

European Works Councils - Problems of Effectiveness

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European Works Councils – chronology

- 1980s – pioneer EWCs,
- 1994 – adoption of the ‘original’ EWC directive (94/45/EC),
- 1994-1996 - ‘window of opportunity’: 400 EWCs on the basis of Article 13 (‘voluntary’ agreements),
- 1998-2005 - development of EU legislation concerning employee involvement,
- 2009 - adoption of the ‘recast’ EWC directive (2009/38/EC).



Effectiveness – Directive 2009/38/EC

Recital 7: ‘it is necessary to modernize Community legislation on transnational information and consultation of employees with a view to ensuring the effectiveness of employees’ transnational information and consultation rights [...]’,

Article 1(2) ‘The arrangements for informing and consulting employees shall be defined and implemented in such a way as to ensure their effectiveness and to enable the undertaking or group of undertakings to take decisions effectively’.



Notion of effectiveness

‘Effective’: ‘adequate to accomplish a purpose; producing the intended or expected results’.

‘The purpose of this Directive is to improve the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings’ (Art. 1(1) of Dir. 2009/38/EC).

An effective EWC: an EWC having a real impact on the decision-making process in the MNC.



EWCs – statistics and research results

1073 EWCs (ETUI EWC Database, 2017),

Compliance rate: approx. 40 %,

42 % - not fully covered by the EWC Directive (ETUI 2017).

‘The quality of information and consultation is generally poor [...]. At best, most EWCs are information rather than information and consultation bodies’ (Waddington 2010).

‘Stable but stagnating institutions’, ‘lack of effectiveness’ (Kohler et. al. 2015).

‘Information and consultation does not usually take place before strategic decisions to restructure have been finalised’ (Waddington et al. 2016).



Reasons for the EWC absence

- Insufficient information about the number of employees (despite Article 4(4) of the EWC Directive),
- complex corporate structures of companies,
- declining union membership, absence of worker representatives, no interest,
- management's reluctance,
- too rigid thresholds (2x150).



Remedies to the EWC absence

- Register of 'Community' scale undertakings (ETUI 2008) ?,
- obligation of the CM and local managements to transmit the information about the attained thresholds to the ERs or to the workforce,
- thresholds including temporary workers (compare Article L1111-2 French Labour Code),
- giving up the 2x150 threshold? (1.000 employees in at least 2 MS),
- subsidiary requirements after 1, 5 year of fruitless negotiations (EP, 2001),
- better protection of SNB members (Article 10(3) of the EWC directive). Not 'similar' but 'adequate' (compare Art. 7 dir. 2002/14/EC) or 'the same' (Art. 10 dir. 2001/86/EC) protection and guarantees,
- reinforcement of trade unions' role, promotion of EWCs by the State institutions.



Creating optimum conditions for the effective EWC

- Pre-condition: a representative SNB, support of experts and trade unions, coordination by ETUFs (IndustriAll guidelines),
- setting-up of a select committee,
- extraordinary meetings, only-employee pre-meetings,
- training provisions,
- appropriate linkage with national bodies,
- budget provisions,
- internal rules of procedure,
- necessity to re-negotiate 'voluntary' agreements!

Obligatory scope of information and consultation (law-based EWCs)



- ‘information relating in particular to the structure, economic and financial situation, probable development and production and sales’ (general information),
- information and consultation on ‘the situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies’ (1(a) of the Annex I).



Obligatory scope of I&C

Proposals:

- Necessity to precise the minimum substantive content of information and consultation in the main corpus of the EWC directive,
- obligation to transmit information also on the 'deemed' central management (compare Article 2(4) dir. 98/59/EC),

Failure of communication at a higher level shall not constitute an excuse for non-compliance with the agreement (CAC, Emerson Electric Europe EWC/13/2015, 19.01.2016)

- Agreements: possible extension of the scope: Health and security, environmental issues, training policy, CSR, equal opportunities.



