hoped. Through a long and complex review process within the European institutions, substantial amendments to the Directive have therefore been achieved, giving rise to what in Community legislative terms is known as the 'recasting' of the Directive.

## Sec. I. P. 50431

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, which carries out this recasting by amending Directive 95/45/EC, has given rise to a need to amend Law 10/1997 of 24 April on the right of employees in Community-scale undertakings and groups of undertakings to information and consultation. This Law therefore fulfils the mandate from the Community legislature, including new aspects incorporated in the Directive and amending those subject to review.

### II

The central thread of this review is the enhancement and consolidation of the objectives of employee information and consultation in Community-scale undertakings and groups of undertakings so as to make those processes real and effective, with a view to creating scenarios in which fruitful and mutually rewarding channels for dialogue are established between undertakings and employees. To this end, the revised Directive firstly includes a series of definitions which were either previously lacking or had not been given sufficient consideration. For instance, it includes a concept for 'information', inspired by Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, which Directive 95/45/EC does not. This is taken up in the new subparagraph 7 in Article 3(1) of Law 10/1997. Secondly, the concept of 'consultation' is reviewed, introducing teleological nuances to overcome the formal nature of the previous wording (new subparagraph 7a in Article 3(1) of the Law). In both cases, the intention is for the exercising of the rights to information and consultation to take place in good time and due form and, of course, before decisions are taken by undertakings, to make it possible for employees' representatives to have real and effective influence on undertakings' decision-making, without prejudice of course to the undertakings' inherent right to make decisions.

In addition, a definition of 'transnational matters' is incorporated (new subparagraph 10 in Article 3(1)) to enable an appropriate distribution of powers between the various levels of representation (transnational on the one hand and national and local on the other) so that matters relevant to each level are dealt with at that level and duplication is avoided, as reflected in the new Article 2(3). Moreover, this aspect requires the development and implementation of coordination machinery between the various levels of representation, and therefore this aspect has been included as forming part of the agreement referred to in Article 12(1)(d). In any event, in the absence of these coordination mechanisms or methods, the legal text lays down subsidiary standards, as defined in Article 31(3). All of this helps to ensure information and consultation for employees and their representatives at the relevant level of management and representation depending on the subject in hand, so that the competence and level of intervention of the European Works Council are clearly distinguished from those of the national representative bodies and confine themselves to transnational matters. It should be pointed out in this regard that, as set out in recital 16 of Directive 2009/38/EC, the transnational nature of a matter should be determined by taking account of three factors: 'the scope of its potential effects, and the level of management and representation that it involves. For this purpose, matters which concern the entire undertaking or group or at least two Member States are considered to be transnational. These include 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'.

## Sec. I. P. 50432

Other relevant aspects of Directive 2009/38/EC included in the present Law transposing it refer to the right of employees' representatives to receive training in relation to their tasks as representatives without loss of pay (new Article 28(4)); the possibility of holding follow-up and preparatory meetings without the presence of the undertaking (Article 11(2)); the presence of and advice from experts, who could be from a trade union, at the election of representatives (Article 11(3)), or the obligation of the undertaking's management to inform the European social partners of the opening of negotiations with a view to establishing a European Works Council (Article 9(4)).

The current transposing Law adds a new Article 29 to refer to the content of the terms of reference of employees' representatives, explicitly setting out their obligation to inform those they represent of the content and results of the information and consultation processes, subject to the duty of confidentiality. There is also an obligation on the undertaking to provide appropriate means for employees' representatives at Community level to perform their duties as representatives.

Similarly, the Directive and the current Law amend the formula for determining the composition of employees' representation in Community-scale undertakings or groups of undertakings, making it simpler and clearer. Both the negotiating committee and the European Works Council will be established using a proportional composition system, so that there is an employees' representative for each group constituting at least 10 per cent of all those employed in the undertaking or group of undertakings in all Member States or a fraction of that percentage. The wording 'fraction of that percentage' ensures that, although employees in a Member State may not amount to 10 per cent of all those employed in all Member States, they have a representative in the representative bodies referred to.

In order to apply the Law properly, it is of overriding importance to understand its scope, the determining factor for which, alongside the good will of the parties, is set out in recital 41 and Article 14 of Directive 2009/38/EC, whereby: 'Unless this adaptation clause is applied, the agreements in force should be allowed to continue in order to avoid their obligatory renegotiation when this would be unnecessary. Provision should be made so that, as long as agreements concluded prior to 22 September 1996 under Article 13(1) of Directive 94/45/EC or under Article 3(1) of Directive 97/74/EC remain in force, the obligations arising from this Directive should not apply to them. Furthermore, this Directive does not establish a general obligation to renegotiate agreements concluded pursuant to Article 6 of Directive 94/45/EC between 22 September 1996 and 5 June 2011'.

