50 ANNIVERSARY
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ETUC response to the second-phase consultation of Social Partners under Article 154 TFEU on a possible revision of the European Works Council Directive (2009/38/EC)

Adopted at the Executive Committee Meeting of 27-28 September 2023

In its legislative-initiative resolution[1] adopted by a large majority on 2 February 2023, the European Parliament called on the Commission to revise the European Works Council Directive[2] with the aim of strengthening European Works Councils (EWCs) and their ability to exercise their right to information and consultation.

On 1 March 2023, the Commission welcomed the European Parliament's initiative and announced a legislative proposal to revise the EWC Directive. However, according to Article 154 of the TFEU, it must first consult the European social partners in a two-phase procedure. Following this, it launched the first phase of the social partner consultation on a possible revision of the EWC Directive3 on 11 April 2023 .

In its response[4] to the first consultation paper, the ETUC already clearly stated that it strongly welcomes the Commission's initiative. In the ETUC's view, the EWC Directive is not fit for purpose. Unclear definitions of legal terms, non-deterrent penalties and ineffective access to justice mean that some of the EWC's information and consultation rights intended by the legislator only exist on paper. The ETUC therefore advocated at an early stage for the EWC Directive to be strengthened by means of a legislative binding initiative in such a way that the rights enshrined therein are effectively applied and enforced.

The ETUC already criticised the Commission's approach in the first consultation phase to examine possible negative effects of a revision on employment or industrial activity in its evaluation. In their response to the first consultation phase, employers' organisations such as BusinessEurope and CEEMET used the argument of the alleged negative impact of effective information and consultation rights on the already crisis-stricken companies in Europe, without however providing any evidence. As rightly pointed by the European Commission as well as by multiple international organisations nowadays (e.g. the OECD[5]), social dialogue, including collective bargaining and information-consultation at the workplace, helps shape transitions towards competitive economies delivering quality jobs. In the context of digital and green transitions of an unprecedented scale, the effective exercise of democracy at work by involving workers in the strategic decision-making processes plays a crucial role in protecting workers' rights, quality jobs and working conditions, ensuring companies' and public services' long-term sustainability and fair anticipation and management of change.

[1] European Parliament resolution of 2 February 2023 with recommendations to the Commission on Revision of European Works Councils Directive (2019/2183(INL))
[2] European Works Council Directive (Directive 2009/38/EC)
[3] C(2023) 2330, Second-phase consultation od social partners under Art. 154 TFEU on a possible revision of the European Works Council Directive (Directive 2009/38/EC)
[4] ETUC reply to the first phase of the Social Partner Consultation on a possible revision of the European Works Council Directive (2009/38/EC)
[5] See inter alia in OECD Employment Outlook 2023

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Strengthening democracy at work is first and foremost a contribution to strengthening the democratic foundation of the EU. The EU is a Union founded on respect for and the strengthening of common values, in particular human dignity, freedom, democracy, equality and the rule of law. These values are expressed, among other things, through the involvement of workers in the decision-making of their company. Therefore, these fundamental rights must not be played off against the expense they may incur. Furthermore, a range of scientific evidence shows that democracy at work has a positive impact on the competitiveness and resilience of companies[6]. The ETUC therefore explicitly welcomes the fact that the Commission in the accompanying analytical document finds no negative impact on competitiveness and even concludes that **companies with an EWC would perform better** in many important areas than companies without an EWC. This could lead to a strategic advantage with relevance for competitiveness. In this context, it should be recalled that only companies with at least 1000 employees fall within the scope of the Directive and that, according to the Commission, the average cost is only 0.009% of annual turnover. The changes or clarifications of already existing provisions discussed by the Commission on the basis of the demands of the European Parliament would most probably only lead to marginal changes here if any.[7] The employers' cost argument is thus completely unfounded.

On 26 July 2023, the European Commission launched the second-phase consultation of the social partners on a possible revision of the European Works Council Directive (Directive 2009/38/EC). The consultation documents are composed of a letter to the social partners, a consultation document[8] and a staff working document[9]. The Commission invites the European social partners to answer the following questions:

- What are your views on the objectives of possible EU action set out in Section 5.1?
- What are your views on the possible avenues for EU action set out in Section 5.2?
- What are your views on the possible legal instruments presented in Section 5.3?
- Are the European social partners willing to enter into negotiations with a view to concluding an agreement under Article 155 TFEU with regard to any of the elements set out in Section 5.1?

The ETUC welcomes the general direction of the consultation document, recognises serious efforts by the Commission to strengthen EWC information and consultation rights and their enforcement and is happy to respond on the questions below.

The ETUC stresses that a wide range of robust studies and disciplines have already delivered compelling evidence of the need to improve the EWC Directive. Throughout the Commission’s consultation document the ETUC notes several references to an “ongoing evidence gathering" to “complete the analysis”. With respect to the additional research conducted on behalf of the Commission directly, the ETUC requests transparency to be provided at the earliest convenience to all social partners about the methodology used (including the objective criterion for the selection of company cases or interviewees) and the necessary neutrality of the authors.

For the sake of clarification, the ETUC would like to point out that when talking about national workers’ representatives in this response, the ETUC means trade unions or the workers’ representatives as provided for by national law or practice, thereby fully recognising and respecting the prerogatives of trade unions and their representatives.

[6] *See inter alia in Steffen Müller, Georg Neuschäffer: Worker Participation in Decision-making, Worker Sorting, and Firm Performance, IWH Discussion Papers No. 11/2020*

[7] *SWD(2023) 662, p. 75-76*

[8] *C(2023) 5054*

[9] *SWD (2023) 662*

On Question 1: What are your views on the objectives of possible EU action set out in Section 5.1?

