



**Consultation of the European social partners on the revision 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 procedure in Company-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees.**

***Opinion of the ETUC of the second phase consultation of the social partners of 20 February 2008***

With the document presented on 20 February, the Commission's aim is to collect the opinions of the European social partners on the content of a possible Community initiative to revise the Directive 94/45/EC.

It is emphasized that the employer's organisations were against such a revision in their response to the first phase consultation (April 2004).

The aim of the intended Community initiative is to respond to the issues at stake in implementing the EWC Directive. The Commission highlights the following issues:

- complexities encountered in linking the different levels of information and consultation;
- uncertainties about what happens to the EWC in the event of mergers, acquisitions and other changes in make-up;
- no role is assigned to European trade unions by the Directive, thus limiting the number of councils established since it entered into force;
- absence of a general response to employee representatives' training needs.

The Commission feels that the following objectives could be met:

- to ensure the effectiveness of employees' transnational information and consultation rights, currently lacking in a significant proportion of situations;

- to resolve the problems identified in the practical application of the Directive and to remedy the lack of legal certainty resulting from some of its provisions or the absence of certain provisions,
- to ensure a better link between Community legislative instruments on information and consultation of employees.

## **I. General assessment**

The ETUC welcomes the Commission's inclusion of the long overdue revision of the EWC Directive in its official work programme for the year 2008. Already in the framework of the first phase consultation in 2004, the ETUC urged for a speedy revision and offered concrete suggestions to that end. The ETUC criticized the Commission's treatment of two themes with different contents in its March 2005 Communication on Restructuring and Employment (COM (2005) 120), and asserted that this was not a proper second phase consultation on the revision of the EWC Directive.

The ETUC strongly shares the Commission's recognition that EWCs must be in a position to fulfil their role vis-à-vis developments in enterprises, anticipating change, and fostering general transnational social dialogue in a rapidly changing economic and social context. With the enlargement of the European Union and the growth of globalisation, more and more companies are integrating their management and production structures across national borders. EWCs are thus presented with new challenges which make it necessary that the EWCs must concern themselves with new topics and continually develop their competences and qualifications.

Furthermore, since the Directive first came into force, restructuring has become a recurring phenomenon; the issue of change management has accordingly become ever more important to European workers. It is widely understood that change can be managed most successfully if the interests of employees as stakeholders are taken into account in this process. Workers in transnational companies need European Works Councils if they are to be able to effectively anticipate industrial and economic changes and their social consequences. A well-functioning EWC is essential if workers representatives are to be able to play a pro-active role at local, national, and European levels so as to ensure that adaptation is managed in a socially responsible way.

Experience has repeatedly shown that this is not always possible on the basis of the existing EWC legislation and EWC practice. It is clear that a revised EWC Directive not only needs to be improved so as to better meet all the original objectives of the legislation, but that care must be taken to ensure that EWCs are well-equipped to meet the real challenges with which they are faced but which were not necessarily foreseen by the original legislation.

The ETUC welcomes the fact that the Commission is finally ready to deal with the problems relating to the practical application of the Directive and which impede an effective working method for EWCs – problems which

clearly cannot be remedied simply by the encouragement of best-practice..The ETUC fully supports the view that substantial changes in the legislation are needed if EWCs are to play their appropriate role in the ongoing process of European integration.

### **Applicability of the EWC Directive (Thresholds and Exemptions)**

Article 15 of the Directive had foreseen until 22 September 1999 for the revision and explicitly mentioned the need to consider the definition of thresholds for the number of employees. The ETUC is therefore surprised that the thresholds are mentioned nowhere in the consultation paper. The Commission correctly emphasizes that the right to information and consultation laid down in Article 27 of the European Union's Charter of Fundamental Rights has the character of a fundamental right. For the ETUC the basic question arises, whether employees can be excluded from the application of the EWC Directive on the sole ground of the size of the enterprise. Experience has repeatedly shown that smaller companies are not spared the challenges of European integration and globalisation. The same justifications for the original EWC Directive (the need to close the gap between national-level systems of employee representation and increasingly transnational management decision-making structures) is as relevant as ever, regardless of the companies' size. In any case, ETUC reinforces its demand that the threshold be reduced from 1000 to 500 and from 150 to 100 employees respectively. The reference to "a procedure for information and consultation of employees" (Article 1, paragraph 2 of Directive 94/45 EC) should be deleted. Such a procedure, which aims to replace a representative body, has never been successfully negotiated in practice.