Accordingly, the scope of Law 10/1997 excludes undertakings or groups of undertakings which concluded agreements prior to 22 September 1996 provided they meet a series of requirements as laid down in the first paragraph of the first supplementary provision of the Law, which is retained in its original wording; it is not therefore considered necessary to add anything specific to the current text. Account must also be taken of unamended agreements with content as set out in Article 12 of Law 10/1997 concluded between 22 September 1996 and 5 June 2009, those concluded between 22 September 1996 and 5 June 2009 which were reviewed between 5 June 2009 and 5 June 2011 and new agreements concluded between 5 June 2009 and 5 June 2011. Essentially, the scope of Directive 2009/38/EC excludes from the application of the obligations deriving therefrom all cases referred to in that section, with the exception of agreements concluded between 22 September 1996 and 5 June 2009 which have not been amended between the latter date and 5 June 2011.

## Sec. I. P. 50433

In this case, therefore, the Community-scale undertaking or group of undertakings will remain subject to the obligations laid down in Directive 2009/38/EC, which is being transposed into Spanish law by means of this Law.

### III

This Law, transposing Directive 2009/38/EC, follows the terms of reference laid down in Article 16, which lays down the transposition only of certain provisions, as the rest is taken directly from Directive 94/45/EC, already transposed by means of Law 10/1997. In the light of this, the structure of the Law is simple: It has a single article with 18 paragraphs amending Law 10/1997 of 24 April, one supplementary provision and three final provisions.

**Sole Article.** *Amendment of Law 10/1997 of 24 April on the right of employees in Community-scale undertakings and groups of undertakings to information and consultation.*

Law 10/1997 of 24 April on the right of employees in Community-scale undertakings and groups of undertakings to information and consultation shall be amended as follows:

One. A new paragraph 1a shall be inserted in Article 1 as follows:

'1a. The methods for informing and consulting employees shall be defined and applied in such a way as to ensure their effectiveness and enable effective decision-making by the undertaking or group of undertakings.'

Two. A new paragraph 3 shall be inserted in Article 2 as follows:

'3. Information and consultation of employees shall take place at the relevant level of management and representation, depending on the subject under discussion. To achieve this, the competence of the European Works Council and the scope of the information and consultation procedure governed by this Law shall be limited to transnational matters.'

Three. The wording of subparagraph 7 of Article 3(1) shall be amended with the insertion of two new subparagraphs numbered 7a and 10 in the same paragraph, as follows:

'1. For the purposes of this Act:

7. 'information' shall mean 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 appropriate to enable employees' representatives to conduct a detailed assessment of the possible impact and, where necessary, prepare for consultation with the competent body of the Community-scale undertaking or group of undertakings;

7a. 'consultation' shall mean 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 group of undertakings;

10. 'transnational matters' shall mean those concerning the Community-scale undertaking or group of undertakings as a whole, or at least two undertakings or establishments of the undertaking or group situated in two different Member States.'

## Sec. I. P. 50434

Four. Article 4(4)(a) shall be worded as follows:

'4. Notwithstanding the above provisions:

a) An undertaking shall not be considered to exercise control over another in which it owns shares where one of the companies referred to in Article 3(5)(a) or (c) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings is concerned.'

Five. Article 6 shall be worded as follows:

'Article 6. *Responsibility for the negotiation procedure*

1. Central management shall be responsible within the meaning of this Act for establishing the conditions and means necessary for setting up a European Works Council or for establishing an alternative procedure for informing and consulting employees.

2. 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 pursuant to Article 3(1)(6) shall be responsible for obtaining and transmitting to the parties concerned the information required for commencing negotiations, and in particular the information concerning the structure of the undertaking or the group and its workforce. This obligation shall relate in particular to the information on the number of employees referred to in Article 3(1)(2) and (4).'

Six. Article 9(1) shall be reworded as follows:

'1. The negotiating committee shall consist of members elected or appointed in proportion to the number of employees of the Community-scale undertaking or group of undertakings employed in each Member State, so that for each Member State there is one member for each group of employees employed in that Member State constituting 10 per cent of the number of employees employed in all Member States or a fraction of that percentage.'

Seven. Article 9(4) shall be amended as follows:

'4. The negotiating committee shall inform the central management of the undertaking or group concerning its composition. Once the above task has been carried out, central management and the negotiating committee shall inform local management and the competent European employees' and employers' organisations of the composition of the negotiating committee and of the commencement of negotiations.'

Eight. Article 11(2) and (3) shall be worded as follows:

'2. The negotiating committee shall be entitled to meet before and after each meeting with central management without the presence of the latter, with the means necessary for communication.

