

Frequently Asked Questions
The Revised Directive on European Works Councils

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1. The Hard-fought Struggle for a New EWC Directive

How did the proposal for a revision of the EWC Directive come about?

- At the beginning of July 2008 the European Commission adopted the long awaited legislative proposal for a revised EWC Directive. This had been preceded by a hard-fought struggle between the ETUC (European Trade Union Confederation) and employers' federations under the leadership of BusinessEurope (European confederation of industrial and employers' federations). For the last decade or so they had blocked every initiative to improve interest representation in European companies to the bitter end.
- This refractory stance was also the reason why in spring 2008 the ETUC did not make use of the possibility of bringing about a revision of the EWC Directive via social partner negotiations on the basis of the social dialogue. It was all too clear that this would only lead to further delays.
- The ETUC therefore expressly welcomed the Commission's proposal to surmount the European employers' opposition by taking the legislative initiative itself. In any case, the existing 1994 EWC Directive was not the result of the social dialogue. Even then, at the end of the 1980s, there was no real chance of reaching agreement with European employers on putting into practice the right to information and consultation laid down in the European Charter of Fundamental Rights for employees.
- A good 15 years after the adoption of the EWC Directive a window of opportunity opened up once more to adapt the rights of EWCs to the realities of the European Single Market and so to strengthen the options of EWCs and to clear up remaining legal uncertainties.

How should the Commission's proposal for a revision of the EWC Directive be assessed?

- The following points were emphasised by the European Commission as the appropriate aims of the proposed revision of the EWC:

- legal certainty for all those involved in the EWC on both the employees' and the employers' side should be extended;
 - the effectiveness of employees' rights to cross-border information and consultation should be guaranteed, thereby boosting the EWC's efficiency;
 - the practical application of the EWC Directive should be improved and above all the number of EWCs being set up should be increased significantly;
 - finally, acquired rights as regards employee information and consultation in the EU should be given greater coherence.
- The ETUC fully concurred with these aims. In the actual formulation of those provisions of the Directive that were to be changed or revised, however, the Commission's proposal fell far short of the recommendations laid down as cornerstones of a future EWC revision in earlier communications. All too clearly massive lobbying by European employers found sympathetic ears in the European Commission.
 - In the face of manifest deficiencies in the functioning of many EWCs and its extensive list of demands for improving the EWC Directive the ETUC could not be satisfied with the Commission's proposed changes. Nevertheless, it accepted the Commission document as the basis of the now pending EWC revision in the context of the European legislation process.

How was political agreement reached on the new EWC Directive at the end of 2008?

- In order to prevent further delays to the revision of the EWC Directive, overdue since 1999, the ETUC, given the narrow window of opportunity for adoption before the European Parliament elections in spring 2009, declared itself against negotiations within the framework of the Social Dialogue. It was successful, though BusinessEurope's reservations about negotiating on changes to the EWC Directive became visible after the Commission's proposals were published.
- In summer 2008, therefore, intensive talks were held and an agreement in principle was reached on further amendments to the Commission proposal. In this way the European social partners, alongside an actively engaged French presidency, contributed substantially to generating the momentum necessary, in view of the intensive struggle behind the scenes and the difficult negotiations in and between the EU institutions, to swing it for this difficult, but heavily symbolic EU dossier without excessive arguments and long delays.
- The clear signals from the European Parliament proved very helpful in this respect, as did the clear statements of the European Economic and Social Committee, which – fully in keeping with its previous advocacy of increased EWC rights – called for clear improvements to the Commission's proposal.
- And in fact, as early as the first reading in mid-December 2008 the revised EWC Directive was adopted by the European Parliament by a large majority and immediately afterwards almost unanimous agreement was reached in the Council of Ministers. With this, nothing stands in the way of formal enactment of the new EWC Directive in spring 2009.

2. What does the new EWC Directive bring with it?

What came out of the negotiations on revision of the EWC Directive?

- The revision of the EWC Directive involves a classic compromise.
 - On the one hand, in comparison with the existing *acquis* the new text of the Directive contains substantial clarifications and improvements on a number of important points, which in practice will yield positive benefits, not only in new establishments, but also in the everyday operations of EWCs.
 - The intensive lobbying of the European employers' federations, which continued right up to the wire, contributed to watering down what were originally more far-reaching plans. As a result, there was little scope for a number of central trade union demands.
- It is therefore not surprising that the innovations in the new EWC Directive, which, after a two-year implementation phase, will become part of national labour law in spring 2011, do not correspond to the trade unions' wish list.
- Among the improvements in the new EWC Directive we may list the following in particular:
 - the situation has been improved as regards EWC foundation
 - the trade unions have been granted a more prominent role in implementing the EWC Directive
 - there are new regulations on the composition of the Special Negotiating Body
 - Work in the EWC should become more effective due to a number of innovations, including:
 - the setting up of a select committee in the EWC as a standard
 - a broadening of skills and know-how by means of EWC members' right to training
 - the creation of a collective mandate for representation for the EWC
 - The provisions on information and consultation are formulated more precisely
 - The EWC is granted the right to renegotiation in the event of structural changes at the enterprise
 - Better coordination of workers' participation at European and national level
- The following central ETUC demands were not met, either wholly or partly, by the revision of the EWC revision:
 - Weak provision for sanctions for violations of the Directive
 - Limitations on application of the Directive remain (thresholds, 'tendential protection' [so-called 'tendential' establishments are establishments in which, owing to their particular purpose, the provisions of the Works Constitution Act are only partly applicable: 'Tendenzschutz' is the special protection granted by the Works Constitution Act to such establishments])
 - The negotiating deadline in the case of EWC foundations remains long, as before

