‘EWC Recast Directive: its impact, problems and outlooks’

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Romuald Jagodziński,

European Trade Union Institute,
Research Department (Unit ‘Europeanisation of industrial relations’)
Senior Researcher
rjagodzinski@etui.org
Workers' participation
Information, consultation, board-level employee representation

A
LINKING TOGETHER PROCESSES, STRATEGY & ACTION ACROSS LEVELS AND COUNTRIES

B
EMPLOYEE REPRESENTATION AT COMPANY LEVEL

C
TRADE UNIONS AND THEIR MEMBERSHIP; WORKERS' MOBILISATION

D
COLLECTIVE BARGAINING

E
INDIVIDUAL AND COLLECTIVE EMPLOYMENT LAW

F
POLICY-MAKING, REGULATION: ACTORS, PROCESSES AND INSTITUTIONS

G
COMPANY LAW AND CORPORATE GOVERNANCE

H
MULTINATIONALS' STRATEGY

I
EU SOCIAL DIALOGUE DATABASE
The palette of workers' participation rights

there are 35 pieces of EU legislation guaranteeing employees' rights to information and consultation at company level.
Articulation - how do we make the pieces work together?

Transnational (European)

Vertical
articulation
(between levels)

Horizontal (interinstitutional)
articulation

Corporate governance

Direct participation

Social dialogue

Health & safety reps

Workplace representation

Employment law (ind & coll)

Board-level representation

Financial participation

Local (plant level)
Finetuning workers' rights in restructuring

Company restructuring opens up whole range of different mechanisms for workers' representatives to get involved at the local level and at the European level of the company. And this applies across Europe. If all workers' representatives in the company use their rights, then they can avert being played off against one another. And what's more: if they combine those rights effectively across borders, then they can achieve a better outcome for the whole European workforce. In cases of restructuring, employee representatives have the right to know all about the restructuring plans, the steps, and their potential consequences.

Information and Consultation in restructuring

Workers of both companies have the right to be informed and consulted about the proposed merger if there is a board-level employee representation or both of the companies before the merger, then they may negotiate new arrangements for board-level employee representation. The new board can include employee representatives from different countries, thus better reflecting the cross-border nature of the new company.

The European Works Council and/or board-level employee representation have been set up, ensuring company management is obliged to inform and consult with employee representatives representing the entire European workforce.

When European works councils and/or board-level employee representation have been set up, consult company management is obliged to inform and consult with employee representatives representing the entire European workforce.

European Works Council

These rights can be exercised early and comprehensively come on top of the local workplace involvement rights.

European Trade Union Federation

In restructuring workers' rights don't disappear.

On the contrary, they can be used to drive the process by interconnecting them across the levels and various stages.

Employee representatives at both companies have the right to be informed and consulted about the planned merger, and any and all employees are entitled to be informed about the merger. An independent expert's report analyzing the proposed merger can be commissioned too.

Local Works Council

There are European rules in place obliging companies to officially notify the local public authorities, and to inform, consult, and negotiate with representatives of the workforce about the dismissal and changes in employment conditions. These rules ensure the workforce is informed and consulted about the transfer of ownership, and the ways in which the workforce will be managed. This means that both employee representatives can work together to seek the best solutions for all. Often together with their unions, they also have rights to negotiate or renegotiate key terms and conditions of employment.

Local Works Council

Employee representatives have the right to be informed about the conditions and terms of their employment. The employee representatives of the company seeking to take over the other also have this information. This is a promising opportunity to work together in the interests of employment and conditions in both companies.
In restructuring, workers' rights don't disappear.

On the contrary, they can be used to drive the process by interconnecting them across the levels and various stages.
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Loopholes and lacunas of the recast directive 2009/38/EC

- Loopholes / shortcomings
  - Right to training (art. 10.4) ‘in so far as this is necessary for the exercise of their representative duties in an international environment...’
    - Who defines what is necessary? What in case of dispute?
    - Who pays for the training?
  - Transnational competence
    - definition in the body not changed
    - Missing explicit link to Art. 10.1
    - Key terms in the recitals rather than in the body
  - Adaptation clause
    - Vague term ‘significant structural changes’

- Lacunias
  - Sanctions: Recital 36
  - Procedures for establishment of EWC after 3 years of fruitless negotiations + 6 months after application
  - Articulation between the levels (despite art. 12.1)
Too little, too late?
Evaluating the European Works Councils Recast Directive
Stan De Spiegelaere - ETUI

The objectives of the Recast

More EWCs

Better EWCs

EWC Recast

Definitions

Rights & obligations

Adaptation clause

Trade union role
The results

More EWCs?