3. The negotiating committee may request assistance in its tasks from experts of its choosing, which may include representatives of competent employees' organisations recognised at Community level. Such experts, whether representatives of competent employees' organisations or not, may attend negotiation meetings on an advisory basis at the request of the negotiating committee.'

Nine. Article 12(1) shall be worded as follows:

'1. Without prejudice to the autonomy of the parties, an agreement in writing between central management and the negotiating committee shall contain:

## Sec. I. P. 50435

- a) identification of the parties to the agreement;
- b) identification of the work sites of the Community-scale undertaking or of the undertakings of the Community-scale group of undertakings covered by the agreement;
- c) the composition of the European works council, the number of members thereof and their distribution, in order that account may be taken as far as possible of the need for balanced representation of employees by activity, category and gender, the length of their term of office and any effects thereon deriving from changes in the structure of the undertaking or group or in the composition of national employee representation bodies;
- d) the powers of the European Works Council and the procedure for informing and consulting it, and the arrangements for linking information and consultation of the European Works Council and national employee representation bodies, in compliance with the principles set out in Article 2(3);
- e) the venue, frequency and duration of meetings of the European Works Council;
- f) the financial and material resources allocated to the European Works Council for the proper performance of its duties;
- g) the date of entry into force of the agreement and its duration, the arrangements for amending or terminating the agreement and the cases in which the agreement should be renegotiated and the procedure for such renegotiation, including, where necessary, when the structure of the Community-scale undertaking or group of undertakings changes;
- h) where necessary, the composition, appointment procedure, functions and procedural rules of the select committee set up within the European Works Council.'

Ten. Article 17(2) shall be worded as follows:

'2. The European Works Council shall consist of members elected or appointed in proportion to the number of employees of the Community-scale undertaking or group of undertakings employed in each Member State, so that for each Member State there is one member for each group of employees employed in that Member State constituting 10 per cent of the number of employees employed in all Member States or a fraction of that percentage.'

Eleven. Paragraph 5 shall be inserted in Article 17 as follows:

'5. To ensure that it can coordinate its activities, the European Works Council shall elect a select committee from among its members, comprising at most five members, which must have the conditions enabling it to exercise its activities on a regular basis.'

Twelve. Article 18(2) and (3) shall be worded as follows:

'2. For the purposes set out in the previous paragraph, the European Works Council shall be entitled to hold at least one meeting per year with central management. The meeting shall be called by central management with at least one month's notice; the invitation shall be accompanied by a report on developments in and prospects for the activities of the Community-scale undertaking or group of undertakings. Central management shall inform local management thereof. Without prejudice to other matters that may arise, the annual meeting shall analyse matters relating to the structure, economic and financial situation, probable development of activities, production and sales of the Community-scale undertaking or group of undertakings.'

## Sec. I. P. 50436

Information and consultation of the European Works Council shall refer above all to the situation and probable developments concerning employment, investments, relevant changes that could affect organisation, the introduction of new working or production methods, relocations of production, mergers, downsizing or closure of undertakings, establishments or significant 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. The European Works Council shall be informed in good time of those exceptional circumstances and decisions to be adopted that may significantly affect the interests of employees, especially in the event of relocations, the closure of establishments or undertakings or collective redundancies. In addition, it shall be entitled to meet at its own request with central management or any other, more appropriate level of management of the undertaking or group with its own decision-making powers in order to receive the information referred to and be consulted thereon. This meeting or meetings shall, where appropriate, be in addition to the annual meeting laid down in (2) except where, depending on existing deadlines, they can be incorporated in the content of the meeting referred to without jeopardising the effectiveness of the consultation.

The information and consultation meetings referred to in this paragraph shall be held in good time so that the committee's view may be taken into account when decisions are adopted or implemented, on the basis of a report drawn up by central management or any other, more appropriate level of management of the undertaking or group.

The European Works Council shall be able to issue an opinion at the end of the meeting or within a maximum of seven days. In the event that the committee considers it unnecessary to hold a meeting, the time limit for issuing an opinion shall be reckoned from the receipt of the information referred to in the first sentence of this paragraph.

This meeting shall not affect the prerogatives of the central management.

The information and consultation provided for in such circumstances shall be without prejudice to the provisions of Article 1(1) and (1)(a) and Article 22.'

Thirteen. The second sentence of Article 19(2) shall be worded as follows:

'Those other members of the European Works Council elected or appointed to represent undertakings or establishments directly affected by the circumstances or decisions at issue shall also be entitled to take part in meetings involving the select committee.'

