

ETUC strategy in view of the revision of the European Works Councils Directive

"Resolution adopted by the Executive Committee, 4-5 December 2003 and final agreement given by the Steering Committee on 13 February 2004".

1. The European Commission is due to launch the revision procedure for Directive 94/45/EC 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" (Directive complemented by Directive 97/74/EC extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 94/45/EC).

2. This revision is already four years overdue despite precise proposals for amendments made by the ETUC in its December 1999 Executive Committee resolution for this revision and a number of other trade union initiatives and actions to speed up its realisation. The European Parliament has also called for such a revision on several occasions and, more recently, even the Economic and Social Committee (EESC) almost unanimously adopted an Opinion confirming the urgent need for the revision and offering a positive framework of reference regarding its contents (23 September 2003). A number of legal judgements - most recently on 13 January 2004 the European Court of Justice (ECJ) handed down its judgement on the Kühne & Nagel AG case - have also confirmed the importance and value of accurate, detailed information and consultation for Special Negotiating Bodies (SNBs) and for EWCs.

3. It is therefore vital that Directive 94/45/EC be revised. Its application so far has had a positive impact, not just in terms of the number of European Works Councils established, but also - indeed, above all - in the light of its reference function and the incitement it has provided to spread and innovate information and consultation practices and rights within both companies and systems of professional relations in the EU Member States and candidate countries. Nonetheless, the experience gained in implementing and running EWCs underlines the need for an urgent review of the Directive to make it more effective with respect to actually seeing rights exercised and enabling EWCs to function effectively.

4. Furthermore, the revision is needed to lend coherence to the new legislative and economic measures that have come about since:

a) the adoption in October 2001 of Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees, and in March 2002 of Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community, which calls for the harmonisation of Directive 94/45/EC and the subsequent Directives;

b) the intensification of the process of restructuring, mergers, relocations, etc. affecting all sectors of activity and bringing about changes in the structure of companies, in production and employment. For we end up being forced to cope with the consequences of such changes instead of being properly informed and consulted.

In our view, the launch of the revision process must entail the European Commission presenting a specific, detailed document on the contents to be covered, so that we can respond by submitting our comments and proposals.

5. The main changes we want to see take place are as follows:

a) Definition of the notions of information and consultation

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, such as Directive 2001/86/EC and Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community. By contrast, the present EWC Directive does not clearly define either the content or means of exercising such rights. So Community legislation is inconsistent, since it defines information and consultation rights in different ways in several separate Directives. We should reiterate that in our view, in accordance with Directive 2001/86/EC, information and consultation should be provided by companies in good time, in other words before any decisions are taken. Moreover, we believe that their content should provide workforce representatives with everything they need to proceed with an accurate assessment of the information received. By the same token, we are demanding the right to a consultation procedure that enables EWCs to draw up their own proposals in time for them, potentially, to be taken on board before the end of the decision-making process.

b) Recognition of the union's role

To guarantee the right to trade union coordination and support for workforce representatives, both in EWC negotiations and in their general duties, the participation of a member or of a representative of the sectoral federations in both Special Negotiating Bodies and EWCs must be guaranteed. This demand is justified by the observation that analyses of the agreements implemented to date confirm that in more than 75% of concluded negotiations the respective sectoral federations played an important coordinating role and/or co-signed the agreements. Naturally, this demand is no substitute for either the presence of or services provided by experts.

c) The procedure for renegotiating agreements

It is absolutely essential to have a more closely specified procedure for renegotiating agreements. The current procedure set out in the Directive is unclear. In particular, we are demanding that EWCs involved in restructuring processes or mergers between two or more companies should expressly have the right to legitimately take any initiatives they deem necessary in the light of such developments until such time as the resulting, new EWC is formed.

d) A clearer definition of the notion of 'controlling undertaking'

Article 3 of the EWC Directive defines the notion of controlling undertaking, in other words it stipulates how to ascertain whether a company is to be treated as a subsidiary of another company within the meaning of legislation governing EWCs. At the moment, this relationship is defined as being the ability of a company to "exercise a dominant influence over another undertaking ('the controlled undertaking') by virtue, for example, of ownership, financial participation or the rules which govern it.". Even though this definition isn't exclusive, it does not clearly stipulate that this includes companies which are controlled by another company via the establishment of a guaranteed monopsony (creating a market on which the buyer has a monopoly).

