



25 May 2023

Response to first phase social partner consultation on a possible revision of the European Works Council Directive (Directive 2009/38/EC)

Introduction

1. As employers we believe that the European Works Councils are a useful tool in large companies for improving the common understanding of employment related issues among management and employees. Where they function well, EWCs can have added value for management in terms of reaching company strategic objectives such as fostering innovation, building mutual trust, undergoing rapid internationalisation and creating job opportunities. They can also add value in terms of improving workers' openness and adaptation to change by ensuring they understand complex issues, reconciling different cultures, assessing different employment and skills related aspects and adapting to new working methods.
2. Whether EWCs function well is to a large extent a reflection of the trust that exists between management and workers representatives in the running of EWCs. And the trust between social partners is not something that can be dictated by law, but through the gradual improvement of EWCs practices improving information flows in a company, supporting employee engagement, and facilitating the introduction of cross-border initiatives. The main vehicle for effective EWC operations is the agreement between the management and the workers representatives.
3. The underlying philosophy of the EWCs Directive is and should remain to give the social partners at enterprise level, who know their own company best, the space to negotiate arrangements that suit their circumstances, not to impose a standard template on everyone.
4. As highlighted in the Commission's report of May 2018 evaluating Member States' implementation of the EWCs Directive, BusinessEurope strongly believed that there is no need to revise the Directive. The challenges identified in the setting up and functioning of EWCs are practical rather than legal and would not be tackled by a revision of the directive.
5. There are around 1,000 EWCs that have been in existence for nearly 30 years. There have been only a limited number of court cases. This is not because EWCs lack the means to go to court. It is because most EWCs work satisfactorily.
6. Our view is that the best EU policy approach to make further progress in EWCs practice is to encourage and support EWC practitioners to help them create more EWCs in the scope of the directive and improve the practice of the existing ones. It is a fact that many of our member federations and sectoral associations at EU and national levels, already provide extensive support to their member companies in the establishment and running of EWCs. This includes written step-to-step guides on how to run EWCs, summaries of current rules, in-depth articles and recommendations.



Consultation response

7. Unfortunately, the European Parliament report adopted by the EP plenary in February 2023 did not take into account business realities. Moreover, the Commission decided to respond to the European Parliament by opening the way for a social partner consultation, which largely contradicts its own report of 2018, which underlined that the large majority of Member States have properly transposed the EWCs recast directive. Rather than proposing a revision of the 2009 recast EWC directive, the Commission suggested then to engage in further actions to facilitate the implementation of the Recast Directive, including as the main proposal the publication of a handbook. We regret these recent changes in EU policy orientations.
 8. Having said this, EWCs being a vehicle of social dialogue, we consider this topic as one that belongs to the social partners. We are now responding to the first-stage consultation in full awareness of the new EU policy context. The way in which the European Commission will prepare and involve the social partners in a balanced way towards its second-stage consultation later in 2023 will be important to create a good climate for an EU initiative that can be workable for both sides of industry.
- I. Do you consider that the issues and possible areas for further EU action are correctly identified in this consultation document?**
9. The issues identified in the first-stage consultation document do not reflect the broader competitiveness challenges facing European companies and looks at the functioning of the European Works Councils without taking into account the context in which European companies find themselves. Already before the series of crises of the last two years, European enterprises were fighting hard to preserve their competitiveness. Having done their utmost to sustain employment during the Covid pandemic, European companies are now faced with the headwinds of the asymmetric shock of the consequences of the war in Ukraine as the rise in energy costs is higher and hitting them harder than their American and Asian competitors. Moreover, incentives and subsidies by some of Europe's key trading partners are redirecting private investment away from Europe.
 10. The European Commission has finally recognised the urgency to address Europe's competitiveness challenges. However, broader efforts will be needed to improve the overall investment and business conditions in Europe. BusinessEurope's Reform Barometer 2023 shows that 9 out of 10 of our member federations believe that global firms see the EU as a less attractive investment location in comparison to our international competitors than was the case 3 years ago, while foreign direct investment inflows to the EU fell by 66% in 2021 compared to 2019 (pre-Covid), contrasting with a 63% increase in the USA during the same period. In this context, it is essential that the upcoming revision of the European works councils recast directive does not add unnecessary regulatory burdens or risks on companies.
 11. The EU policy debate on EWCs should therefore be about whether and how a revision of the existing EWCs directive could lead to improve the functioning of EWCs from the perspective of both companies and workers. Furthermore, a clear difference needs to be made between the role of the law and the role of the contract in setting up EWCs so that social partners at the company level enjoy the leeway they need to adapt their practices to the changing situation of their company.