Fourteen. Paragraph 4 shall be inserted in Article 28 as follows:

'4. In so far as this is necessary for the exercise of their representative duties in an international environment, the members of the special negotiating body and of the European Works Council shall be provided with training without loss of wages.'

Fifteen. A new Article 29 shall be inserted as follows:

'Article 29. *The role of the employees' representatives*

1. The members of the European Works Council shall collectively represent the interests of the employees of the Community-scale undertaking or group of undertakings, without prejudice to the capacity of other bodies or organisations in this regard. To this end, it shall have the means required to apply the rights stemming from this Directive.

## Sec. I. P. 50437

2. The members of the European Works Council shall inform employee representatives from establishments or from undertakings of a Community-scale group of undertakings or, if there are no representatives, all employees of the content and results of the information and consultation procedure established in accordance with the provisions of this Act, without prejudice to the provisions of Article 22.'

Sixteen. Article 29, concerning the enforceability in Spain of provisions from other Member States, shall become Article 30, forming part of Title II, with no changes in wording.

Seventeen. A new Article 31, forming part of Title II, shall be inserted as follows:

'Article 31. *Relationship with other Community and national provisions*

1. Information and consultation of the European Works Council shall be linked with that of the national representation bodies, with due regard for the competences and areas of action of each and for the principles set out in Article 2(3).
2. The methods for linking information and consultation of the European Works Council with that of the national representation bodies shall be regulated by the agreement laid down in Article 12. This agreement shall be without prejudice to the provisions laid down in national legislation regarding the rights concerning information and consultation of employees and their representatives.
3. If no linkage arrangements are set out in the agreement, the process of information and consultation in advance of decisions which could bring about significant changes in work organisation or employment contracts shall run simultaneously with both the European Works Council and national employee representation bodies.'

Eighteen. A new Article 32, forming part of Title II, shall be inserted as follows:

'Article 32. *Adaptation*

1. When significant changes occur in the structure of a Community-scale undertaking or group of undertakings which has its central management in Spain and there are no provisions in the agreements in force, or there are conflicts between the provisions of two or more agreements, the central management shall open the negotiations referred to in Article 7 on its own initiative or following a written request from at least 100 employees or their representatives in at least two undertakings or establishments located in at least two Member States.
2. At least three members of the existing European Works Council or from each existing European Works Council shall form part of the negotiating committee, in addition to those members elected or appointed pursuant to Articles 8 and 9.
3. During these negotiations, the existing European Works Council or Councils shall continue to operate in accordance with the procedures adopted by agreement between the members of the Council or Councils and the central management.

**Sole supplementary provision.** *Agreements in force.*

1. Without prejudice to the provisions of Article 32 of Law 10/1997 of 24 April on the right of employees in Community-scale undertakings and groups of undertakings to information and consultation, Community-scale undertakings and groups of undertakings which have their central management in Spain shall not be subject to the obligations deriving from this Law where:



## Sec. I. P. 50438

- a) on 22 September 1996 there already existed an agreement concluded with employee representatives applicable to all employees of the undertaking or group, providing for transnational information and consultation of employees and meeting the minimum requirement of having been negotiated on behalf of Spanish employees by persons authorised to do so in accordance with the provisions of Articles 87 and 88 of the *Estatuto de los Trabajadores* (Workers' Statute) and formalised in the terms laid down in Article 13(2) of Law 10/1997 of 24 April;
- b) an agreement pursuant to Articles 12 and 13 of Law 10/1997 of 24 April was concluded between 22 September 1996 and 5 June 2009 and reviewed between 5 June 2009 and 5 June 2011;
- c) an agreement was concluded pursuant to Articles 12 and 13 of Law 10/1997 of 24 April between 5 June 2009 and 5 June 2011.

2. Upon the expiry of those agreements which may exist in accordance with the provisions of the preceding paragraph, the parties may agree to extend them, otherwise the provisions of this Law shall apply.

### **First final provision.** *Legislative competence.*

This Law is issued on the basis of the exclusive competence conferred on the State by Article 149.1.7.<sup>a</sup> of the Constitution in respect of labour legislation, without prejudice to its enforcement by the bodies of the Autonomous Communities.

### **Second final provision.** *Incorporation of European Union law.*

This Law hereby incorporates into Spanish law 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.

References in existing laws, regulations and administrative provisions to the repealed Council Directive 94/45/EC of 22 September 1994 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 shall be construed as references to 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.

### **Third final provision.** *Entry into force.*

This law shall enter into force on the day following its publication in the Official State Gazette.

Therefore,

I order all Spaniards, private individuals and authorities to uphold this Law and to have it upheld.

Madrid, 19 May 2011

JUAN CARLOS R.

The Prime Minister, JOSÉ LUIS RODRÍGUEZ ZAPATERO