Consequently, the definition of "control" in the Directive should be altered to explicitly include such subsidiaries controlled by monopsony, a situation that is becoming increasingly frequent in all sectors.

e) Training

Experience shows that one of the major difficulties faced by EWCs is communication, due to the many different languages involved and the knowledge, including technical know-how, required in a range of areas - economics, finance and social affairs - if the information received is to be analysed correctly. For this reason it would be a good idea to shore up the right to language training and step up the implementation of specific training programmes aimed at enabling workforce representatives to exercise their duties within EWCs efficiently.

f) Shortening the period for negotiations

The present version of the Directive provides for a period of three years, which has proven far too long. Most agreements concluded so far have taken no longer than a year to reach. Consequently, it would seem reasonable to reduce the deadline for negotiating agreements from three years to one.

g) Sanctions

We are demanding that in the event of companies violating the provisions of the Directive, they are sanctioned in the manner set out in the European Parliament's proposal regarding infringements of Directive 2002/14 on establishing a general framework for informing and consulting employees in the European Community, namely via the non-applicability of decisions taken - even before they are fleshed out in full - in the event that the respective information and consultation procedures are not respected or that false or deliberately imprecise information is circulated. EWCs must also be able to take legal action if the provisions of the Directive or of an agreement are violated.

h) Confidentiality

We are calling for a clearer definition of this notion, fully respecting the need to withhold information received on financial or business policies or information of a personal nature, but preventing any abusive application of the term by the company management designed to prevent the members of EWCs from communicating with each other or with the unions.

i) Recourse to experts

We are calling for the amendment of the provision in the Directive limiting the right to cover the funding of one expert only. Experience in more complex cases of restructuring in particular shows that EWCs often need to call on more than one expert, e.g.

people with legal, scientific or technical know-how. The provisions currently in force have prevented them from doing this. For this reason, we are demanding the right to call on a second expert in the circumstances outlined above and guarantee sufficient financial cover.

j) Access to sites

The current Directive makes no provision for an EWC representative to gain access to all the sites within a company. It goes without saying that members of EWCs cannot fully discharge their duties as representatives if they are not even allowed to acquaint themselves with the workplaces falling within their remit or given the right and the necessary facilities to engage in direct contact with workforce representatives and/or the workers themselves.

k) The right to preparatory and follow-up meetings

We are asking for the right to hold preparatory meetings to give the members of EWCs an opportunity to discuss their views before meeting their employers. We are also demanding the right to hold follow-up meetings to perform an initial evaluation of the information received. There should further be a possibility to set up a smaller EWC Select Committee to liaise between one meeting and the next. The necessary funding must be set aside to guarantee this.

Annex(es):

Annex

The following list outlines all the points on which the ETUC would like to see changes to the Directive and which should be covered by any forthcoming negotiation with between the European Social partners and addressed by the European Commission. They are all made in the knowledge that the structures and physiognomy of the European Union will change in May, when 10 new countries become members. We consider that the expansion of Europe further underlines the importance of an improved legal basis for European works councils:

1. Definitions of 'information' and 'consultation'

The concepts of 'information and consultation' which are central to the EWC Directive have been developed in subsequent community legislation (notably 2002/14/EC of 11 March 2002, establishing a general framework for informing and consulting employees in the European Community and, at the European level, in Directive 2001/86/EC of October 2001, supplementing the Statute for a European company and Directive). These definitions have further concretised the intentions of the existing EWC Directive and have clearly been developed in the context of the experiences of EWCs. However, the current EWC Directive does not for its part include precise definitions of either the content of these rights or the procedures for exercising them. This has in some cases led to EWCs not being informed and consulted within the spirit of the Directive.

We therefore reiterate that the EWC Directive must clarify the need for information and consultation to be provided with such content and within such a timescale as to make them a meaningful part of the decision-making processes of the undertakings concerned. As it seems logically incoherent to define the right to 'information and consultation' at European level differently in different directives, we consider that it would be reasonable to incorporate the following definitions of information and consultation, taken from Article 2 of Directive 2001/86/EC (the SE Directive), into the EWC Directive:

"information" means the informing of the EWC on questions which concern the undertaking ... in a manner and with a content which allows the employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare consultations with the competent organ of the undertaking;

"consultation" means the establishment of dialogue and exchange of views between the EWC and the competent organ of the undertaking, at a time, in a manner and with a content which allows the employees' representatives, on the basis of information provided, to express an opinion on measures envisaged by the competent organ which may be taken into account in the decision-making process within the undertaking;

2. The role of the trade unions

In order to ensure a good level of support and coordination for workers representatives from the trade unions involved in EWCs and their creation, at least one seat should be set aside for the trade unions to be represented as full participants in all special

negotiation body (SNB) and EWC meetings.