‘Transnational matters’

- ‘Matters concerning the Community-scale undertaking or Community-scale group of undertakings as a whole, or at least 2 undertakings or establishments of the undertaking or group situated in 2 different MS’. (Article 1 Objective (4) of the EWC directive).
- Other determinants (Recital 16): ‘matters of importance for the European workforce in terms of the scope of their potential effects or which involve transfers of activities between MS’,
- issues concerning one undertaking but resulting from a global strategy of the group (CA, Versailles, judgment of 14.06.2006),
- ‘transnational matters’: also ‘global matters’ concerning European undertakings (CAC, Emerson Electric Europe EWC/13/2015, 19.01.2016).
- Compare Article 2(i) dir. 2001/86/EC: questions ‘which exceed the powers of the decision-making organs in a single Member State [...]’.



I&C procedure – proposals

- Transmission of information and consultation with the EWC shall take place before the decision is adopted,
- 21 days' period for the EWC to express an opinion (suspension of the decision-making process).



EWC as a negotiating party

- § 291 (3) of the Czech Labour Code: ‘Negotiations between the central management and [...] the EWC must be conducted in a spirit of cooperation with a view to reaching an agreement’.
- 3% EWC agreements: right to negotiate (De Spiegelaere, Jagodzinski 2015)
- EWCs practice: ‘substantial’ agreements, IFAs, EFAs
282 TCAs (total) - 105 TCAs (EWC as a (co)signatory) (EC database, 2017)
73 EFAs (total), 52 EFAs (EWC) – (Telljohann 2009)

Advantages: Building transnational solidarity, proof of good internal cooperation, effects for the workforce.

Criticisms: weakening of the TUs’ position, lack of mandate for EWCs.



EWC as a negotiating party

- ‘full involvement of EWCs ‘in the negotiations with ETUFs where applicable, notably since they are able to detect the need/opportunity for a TCA, initiate the process and pave the way for negotiations, and help in ensuring the transparency and dissemination of information concerning the agreements to the workers involved’ (EP resolution, 2013),
- ETUC resolution (2014): TCAs should be negotiated primarily by ETUFs, the EWC eventually with a role of a co-signatory,
- OLF concept: a vague role for EWCs.
- Present state: mutual recognition of social partners; consultations with a view to reaching an agreement as a natural process, not forbidden by the EWC Directive.
- Perspectives: Priority to ETUFs but EWCs’ role in the negotiation (as a co-signatory) and in the control of the implementation process.

Linkage with national representative bodies



- a) I & C on a 'regular basis'
- b) I & C in cases where decisions are likely to lead to substantial changes in work organisation or contractual relations are envisaged (transnational restructuring).
 - Unclear rules on the articulation between different levels in case b) (Article 12(3), which chronology?)
 - Recital 37: National legislation and/or practice may have to be adapted to ensure that the EWC can, where applicable, receive information earlier or at the same time as the national employee representation bodies, but must not reduce the general level of protection of employees.
 - The content of recital 37 should be transferred to the text of the EWC directive! (compare § 1(7) EBRG: 'spätestens gleichzeitig', 'at the latest simultaneously')

Linkage with national representative bodies



Duty to report back (Article 10(2), also in case of lack of representatives),

- guarantees to EWC members (Belgian CCT n^o 101, Art. 47: 'time and necessary measures'),
- enforcement of duty to report back (CAC in the UK),
- accountability of EWC members before the workforce (possibility of revocation).



Sanctions

- Too big divergence of sanctions in the Member States,
- necessity of 'effective, dissuasive and proportionate' sanctions both for the breach of I&C obligations (the management-side) and for the breach of confidentiality duty (the employee-side),
- real severity of sanctions imposed on MNCs in case of breach of I&C duty (reference to the total worldwide annual turnover, exclusion from public contracts?),
- role of collective action in the enforcement of I&C rights.



Conclusions

The effectiveness of the EWCs may be enhanced by:

- improvement of definitions of information, consultation and ‘transnational matters’,
- elimination of ‘voluntary’ agreements,
- better quality of agreements, elaborated with support of experts and TU representatives,
- bigger accountability of EWC members before the workforce,
- introduction of effective, dissuasive and proportionate sanctions for the breach of the I&C duties but also for the breach of confidentiality,
- development of trust, mutual respect, spirit of cooperation.



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Building trust and fostering a spirit of cooperation supposes continuous and conscientious efforts on all sides. It is a delicate plant to be cherished and nourished permanently.

prof. Roger Blanpain