As explained in its response to the first phase of the social partner consultation, the ETUC believes that the information and consultation rights described in the EWC Recast Directive provide a sound basis for the transnational participation of workers' representatives and their trade unions in management decisions. However, the rights described in the EWC Recast Directive merely represent the absolute minimum of such involvement. It should be recalled that Member States can provide more in the transposition law at domestic level. However, since rights that are only vaguely defined and hard or impossible to enforce are not real rights and merely simulate democracy at work, the ETUC believes that at the very least, it is essential to finally **make the EWC rights already defined in the Recast EWC Directive effective and enforceable**. The ETUC therefore welcomes and strongly supports the overall objective chosen by the Commission to improve the effectiveness of information and consultation of workers at transnational level.

The ETUC is of the opinion that the Commission has also for the most part chosen the specific objectives correctly, and that the general objective can be achieved if they are implemented correctly. As the individual specific objectives and the associated measures are dealt with in more detail in the answer to question two, only brief comments on these are made below.

The ETUC supports the specific objective to avoid unjustified differences in workers' information and consultation rights at transnational level. However, it believes that the objective could be better formulated: rather than avoiding unjustified differences, the **objective must be to ensure that every worker in the EU enjoys the same effective minimum transnational information and consultation rights** defined at a high uniform level. It is not acceptable that workers' participation rights are blatantly disregarded depending on the Member State in which their company is headquartered, the structure of their company, or the year in which their EWC agreement was negotiated. To achieve this objective, it must be considered a necessary condition that one set of rules is applied to workers and all transnational undertakings across the Union. There must be no more first or second-class workers' rights at the transnational level. For this to happen, **all exceptions to the application of the EWC Directive must be eliminated**.

Ensuring an efficient and effective setting-up of EWCs is also a well-defined special objective in the ETUC's view. As explained in its response to the first phase of the social partner consultation, the ETUC sees a strong need for action to stop employers' obstructionist strategies at all stages of the negotiation process. Furthermore, the ETUC fully supports the sub-objective to achieve a better gender balance in Special Negotiation Bodies (SNBs) and EWCs. Gender equality and equal participation is a human right and the ETUC and its affiliates are strongly committed to its realisation. It is important for the ETUC to point out in this context that the objective of ensuring gender equality must in no way give management a say in determining who represents the workforce in EWCs and SNBs: The appointment of worker representatives is the sole prerogative of the workforce.

In the ETUC's view, the objective to ensure an **effective and timely process of information and consultation** of EWCs and appropriate resourcing for their operation **is of outstanding importance**. This objective lies at the heart of the EWC Directive. Without an effective and timely process of information and consultation, the rest of the Directive is worthless paper. Achieving this objective is therefore a top priority for the ETUC. The necessary conditions for this are discussed in more detail in the reply to question two. The areas to be addressed have been sufficiently listed by the Commission in 5.1, including strengthening and better defining the information and consultation process, defining the concept of transnational matters in a legally clear way, objectification and verifiability of confidential documents, addressing the exemptions of

Union-scale undertakings with complex structures from the personal scope and strengthening the arrangements related to the resources needed for the work of the EWC, in particular bearing the costs of experts, legal advice, and litigation.

At this point, the ETUC must express its disappointment that the Commission has failed to take up the demand it made in its response to the first phase of the social partner consultation on the involvement of the trade union representative. Trade union support of an EWC is an important precondition for its successful work. It provides the EWC with expertise and advice, and on the other hand, it is an important means of exchange. EWCs can learn through trade union representatives how EWCs in other companies have dealt with similar situations. This ensures networking within a sector and beyond, thereby strengthening the social dialogue at all levels. The ETUC therefore reiterates its call to **strengthen the position of the trade union representative** as a permanent expert assisting the work of the SNB and EWC. As all Member States provide in their transposition laws for the involvement of a maximum of one expert, EWCs are put in the difficult position of having to decide whether to invite a trade union representative or another expert (e.g. a financial expert, a legal expert, etc.) to their meetings. To avoid this, the EWC or SNB must be given the right to invite other experts to its meetings in addition to the trade union representative. It must also be at the discretion of the workers' representatives on the EWC to decide to which meetings (ordinary or extraordinary) they invite a trade union representative, including joint meetings with management. The central management does not have a veto right here. As the trade union representative is bound by the confidentiality rules contained in the agreement in the same way as the EWC members, it is also mandatory that he or she be admitted to the joint meetings with management if the EWC so requests.

It is of paramount importance to **ensure more effective enforcement** of the EWC rights enshrined in the Directive as well as access to justice. In the ETUC's view, the Commission sufficiently describes the need for effective access to justice in its submitted documents. In this context, the ETUC recalls that it fully supports the measures proposed by the European Parliament to strengthen sanctions. Furthermore, the ETUC underlines here the basic requirement of the rule of law. Irrespective of the Directive under discussion, a right is not a right if it is not enforceable, or if the legal process is blocked by obstacles. Any weakening feeds doubts about the rule of law and undermines the democratic foundation of our society. Therefore, it is not only in the specific interest of workers' representatives, EWCs, SNBs, and trade unions to regulate access to justice properly and effectively according to European values, it is an obligation of the European legislator and national governments to ensure this in their own interest. In this respect, the ETUC criticises the verb chosen by the Commission, as guardian of the Treaties and thus also guardian of the rule of law, to describe this specific objective. It is not about "promoting" more effective enforcement of the Directive and access to justice, but about "ensuring" it. The Commission should therefore redefine the description of that specific objective and change it as follows: "To ensure effective enforcement of the Directive, in particular through effective and dissuasive sanctions and effective access to justice for workers' representatives, SNBs and EWCs".

