



On the Offensive for More and
Stronger European Works Councils

The **New** European Works Council Directive (“Recast”)



EUROPEAN TRADE UNION CONFEDERATION (ETUC)

Why a New European Works Councils Directive?

European Works Councils ('EWCs') are bodies representing the employees of companies operating across borders in different Member States. Employees' representatives sitting in the EWC are to be informed and consulted by management on the situation and development of the company and on any significant decision that could have an impact on the workforce.

EWCs are therefore an essential element of good corporate governance. As the economic landscape is deteriorating, with the crisis hitting companies worldwide, the pace of restructuring is accelerating. Efficient information and consultation procedures through active EWCs favour responsible anticipation and management of changes in transnational companies.

The first EWC Directive was adopted on 22 September 1994 (Directive 94/45/EC). In 2008, approximately 800 EWCs were active, representing 14.5 million employees. However, the ETUC was very concerned about the practical application of the Directive. It appeared that early and extensive information on management

decisions was rare and that EWCs were rarely involved in company decision-making and playing an effective role in the management of changes. The norm was for the EWC to be 'consulted' after management decisions had been finalized.

Following an active campaign by the ETUC and the European Trade Union Federations, a new EWC Directive was finally adopted on 6 May 2009 (Directive 2009/38/EC). Member States have until 5 June 2011 to put its provisions into their national laws. The new Directive does not respond to all the trade union demands. Nevertheless, **the ETUC is satisfied that EWCs will be better equipped with the tools they need for a stronger right to information and consultation.**



1 Stronger definitions

The new Directive introduces stronger definitions, especially on information and consultation. This was a strong trade union demand. We know that some EWCs still operate below the standards set out in the 1994 Directive because some of the key concepts were left open to misinterpretation. The new definitions of information and consultation were designed to strengthen the role and the effectiveness of EWCs:

- ▶ Information and consultation procedures must fulfil essential criteria of **timing and quality**
- ▶ **Information and consultation are two distinct procedures.** Consultation cannot be conducted if the information phase has not been properly initiated
- ▶ **A consultation means that workers' representatives have to be effectively involved in the management decisions. This presupposes that there is sufficient flexibility as to the outcome of management's decision-making process. In other words, consultation cannot be equated with the mere disclosure by management of its final decision**

“‘**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.” (Art 2.1.f)

“‘**Consultation**’ means 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.” (Art 2.1.g)

The new “subsidiary requirements” (which would govern the operation of the EWC in the absence of an agreement between the negotiating parties) entitle the EWC to an answer from management:

“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.” (point 1a of the subsidiary requirements)

2 The transnational competence of the EWC

The EWC is competent for transnational matters, which are defined in the new Directive as follows:

“Matters shall be considered to be **transnational** where they concern the Community-scale undertaking or Community-scale group of undertakings as a whole, or at least two undertakings or establishments of the undertaking or group situated in two different Member States.” (Art 1.4)

The ETUC is concerned that a narrow reading of this definition could unduly restrict EWC activities in cases where a decision affecting the whole company is in practice implemented in different stages, affecting one country after the other. However, **new Recital 16 clarifies that it is not the formal number of Member States affected which should be taken into account but the potential effect of the decision:**

“The **transnational** character of a matter should be determined by taking account of both 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.” (Recital 16)

3 Better interaction between various levels of representation

The Directive contains new rules linking European and national information and consultation procedures. **The general principle of the new provision is that information and consultation procedures conducted in the EWC and national representation bodies must be coordinated, without prejudice to each other's competence and areas of action.**

The new Directive encourages the negotiating parties to set out in the EWC agreement the concrete arrangements laying down the procedure for the coordination between both levels. Failing that, information and consultation procedures must be conducted at both levels.

These provisions amount to an important opportunity for employee representatives and their trade unions at the local and national levels to further develop and deepen their own communication and cooperation processes on a day to day basis at the company level and beyond. This is not always easy, but it is essential that employee representatives grasp the fact that the European level is a sphere of activity which is integrally linked to their activities at the local and national levels.

