

ETUC position paper For a modern European Works Council (EWC) Directive in the Digital Era

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The 20th anniversary of the EWC Directive in 2016 is one reason for assessing EWC - related achievements and shortcomings when it comes to representing the workers' interests in transnational companies. The EWC Directive stipulates that the European Commission should deliver an assessment "not later than June 2016", but some delays occurred and the assessment will be delivered in spring 2017. An increase in the overall number of EWCs due to the EWC Recast did not materialise. Whereas some improvements can be achieved from the trade union side, other advances are impossible without a substantial improvement of the EWC Directive. All too often, workers' involvement is a mere formality and has limited impact as EWCs continue to be presented with a "fait accompli", especially in the event of transnational company restructuring. In the digital era, new societal, technological and structural challenges are requiring a strengthening of EWC tools. Digitalisation will not wait. It is taking place now. EWCs must have the means to shape it.

Therefore, after long and in-depth discussion with its affiliates, the ETUC has identified the following main priorities for making workers' rights to information and consultation effective and solving difficulties in the practical implementation of the EWC Directive:

1. Enforcement of rights arising from the Directive through effective and dissuasive sanctions, including a right to a temporary suspension of company decisions with a national trade union prerogative. The implementation of information and consultation in practice is often inadequate and information is provided too late. The ETUC requests, above all, that there should be effective enforcement. Information and consultation must be an integral part of company decision-making at all levels: local, national and transnational. Before management takes a final decision, the transnational information and consultation process must be properly conducted and completed¹. In this context, the definition of consultation (in Article 2.1 g) should be strengthened so that the opinion of the EWC "shall" (instead of "may") be taken into account by the management. The differences in levels and scope of sanctions defined at national level must be reduced, with the aim of meeting the requirement of being "effective, dissuasive and proportionate" and to ensure a level playing field. The ultimate sanction should be to nullify company decisions in case of breach of information and consultation procedures, on the condition that the national trade unions directly affected by the decision support a suspension and/or nullification.
2. Ensuring access to justice. Specification of legal status of EWCs and Special Negotiating Bodies (SNBs) as legal actors. Definition of legal means to launch litigation against the company in defence of rights conferred by the EWC Directive.
3. The role of "representatives of competent recognised Community-level trade union organisations" in Article 5.4 should be reflected in the subsidiary requirements. A right for trade union experts to participate in all EWC and Select Committee meetings and to have access to all sites is a necessary condition for supporting and coordinating the EWC's work more effectively.

¹ <https://www.etuc.org/documents/etuc-position-paper-orientation-new-eu-framework-information-consultation-and-board-level#>

4. Ensure a more efficient coordination between local, national and European levels. Information and consultation rights must guarantee that the EWC can deliver its opinion before consultation is finished at the respective level. The EWC must be able to communicate with the national level whenever necessary, especially before and after EWC/SE meetings. The necessary resources and rights, such as access to sites, must be ensured.
5. A comprehensive definition of “controlling undertaking” to include contract management, franchise systems and joint ventures. Objective criteria to determine the location of the “representative agent” and “central management” must be laid down to avoid regime shopping and use of letterbox companies.
6. After 20 years, there is no longer justification for exempting old, so-called voluntary (Pre-Directive, “Article 13”) agreements². Double standards must be ended by bringing them into the scope of the Directive. To ensure a level playing field and legal clarity, all provisions laid out in the Directive must apply to all agreements, either automatically or by renegotiation based on clear fall-back provisions embedded in transitional rules to ensure continuity for the duration of renegotiations.
7. Improve and clarify the rules for negotiations with SNB (clear timeframe for the first SNB meeting, pace of SNB meetings, clear obligation of central management to establish an EWC if subsidiary requirements are to apply).
8. The concept of “transnational character of a matter” (recitals 12 and 16) should be consolidated and incorporated in the main body of the Directive. There must be an enforceable comprehensive right of the EWC to be informed and consulted throughout the decision-making process.
9. Prevent abuse of confidentiality clauses by clarifying more precisely on what grounds, under what circumstances and how long a company may withhold information, and on what grounds EWC members' right to share information with stakeholders (particularly employee representatives) can be restricted. Clarification is needed because management all too often does not provide sufficient information regarding the confidentiality rules and hinders EWC delegates in their necessary communication at European and National level.
10. Strengthen the subsidiary requirements to improve the practical functioning of the EWC (e.g. rights and means of Select Committee, enlarged list of topics).

² In March 2016, of all the EWCs in place, 42% (395) were still exempted from the rules of the Directive and the Recast (so-called pre-Directive EWCs), 53% (495) were functioning as Article 6 EWCs, and 3% (31) were functioning as Article 14.1b European Works Councils. Additionally, nine information and consultation procedures were registered, alongside 12 EWCs functioning under the subsidiary requirements. (Stan De Spiegelaere. *Too little too late*; ETUI 2016, p. 17)