In more than three quarters of the negotiations concluded, the European Industry Federations have already played an important role in coordination and/or were co-signatories of the agreement. The benefits of involving their representatives at all stages of EWCs development can not only be seen through our own experience and the deliberations in ECOSOC but also through a number of independent academic studies that have stressed the advantages to all concerned of bringing the experience and pan-European understanding of European Industry Federation representatives to the table.

This seat reserved for trade unions should therefore be allocated to the relevant sectoral European Trade Union Federation(s) to nominate a representative of their choice. This right should not affect the wholly separate provision for paid experts who may or may not be trade union officials.

3. The maximum number of persons in SNBs and EWCs (in the subsidiary requirements)

The maximum number of members for the SNB and (in the case of the subsidiary requirements) the EWC will have to be changed. This is a matter of some urgency because article 5 of the Directive currently stipulates that these bodies must comprise no more than 17 members and equally that each member state in which the undertaking is based must be ensured at least one member.

In May this year the EU will have 25 Member States and the Directive will cover 28 states (including Norway, Iceland and Liechtenstein). A number of companies will be then be operating in 18 or more member states and it will therefore be impossible for them to have no more than 17 members and to give one seat to each country: the Directive will be contradicting itself. We thus propose that the limit be increased to 28.

4. The procedure for renegotiating agreements

A more precise procedure for the renegotiation of agreements is needed. The current procedure described in the Directive is not very clear. This is particularly the case when EWCs are involved in restructuring or merger processes. This is also true when an EWC wants to renegotiate an 'article 13' agreement under 'article 6' to benefit from the subsidiary requirements.

It is vitally important that EWCs are fully able to carry out their important role while restructuring is taking place. Above all, they must not be disbanded leaving workers without European information and consultation rights, during periods when it is most needed. It must therefore be made totally clear that EWCs have the right to remain in place until any legitimate replacement is up and running.

It should also be made clear that existing EWCs in which include trade union's are represented have the right to re-negotiate their own agreements rather than having to disband or set up a new SNB for the process. This must be the case even when negotiating under the rules in Article 6 of the EWC Directive. Currently an EWC established under 'article 13' and wishing to negotiate a new agreement under 'article 6' would, according to the Directive, have to request that a new SNB be set up, no matter what the circumstances. This can only cause unnecessary confusion and delay.

5. Provision for a second exceptional meeting

Provisions for exceptional meetings are extremely important when there is restructuring in an undertaking. The subsidiary requirements of the EWC Directive already state that EWCs established under those arrangements have the right for their select committee and representatives of countries directly effected to have an exceptional meeting with management representatives concerned "where there are exceptional circumstances effecting employees interests to a considerable extent". It is important, if consultation is to be effective, that the parties to such meetings can reconsider their positions in the light of the discussions when they are unable to come to a agreement in the first instance. The Directive should therefore make provision for a second exceptional meeting in such circumstances.

6. One-year negotiating period

The current Directive provides for a period of three years to complete negotiations. This has proved to be excessively long. While negotiations have generally not lasted more than a year, in some cases this over lengthy period has served to encourage obfuscation and has undermined negotiations. The negotiating period should therefore be reduced from three years to a maximum of one year.

7. Better definition of “controlling undertaking”

Article 3 of the EWC Directive deals with the definition of a 'controlling undertaking': in other words how to establish whether a company should be treated as the subsidiary of another for the purposes of EWC legislation. Currently this relationship is defined as one where an undertaking “can exercise a dominant influence over another undertaking by virtue, for example, of ownership, financial participation or the rules which govern it”. Although the definition is not exclusive, it does not make it clear that it includes companies which are controlled by another through a guaranteed monopsony (the creation of a market in which they are the only buyer).

The definition of control in the Directive should thus be changed so that it clearly includes such monopsony controlled subsidiaries, which are becoming increasingly common in all sectors.

8. Access to workforce and workplaces

The right of EWC members to meet the workers they represent and to have access to all the sites in the company where they represent workers is not guaranteed at present. It is clear that an EWC member cannot fully exercise her or his representative tasks without the being able to talk to those they represent and to assess the conditions in which they work. We therefore call for these rights and for appropriate financial measures to permit such functions to be properly exercised.