Furthermore, the current possibilities of exemption prevent workers' representatives in so called "ideological guidance" undertakings and in the merchant navy from benefiting from the right to information and consultation at European level. In recent years it has been seen that workforces in media companies were also confronted by restructurings of transnational dimensions. The ETUC does not see why merchant navy crews should not have the right to information and consultation. The provision that the Directive does not apply to merchant navy crews (Article 1, paragraph 5) and "ideological guidance" undertakings (Article 8, paragraph 3) has in the opinion of the ETUC to be deleted.

### **II. Opinion on specific issues raised in the Commission's Communication**

In the following, the ETUC responds to a range of issues raised in the Commission's Communication. A number of additional related issues are also highlighted.

In **paragraph II.1**, the Commission considers concrete measures to guarantee the effectiveness of the right to transnational information and consultation of employees.

### **The terms „Information and Consultation“ (1.1.)**

The Commission rightly points out that „some of the definitions found in – or absent from – the Directive lead to different interpretations which have a major impact on the clarity of the legislative framework, the effectiveness of the rights introduced by the Directive and legal certainty.” With reference to recent Directives the definition of consultation could in the opinion of the Commission be clarified and a definition of information could be added.

The ETUC strongly supports the need for a definition of “information” and a much more precise definition of “consultation”. These definitions should not regress from the definitions of European-level information and consultation which have already been clearly set out in Directive 2001/86/EC. Here, it is important to note that although the Commission also points to the definitions in Directive 2002/14/EC, this Framework Directive does not deal with European-level information and consultation, but rather with national- or local-level information and consultation. In any case, there must be a guarantee that, in line with Directive 2001/86/EC, information will be given to EWCs “in a manner and with a content which allows the employees’ representatives to undertake an in-depth assessment of the possible impact” and that consultation will take place “at a time, in a manner and with a content which allows the employees’ representatives, on the basis of the information provided, to express an opinion on measures envisaged” so that they can be taken into account in the decision-making process.

The current lack of clarity has led to the failure of EWCs to be informed and consulted in the spirit of the Directive. The ETUC believes that such a definition would adequately take the acquis into account and would in effect simply acknowledge the accepted interpretations of information and consultation that have emerged in the courts in the absence of uniform definitions in Community legislation.

Such a definition would be an improvement for all in the direction of a stronger dialogue between EWCs and management in order to reach a common understanding on the general principles of a planned decision, its potential impact on the workforce and a coordinated and balanced process of implementation. A common definition would also help to streamline processes of information and consultation across local, national, and European levels, thus contributing to greater coherence in this area.

### **Content of subsidiary requirements (1.2.)**

To reinforce the role of EWCs, the Commission is of the opinion that it could be envisaged to add new requirements , for example the right of the

EWC to obtain a response, and the reasons for that response, a precise definition of exceptional circumstances, the possibility of a second meeting, and the inclusion of new subjects for information and consultation.

The ETUC strongly supports the view that the role of the EWC should be strengthened within the framework of the subsidiary requirements. As large-scale empirical research has clearly demonstrated, the subsidiary requirements play an important role in providing a benchmark or blueprint for negotiated solutions. In addition, recent experience has shown that that in more and more cases, they are being applied directly. This has brought even more of the shortcomings and gaps in the subsidiary requirements to light, particularly with respect to their enforcement. For these reasons, it is imperative that the subsidiary requirements be expanded and clarified on a range of issues.