Corrections to the EWC Recast Directive are all the more essential since the EWC Directive does interact with other provisions in the EU acquis. To name only one recent example, the cross-border company mobility Directive[10] explicitly provides for the information and consultation of the EWC. This role can only be properly fulfilled if the operations of EWCs are on a secure legal and practical footing. Overall legal coherence would be markedly improved if there were more clear alignment in the provisions about information and consultation across the EU Acquis. Eliminating the identified shortcomings in the EWC Recast Directive would go some way towards redressing these inconsistencies.

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[10] *Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions*

The Commission rightly identifies that the Directive's shortcomings negatively affect the scope of social dialogue which is essential to successfully address the challenges of the twin transitions. Company policies that impact workers increasingly and demonstrably do not keep within national borders; where transnational decision-making is not linked to information and consultation at all levels of the company, then both management and workers' representatives simply do not have the complete picture needed to address them appropriately and effectively.

The ETUC agrees with the Commission's assessment that in the absence of EU action, the challenges identified are likely to persist and that the gaps between needs and the actual operations will continue to grow in the context of further internationalisation and European integration. The **current EWC Recast Directive is clearly not fit for purpose**: it fails to deliver on the objectives in its recitals to provide for genuine and meaningful information and consultation on transnational matters in a way which complements and connects, rather than replaces information and consultation at the national level. It is also important to recognise that **EWCs perform a crucial function in supporting European integration**. It is via EWCs, for example, that workforces that are at the operational periphery of multinational companies, such as in Central and Eastern Europe, have access to the loci of power and decision-making in their companies and to their colleagues and counterparts in other countries. EWCs are thus a crucial vehicle for a fundamental European value of democracy – at work and in the wider civil society.

On Question 2: What are your views on the possible avenues for EU action set out in Section 5.2?

Same minimum information and consultation rights for all EWCs

The ETUC agrees that legal uncertainty and regulatory complexity could be reduced by phasing out exemptions from the scope of the Directive of undertakings with pre-existing agreements.

The ETUC therefore reiterates its call to **end the exemption** provided nearly 30 years ago for EWC agreements signed prior to the entry into force of Directive 94/45/EC which pioneered the process of company-level negotiations to determine the way in which information and consultation rights and processes are enacted at company level. The ETUC sees no reason to suggest that this would not be a very straightforward process that does not require an immediate renegotiation of all those agreements. It is important to recall that, in effect, EWCs established within the scope of the Directive have two sources of regulation: that which is laid down in their negotiated agreements on the one hand, and the rights and obligations laid down in the EWC Directive and its transposition into national law on the other. If undertakings with pre-Directive agreements are brought into the scope of the EWC Directive, this would only mean that clarifications, rights and obligations laid down in the Directive simply apply complementarily to their existing agreements, exactly as is the case for so-called "Article 6 Agreements". Therefore, just as the 2009 EWC Recast Directive applied new minimum rights and obligations to existing EWC agreements **without entailing any need for renegotiation or adaptation**, bringing the pre-Directive agreements into the scope of the EWC Directive would not entail any need to renegotiate or adapt pre-Directive agreements, unless they would be in contradiction with any of the new rights and obligations, making it impossible to apply them.

The only thing that would need to be clarified is how any future renegotiation would proceed, since this process is largely unregulated in existing pre-Directive agreements and agreements concluded under Article 6. In order to eliminate legal uncertainty, it should be clarified that unless the agreement clearly defines the process for its renegotiation, any EWC agreement can be terminated by simple request of a majority of the worker representatives, upon which new negotiations with a mandated special

negotiation body are to take place. As long as negotiations are ongoing, the existing EWC must have the right to continue exercising its competences as defined in the old agreement. Should the parties not agree on a new agreement within a fixed period of time, then the subsidiary requirements must take effect.

The case to do away with the special status of undertakings with agreements concluded during the transposition period of Directive 2009/38 is even more clear. This tiny minority[11] of agreements are the only ones which still apply the original EWC Directive 94/45/EC; it is absurd that the Member States must retain their transposition of the previous EWC Directive of 1994 simply to accommodate a handful of EWCs that were exempted under 14b of Directive 2009/38 and that the social partners must continue to operate within a legal framework that is obsolete in the remaining – and vast – majority of cases.

The ETUC does not share the Commission's view that a carefully calibrated **transition period** is necessary to preserve the principle of autonomy of the parties. The autonomy of the parties is also ensured for those negotiating within the scope of the Directive. It is of course not uncommon in labour law to balance the different power relations of the contracting parties by legal provisions in favour of the weaker party. In this context, the ETUC emphasizes that in most Member States, there are only limited collective means available to the workers' side and their trade unions in order to lend weight to their SNB negotiation demands. From the ETUC's point of view, it is essential that EU law provides for the enabling framework to support the weaker negotiating position of the workers' side with a set of uniform European minimum standards on the workers' right of transnational information and consultation by defining the key elements of the operation of EWCs in the body of the Directive which apply to all. By means of the **favourability principle**, the Commission can clarify that the more favourable regulation for the EWC applies to its rights, which can be derived either from its specific agreement or from the regulations of the Directive.

Regarding the extension of the scope of the EWC Directive to include structurally independent undertakings that can influence one another's operation and business decisions by virtue of contractual arrangements, the ETUC underscores that there are issues arising within such transnational corporate constructs that effectively amount to precisely those transnational subjects for information and consultation which the Directive seeks to ensure in union-scale companies. Evidence shows that many transnational companies fall outside the scope of the EWC Directive because the very structure of ownership and control of the franchise model is such that the definition of "community-scale undertaking" laid down in Article 2.1(a) and the rudimentary definition of "controlling undertaking" laid down in Article 3 does not grasp the reality of the situation of franchise-takers as fully dependent parts of the company. The same is true for other contract management models.