EWCs can be considered as Art 14.1b EWCs.
Conclusion

Too little & too late

- Slowing growth rate
  - Lack of incentives

- Ineffective adaptation clause
  - Lack of instruments to overcome obstacles

Confirming, not forming reality

- No incentives for real innovation
Future

More & better

- Policy which drives innovation
- Rights and the levers to use the rights
- Capacity building
- Knowledge dissemination
- Monitoring
- Clarity on objectives
Changes to the EWC Recast Directive: pressing evidence

EWC Recast Directive only confirmed existing practice and had little/no impact.

Subsidiary requirements used as a benchmark in EWC negotiations and act like minimum standards.

Sanctions not effective, dissuasive & proportionate
In 15 MS EWCs have no legal capacity to approach courts
Expiration of SNB negotiation term - what after?
Problems with definitions: transnationality & confidentiality.

In 2016:
42% of EWCs active still exempted from EWC Directive = No level-playing field for all EWCs & workers excluded.
Plenary meetings

EWC Survey 2015: Improvements and positive impacts

"resources for plenary meetings (...) often mentioned as an area of improvement"

Figure 21 Plenary meetings

- 70% Once a year
- 23% Twice a year
- 3% More than twice a year

1/4 of EWCs meet more than once a year in a plenary meeting

In 50% of the EWCs the plenary meetings are spread over more than one day

Figure 22 Preparatory & debriefing meetings

- 41% Preparatory
- 44% Preparatory and debriefing
- 15% Unknown/unspecified

44% of EWCs foresee an employee-only preparatory and debriefing meeting

View / rjagodzinski@etui.org
**types of EWCs**

**Figure 2 Different EWC types**

- **Information and consultation procedure**: 1%
- **Other**: 2%
- **SE works councils**: 9%

- **Pre-directive**: 39%
- **Art.6**: 49%

- 9% of current EWCs are established in SEs and the share is rising over time.
- 2% of current EWCs have decided to enlarge their scope from Europe to the world.
- 39% of EWCs are still not fully covered by the rules of the directive or its recast.
EWCs: very limited impact on restructuring

Recast Directive had limited impact on agreements & practice

Problems with confidentiality

EWCS uneble to influence decision-making

EWCS largely unable to play their role (timing, meaningless, restructuring)

Better coordination between local, national and European levels essential; insufficient resources

Sources:
1) ETUC (2016) "European Works Councils: Assessment and Requirements. Report to the ETUC
7) European Commission (2015) "Study to evaluate the effectiveness of the European Works Councils in the transport sector", a study by ICF
Changes to the EWC Recast Directive: trade unions' demands

**EVIDENCE**

Subsidiary requirements are *used as a benchmark* in EWC negotiations and *act like minimum standards.*

Sanctions for violations of EWC law not up to the standard of *effective, dissuasive & proportionate* (as low as 4 Euro)

**PROBLEMS**

Vague rules on confidentiality too often used to abuse, block information flow, withhold information & limited rights to appeal to court

Vague definition in the body of the EWC Directive; Clear definition only in the Preamble

Definition of 'Transnational character of a matter'

Subsidiary Requirements

Enforcement

Confidentiality rules

Access to Justice

Improved & clarified rules

Role of

In 15 out of 28 MS EWCs have no legal capacity to approach courts

Revise the EWC Directive
Revise the EWC Directive

- Improved & clarified SNB negotiation rules
- Article 13 agreements
- Definition of 'controlling undertaking'
- Articulation between levels
- Role of European Trade Union Federations

In 2016: 42% of EWCs active still exempted from EWC Directive

No level-playing field for all EWCs & workers excluded

Currently contract management, franchise systems and joint ventures excluded. Objective criteria to determine location of 'representative agent' & 'central management' lacking

Better coordination between local, national and European levels essential. Resources and rights must be guaranteed

Sources:
ETUC position paper - For a modern European Works Council (EWC) Directive in the Digital Era adopted at the ETUC Executive Committee on 15-16 March 2017 in Malta
Problems: some facts and figures
- EWCS: coverage rate & slow creation rate
  (De Spiegelaere 2016, De Spiegelaere & Jagodzinski, 2015)
  - ineffective legal procedures (Jagodzinski 2015)
  - SEs: circumvention at registration (ETUI 2017: 2979 SEs, aprox. 130 with workers’ reps)
  - lacking registry / knowledge gaps

- recognition of unions and trade union rights & unionisation / organisation challenges
- union resources shortages... (transnational) --> transnational WP not a priority
- quality of information and consultation & timing (Waddington 2010, 2nd edition 2017-19)