Among these is the right of the EWC to be apprised of reasons for a decision. Also, a more precise definition of exceptional circumstances is urgently needed, since conflicts over when an extraordinary meeting is to be called has been the subject of many conflicts in practice. Directive 2001/86/EC also contains more explicit and practicable provisions on extraordinary meetings. In order to ensure that meaningful consultation takes place, the provision that an additional follow-up extraordinary meeting can be convened in cases where management decides not to act in accordance with the opinion expressed by the EWC should be taken on in a revised EWC Directive.

In practice, the limitation to one meeting of the EWC per year has not proved effective. The fact that many companies have abandoned this limitation in practice demonstrates that the pace, scope, and complexity of European-level information and consultation are such that more meetings are needed. Therefore the right to at least two regular meetings a year should be laid out in the subsidiary requirements.

The ETUC welcomes the proposal of the Commission to introduce new subjects for information and consultation and not to restrict the role of the EWC just to "anticipation" and "accompanying change". In addition to the subjects proposed by the Commission (development of competences and professional mobility, health and safety at work, work organisation, environment) subjects like data protection, gender mainstreaming, anti-discrimination and policies to aid in the integration of differently abled people should be covered as well. These issues are important for both employers and workers alike and are of clear relevance at the European level as all are covered by European legislation. Inclusion of these issues into the catalogue of topics deemed to be of particular relevance to EWCs in the subsidiary requirements would ensure that more EWCs can play a useful role in the development and monitoring of policies on these matters.

Given the great importance of experts and operating expenses for the efficient functioning of EWCs, the ETUC is of the opinion that these issues must be clearly identified as matters to be negotiated between the SNB

and central management. The ETUC therefore suggests that the provisions under number 6 (experts) and number 7 (operating expenses) of the subsidiary requirements be transferred into Article 6 of the Directive.

The subsidiary requirements already provide for an internal pre-meeting of the employee representatives prior to their meeting with management. There is, however, no mention of an internal follow-up meeting. Practice has shown that it is at least as important for employee representatives to meet following their meeting with management in order to discuss the implications of what they have heard, to formulate a common position and discuss possible next steps. Indeed, the notion of consultation loses meaning if employee representatives cannot meet to formulate a joint opinion. Most EWC agreements accordingly provide for an internal follow-up meeting. This gap in the Directive's provisions must be closed.

Practice has also shown that the select committee plays a very important role in ensuring the continuity of EWC work between regular meetings with management. In the light of the inherent multinationality of EWCs, the maximum number of select committee members provided for in the subsidiary requirements should be increased from 3 to 5 in order to better reflect the wide range of countries and regions represented on many EWCs. Furthermore, the subsidiary requirements should specify — as nearly all of the EWC implementing legislation does — that a select committee is to be set up where the EWC has nine members or more. Finally, the subsidiary requirements must also provide the select committee with all the necessary facilities to meet and to communicate with each other and with the larger EWC as needed to fulfil their role.

Experience shows that due to the complexity and scope of many transnational issues faced by EWCs, they often need to call on different sources of expertise, such as legal, economic, financial or technical expertise. For this reason, the ETUC demands that EWCs must have the right to call upon any expertise necessary to fulfil their role, rather than being forced to choose whether they need expert support regarding one specific aspect of a complex issue rather than another. In a revised Directive, the existing possibility to restrict the obligation of the company to pay for more than one expert must therefore be removed. The Directive must furthermore make it clear that the experts have the right to participate in all meetings and every part of the process at the request of the employee representatives.

The current Directive is unclear on the necessity of translation and interpretation. This has led to significant problems in practice. Revised subsidiary requirements must ensure that in addition to meetings with central management, all internal preparatory and follow-up meetings of the employee representatives and of the select committee are supported by interpretation as needed. It must also be explicitly ensured that information given in writing is to be translated into all necessary languages.

### **Role of trade union organisations (1.3.)**

The Commission finds it appropriate to explicitly recognise the special role which trade unions can play in negotiations and support for EWCs.