Indeed, experience shows that topics, policies, and measures that the franchise owner imposes on its franchisees which would clearly fulfil the definition on transnationality of the Directive and on which national-level information and consultation fail to get any purchase because everything has been decided by the franchise owner at the transnational managerial level. Franchisors maintain significant control over the way franchisees operate including, inter alia, on work organization, marketing practices, trade union policy, working conditions, and business performances. Sales and business performances are also strictly monitored. Franchisees are required to implement, apply and comply with the "System" (including know-how and manuals of operation) that is licensed to them. These uniform business methods have a direct impact on workers, since they are the ones who implement the methods, know-how and business practices that are imposed by franchisors on franchisees.

[11] *A total of 28 agreements fall into this category, but at least 16 of these have agreed to apply the EWC Recast Directive anyway.*

The ETUC therefore demands that **franchise and contract management are brought within the calculation thresholds of community-scale undertakings and within the definition of controlling undertaking**, thus ensuring that transnational matters of relevance to workers and operations across franchises are subject to transnational information and consultation at EWC level. To achieve this level playing field, franchising and contract management models should therefore be fully covered by the definition of controlling undertaking in Article 3, and by ensuring that workers across franchise systems are counted towards the thresholds outlined in Art 2 of the Directive with the aim of establishing a EWC. This is absolutely needed, since some of these companies are not only major players in their respective sectors, but also because franchising and contract management are growing business strategy that allow owners and employers to exert control while escaping their liabilities under national and EU law.

Conditions for an efficient and effective negotiation and conclusion of EWC agreements

The ETUC agrees that clarifications are needed to ensure that the resources to which the SNB is entitled must also clearly include the costs of legal assistance and legal representation as well as assistance by experts and training.

However, the Commission's suggestion falls short of closing the gaps found in practice. The Commission rightly recognises that a refusal of management to negotiate creates legal uncertainty, which could easily be avoided if there are clear rules and provisions in place. Without further clarification available, Article 7 has in practice been taken to mean that the first meeting of the SNB must be convened within six months of the request from the workforce to do so, or else the subsidiary requirements apply. As the Directive reads today, it takes a judge to enforce that understanding where management disagrees.

Furthermore, it is not just the convening of the SNB for its first meeting that is enough to demonstrate a willingness to negotiate. Article 5 (4) misleadingly refers to convening "a meeting". What is lacking is a clear requirement to continue to convene the SNB at regular intervals during the maximum 3-year negotiation period. Experience with over 30 years of negotiations shows that SNB meetings convened on a regular basis, and at least every quarter, is a much-needed impetus to ensure genuine and constructive negotiations.

But the Commission's proposal fails to address the biggest gap in regulation and practice: the EWC Directive is silent about how exactly the provisions of Article 7 – i.e., the application of the subsidiary requirements if central management does not convene the SNB within six months of the workers' request or if no agreement has been reached within three years of the workers' request – is to be implemented. In particular the Directive does not fix a deadline for this first SNB meeting, creating confusion. It only states that the subsidiary requirements will apply if the central management and the special negotiating body so decide, or if the central management refuses to commence negotiations within six months of the request referred to in Article 5(1), or if the management and the SNB are unable to conclude an agreement within three years from the date of the official request. But it doesn't clarify what a refusal actually is. Evidence shows that management almost never explicitly refuses the establishment of the SNB. Most of the time it remains silent or plays for time. This leads to unnecessary and in many cases insurmountable delays. The Directive must therefore clearly specify the responsibility of the central management to initiate the appointment of the EWC members in accordance with national laws and practices as soon as the conditions laid down in Article 7 are met, i.e. within 6 months or 3 years of the official request, and to **convene its first meeting** in accordance with the subsidiary requirements at the latest **within six months** following the fulfilment of those conditions.

The ETUC reiterates its position that the maximum three-year negotiation period foreseen is appropriate, given the challenges of the negotiating process. The complexity

of such a process should not be underestimated. The ETUC does not agree with the European Parliament's demand to shorten the negotiation period; none of its European or national affiliates are demanding this, nor is the ETUC aware of any other practitioners involved in the negotiations demanding reduction of the maximum negotiation period. Therefore, the ETUC calls on the Commission not to amend the Directive on this point.

The ETUC is a strong advocate of redressing gender imbalances in all areas of life. The difficulty of ensuring a **gender balance** in SNBs and EWCs is that in many cases, a national workforce only has one delegate to appoint. One way forward could thus be to propose that if the workforce of a Member State appoints at least two representatives to the SNB or the EWC, then the appointing workforce must strive to appoint a delegation from that Member State that is gender balanced, taking into account, if relevant, the gender distribution in the workforce of the company. In any case, as stated above, it is important to ensure that the appointment of the workers' representatives is the sole prerogative of the workforce. Furthermore, since as a rule procedure for appointing members of the Select Committee is a collective exercise to nominate a group of representatives, the Directive could require that the gender composition of the Select Committee, if one is foreseen, takes into account the gender balance in the company's European workforce as a whole.

Possible avenues to ensure an appropriate resourcing of EWCs and an effective procedural framework for their information and consultation

The ETUC shares the view of the Commission that the effectiveness of the information and consultation process could be improved by dealing with the following factors:

- the issue of legal certainty regarding the concept of 'transnational matters',
- the requirements for consultation set out in the definition of that term,
- the appropriate resourcing of EWCs to carry out their role effectively, and
- the matter of confidentiality or non-disclosure of sensitive information.