- lacking framework & prospects for EWC role in TCB
  - Brexit
  - Articulation: limited & still falling presence of works councils (2002/14/EC; 2015 EWCS by Eurofound), especially in CEEC, EL, PT, Baltics
Advantages of workers' participation & ESM - research evidence

- **strengthen workplace democracy**
- **support companies, EU + MS in combining economic competitiveness with social progress**

- **democratic legitimacy** for corporate decision-making (Bruun 2010)
- workers’ rights recognised as **fundamental rights** (2010 Lisbon Treaty)
- **collective voice**
- control & self determination of workplace as **means against alienation** and **higher motivation**

- **50% of workers without representation**
  (EWCS 2015, Eurofound)

- 'ESD could constitute **a tool for the modernisation** (...) for **all key issues** on the EU agenda' (EC 2002)
- ESD should be considered **'a force for innovation and change'** (EC 2002) in the guise of partnership for change in an enlarged Europe (EC 2004)

- **benefits for companies:**
  - **3 channels** (Wigboldus et al. 2014):
    - **innovative**: identify problems + solutions
    - **social**: communication + involvement --> better mgmt plans & higher acceptance + smoother implementation
    - **political**: reduce opportunistic mgmt behaviour & checks on damage to company
  - performance of listed companies (Vitols 2010)
  - improved performance when mgmt indifferent (Vitols & De Spiegelaere 2017)
Do we need a NEW all-encompassing framework on information, consultation and board level representation rights?

Proposal for a new EU framework for ICP (2016)

- An **integrated architecture** (single reference) for workers' involvement in European company forms
  - ICP, BLER, company law, CBM, CB divisions, CB transfer of seat
- Pledge for common level-playing field for BLER
- **Sustainable vision of EU company law**: common, coherent standards across EU
- **Non-regression clause**
- **Stronger I&C rights** (extend to subcontracting, temp work, data protection, environmental, etc.)
- **Confidentiality**
- BLER in all companies above 50 employees
- is this **enough... & feasible in the current circumstances?**

- **What level** should the solutions (policy intervention) be applied at?
  - Revision vs. stricter implementation review
  - Coherence of definitions / key rights vs. national diversity?
Both managers and EWCs report:
• EWCs are for information, consultation
• EWCs are for implementation of decisions, not for decision-making
• EWCs don't influence the content of decisions
• BUT, concern: they may slow down decision-making

• Managers say:
  • ‘EWCs are primarily for implementation of corporate decisions, rather than for participation in corporate decision-making’
The position of BusinessEurope on EWCs: (09/02/2017)

- recognises that EWCs 'can improve information flows in a company, support employee engagement and facilitate introduction of cross-border initiatives'.

- limited experience of practical operation of the Recast Directive = more time needed to assess the full impact on EWCs.

- the current framework is 'fit for purpose' = no need for a revision (uncertainty for companies and pressure on well functioning EWCs to renegotiate).

BusinessEurope 'opposed to a revision of the Recast Directive'
puzzle?
- **Transnational Collective Bargaining**: legal framework
- **EU collective action** (strike) (but it's about union power...)
- EU level **ADR**
- coherent framework for ICP rights & recognition of **trade union rights**
- **articulation**: practice or legal framework(?)
- more **definitions**, stricter definitions (e.g. confidentiality, controlling undertaking, etc.)?
- upgraded **enforcement**
- **EU registry** of companies + corporate reporting
- lower **thresholds**?
- **EU Labour Authority** (Juncker's State of the Union speech 13/09/2017) ???
**Current situation**

- political climate: the 1990s social climate and Lisbon Strategy times are gone...
  - complete exclusion of workers' participation from the **Europe 2020 strategy** (underappreciated & underplayed)

**Europe 2020**

smart, sustainable and inclusive growth

- economic (more competitive)
- ecological (greener, resource-efficient)
- social

- despite references to 'promoting quality in industrial relations'

- complete lack of workers' participation in
  - the EU Social Pillar (2017)
  - 'A renewed Industrial Policy strategy' (Juncker's State of the Union speech, 13/09/2017)

- deregulatory approach towards ESD
  - in EC's CSR and memorandums of understanding
  - hostility of some MS governments towards CB and ESD (ETUI and ETUC 2016)

- stagnation / phasing out of **European Social Dialogue** (growing reluctance of employers)
- is this **enough**... & **feasible in the current circumstances**?

- **What level** should the solutions (policy intervention) be applied at?
  - Revision vs. stricter implementation review
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Thank you for attention
Questions & comments welcome

Contact: rjagodzinski@etui.org
Further resources:
www.ewcdb.eu
www.worker-participation.eu
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