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12. Unfortunately, the Commission's consultation document does not address important issues for the business community, such as:
 - ✓ Creating more space for social partners at the company level to come up with their own solutions to improve the functioning of their EWCs in practice; and
 - ✓ Improving the way EWCs actually operate, for example by reconsidering some EWCs meetings arrangements set in the directive with a view to providing more flexibility to companies and EWC members, limiting the related costs, and making good use of the possibilities created by improved digital communications.
13. We regret that the Commission's consultation document focuses largely on the main areas raised in the European Parliament report. 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.
14. In particular, we believe 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. GDPR-sized fines, as proposed by the European Parliament, do not have any positive role to play in labour relations and would seriously damage the cooperation and trust between social partners at company level and increase the risk of social dialogue becoming excessively adversarial.
15. While enforcement regimes can of course differ between Member States, we agree that, if national implementation laws do not appropriately transpose the EWCs directive, it is the Commission's role to conduct the necessary infringement procedures to ensure a good transposition of the directive in all the EU Member States.
16. The study on "The perspective of management on European Works Councils" ¹ published by University of Leuven in 2016 underlined 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.
17. Many EWC agreements either provide for specific timeframes for information and consultation procedures or the parties to agreements tend to work out the timeframes according to the issue which is being addressed. Also, many agreements provide for a management response to an opinion of the EWC, reflecting the subsidiary requirements that demand a formal response from management to any opinion of the EWC. Given the variety of situations management and EWCs are confronted with, it would be impossible to draft a "one size fits all" template that would work equally well.

¹ <https://soc.kuleuven.be/ceso/wo/erlm/research/permewc-2013-the-perspective-of-management-on-european-works-councils>



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18. Revising the directive in a way that ignores business needs would in fact run counter the shared objective of creating more EWCs. It would disincentivise the large companies in scope to create such a forum for dialogue. 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.
19. 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 an EWC. On that basis, a number of ways to increase the number of EWCs can be considered, such as awareness raising and capacity building among the employee representatives and management about the procedures and benefits of creating EWCs.
20. A revision of the EWCs directive should create a safe harbour for pre-existing EWC agreements (e.g. in particular the pre-Directive agreements under article 14 (1) (a)) by ensuring they can remain out of its scope in the future.
21. Finally, the quality and coordination of EU and national information and consultation processes depends mainly on building the environment of trust, cooperation, positive attitude and engagement. It is essential to keep the spirit of the 1994 directive and not seek to transform it into a co-decision body which does not correspond to the possible model of governance.

II. Do you consider that EU action is needed to address the identified issues? If so, what should be the direction and scope of that action?

22. To improve in practice the functioning of EWCs in a way that respects the autonomy of social partners at the company level, BusinessEurope encouraged the Commission to come forward with an alternative approach to the European Parliament proposal, in the form of a Commission recommendation and a code of practice.
23. A code of practice could be a good basis to help social partners at company level to identify ways of improving their own practice by taking into account the practices of other companies. The EU business community expressed its commitment to engage constructively with the Commission and trade unions to deal with the identified issues through this type of EU action.
24. The code of practice could also help diverse EWCs to acquire a clear vision and plan to improve their effectiveness, having a thorough knowledge of the basics of what EWCs are and what they are not (i.e. co-determination bodies), how EWCs fit into the wider context of employee representation (link to local and national levels) and how they have built other layers on top of this which leads to high levels of trust between parties.
25. Likewise, the code of practice would improve the effectiveness of EWCs, particularly as a vehicle for sharing concrete examples of approaches that have been successful and provide concrete advice and guidance for employers and employee representatives, while helping to clarify the meaning in practice of some of the terms in the Directive, such as transnational, information, and timelines around consultation.



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26. Nevertheless, the Commission decided to launch a social partner consultation, making clear its intention to come forward with a legislative proposal by the end of 2023 in the absence of negotiations between the EU cross-industry social partners towards the revision of the EWCs recast directive.

III. Would you consider initiating a dialogue under Article 155 TFEU on any of the issues identified in this consultation?

27. If the upcoming Commission's second stage consultation of social partners provides a balanced basis for social partners to negotiate, we will look constructively into the possibility of offering negotiations to ETUC with a view to revising the EWCs recast directive under the procedure set out in Article 155 TFEU.