- No second annual regular meeting
- The redefinition of transnationality does not clarify matters unambiguously

What innovations does the revised Directive contain as regards the EWC?

- The amendments to the EWC Directive largely concern some new or revised procedural law provisions relating to the establishment of future EWCs, such as the revised arrangements on the composition of the Special Negotiating Body for negotiations with the central management or additional provisions concerning matters whose inclusion in an EWC agreement is now mandatory.
- In this way the situation of plant workers' representatives and of the trade unions in the founding of EWCs was improved and a basis formed, by means of several new provisions that now have to be included in EWC agreements, for making the work of the EWC more effective.
- The provisions on cross-border information and consultation of employees and their representatives in the EWC have been refined significantly and clarifications provided on the forms of participation of workers' representatives at national and European level. These approximate how things currently stand as regards the Directive on employee involvement in the European Company of 2002.
- Finally, existing EWCs retain the right to renegotiate in the event of structural changes in the company, if practicable information and consultation of all employees in accordance with the agreed standard is no longer guaranteed.

How will the work of the EWC be made more effective?

- There are a number of innovations that will make the work of the EWC more effective. For example, the new Directive now lays down that an agreement on founding an EWC must also provide for the establishment of a select committee of up to five members as standard, which will conduct the EWC's day to day business and is supposed to facilitate the coordination and greater efficiency of regular EWC work, as well as the fastest possible information and consultation in exceptional circumstances.
- The provisions on cross-border information and consultation of employees and their representatives are formulated much more precisely: it was clarified that the opinion of the EWC shall be sought before a decision has been taken and not merely before implementation of a corporate decision and the information given to the EWC should refer to the planned measures and should not concern what is already known or has already been decided.
- The situation in the case of founding an EWC has been improved. For that purpose central managements have to furnish all parties with details on the structure of the undertaking and on the workforce required for the commencement of negotiations. It may be expected that this necessary clarification will in future contribute to avoiding possible disputes on this point. In the past disagreements had to be fought out before the ECJ on several occasions. Nevertheless, there will still be no obligation to give notification of

mergers or takeovers that, as structural changes, would possibly give rise to renegotiation of EWC agreements.

- Revised arrangements as regards composition of the Special Negotiating Body: the mandatory number of members of the Special Negotiating Body shall in future accord with the number of employees in each member state, with one seat for every 10 per cent of the total number of employees per member state or a fraction of this. A threshold originally envisaged in the draft for the revised directive that would have ruled out EWC representation for employees from smaller establishments was avoided by the European Parliament's decision.
- The skills and know-how of EWC members will be broadened by a new right to education and training without loss of pay stemming directly from EWC membership and going beyond national entitlements to work release and training.
- Clarifications concerning coordination of workers' participation at European and national level: appropriate provisions are to be applied in order to guarantee that employees at different levels do not receive different information at different times on one and the same subject. If measures are planned that could result in substantial changes in work organisation or employment contracts the process of information should take place at the same time at the level of individual states and in the EWC. The respective competences and scope of action of workers' representatives should be taken into account here. Certainly, legal rights to interest representation at national and local level shall be undiminished. An employer cannot, for example, appeal to different regulations in the EWC agreement in order to announce his decision later than provided for under national law.
- The EWC will also be assigned a collective representative mandate which will be advantageous particularly within the framework of legal action.
- Members of the EWC shall explicitly retain the right to inform employees and workforces of establishments and undertakings concerning the contents and results of the EWC's activities. Building on that, communication between the EWC and national organs of workers' representation should improve.

What about the new provisions on information and consultation in the EWC?

- It was made clear that the opinion of the EWC should be sought before a decision is taken, not merely before implementation of a corporate decision.
- It is laid down explicitly that information, in terms of both form and content, should be arranged in such a way that it enables the EWC to carry out a detailed examination of the potential effects of planned decisions in preparation for possible consultations with competent management representatives.
- Consultation shall be understood as a procedure by means of which the EWC shall be able to present its own proposals in sufficient time to make it possible for the management to take them into consideration, as long as the decision-making process has not been concluded.
 - The aim here must be that the submission of an opinion that may be useful for decision-making purposes must be possible, which presupposes that consultation takes

place at a time, in a way and with such a content that make this possible.