As outlined by the ETUC in its answer to the first phase consultation of the European Social Partners, a first step to clarify the **concept of transnational matters** is quite straightforward. The Commission stated that the concept of transnational matters, defined in Article 1(4) must be read together with Recital 15 and16. The Commission forgot however to refer equally to Recital 12, which clarifies that a matter is of a transnational nature "when decisions which affect them [employees] are taken in a Member State other than that in which they are employed". The recitals 12, 15 and 16 do indeed contain crucial clarifications on how the concept is to be effectively implemented. The original intention in the legislative process for the EWC Recast Directive was to include these clarifications in the legal body of this Directive. As it is so often the case in European legislation, the shifting of this legally clarifying definition to the recitals was part of a political compromise that in effect, however, leads to considerable problems in practical implementation. Recitals may play a certain role for the Court of Justice of the European Union (CJEU) or courts at the national level in the assessment of a legal dispute, but they do not do so for the practical implementation on the ground. In the absence of a reference to the CJEU, the Commission's view that Article 1(4) should be read in conjunction with recitals 16 and 15 does not help. Moreover, the Commission's reference to the transposition of the concept into national law in all Member States[12] applies therefore only to part of Article 1(4), as a large number of Member States have only transposed the mandatory legal body of the Directive without the recitals. The ETUC therefore proposes to follow the initial intention of the European legislator and include the clarifications from the recitals in the legal body of the Directive, thus correcting the negative impact of the compromise of the EWC Recast Directive and giving legal clarity to the actually intended concept of transnational matters.

[12] *SWD(2023) 662, p. 31*

The ETUC shares the Commission's view that a possible EU initiative would need to clarify the existing **minimum procedural requirements for a meaningful and effective consultation**. In doing so, the Commission has correctly defined the crucial factors for such clarification in the consultation document. First, the right **timing of a consultation**. It must be ensured that the EWC is consulted in good time, that is before any final decision has been taken, and has sufficient time to exchange views with the national workers' representatives and trade unions concerned and to form an informed opinion at the European level on behalf of the whole workforce. Wording matters here and the ETUC regrets that the Commission framed the discussion by stating that "EWCs must be informed and consulted on management decisions with transnational effects affecting their employment and working conditions"[13]. The ETUC believes it being of the utmost importance to respect the Recast EWC Directive's wording according to which information and consultation take place on "proposed" measures (i.e. not decisions already take) which may have a "potential effect" on employment and working conditions (whether these be positive or negative, and whether or not they are certain to occur.)

The end of the information and consultation process must precede the date on which the management takes the final decision. Unfortunately, even this simple requirement, which should be common sense, is very frequently disregarded by employers across the EU. The ETUC points out that it considers the European Parliament's proposals on Article 2(1) and Article 9[14] to be a viable basis for satisfactorily addressing the issues described here. These clarifications would go a long way towards fostering genuine and meaningful ex ante social dialogue.

In this context, it is also important to ensure that the **consultation process at the transnational level is initiated at the latest at the same time as the respective consultation process with the national workers' representatives**. In principle, the consultation process at transnational level should be completed before that at national level, if possible, as it is indeed important that the EWC delivers its opinion and gets a motivated response before the consultation procedure is finalised at the respective national levels. The Commission omits to mention that Recital 37 does actually seek to ensure that the EWC is to be informed earlier or at the same time as the national level worker representatives. Enshrining this key point in the body of the Directive, rather than burying it in a vague way in the recitals, would not only serve the objectives of effectiveness, consistency and legal certainty, but would also foster the necessary articulation between the national levels and the European level of information and consultation. Only in this way can a meaningful joint opinion-forming process on the part of workers' representatives' function. This would strengthen the spirit of the Directive since it would clarify that workers from different countries have the possibility to develop a joint position opinion before national consultation processes are finalised. This is crucial in the case of transnational matters such as relocations or transnational restructurings. The timing must also take into account that the EWC must receive a reasoned response from the management to its opinion. Only with the delivery of this reasoned response, which must explain how the EWC's opinion has been taken into account in the final decision, can the consultation process be considered complete.

This **right to receive a reasoned response** is currently only laid down in the subsidiary requirements of the EWC Recast Directive. This requirement of a meeting to receive and discuss a reasoned opinion has served well in the Article 4(4)(d) of the Framework Directive on information and consultation[15] and in SE Directive[16], which provides for a further meeting with the transnational representative body with a view to seeking agreement where the management decides not to act in accordance with the opinion

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[13] C(2023) 5054, p. 8

[14] See European Parliament 2019/2183 (INL)

[15] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community

[16] Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees

expressed by the worker representatives. Bringing the right to a reasoned response into the definition of consultation would also serve to strengthen the coherence of the EU Acquis in this area. Finally, it should go without saying that the end of the information and consultation process must precede the date on which the management takes the final decision. Unfortunately, even this simple requirement, which should be common sense, is very frequently disregarded by employers across the EU. The ETUC points out that it considers the European Parliament's proposals on Article 2(1) and Article 9[17] to be a viable basis for satisfactorily addressing the issues described here. These clarifications would make an important contribution to promoting genuine and meaningful ex ante social dialogue.

