BUSINESSEUROPE

POSITION PAPER

30 November 2023

Revision of the European Works Councils Directive

KEY MESSAGES

1. As employers we believe that the European Works Councils proved they are useful bodies for strengthening social dialogue and employees' representation, bringing added value for management in terms of reaching company strategic objectives, including improving workers' openness and adaptation to change.

2. The up-coming initiative on European Works Councils Directive must be coherent with the European Commission's policy approach aimed at strengthening European companies' competitiveness and reducing regulatory burdens, and as such should take into account the context in which European companies find themselves with respect to the functioning of European works councils.

3. Transforming EWCs in co-decision bodies through granting a right to injunctive relief in the case of an alleged violation of their information and consultation rights would distort the purpose of the directive and represents a real danger for European companies' competitiveness and their ability to take decisions effectively. Therefore, any form of co-determination should be absolutely avoided.

4. If the Commission deems changes in the Directive necessary, these changes should promote and safeguard companies' prerogative and ability to make decisions and manage their operations. Effective transnational information and consultation of employees should take place without delaying companies' decision-making processes and their implementation of decisions.

5. It is essential to protect the EWCs that are functioning well through ensuring that possible changes for these bodies are not automatically mandatory for existing agreements. It should be possible that agreements can remain unchanged as long as they are valid. Moreover, as regard the voluntary EWCs agreements concluded under Article 13 of the original EWCs directive 94/45/EC or concluded or revised during the transition period following adoption of the recast directive 2009/38/EC from June 2009 to June 2011 i.e. the pre-Directive agreements, their specific nature needs to be valued and protected.

BUSINESSEUROPE a.i.s.b.l.
AVENUE DE CORTENBERGH 168 – BE 1000 BRUSSELS – BELGIUM
TEL +32 (0)2 237 65 11 – FAX +32 (0)2 231 14 45 – E-MAIL main@businesseurope.eu
WWW.BUSINESSEUROPE.EU – Follow us on Twitter @BUSINESSEUROPE
EU Transparency register 3978240953-79

6. The initiative should respect the prerogatives of the Member States to impose effective, dissuasive and proportionate sanctions in line with national laws and practices. Calls for GDPR-size fines should be rejected as this would be totally disproportionate and not in line with the EU legislative practice under the social policy chapter in the EU Treaty, whereby it is up to the Member States to provide for sanctions that are effective, dissuasive and proportionate. This practice needs to be respected by the Commission.

7. It is essential that the definition of transnational matters remains unchanged, and that the text of the definition includes that matters can only qualify as transnational if they concern at least two undertakings or establishments of the undertaking or group situated in two different Member States.

8. The ability of management to keep information confidential needs to be maintained as proprietary information is a key element to the success of many businesses. The Commission must therefore avoid provisions increasing the risk of disclosure of confidential information.

9. The Directive must respect the importance of local consultation and continue allowing EWC consultations running in parallel to national ones ensuring national information and consultation procedures can be conducted in accordance with national legislation and practices. The Commission should therefore avoid any provision demanding the conclusion of EWC opinion prior to the conclusion of national consultations.

CONTEXT

1. The legal framework governing the functioning of EWCs deals with crucial issues for the social partners. There are EWCs in some 1000 companies today and another 2,600 companies are potentially concerned. In total, they employ some 30 million employees.

2. The EWCs are tools valued by employers as they are a tangible example of social dialogue, which is a keystone of the European labour market. The improvement of the EWCs practices, based on the trust that exist between management and workers representatives, can help improving information flows in a company, developing cross-border initiatives, supporting the adaptation to the digital and green transition, and addressing different employment and skills aspects.

3. In response to the European Commission's second-stage consultation of the European social partners on a possible revision of the EWCs Directive published on 26 July, BusinessEurope offered on 4th October 2023 to the European Trade Union Confederation to negotiate the revision of the EWCs Directive.

4. Unfortunately, despite that the functioning of EWCs is at the core of social partners competences, the European Trade Union Confederation rejected the

offer of BusinessEurope to negotiate a revision of the Directive which would have led to a legally binding solution improving the functioning of the EWCs.

5. Therefore, taking stock of the new EU policy context and acknowledging the intention of the European Commission to come forward in 2024 with a legislative or non-legislative initiative for rules concerning EWCs, we underline in this paper that the up-coming initiative must be coherent with the Commission's policy approach aimed at protecting European companies' competitiveness and reducing regulatory barriers, and as such should take into account the context in which European companies find themselves.

6. European companies are lagging behind competitors from other continents because the regulatory burden remains significantly higher in Europe, while energy prices are still significantly above their long-term average. Companies are currently faced also with significant labour and skills shortages, and with managing the impact of the digital and green transitions. The excessive regulatory burden can also disincentivise companies from outside EU to invest in the European economy. The European Commission must live up to its commitment to carry out a serious quality competitiveness check when proposing an initiative on the EWCs, taking the cumulative impact of EU legislation on companies into account.