- To be sure, also in future the EWC's opinion will not have the power to delay a corporate decision. Submission of its position exhausts an EWC's legal options.
- The task now is to implement this standard of workers' participation in practice, which in the first instance means integrating these definitions in existing EWC agreements and thereby making them a binding obligation for company managements.

Will the EWC Directive lead to more EWC foundations?

- We can assume that the situation of enterprise workers' representatives and trade unions will improve as regards EWC foundation. For example, in future it will be much easier to get company managements to divulge the information needed on the structure of the company to prepare for the commencement of negotiations.
- We can expect that this necessary clarification will in future contribute to avoiding possible disputes on this point. In the past on several occasions problems had to be fought out before the European Court of Justice. In extreme cases legal disputes lasted years concerning who exercised a dominant influence in a firm, among other conditions for founding an EWC. It should now be much more difficult for enterprises to shuffle out of their responsibility when the employees wish to found an EWC.
- Nevertheless, enterprises are still under no obligation to inform concerning mergers or takeovers possibly resulting in the renegotiation of EWC agreements by virtue of being structural changes.
- However, the trade unions have been granted a much more significant role in the implementation of the EWC Directive: both the European trade union confederations and the European employers' organisations are to be informed of the commencement of negotiations and the composition of the Special Negotiating Body.
- This amounts to express recognition of the positive role of the trade unions in negotiations and makes their participation in the EWC easier. In this way trade union assistance for workers' representatives in undertakings should be ensured at an early stage.

3. Validity and legal consequences of the new EWC Directive

When will the new regulations of the revised EWC Directive come into force?

- The revised Directive on EWCs was adopted at its first reading by a large majority in the European Parliament in mid-December 2008. Further substantial amendments were made on which almost unanimous agreement was reached immediately afterwards in the Council. As a result, there is no obstacle to the formal adoption of a resolution on the new EWC Directive by the Council of Ministers of Employment and Social Policy in spring 2009.

- The new EWC Directive therefore replaces the 1994 text, but it will not come into force immediately. With the publication of the EU Official Journal begins the usual process for EU directives of implementing European framework legislation in the labour codes of individual member states.
- That applies to all 27 EU member states and the EEA countries. All the countries that have joined the EU up to this point have to have implemented this directive at accession.
- In effect, the new legal foundation for EWCs will therefore not come into force before 2011. From then on, no matter what the new procedural rules for founding EWCs, as well as the new legal entitlements of EWC members and the regulations on the revision clause for existing EWCs in the case of substantial structural changes in the undertaking shall apply.

What does the recasting of the Directive mean for existing EWCs?

- Most of the regulations in the recast EWC Directive apply in the first instance to EWCs yet to be established or to be revised/renewed after 2011. It was not possible to push through an automatic obligation to revise existing EWC agreements. Having said that, the text of the new Directive now contains a quite useful revision clause that it will be possible to apply for many existing EWCs in future, after the EWC Directive has come into force.
- Existing EWCs retain the right to renegotiate the EWC agreement if substantial changes in the size or structure of the undertaking no longer guarantee practicable information and consultation of all employees in compliance with the agreed standard. The clarifications on this point are to be particularly welcomed, in accordance with which existing agreements are to remain in place during renegotiation.
- EWCs founded before the existing EWC Directive came into force at national level in September 1996 will explicitly also be entitled to exercise this option. In the event of renegotiation of agreements reached voluntarily and with weak provisions, however, the regulation contains no compulsion for employers to agree to a better and more effective agreement. For example, the Directive lacks a clarification concerning what has to happen if agreement is not reached in the event of such renegotiation.
- However, this possibility will not be available before 2011 and the implementation of the new EWC Directive in national law.
- What is certain is that the new Directive from 2011 will not apply to agreements revised or newly concluded during the transitional period between May 2009 and May 2011. In these negotiations the improved regulations of the new Directive should be used proactively as guidelines in the conclusion of new agreements or in follow-up negotiations on existing EWC agreements. Alternatively, these agreements could be set to expire at the end of the transitional period or an appropriate adjustment clause can be agreed related to the new EWC legislation.

4. Summary: Partial success, but no end in sight in the struggle for more workers' participation

Now the order of the day is to put to use the new possibilities for improved EWC practice

- The adoption of the new legal basis for EWCs is certainly a success for all those in the EU who advocate strengthening workers' participation rights as a core element of the European social model. This estimation holds even though many trade union demands for improving the EWC Directive remain unfulfilled.
- The new Directive sets new standards for the EWC. Enterprise workers' representatives and trade unions have a new and partially readjusted toolbox. It is now up to all existing EWCs to make active use of this in order to improve the conditions of agreements and their current practice.
- Even though the new possibilities as regards renegotiation in the case of structural changes in the undertaking cannot be exercised before 2011 the improved regulations of the new Directive in this connection should be used proactively as a benchmark for the renegotiation of existing EWC agreements.
- Certainly the trade unions in Europe will sooner or later have to build on this partial victory in the struggle for more codetermination rights in multinational companies and further improve them in a subsequent round.
- For the moment, we have to seize the new possibilities and improve the practical implementation of the participation rights contained in the revised EWC Directive.