9. Confidentiality

We call for a clearer definition of confidentiality, properly defining it so as to limit its use to information that is of clear commercial or personal sensitivity. While we fully respect the need for an obligation of confidentiality as regards genuinely and necessarily confidential information, misuse of the concept must be prevented. This is particularly the case where it is wrongly utilised in order to block communication between EWC representatives and/or between them and their trade union organisations. The burden of proof should thus rest with the undertaking when it comes to showing that information must be kept confidential. Undertakings should also not have the right to veto any expert requested by the EWC on

grounds of confidentiality when that expert is prepared to sign a confidentiality agreement in good faith.

10. Penalties

Currently, the Directive does not ensure adequate penalties in the event of violation of its provisions and/or resulting agreements by undertakings. The European Parliament approved provisions for the first draft of Directive 2002/14 (National I & C Framework Directive) that would have avoided this problem for that legislation. However they were, unfortunately, later withdrawn at the behest of UNICE and some member states. We continue to support the original decision of the Parliament and call for this text concerning sanctions to be inserted into the EWC Directive:

1. The member States shall provide for adequate sanctions to be applicable, in the case of infringement of the dispositions laid down in this Directive by the employer or employees' representatives. These sanctions must be effective, proportionate and dissuasive

2. The member States shall establish provisions according to which, in the case of non-compliance by the employer with the obligations to inform and consult with employees regarding decisions as described under article 1 and the agreements signed for the setting up of a EWC, which may have direct and immediate consequences in the sense of substantial changes or termination of working contracts of the concerned groups of employees, such decisions shall not have any legal effects on the contracts and terms of employment of the concerned employees. Legal effects shall not enter into force until the employer has fulfilled all obligations, or, should compliance have become impossible, an adequate compensation be determined, according to procedures and modalities to be established by the member States.

3. with reference to the commas above, non-compliance is considered such:

a) In the complete absence of information to and/or consultation of employee representatives prior to the adoption of decisions or the publication of such decision;

b) In case of withholding important information or the release of inexact information with the result of making the exercise of information and consultation ineffective.

11. Legal challenges

Without the possibility of some sort of legal challenge, the legislation becomes unenforceable, no matter what the penalties might be. It is therefore very important that workers representatives in the EWC are ensured of the ultimate possibility to legally challenge breaches of the agreement by management. EWCs that are chaired by management have been told they cannot challenge the actions of management in the UK courts because that management is part of the EWC. Furthermore, a number of EWCs have found it difficult to get the resources from management to mount a legal challenge. The law should be clarified on this issue to ensure that the workers' side of any mixed EWC have the right to challenge management breaches and that there are financial provisions for the EWC to take legal action if necessary.

12. Information on eligibility

In some cases it has been very difficult to establish whether an undertaking is covered by the Directive and whether the workforce in that undertaking are aware of the possibility to request that an EWC be established. The European Industry Federations should therefore be able to request relevant information to allow them to ascertain whether or not a company is covered by the EWC Directive. This should include employee numbers in Europe broken down by subsidiary as well as the location and NACE sector(s) of those subsidiaries.

13. Preparatory and follow-up meetings for SNBs and EWCs (in the subsidiary requirements)

Pre-meetings and follow-up meetings for the workers representatives in SNBs and EWCs have become fairly common in agreements and could now be considered a standard indicator of good practice. To operate effectively, members of these bodies must be able to hold preparatory meetings before and follow-up meetings after each meeting with central management. They allow the employee representatives time to discuss their position before and after talking to management and to go over action points so as to follow up what has been discussed. As such they add an important contribution to the creation of effective EWCs and efficiency of operating EWCs. We therefore call for the facility to hold such meetings with appropriate financial provision and language resources to be incorporated into the Directive.

14. Training

Experience demonstrates that a major obstacle to the good functioning of EWCs is lack of training in languages as well as in economic/accounting and other technical and social matters. EWCs are multi-lingual bodies at the heart of large and complex corporations bringing together highly different industrial relations cultures. The SE Directive and even the National I & C Framework Directive (where linguistic and cultural differences are less of an issue) have both recognised the importance of this issue and made provisions for the training of representatives on the bodies to which they apply. It is thus clear that the EWC Directive should also ensure that workers' representatives under its provisions are given the skills to carry out their tasks correctly. This means asserting the right of the EWC to determine a training programme at EWC level and the right to appropriate time off.

15. Experts (EWCs)

The current subsidiary requirements of the Directive state that only one expert per meeting need be funded by the employer. Practice has shown that in times of radical change and uncertainty, such as the more complex cases of restructuring, the EWCs often require the benefit of expertise in more than one field: for example, in both legal and economic/accounting matters. This should be recognised by the Directive. We therefore call for provisions in the Directive to entitle EWCs to at least one paid expert at all meetings and a second when necessary.