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4 A bigger role for employees' representatives

The new Directive establishes the competence of EWC members to collectively represent the interests of the employees of the company. This leads to legal and financial consequences:

- **Members of the EWC are the legal representatives of the workers' interests.** They are as a result entitled to take legal action against the company where one or more rights arising from the Directive have been infringed. This also applies to the employee-side representatives of so-called "mixed" EWCs.
- "Means required to apply the rights stemming from this Directive" must be understood as also including **financial means to cover the costs linked to legal actions.**

"Without prejudice to the competence of other bodies or organisations in this respect, the members of the European Works Council shall have 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." (Art 10.1)

- The new Directive also imposes on employees' representatives the **obligation to transmit to the workforce the outcomes of information and consultation.** This new obligation underlines the need for appropriate communication tools and opposing an overly restrictive use of 'confidentiality' requirements. This provision gives EWC members better means to firmly anchor their political work within the workforce.
- Explicit language on the right to training was a strong ETUC demand. The new Directive contains a **clear entitlement to training without loss of wages.**

"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." (Art 10.4)

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5 A stronger role for trade unions

The ETUC has long been insisting on the positive role **that trade unions can play in supporting the establishment and the functioning of EWCs, thereby promoting best practice.** The new Directive explicitly recognizes this special role:

- The employees' representatives negotiating the EWCC agreement in a Special Negotiating Body (SNB) can request assistance from experts which can include representatives of the competent Community level trade union organization. (Art 5.4)
- Representatives from the competent Community level trade union have the right to participate in the SNB meetings. This participation is without prejudice to the role that these trade union representatives may also play as experts for the SNB. (Art 5.4)
- The competent European workers' organizations must be informed of the composition of the SNB and of the start of the negotiations (Art 5.2.c). This notification can prove to be vital to secure good quality agreements and to promote best practice. In addition, such notification will allow for the recording of agreements and enable interested parties to verify whether or not a company is covered by a EWC.

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6 Better rules for the establishment of EWCs

The ETUC has formulated very precise demands for the improvement of the functioning of the SNB and EWC. The new Directive contains as a result a number of provisions designed to facilitate the establishment of EWCs and to guarantee better quality agreements:

- **central and local managements are obliged to provide the necessary information for negotiations to be opened, including in particular information relating to the structure of the business unit and its workforce** (Art 4.4). Local managements have previously been in a position to obstruct the start of the negotiations by acting as if they were under no obligation to communicate to central management or to their employees' representatives essential information related to their workforce.
- The rules governing the functioning of the SNB have been significantly improved. **The composition formula of the SNB gives employees' representative more seats, which are more fairly distributed:**

"The members of the special negotiating body shall be elected or appointed in proportion to the number of employees employed in each Member State by the Community-scale undertaking or Community-scale group of undertakings, by allocating in respect of each Member State one seat

per portion of employees employed in that Member State amounting to 10 %, or a fraction thereof, of the number of employees employed in all the Member States taken together.” (Art 5.2.b)

- ▶ Before and after any meeting with central management, the **SNB is entitled to preparatory and debriefing meetings**, which facilitate the formulation of proposals.
- ▶ The list of mandatory requirements that negotiating partners must respect when concluding their agreement has been strengthened (Art 6). The composition of the EWC should take into account the **need for a balanced representation of employees, with regard to their activities, category and gender**. The subsidiary requirements foresee the same composition formula as for the SNB.
- ▶ **EWC agreements can now provide for the establishment of a select committee when this is necessary**. The subsidiary requirements provide detailed rules on the establishment, composition and functioning of a select committee. This is a significant improvement as practice has shown that the select committee plays an important role in coordinating EWC activities between regular meetings with management.
- ▶ The new Directive also puts the emphasis on the **need to include expiry clauses and renegotiation clauses in the EWC agreement**. Such clauses allow the EWCs to update their agreement over time.
- ▶ The new Directive emphasises that **sanctions in case of violation of its obligations must be effective, dissuasive and proportionate** in relation to the seriousness of the offence (Recital 36).