One of the core demands of the ETUC is the recognition of the role of trade unions in EWCs. Guarantees are therefore required that representatives of the European trade union federations can must be able to attend all meetings of the special negotiating body (SNB) (Article 5). An official trade union participation in these bodies confers additional legitimacy to the outcome of the negotiations. Trade union representatives must also have the right to participate in EWC meetings, whenever their presence is requested by EWC members, notwithstanding any role that trade union officers might play as experts for EWCs. Inasmuch as it is part of the national tradition, it is also important that full-time trade union officials are not prevented from becoming full members of the EWC (Article 6).

The SE Directive already recognizes the role of Community level trade union organisations in promoting coherence and consistency for SNBs. The entitlement to official trade union participation in these meetings is also essential, given that only trade unions have the right to represent workers in negotiations in many EU countries.

### **The role and competences of employee representatives (1.4.)**

The Commission proposes that EWC representatives be obliged to report to the workers they are representing and that employee representatives have a right to training.

The ETUC is of the view that access to the business, parts of the business and undertakings must be facilitated for the EWC and that it must have the right to inform all employees about the work of the EWC. Furthermore, EWC members must have the right and the resources to communicate with the workers whom they represent. In practice it has been seen that particularly in cases where a member of the EWC from one country represents several different sites and/or divisions of the company, the flow of information is greatly hampered if there is no representative infrastructure which provides a link between the local sites and the European level. This raises important questions about the legitimacy of employee representation at the European level and must be addressed in a revised EWC Directive.

In order to improve the EWC's functioning, the right of the employee to training is of prime importance. EWCs are multi-lingual bodies dealing with diverse and complicated issues at the heart of large and complex groups of undertakings. They also bring together highly different industrial relations cultures. It is unthinkable that they can work effectively without adequate preparation and training. Accordingly, Directive 2001/86/EC provides for training for members of the analogous Representative Body. Comparable provisions must be developed for the EWC. The employee

representatives and their deputies must be allowed free time for this and the employer must cover the costs. It is clear that such training should not be allowed to be restricted to language courses, but that it must also embrace economic, legal and social topics. The EWC must have the possibility to determine the content of its training programmes. Comprehensive provisions to this effect should be included in the body of the Directive, not in the subsidiary requirements.

### **Protection of rights (sanctions and legal personality of EWCs) (1.5.)**

In the Commission's view, it is useful for the Directive to reiterate the general principle according to which, in the event of infringement of the applicable provisions, sanctions must be effective, proportionate and dissuasive. Furthermore the Commission states that it could be useful to explicitly recognise the EWC as the representative of the firm's or group's employees.

Experience has repeatedly shown that EWC rights have been violated, especially in far-reaching decisions of companies with important negative effects for the employees. Therefore the ETUC has repeatedly underlined the importance of guaranteed legal proceedings to strengthen the obligations resulting from the Directive. The ETUC endorses the Commission's advice that sanctions must be effective, appropriate and dissuasive. Furthermore, Management decisions with important impact for employees must be abandoned if they violate information and consultation rights.

Workers representatives on the EWC must be allowed the possibility of taking legal steps in the event of violation of the EWC agreement. This means that the EWC must have the legal personality and capacity necessary to ensure that the agreement is complied with. One prerequisite is that the EWC has adopted legitimate means to reach collective decisions. Due to the lack of rules of order in many EWC agreements, collective decisions taken by EWCs have been questioned in the past. Therefore it must be ensured in Article 6 that EWCs have laid down rules for collective decision-making, and there should be a fall-back procedure outlined in the Directive if an EWC agreement fails to do so. Such provisions may not, however infringe on the individual rights of EWC members nor trade unions. Finally, the costs of legal assistance and legal or court proceedings must be borne by the employer. This provision must be contained in the body of the Directive, not in the subsidiary requirements.

The ETUC agrees that the EWC, without prejudice to the representative role of the trade unions and their federations, must be considered a legitimate representative of the European workforce, for example if they put forward a position to the EU Commission in the course of the Merger Control Procedure.