The Commission rightly points out that "another aspect relating to the timing of EWCs' consultation is the coordination with a possible consultation on the same matter at local or national level."[18]. In its reply to the first stage social partner consultation, ETUC already pointed out that the consultation document did not reflect on the urgent need to **ensure more efficient coordination between local, national and European levels**. The ETUC is therefore disappointed to see no concrete measures proposed to ensure this crucial aspect of ensuring a genuine and meaningful social dialogue at all levels. The ETUC therefore welcomes the Commission's announcement that it is examining whether the current rules and arrangements sufficiently ensure an efficient coordination between local, national and European levels. The ETUC is convinced by the experience in practice that leaving it to the agreements to define this process has not led to any greater clarity nor to an effective and workable articulation of information and consultation processes between the national and European levels. If they take this issue up at all, most agreements signed or revised since the EWC Recast Directive entered into force do not develop this more fully at all: they generally merely mirror the wording of the Directive that the national and European levels must be informed and consulted at the same time without addressing the practical operation of such implicitly simultaneous processes. In consequence, a more effective articulation of information and consultation across the levels of the company can only be achieved with strengthened rules in the EWC Directive which ensure an iterative process of information and consultation of the European and national levels. It would thereby put the EWC into a position to deliver an opinion on the transnational matter in question that has been developed in close coordination with the national and local levels of workers' representation prior to any decision being taken by the central management. The lifting of the duty of confidentiality towards national-level workers' representatives, the right to a reasoned response by central management, and the support of trade union experts are further components of clarification which could actually ensure a genuine and meaningful social dialogue which is articulated across all levels of the company.

The **subsidiary requirements** should be concretised as described by the Commission. Even though only a limited number of EWCs have been established directly on the basis of the subsidiarity requirements, these provisions have considerable influence on the design and content of negotiated agreements. In effect, every single one of them serves as a baseline and thus specify the minimum components of new or renegotiated agreements from which no downward deviations can be made. Moreover, they guarantee a solid basis for the practical arrangements for the functioning of a EWC in case no agreement is reached within the legal timeline or where management refuses to initiate proper negotiations. In this context, the ETUC reiterates that new agreements hardly deviate from the minimum standards set out in the subsidiary requirements, and that over time, renegotiated pre-Directive and Article 6 agreements have converged closely to the contents laid down in the subsidiary requirements. They thus contain valuable elements such as a non-exhaustive list of issues to be dealt with EWCs either via information only or information and consultation procedures. The ETUC however regrets that, in practice, many EWC agreements limit the list of issues to that found in the subsidiary requirements. This restrictive approach is all the more problematic, since

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[17] See European Parliament 2019/2183 (INL)

[18] SWD p 36

the Directive's list of issues does not include topics of growing importance in our modern societies about which dialogue with worker representatives in the EWC would add strategic value. The ETUC therefore invites the Commission to **develop the minimum list of issues** - as regards transnational matters - for the EWC to be informed about and consulted with such as: the decarbonisation strategy of the company; the introduction of artificial intelligence at the workplace and in work processes, the respect of human rights and environmental standards in the supply chain (Due Diligence strategies).

The ETUC fully supports the Commission's consideration to **increase the annual meetings** with central management from one to at least two meetings per year and to strengthen the participation of concerned EWC members in the meetings of the Select Committee. One of the ways to strengthen the participation of the members in the meetings of the Select Committee, should be to define a minimum of four annual meetings between the Select Committee and central management. The ETUC stresses that the regular SNB negotiations and EWC meetings with central management must take place as face-to-face meetings and rejects the employer's demand to hold them virtually if possible. It is of high importance for communication flow and for building and maintaining trust between management and SNB and EWC that everyone gets to know and understand each other in person. Complex and conflictual issues can generally be better dealt with in face-to-face meetings. Moreover, it is also important for the workers' representatives on the SNB or EWC to meet in person and engage in collegial trust-building exchange. It has to be taken into account that SNB and EWC members with different national prerequisites and traditions of industrial relations, speaking a variety of languages and coming from very diverse backgrounds have to make joint decisions in a trans-European body. For this, the SNB and EWC members need enough time to get to know each other personally and to fully explore the possible implications of transnational issues. While virtual meetings can be useful for additional or ad hoc meetings, such virtual meetings must be subject to the agreement of the EWC or Select Committee and agreed upon on a case-by-case basis.

As the EWC is the institutionalised workers' representative body in the company, it does not have its own sources of funding and consequently must be provided with **sufficient financial resources** by the company to fulfil its complex role. The ETUC therefore welcomes the fact that the Commission is considering a clearer regulation of the EWC's resources. Apart from a rather general reference in Article 6 that the agreement to be negotiated should regulate this element, point 6 of the subsidiarity requirements lists some costs to be borne, in particular in connection with the meetings. It would make sense to expand this open list, in particular to include the points listed by the Commission on expenses for experts, training, legal advice and litigation. It is especially the latter which leads to disputes in practice. As explained above, the rights that can be derived from the Directive must be able to be enforced in court. **The court and legal costs can only be borne by the (central) management**. As mentioned above, the EWC has no financial resources of its own and even though it is an institutionalised workers' representation body, i.e., an organisationally independent body, the only logical consequence is that the company must bear all its costs, including legal costs.

Furthermore, it must be ensured that the costs for the expert are borne by the management. It is at the discretion of the EWC to define whether the expert is needed for the fulfilment of its tasks. In addition, the ETUC reiterates its call for support for the trade union representative to be ensured in addition to the expert. While other experts may be appointed on a case by case and temporary basis, the presence of a trade union representative should be granted on a permanent basis. The legal arrangement for this can be found in the European Parliament legislative-initiative report.[19]

The ETUC reiterates its position from its reply to the first phase social partner consultation on the abuse of **confidentiality requirements** by central management. A possible EU initiative must limit the possibility of classifying shared information as

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[19] See European Parliament2019/2183 (NLE)

confidential to those matters where central management can demonstrate the need to do so on the basis of objective criteria. It must notify the EWC of this criterion in writing and limit it to the time absolutely necessary. When the EWC Recast Directive was adopted, there was no regulation on trade secrets at European level. In 2016, the European legislator adopted the Directive on the protection of undisclosed know-how and business information (trade secrets)[20] against their unlawful acquisition, use and disclosure. Therefore, a reference to the definition of trade and business secrets in Article 2 of this Directive could also provide clarity on what is to be considered as such.