16. Experts (SNBs)

While the Directive gives special negotiating bodies the right to be assisted in negotiations by experts of its choice, this right is often disregarded or only partially met. The Directive must make it clear that the experts requested by the SNBs can participate in the negotiations with central management.

17. Select committees

It was noted by ECOSOC and is borne out by our own experience that select committees are crucial to the smooth running of all but the smallest EWCs. However, currently the subsidiary requirements of the Directive are very vague as to when an EWC established under those provisions should have one, stating only "where it so warrants". Experience shows that all EWCs with more than 9 or 10

members need a select committee in order to function properly and the Directive should be clear about that and the need to provide the Select Committee with appropriate time and resources to carry out their work.

18. Two meetings a year for EWCs

At the moment the subsidiary requirements stipulate one meeting a year with the possibility of a second meeting in exceptional circumstances. Many of the better agreements already allow for two meetings a year which has significantly improved the functioning of those bodies. The subsidiary requirements should therefore be altered so that they prescribe two meetings a year with the possibility of further meetings in exceptional circumstances.

The SE Directive already recognises this need. We therefore call for the following phrase from Part 2 of the Annex to that Directive to be inserted into the part of the EWC Directive dealing with exceptional meetings:

“Where the competent organ decides not to act in accordance with the opinion expressed by the representative body, this body shall have the right to a further meeting with the competent organ of the [undertaking] with a view to seeking agreement.”

19. Interpretation and translation of documents

As stated above, the content of information must enable employees' representatives to examine in detail the possible repercussions of a proposed measure, properly and in good time. The Directive must therefore provide that information given in writing should be in all necessary languages and that there is adequate interpretation provided for all meetings including preparatory and follow-up meetings.

20. The topics of 'health and safety policy', 'training and education policy', 'environmental policy' and 'equal opportunity policy'

The issues of health and safety, training and education, environment and equal opportunities are important for both employers and workers representatives and are of clear relevance at the European level as all are covered by European legislation. EWCs can play a useful role in the development and monitoring of policies on these matters. These topics should therefore be included

among those listed in the subsidiary requirements of the Directive as of particular relevance for EWC meetings.

21. Gender balance in EWCs

Women are still under-represented in SNBs, EWCs and their select committees. While we are aware that the ETUC itself and its member organisations still have much work to do on this issue, we also call for the preamble to the Directive to mention the importance of the promoting gender democracy in EWCs.

22. "Ideological guidance" undertakings

The Directive currently allows a limited exemption for "ideological guidance" undertakings. This has prevented employees in media groups registered in some member states from benefiting from the Directive. This provision should be completely removed. Workers in this sector have experienced a lot of company restructuring since the Directive came into force and these processes are not helped by denying their right to be informed and consulted at European level.

23. Commercial shipping

Merchant navy crews are also subject to an exemption from the scope of the Directive. This provision should also be removed.

24. The 'transnational' criterion

It is not always easy to distinguish whether any one issue meets the 'transnational' criterion, thus making it a legitimate topic for information and consultation in the EWC. In order to prevent the misuse of this argument in order to frustrate and delay legitimate information and consultation procedures from taking place, the burden to prove that an issue affects only one country should rest with the management of the undertaking.

25. Reducing the threshold

The Directive's stated aim is to strengthen employees' rights to information and consultation in undertakings and groups of undertakings operating on a Community-scale. A number of

companies with somewhat fewer than 1000 employees clearly operate on a Community-scale but are not covered by the Directive because of this threshold. Representatives from some of these companies have expressed their view that they would benefit from the existence of a European works council. As they too are employees in undertakings operating on a Community-scale and the current threshold is preventing them from benefiting from its provisions, we suggest that the threshold should be reduced to 500 employees with at least 100 employees in 2 different member states.

26. Registering agreements

At present a number of organisations, including those supported by the European Commission and the ETUC and its member organisations, spend a great deal of time and money trying to gather all the latest EWC agreements so that they can be analysed for research and we can see the trends that are occurring. We suggest that undertakings should be obliged to send a copy of their latest EWC agreement to a neutral and mutually acceptable body, such as ECOSOC or the Dublin Foundation, where they would be made publicly available. This would avoid a lot of unnecessary work and ensure a more complete picture of how EWCs are developing.

WC/SC