In **paragraph II.2.** the Commission presents measures to solve problems associated with the practical application of the Directive and removal legal uncertainties.

### **Adaptation clause (2.1.)**

As the Commission rightly points out, many EWC agreements fail to contain adaptation or renegotiation clauses. The Commission suggests that the introduction of an adaptation clause to stipulate what should happen to EWCs in the event of a change in corporate structure could help improve legal certainty.

The ETUC supports the opinion of the Commission that all new agreements must include procedures for their adaptation, termination and renegotiation.

It is important to differentiate between different reasons for renegotiating agreements. On the one hand, changes in corporate structure have accelerated significantly, for example as a result of mergers or acquisitions. It must therefore be ensured that EWCs are more dynamically able to take structural changes into account by enabling the renegotiation or adaptation of the agreement with the involvement of representatives of the workforces falling under the scope of the agreement.

But it is not just changes in corporate structure which gives rise to the need to adapt the agreement. Many agreements, in particular those concluded under the provisions of Article 13, do not contain provisions on a wide range of important issues. Since they also often fail to provide for renegotiation, this has led to a great deal of uncertainty.

In the light of the far reaching improvements to the Directive which are under consideration, the ETUC is strongly of the opinion that all existing EWCs must have the opportunity to benefit from improvements to the EWC Directive, and the legal certainty which it provides, whether they are based on Article 6 or Article 13 . In particular, in the absence of relevant provisions in existing agreements, an obligation must be introduced in a revised EWC Directive that renegotiations can be opened upon request. Adequate transitional arrangements and an appropriately abbreviated time frame must be laid out in the Directive.

### **Central management and responsibilities of local managements (2.2.)**

With reference to the judgments of the European Court of Justice (Bofrost, Kühne & Nagel, ADS Anker) the Commission is of the opinion that all

information which is essential to the opening of negotiations for the setting-up of EWC must be supplied to the employees regardless of the location of the group's headquarters or the opinion of the group's management concerning the applicability of the Directive.

The ETUC confirms the view that within the framework of the revision of the Directive the demands made by the European Court of Justice must be fully taken into account. Management is obliged to provide all necessary information in good time, regardless of the responsibility of other parts of the group to make themselves available.

In some cases it has proven very difficult for employee representatives to establish whether an undertaking is covered by the Directive, and whether the national workforces in that undertaking are aware of the possibility to request that an EWC be established. In some cases, it has proven dangerous for employee representatives even to ask management for information if they were in doubt. It must therefore be made very clear in the Directive that the European trade union federations are entitled to request relevant information to enable them to ascertain whether or not a company is covered by the Directive.

### **Composition of the special negotiating body (SNB) and organisation of negotiations (2.3.)**

The Commission Communication does not mention the SNB negotiation period. The present version of the Directive provides for a negotiation period of three years before the subsidiary requirements shall apply. This has proved to be excessively long. Practice has shown on the one hand that negotiations conducted in good faith have generally not lasted more than one year. On the other hand, in a very large number of cases, negotiations have been unnecessarily prolonged and only concluded once the end of the 3-year period drew to a close. It is fairly common that up a year passes between SNB negotiation meetings. In order to remedy this situation, the ETUC proposes that the negotiation period be reduced to one year unless the parties agree to extend negotiations for a maximum of six months. Furthermore, in order to ensure that continuity is maintained in the negotiations and unnecessary delays are avoided, a provision should be included that the subsidiary requirements shall automatically apply if SNB negotiations are not resumed within 4 months of the last SNB meeting.

As the Commission proposes, the maximum number of members on the special negotiating body should be deleted from the Directive since these restrictions have posed practical difficulties. The ETUC opposes the idea of grouping together or otherwise indirectly representing Member States with smaller workforces. The general principle of representativity should be respected while at the same time the general principle of proportionality must be taken into consideration.