7 Adaptation clause (Art B)

The new Directive has introduced an **adaptation clause, which enables EWCs to adapt efficiently to significant changes of structure in the company (eg: merger, acquisition, division)**. The adaptation of the agreement is to be carried out in accordance with the provisions foreseen in the applicable EWC agreement. In the absence of such provisions, or where two or several EWC agreements conflict with each other, there should be negotiation of new agreement(s) in accordance with the negotiation procedure foreseen in the Directive (establishment of a new SNB etc.). The negotiation procedure has to be triggered by management on its own initiative or at the written request of at least 100 employees in at least two Member States.

Negotiation under the terms of the new Directive implies the conclusion of a new EWC agreement, which will be entirely subject to the terms of the Directive including the application of the new fallback provisions (subsidiary requirements) if necessary.

Continuity in the information and consultation procedure is guaranteed as EWC(s) are allowed to stay in place while negotiating their replacements.

The principle of adaptation is mandatory and applies to all EWC agreements, regardless of the date of their signature.

8 Which impact of the new Directive on existing agreements?

The new Directive does not create an obligation to re-negotiate existing EWC agreements. However, **existing agreements are not immune from the new rules**. Agreements that were signed between 22 September 1996 and 5 June 2009 will as a rule be subject to the new provisions from 6 June 2011 onwards (see summary table).

The ETUC has agreed with BusinessEurope on a **“two year interim period”** (from 5 June 2009 to 5 June 2011) during which any agreements signed or revised will not benefit from the new obligations introduced by the Directive. This compromise was necessary in order to achieve an agreement with BusinessEurope. Important joint recommendations on such ‘interim agreements’ have now been issued by the eight European Trade Union Federations in whose sectors we find nearly all EWCs in cooperation with the ETUC. This advice should help to **ensure that EWC and SNB members understand the consequences of signing agreements in the ‘interim period’ and can make their decisions accordingly**.

Impact of the new Directive on existing agreements - **summary table**

	Until 5 June 2011	From 6 June 2011	Negotiation procedure under adaptation clause	After negotiation under adaptation clause
Old Article 13 agreements (signed before 22 September 1996)	No legal impact	<ul style="list-style-type: none"> ▶ Adaptation in case of significant change of structure (Art 13) ▶ The ETUC recommends that the notions of information and consultation are interpreted in the light of the definitions of the new Directive (Art 2.1.f and g) 	Article 13 +5,6,7	Entire 2009 Recast EWC Directive
Old Article 6 agreements (signed between 22 September 1996 and 5 June 2009)	No legal impact; only 1994 EWC Directive applies	Entire 2009 Recast Directive	Article 13 +5,6,7	Entire 2009 Recast Directive
Interim Agreements (signed or revised between 6 June 2009 and 5 June 2011)	No legal impact; only 1994 EWC Directive applies	<ul style="list-style-type: none"> ▶ Adaptation in case of significant change of structure (Art 13) ▶ The ETUC recommends that the notions of information and consultation are interpreted in the light of the new Directive (Art 2.1.f and g) 	Article 13 +5,6,7	Entire 2009 Recast Directive
New Agreements (signed after 6 June 2011)	N/A	Entire 2009 Recast Directive	Entire 2009 Recast Directive	Entire 2009 Recast Directive

Useful links:

- ▶ ETUC website: <http://www.etuc.org/>
- ▶ General information about worker participation: <http://www.worker-participation.eu/>
- ▶ ETUI EWC database: <http://www.ewcdb.org>
- ▶ Social Development Agency (SDA) database: <http://www.sda-asbl.org/>

For more information on the interpretation of the Recast Directive, see 'European Works Councils: a trade union guide to Directive 2009/38/EC', available at www.etui.org



EUROPEAN TRADE UNION CONFEDERATION (ETUC)

Boulevard du Roi Albert II, 5 - 1210 Brussels - Tel + 32 2 224 04 11 - Fax + 32 2 224 04 54/55 - E-mail : etuc@etuc.org - www.etuc.org