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Comments on the functioning of the EWC Recast Directive

KEY MESSAGES



- 1** BusinessEurope recognises an European Works Council can improve information flows in a company, support employee engagement, and facilitate the introduction of cross-border initiatives. BusinessEurope therefore supports policy efforts aiming to improve the functioning of EWCs in practice, as was the case when the Recast Directive was negotiated.
- 2** There is only limited experience of practical operation of the Recast Directive. More time is needed to assess its full impact on the functioning of EWCs. There is evidence that EWCs are a « learning process » with cooperation between management and employees usually getting better with time.
- 3** The current framework is fit for purpose, so there is no need for a revision but for awareness amongst employee representatives and management of the procedures and benefits of creating EWC's. A revision would only create uncertainty and pressure for companies and employees to change already well-functioning EWCs showing also lack of respect for existing agreements. BusinessEurope is therefore opposed to a revision of the Recast Directive.

BusinessEurope comments on the functioning of the 2009 EWCs recast directive

Article 15 of the 2009 EWC Recast Directive requires the Commission to report to the European Parliament, the Council and the Economic and Social Committee on the implementation of the Directive, making appropriate proposals where necessary. With this position paper BusinessEurope would like to offer views of the business community on the functioning of the EWCs and the recast directive.

General comments

- 1.** It is still too early to assess the full impact of the EWC Recast Directive as it has been effective only for 5 years. Companies are still adapting to working with the new rules. The Recast Directive was only enacted into national laws in 2011. Companies and



EWCs/SNBs then took several years to negotiate agreements, so that actual experience with the Recast Directive is limited to around 2-3 years. It is difficult to draw conclusions from such a short period of time as the examples of how the Recast Directive is operating in practice are limited.

2. The business community does not see the need for revising the Recast Directive. The current framework works appropriately. A revision would only bring uncertainty for companies and employees, and could necessitate renewed negotiations within EWCs on procedural issues. Experience has taught us that nothing undermines the success of an EWC more than when the parties are distracted by continual debate about the wording of the agreement from undertaking their useful role and from developing the behaviours most appropriate to that role. Existing agreements, some of which have just been updated or concluded between companies and their employees, should be respected and be given an opportunity to work.
3. The quality of information and consultation would not necessarily be improved by revising legislation and attempting to create new formal standards. Quite the contrary, the quality of information and consultation processes depends mainly on corporate culture, mutual trust, and whether employers experience an added value of their efforts to involve employees. Moreover, employee representatives have to be competent and to show the willingness to constructively engage in the dialogue and to further develop skills in the course of the process.
4. Important parts of the recast directive were based on a joint contribution by BusinessEurope and ETUC and this should be respected as it provides an appropriate balance between the needs of management and employees.
5. As many EWCs – both UK-headquartered companies and numerous non-EU ones – are currently governed by the UK law, the future of these agreements could be affected by Brexit negotiations. It is important to ensure that this process of adaptation is as smooth as possible and take into account the needs of companies. It would not be helpful if, in addition to dealing with human resource complexities potentially created by Brexit, businesses were also renegotiating their EWC agreements in view of an unnecessary revision of the Recast Directive.

Conclusions from the Leuven University project

6. In 2015 BusinessEurope gave an endorsement for the University of Leuven to carry out a project financed by the European Commission to explore managers' perspectives on the functioning of their European works councils. The research was based on interviews with 56 large companies (more than 1000 employees) which were performed in early 2016.
7. The report shows that managers engage positively in running the EWCs and the majority sees that the EWC can add value to the company. Building the environment of trust, mutual respect, cooperation, positive attitude and engagement are mentioned as most important contributors to the quality of information and consultation processes. There is evidence that EWCs are a « learning process » with cooperation usually getting better with time. BusinessEurope believes that attempting to impose



rigid rules, even if such rules could be devised, would undermine the relationship-building process and would result in “formalism” at the expense of constructive engagement.

8. Moreover, the report shows that managers and their employees found ways, adapted to their circumstances, to overcome operational difficulties in running EWCs such as consultations timelines, definition of a “transnational” scope, and relations between national and EU level processes. It is important that pragmatic solutions are possible in the course of the information and consultation process in order to enable efficient and high-quality implementation of corporate decisions. That the process works is underscored by the fact that there are not so many “Subsidiary Requirement” EWCs in existence.
9. The report also concludes that the provisions of the recast directive have been largely built on practices developed beforehand within multinational companies. The directive did not therefore constrain companies but rather confirmed common standards for dialogue while respecting the autonomy of the negotiating parties. This is, in BusinessEurope’s view, one of the success factors of the directive.

BusinessEurope comments on the executive summary of the draft ICF report

10. In June 2016, the ICF consultancy, working for the European Commission, presented to the Expert Group on the European Works Councils, the conclusions of their study on the functioning of the Recast directive.
11. The ICF report claims that the **EWC directive is generally consistent with other EU legislation on information and consultation but there are some differences, i.e. the Recast Directive does not include a list of information to be provided to employees in the I&C procedures, a specific timeframe for I&C procedures and does not require an official management answer** to an opinion from an EWC in a consultation process.”
12. BusinessEurope underlines that each of the information and consultation directives (EWC Directive, Collective Redundancies, Transfer of Undertakings, General Framework Directive on Information and Consultation of Workers) serves a different purpose so some differences between them are justified and needed. The Commission acknowledged these different purposes in the Staff Working Document/ Fitness Check on the functioning of the I&C legislation.
13. Secondly, the Recast does provide a framework on what information is to be provided to employee representatives at EU level, requires annual meetings, provides that EU-level information and consultation procedure during an extraordinary transnational event must be coordinated time-wise with local consultations, and that the opinion from employee representatives in response to planned management decisions must occur within a “reasonable” time.
14. At the same time, Recital 19 of the Recast Directive clearly underlines « the principle of autonomy of the parties » : *In accordance with the principle of autonomy of the parties, it is for the representatives of employees and the management of the*



undertaking or the group's controlling undertaking to determine by agreement the nature, composition, the function, mode of operation, procedures and financial resources of European Works Councils or other information and consultation procedures so as to suit their own particular circumstances