As the Commission points out, a number of important issues are not explicitly provided for in the current Directive. It is imperative that the

SNB can meet without management representatives both before and after the meetings and that experts can be invited. Translation and interpretation must be provided for all SNB meetings and these costs must be borne by the employer.

In addition, the ETUC believes that it is important for the Directive to make it very clear that European trade union federations have the right to initiate negotiations to establish an EWC.

It has also to be clarified that for the purpose of concluding an EWC agreement, the SNB shall take decisions by an absolute majority of its members, provided that such a majority also represents an absolute majority of the employees, including the votes of members representing employees employed in at least two Member States.

In **paragraph II.3.** measures are proposed by the Commission to ensure the coherence of EU rules in the area of information and consultation of employees.

### **Linking of definitions of information and consultation (3.1.)**

The Commission suggests putting in place a better coexistence of EU rules in the fields of information and consultation of employees (2001/86/EC and 2002/14/EC and 2003/72/EC).

The ETUC shares the view that the Directive has to be tailored to the legislative context arising from the adoption of new Community standards relating to the information and consultation of workers, but emphasises the greater relevance of 2001/86/EC since this Directive deals with the analogous information and consultation at the European level (see above 1.1.). The ETUC therefore calls for the harmonised adoption of information and consultation rights as defined in Directive 2001/86/EC .

### **Transnational competence of EWCs (3.2.)**

The ETUC shares the opinion of the Commission that the Directive establishes a right for employees to information and consultation on transnational issues and that applying the principle of subsidiarity in this context might prove useful. In practice, however, it is not always easy to distinguish whether any one issue meets the "transnational" criterion. The burden to prove that an issue involves only one country should rest with the management of the undertaking.

### **Linking of information and consultation levels (3.3.)**

The ETUC welcomes the Commission's intention, in the framework of the revision of the EWC Directive, to clarify the link between national and transnational levels in relation to information and consultation. Experience has shown that in practice, effective information and consultation processes which concern more than one country must be conducted in

parallel and iteratively across a multi-level system which encompasses the local, national, and transnational levels. But at the same time, this has given rise to significant legal and political uncertainty. The ETUC is therefore very interested in a further explanation of the Commission's deliberations on the "best way to set out the principles of linking information and consultation levels".

### **III. Further reaching proposals of the ETUC for the revision of the EWC Directive**

In addition to the preceding comments, the ETUC feels there is an urgent need to look at further important topics in the revision of the Directive.

#### **1. Definition of the term "controlling undertaking"**

In Article 3 of the EWC Directive the term "controlling undertaking" is defined. In the practical application of the current definition, significant gaps (for example with respect to joint ventures) and legal uncertainties (for example with regard to franchise companies or monopsonies) have emerged. In the view of the ETUC, the definition of "controlling undertaking" urgently requires more precision.

#### **2. Protection of Employees**

Conflicts have arisen in practice because the issue of protection of employee representatives, in particular their right to paid time off to pursue their duties as EWC or SNB members is not clearly and uniformly regulated in the EWC Directive. This is much better provided for in Directive 2001/86/EC.

#### **3. Confidentiality of information**

Based on experience, the ETUC believes a clearer definition of "confidentiality of information" is necessary in order to prevent interference with the work of the EWC. The ETUC calls for a clearer definition of confidentiality: one which fully respects the need to withhold information which genuinely constitutes business secrets, but which prevents any abusive application of the term by company management designed to prevent the members of EWCs from communicating with each other, with other employee representatives, with their constituents, or with their unions. The burden of proof should thus rest with the company when it comes to showing that information must be kept confidential.

#### **4. The need for gender equality in EWCs**

Women are underrepresented in the composition of EWCs. Therefore, in the framework of the revision of the EWC Directive, the requirement to promote equality of men and women must be taken into account.

#### **5. The duty of the undertaking to register the most recent EWC agreement**

The ETUC believes that interested parties must be able to quickly verify whether or not a company is covered by an EWC and read the

relevant agreement. For this reason, the ETUC urges that in the future all EWC agreements be made accessible in a public register.