7. As previously expressed, BusinessEurope is deeply concerned about the European Parliament's main proposals which would further undermine European companies' competitiveness and damage the smooth-functioning of EWCs. Rather than fostering social dialogue based on trust, the European Parliament's approach creates significant risks of administrative or judicial injunctions imposing on companies to freeze or delay decision making, leading to disproportionate penalties, an undermining of the trust and confidence of companies in EWCs and undermining the role of social partners at company level.

8. Therefore, it is now essential that the any initiative of the European Commission is careful and balanced safeguards companies' prerogative and ability to make decisions and manage their operations, acknowledging that EWCs are not co-decision bodies, and improves the effectiveness of transnational information and consultation of employees without delaying companies' decision-making processes and their implementation of decisions.

COMMISSION'S SECOND STAGE CONSULTATION

9. Hundreds of companies reached agreement prior to the Directive coming into force in September 1996, and have chosen to maintain that status over almost 30 years through agreement renewals and despite changes in the law. The maintenance of Article 13 status has not rooted EWCs in history and prevented progress. EWCs have moved forward with the times. They have expanded in size and geographic coverage, dealt with organizational change including mergers,

acquisitions and divestitures, managed the substantial restructuring of European business over 30 years, including major expansion in the East of Europe, dealt with a global pandemic in creative ways, and updated the meeting agenda to include new issues like diversity and inclusion, sustainability, and health and safety.

10. Despite the fact that the second-stage consultation document highlights that the 2018 Commission evaluation did not conclude whether and to what extent exemptions under pre-existing agreements create legal uncertainties or prevent effective information and consultation in these undertakings, the Commission indicates that regulatory complexity could be reduced through phasing out exemptions from the scope of the Directive of undertakings with pre-existing agreements.

11. The majority of agreements, and particularly the older ones that have stood the test of time, describe a broad framework that provide for annual and extraordinary meetings, membership criteria, experts, select committees, and use the key definitions from the Directive on information, consultation, transnational questions and agenda subject matter. These aspects prove the well-functioning of the pre-existing agreements and the satisfaction of both sides with their current agreements.

12. It is therefore crucial that the Commission does not propose changes in the directive that would be automatically mandatory for the pre-existing agreements, in particular the pre-Directive agreements under an updated article 14 (1) (a) in the recast Directive. There must also be no obligatory negotiations on the reorganisation of existing bodies.

13. We call on the Commission to ensure that any potential changes in the existing agreements would come as a result of negotiations between the concerned social partners at company level. In this regard, it is important to make good use of transitional provisions that should offer to the concerned social partners the flexibility and necessary time to negotiate changes in their agreements under the framework of the revised version of the Directive.

14. We expect that the Directive continue to provide the running of EWC consultation in parallel to national ones in an effective way, ensuring national information and consultation procedures can be conducted in accordance with the applicable national legislation and practices. Unsuitable changes in this regard would not only risk undermining the functioning of EWCs but also national consultation bodies, with potentially very dire consequences for the EU labour markets and industrial relations.

15. The Commission should therefore avoid any provision demanding the conclusion of EWC opinion prior to the conclusion of national consultations, as this could negatively affect information and consultation of national employees' representatives carried out in accordance with Directives 2002/14/EC, 98/59/EC and 2001/23/EC.

16. As regards the confidential information shared by management with EWCs, we highlight that the ability of management to keep information confidential needs to be maintained as proprietary information is a key element to the success of many businesses. Despite different mechanisms such as signing confidentiality agreements, sharing sensitive information creates many risks of breaches of confidentiality. There are also strict legal and market rules around price sensitive information.

17. The Commission should avoid provisions increasing the risk of disclosure of confidential information or of delays to companies' decision making, such as imposing court or administrative authorisation prior to withholding company information or sharing confidential information with persons outside the EWC or third parties.

18. According to the second stage consultation document, the Commission is continuing to gather evidence on the appropriateness of the existing Directive's definition of "controlling undertaking" and on whether the level of influence exercised by means of such contracts warrants the application of information and consultation requirements at transnational level.

19. In this respect, we call on the Commission to avoid widening the scope of the Directive to also include structurally independent undertakings. There are no precedents in EU law where contractual arrangements are taken into account to define 'dominant influence'. Based on national company laws and practices, we reject the idea of extending the concept of group of companies or dominant influence to a situation where one party has some influence over another party purely based on a contract such as franchise arrangement. A franchisor usually does not have any real dominant influence over the governance and management of a franchisee. Further, this would lead to groups of companies having to publish their contractual arrangements, which constitutes often sensitive business information, which is usually not open to the public, and would create difficulties to monitor in practice the existence, evolution and developments of such contractual networks which are often volatile.

20. Further, on the issue of training and use of experts, we underline that training has been given to EWC members in many cases, being almost always funded by the company either at management discretion, by agreement with the EWC, or using a pre-agreed training budget. Usually, the training covers a wide range of topics and goes well beyond the terms of the directive and the company agreement including working across cultures, effective management, language, and financial training. This includes training for individual members. A variety of training methods have been used including stand-alone sessions, virtual training, and self-learning.