The current EWC Recast Directive already provides for a rule that the EWC should be able to have the classification as confidential reviewed afterwards by means of an administrative or judicial procedure (Article 11(3)). However, the implementation of this provision in national law is not purposeful. A decision on classification as confidential must be taken promptly, ideally within a few days. The ETUC therefore calls for the administrative or judicial procedure provision in Article 11(3) to be supplemented by the time aspect to ensure that the body defined by the Member States as competent must take a decision within a few days.

Irrespective of the classification of shared information as confidential, the disclosure of this information to national workers' representatives and trade union representatives must be exempted. A restriction on the exchange of information between national and transnational workers' representatives would severely limit the EWC's ability to form an informed opinion on the matter. It is difficult to see how the required articulation between the European and national levels is to take place in the face of such obstacles. In order to give an informed opinion, it must be possible for the EWC to exchange information with the national level on all issues.

In this context, the ETUC would also like to draw attention to the importance of protecting whistleblowers. According to the Whistleblower Protection Directive[21], a non-disclosure agreement cannot under any circumstances limit the protection of whistleblowers. A revision of the EWC Recast Directive should explicitly refer to this important protection.

Effective enforcement of the Directive through sanctions and access to justice

As already stated above in reply to question two, access to justice combined with effective, dissuasive and proportionate sanctions are crucial to enforce the rights to information and consultation. In its consultation document, the Commission defines possible measures to facilitate access to justice:

- Commission recommendations as to how Member States can comply with their existing obligations arising from general principles of Union law and Directive 2009/38/EC.
- Laying down in the enacting terms of the Directive an obligation for Member States to provide effective and timely access to courts to enforce rights under the Directive.
- Laying down in the enacting terms of the Directive more specific rights (for example, preliminary injunctions) for relevant infringements of the Directive's requirements.

The ETUC is of the firm opinion that mere Commission recommendations will not suffice to remove the many documented obstacles to EWCs' and SNBs' access to justice in a sustainable and effective way. The Commission recalled it has been approached through formal complaints about problems of access to justice in Ireland and Finland. The ETUC

[20] *Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure*

[21] *Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law*

recalls that the trade unions also sent a complaint letter to the European Commission regarding the difficulties to access justice in Spain too. Only against Ireland has the Commission launched infringement proceedings which have so far failed (a year and a half later) to remedy the obstacles for SNBs and EWCs to seek redress before an Irish court. The ETUC thus sees no reason to believe that a non-binding recommendation would have a greater effect. Rather, the ETUC believes that the relevant provisions must be specified in the EWC Recast Directive. **Member States must either grant the EWC and the SNB legal personality or ensure that the EWC or the SNB can act as a party in legal proceedings**. Furthermore, it must be ensured that the chosen administrative or judicial procedure for EWCs and SNBs does not differ from the usual collective dispute resolution procedure in the respective Member State.

The ETUC expressly welcomes the fact that the Commission has taken up the idea of **preliminary injunctions** for the violation of Directive's requirements and is considering making them more concrete in the Directive. ETUC reiterates its support for introducing a right to injunctive relief to suspend management decisions taken in violation of their information and consultation rights. Such a procedure, similar to the procedure described above for checking whether information has been correctly classified as confidential, must be taken promptly and within 24 to a maximum of 48 hours. This is the only way to ensure that central management decisions that disregard the EWC's right to be informed and consulted are provisionally suspended in time. The ETUC considers a legally well-designed and effective preliminary injunction to be the most appropriate means of enforcing the rights of EWC. It is a proven effective instrument with dissuasive effects and can thus improve the sanctioning of violations. The legal design of such an injunction should be without prejudice to the role of trade unions in accordance with national law and with a national trade union prerogative, meaning that the national trade unions directly affected by the decision support a suspension and/or nullification.

The ETUC reiterates that in the vast majority of Member States, the possible maximum **sanctions** for breaches of the obligations arising from the Directive do not prove in any way dissuasive for multinational enterprises. Sanctions that a union-scale undertaking can pay out of petty cash will not make it respect EWC's legal information and consultation rights. The Commission rightly points out that national laws provide for more dissuasive sanctions for violations relating to the SNB process than for violations relating to the actual information and consultation of the EWC, and that the 2018 evaluation already found that in many cases the nature and level of sanctions are not effective, dissuasive, and proportionate. Furthermore, the Commission confirms that there are significant differences in the maximum penalties; that these vary so widely across the Union raises questions about the impact on enforcement of an EU obligation in the Member States: how can a common EU obligation be subject to such a wide range of penalties? The case is quite clear that something must be undertaken to remedy this.

The Commission lists the following solutions in its consultation document:

- Commission recommendations as to how Member States can comply with existing obligations arising from the broader Union law and Directive 2009/38/EC.
- Laying down in the enacting terms of the Directive an obligation on Member States to provide for effective, dissuasive and proportionate sanctions.
- Laying down in the enacting terms of the Directive additional specific references (for example, size of undertaking) that could be used to guide the determination of fines.