15. This framework works well. In reality, many EWC agreements either provide for specific timeframes for I&C procedures or the parties to agreements tend to work out the I&C timeframes according to the issue which is being addressed. Also, the many agreements provide for a management response to an opinion of the EWC, reflecting the subsidiary requirements that require a formal response from management to any opinion of the EWC. In other words, social partners at company level adequately address concerns raised in the ICF study, often on a case by case basis. Given the variety of situations management and EWCs are confronted with, it would not be appropriate to define such matters in an abstract manner. In fact, it would be impossible to draft a “one size fits all” template that would work equally well.
16. Finally, we would like to remind that the definitions of “information” and of “consultation” contained in the Recast directive were based on the joint proposals agreed by the EU social partners. We believe they remain appropriate and individual EWCs continue to work out what they can best mean in their individual circumstances/business.
17. The ICF report also states that **“A clearer distinction between the information and consultation phases can help EWC’s in influencing the decision making, as well as employer willingness to share relevant information.”** The feedback from companies suggest that most of the time this would be an artificial separation creating more disputes over categorization than it will actually solve problems or meet perceived needs. To insist on a rigid separation between “information” and “consultation” could also tend to curtail effective involvement by artificially limiting the nature and content of discussions at each of the proposed phases.
18. The ICF report also suggests that **“The rationale on the employers side is often that information needs to remain confidential specifically for companies listed on the stock market. The latter should, in principle, already be addressed by requiring EWC members to respect such confidentiality”** Listed companies have to comply with strict rules on when and to whom price sensitive information can be given before public disclosure. Such information is essentially limited to persons who need it in order to be able to perform their work for the company. This is to ensure that companies release relevant information first to the stock market so that all those who want to deal in shares have access to the same information at the same time. European Works Councils not only include employees who do not need the information to perform their work for the company but can also include external experts not employed by the company. Companies, management and employees can be severely punished for any breaches of stock market rules for example having to pay compensation, fines or imprisonment. How strict these rules are can be different depending e.g. on where the company or the stock exchange is based. However, even if the information is provided after public announcement for reasons



of confidentiality, there is generally enough time for consultation to occur prior to the finalization of planned decisions. For example, in the context of a merger or acquisition announcement, there is usually an extensive regulatory approval process, and consultation can effectively take place during this time.

The report prepared by the University of Leuven also confirms that the majority of the EWCs have found solutions regarding the trade-off between confidentiality and the timing of information and consultation within MNCs¹.

19. The ICF study states that **“There has been a limited impact of the Recast EWCs on the conclusion and quality of transnational company agreements. Only 3 out of 37 Recast EWCs have concluded such agreements to date.”** There is no reference in the 2009 EWC Directive to transnational company agreements. Comments about such agreements have in our view no place in a report on the transposition of the Directive. Moreover, the EWCs are essentially bodies for information and consultation, not for negotiations.
20. The ICF study states: **“In principle, the Directive remains silent on which law shall be chosen to govern the negotiations or the national jurisdiction governing the EWC agreement (...) more prescriptive action could be taken to prevent possible misuses. This could include further specification in the legislation on this issue (e.g. stipulating that the national law of the company's European HQ should govern the EWC agreement; this could include guidance on how the location of the company's European HQ is to be determined ...).”** BusinessEurope considers this to be incorrect: The Directive does not remain silent on which law should govern the negotiations as this is dealt with in Article 4 (1) and (2) of the Recast Directive. The Recast Directive stipulates that where central management is situated outside the EU, then central management can appoint a “representative” which acts as “central management” for EWC purposes. The location of the management of a company cannot be a matter for discussion, as this is a management prerogative. The Directive does remain silent as regards the law that should govern a negotiated EWC. This is however understandable, as the two parties – management and workers representatives – negotiate a contract and therefore it is up to the parties to agree on the law governing their agreement. There is no evidence that this has been a problem in practice and EWC agreements are generally subject to the law of the country in which central management (or representative agent) is located.

¹ *“Interviewees mentioned the following as central: trust; loyalty; transparency; introducing and/or adapting (new) rules to the agreement; developing shared common understandings of what confidentiality is between management and EWC representatives; respecting each-others positions; increasing shared information between management and EWC representatives; involving employee representatives in decision-making processes; and regulating formally and informally what can and cannot be shared between management and EWC representatives.” p.29*



Next steps

21. BusinessEurope is opposed to any revision of the Recast Directive:
 - The current framework is fit for purpose, so there is no need for a revision,
 - A revision would only create uncertainty and pressure for companies and employees to change already well-functioning EWCs.

22. A number of stakeholders have indicated that there is a wide variation in sanctions within the EWC implementing legislation. While enforcement regimes can of course differ between Member States, we agree that to the extent that national implementation laws do not provide for sanctions that are sufficiently dissuasive or proportionate, we believe the Commission could on a case by case basis take action towards such countries to encourage them to modify their legislation.

23. We understand that the Commission considers that the Recast Directive has produced a small number of new EWCs. In our view, any effort to increase the number of new EWCs should be preceded by an analysis of the reasons why management and workers in some companies which meet current threshold decided not to establish a EWC. On that basis, a number of ways to increase the number of EWCs can be considered if need be, such as awareness rising among the employee representatives and management throughout the EU of the procedures and benefits of creating EWCs.