21. Whilst the use of experts is common to most of the EWCs agreements, the number, selection , active participation in joint meetings and the background of the experts vary among companies. In most cases the experts are chosen by the

representatives themselves and in some cases with the involvement of management. The experts are from various backgrounds including national trade unions, specialist enterprises or independent advisers. Furthermore, the possibility for EWCs to be assisted by experts is already acknowledged in the existing Directive and no changes are therefore required. However, if additional experts should be available to the EWC at management cost, we believe that management should decide on the expert's mandate and the level of costs incurred.

22. Additionally, we should take into account that EWCs are representative of all employees and not trade union bodies. Therefore, giving trade union representatives the right to sit on every EWC and to attend meetings with management irrespective of the number of union members in a company raises a legitimacy issue.

23. Regarding the gender equality, the source of the EWC employee representatives are local works councils or trade union bodies. The gender balance of employee representatives is determined by the gender composition of the local consultation bodies, of which the employer has no control. Any provision in this regard has to be aspirational and not prescriptive. The company should not be held responsible for strict gender quotas.

IMPROVING THE FUNCTIONING OF THE EUROPEAN WORKS COUNCILS

24. Social partners at company level are best placed to solve difficulties occurring in the activity of the EWCs, and this is proved by the renegotiation of many EWCs agreements over time. Any initiative must therefore respect the autonomy of the social partners and leave enough space for manoeuvre to come with arrangements that suit circumstances at company level.

25. The upcoming initiative should focus on changes improving the functioning of EWCs in practice and which ensure legal clarity and certainty. Changes should create more space for social partners at the company level to come up with their own solutions, provide clarity, improve efficiency, avoid unnecessary costs and administration for employers, and respect the diversity in existing practices.

26. For example, a reduction of the deadline when the subsidiary requirements apply from 3 to 2 years could improve the process of setting up new EWCs. However, changes to the annex listing subsidiary requirements should be limited and appropriately balance the interests of employers and workers.

27. We welcome the Commission mentioning that social partners should have full discretion in reconsidering some overly detailed prescriptions on EWCs meetings arrangements set in the Directive with a view to providing more flexibility to companies and EWC members. Allowing EWC meetings and decision-making processes via virtual means will lead to improvements in the way EWCs actually operate.

28. Revising the Directive in a way that ignores business needs would in fact run counter the shared objective of creating more EWCs. The more the legal framework is constrained and prescriptive, the less employers will want to create such a forum for dialogue because they will fear the legal and industrial relations risks.

29. Transforming EWCs in co-decision bodies through granting a right to injunctive relief in the case of an alleged violation of their information and consultation rights would distort the purpose of the Directive and represents a real danger for European companies' competitiveness and their ability to take decisions effectively. Therefore, any form of codetermination should be absolutely avoided.

30. To allow, in line with the European Parliament proposal, that all legal costs incurred by an EWC must be covered by the employer even if the claims made are found to be without foundation and of no merit, is to create a counterproductive incentive to make use of this facility. Injunctions would therefore turn EWCs from dialogue fora into highly conflictual industrial relations fora.

31. We regret the lack of attention given in this policy debate to the use of intermediary steps such as conciliation, mediation or arbitration, in line with diverse national practices, before legal action, as legal action should be a last resort. For example, at the moment, disputes over the establishment or functioning of EWCs can be resolved in 15 Member States via alternative dispute mechanisms such as conciliation, mediation or arbitration.

32. Those alternative mechanisms are not specially designed for EWCs (they are available for any private dispute), except in the case of Italy, where a dedicated Conciliation Committee was established to provide proposals to solve EWC-related disputes within 20 days. We encourage the Commission to include in their initiative provisions that will lead to the development of more designed EWCs bodies and procedures allowing intermediary steps such as conciliation, mediation or arbitration, taking into account the diversity of industrial relations dispute resolution approaches and bodies in the Member States.

33. It is essential that the definition of transnational matters remains unchanged, and that the text of the definition includes that matters can only qualify as transnational if they concern at least two undertakings or establishments of the undertaking or group situated in two different Member States.

34. Calls for GDPR-size fines should be rejected as this would be totally disproportionate in relation to the envisaged information and consultation obligations. We highlight that the regulatory framework of the Recast Directive, based on Article 153 TFEU, does not allow the EU to instruct Member States on the precise level of sanctions to be applied. This should be a matter for Member States to decide in line with national laws and practices.

35. We recall that it is the role of the Commission to conduct the necessary infringement procedures to ensure a good transposition of the Directive in all the EU Member States. Nonetheless, acknowledging that enforcement regimes differ between Member States, we draw the attention of the Commission to look into the issue of penalties with respect to Member States' competences, and with a view to making penalties effective, proportionate, and dissuasive, including the possibility to provide recommendations to the Member States in this regard in a way that respects the Article 153 TFEU.

*****