Similar to its reply with respect to ensuring access to justice, the ETUC is of the opinion that a Commission recommendation will not suffice to ensure that Member States will adapt their sanctions regimes as needed. The ETUC reiterates its support of the position of the European Parliament to ensure penalties in relation to the turnover of an undertaking or group of undertakings. Inspired by the GDPR, the European Parliament calls for penalties up to 2% of the worldwide turnover. The ETUC indeed considers such penalties as dissuasive. For the ETUC it is important to underline that it is not the aim of

any EWC nor trade union to impose the highest possible fines on a union-scale undertaking. Rather, **the level of the penalty** is determined by the fact that it **must be dissuasive** and serve to secure the EWC's role in its own right. In the case of multinational companies with at least 1000 employees, this must be correspondingly high. **Orientation to turnover** also means that the respective size of a company is taken into account when determining the penalty. In contrast, the preliminary injunction discussed above does not involve financial penalties. Nevertheless, if well designed and implemented, this can still have a far greater dissuasive effect than fines. Non-financial sanctions foreseen in other social EU Directives could also serve as inspiration, such as the principle of exclusion of employers violating the EWC rights from public procurement procedures and entitlement to or recovery of public benefits, aids or subsidies (including EU funding managed by Member States) that have already been laid down in EU legislation.[22]

In order to strengthen access to justice and sanctions, the Commission proposes to include a provision in the Directive requiring Member States to inform the Commission of the "procedural elements by which the national law ensures that all rights set out in the Directive can be effectively asserted through administrative or judicial proceedings".[23] The ETUC shares the Commission's view that such a provision would enable the Commission to identify the shortcomings in national legislation and address them. However, the ETUC would go a step further and propose to **establish a permanent Monitoring Committee**. The Monitoring Committee should ensure the correct application of the Directive through regular exchanges and, in particular, address and resolve practical problems arising from its implementation. The Monitoring Committee should include representatives of the Member States, the European social partners with an equal number of representatives of the trade unions and the employers' organisations and of the Commission. The Commission could chair the committee and provide organisational support. The ETUC is convinced that with such a committee, the practical implementation problems can be identified in time by those confronted by them on a day-to-day basis and solutions can be found in a timely manner.

On Question 3: What are your views on the possible legal instruments presented in Section 5.3?

The ETUC shares the Commission's view that the problems and deficits it has identified with the currently valid EWC Recast Directive **can only be addressed with a legally binding instrument**. In fact, the ETUC has been advocating this position since 2017 and made this perfectly clear in its response to the first phase of the social partner Consultation. It therefore supports a possible revision of the EWC Recast Directive by means of an EU legislative act and considers Article 153(1)(e) TFEU to be the correct legal basis.

The ETUC is aware that only minimum standards can be defined with the relevant legal basis. Full harmonisation in the area of information and consultation is not considered desirable because of the different national traditions of industrial relations. The ETUC and its affiliates offer to assist the Commission in its task of monitoring compliance with the applicable regulations and underlines once again its proposal, explained under question two, to set up a Monitoring Committee for this purpose.

However, the ETUC rejects the Commission's considerations to achieve parts of the described objectives by means of non-binding measures. With regard to the objectives defined in 5.1 of the consultation document and the possible avenues for EU action described in 5.2, there is no ground for the ETUC to believe that these can be addressed sufficiently by means of a legally non-binding Commission Recommendation. In this

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[22] *see Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals*

[23] *C(2023)5054, p.20*

case, it would be up to the Member States to follow the Commission's Recommendations voluntarily. In any case, there would be no possibility of legal action, especially before the CJEU. In particular, on the issue of access to justice and dissuasive and effective sanctions, a Commission Recommendation would come to nothing. In the ETUC's view, the Commission should not pursue this option.

The ETUC is also convinced that a Commission Communication cannot even come close to contributing to achieving the objective described in 5.1. Experience with Commission's Communications in the field of social dialogue has regrettably proven ineffective as they remain largely discarded in practice, as recently confirmed by the Commission's evaluation of the application of the EU Quality Framework for anticipation of change and restructuring. Therefore, the Commission should not pursue this path at this stage. Notwithstanding this, the Commission should, after the adoption of a possible revision of the EWC Directive by the co-legislators and in close consultation with the European social partners, provide interpretative guidance for the correct implementation of the revised Directive in the Member States. In addition, the Commission should financially support the respective European and national social partners in the preparation of their own implementation guides, so that the national implementation can also be properly accompanied by the respective national trade unions and employers' organisations.

On Question 4: Are the European social partners willing to enter into negotiations with a view to concluding an agreement under Article 155 TFEU with regard to any of the elements set out in Section 5.1?

While reaffirming its full commitment to social dialogue, the ETUC is convinced that it is urgent to act in order to provide for legal certainty and legal predictability for all parties. The ETUC reiterates its clear demand that the EWC Directive be strengthened by means of a EU legislative act in such a way that the rights enshrined therein are effectively applied and enforced. Such a demand is founded on the evidence that the current legal framework provided by the Recast EWC Directive is not fit for purpose, and that it therefore needs to be adapted in order to address all the gaps and loopholes identified in the ETUC reply to the first stage consultation, as well as those developed in this reply to the second stage consultation.

Considering the responses of the employers' organisations to the first phase of the consultation of the European social partners and in the light of the public statements of BusinessEurope and other employers' organisations, it is not clear to the ETUC on what substantive basis meaningful, if any, negotiations can take place with the aim of a legally binding instrument. As above and in its reply on the first phase of the social partner consultation, the ETUC has made it clear that there are essential problems to be addressed, in particular but not exclusively, concerning the definition of the information and consultation rights of EWCs as well as in their enforcement, and that therefore essential parts of the EWC Recast Directive need to be revised. Most of the employers' organisations, however, deny any need for adjustment and believe that the problems described do not exist.

Furthermore, considering the importance, the timing, and the scope of the initiative, as well as the documents elaborated for the second stage consultation, a legislative initiative triggered by the Commission remains the most suitable instrument to provide for substantial improvements of the rights of EWCs still in this legislature period.

Consequently, the ETUC urges the Commission to put forward a legislative proposal that will improve the negotiation position for SNBs and the information and consultation rights of EWCs and their enforcement.

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