

Opinion of the European Economic and Social Committee on the ‘Proposal for a European Parliament and Council Directive on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees’

COM(2008) 419 final — 2008/0141 (COD)

(2009/C 175/21)

On 22 July the Council decided to consult the Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the

Proposal for a European Parliament and Council Directive on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees

COM(2008) 419 final — 2008/0141 (COD).

The Section for Employment, Social Affairs and Citizenship, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 4 November 2008. The rapporteur was Mr GREIF.

At its 449th plenary session, held on 3 and 4 December 2008 (meeting of 4 December), the European Economic and Social Committee adopted the following opinion by 108 votes to 31 with 7 abstentions.

1. Conclusions: the case for more European Works Councils and improved cross-border social dialogue

1.1 The EESC explicitly welcomes the fact that the European Commission has taken steps to draft legislation since negotiations with the European social partners were not resumed in accordance with Article 138(4) of the Treaty. The present Commission proposal is intended to adapt the rights of European Works Councils (EWCs) to the conditions of the European internal market. The EESC identifies some substantial improvements in the proposal with a view to adapting the Community legal basis for EWCs to circumstances in Europe and so ensure more legal certainty and coherence in Community legislation on informing and consulting employees.

1.2 The EESC expects that the proposed clarifications and changes in the text and definitions in the directive will make the work of EWCs more effective and thus help to create more legal certainty, as well as improving the application of the directive and thus leading to more EWCs being set up. The EESC also points to the importance of finding pragmatic solutions that increase the effectiveness and efficiency of EWCs’ work and therefore do not tend to impair company competitiveness but rather strengthen it. This means in particular that:

- Company management is now obliged to prepare all the information required for setting up a EWC.
- The European social partners will be directly involved in the process of setting up European Works Councils, as they have to be informed as to when negotiations are starting.
- The day-to-day business of EWCs can be made more effective by the possibility of setting-up a select committee, by broadening skills on the basis of training that is to be offered to EWC members without loss of wages, and by recognising the EWC as a body collectively representing the employees’ interests.

- An existing EWC can more easily be adapted to new conditions because it can request re-negotiation of EWC agreements, especially where substantial structural changes are taking place that make it impossible to guarantee that all the employees in a group of undertakings can continue to be briefed and consulted in a viable way that conforms to the agreed standard.

1.3 However, the EESC laments the fact that the proposed recast version of the directive does not pursue its own objectives — set out in the explanatory memorandum and recitals — consistently enough and that certain things remain unclear. This applies to the following points in particular:

- Whereas the proposal from the social partners would make the terms of informing and consulting more precise, the rules on linking representation between the national and European levels in a logical and practicable way remain unclear.
- The definition of the EWC’s competence as transnational restricts its remit rather than making it more precise as intended. ‘Transnational’ should also cover decisions that concern only one establishment in an EU Member State but are not taken in that Member State.
- Certain limitations in the application and scope of the original directive are retained or even re-introduced.

1.4 The priority of the EESC is to improve the EWC Directive so as to make its application more attractive and increase the number of EWCs. For efficiency reasons, among other things, the EESC endorses the aim of maintaining negotiations as the prime basis for EWC agreements. This makes for flexible solutions tailored to the individual company in a bid to shape transnational social dialogue in line with the specific requirements of each individual case.

1.5 To ensure that the new provisions are accompanied by an improvement in the substance of EWCs' work and their efficiency, the EESC recommends that any remaining imprecision and incoherence be removed from the text during the next stages of the legislative process, with improvements made on the following points in particular:

- The envisaged restriction to transnational competence may limit the rights and possible effectiveness of the EWC, and should therefore be reconsidered. No relevant employee representation body should be cut off from the information flows at the international headquarters of a company by rules that are too constraining.
- The negotiation period should be reduced to 18 months, since a shorter time for setting up a EWC is consistent with practical experience, and more time does not seem to be necessary. Effective measures should also be envisaged to ensure no negotiating partner can relinquish responsibility when a European representative body is to be set up.
- More precise definitions of the terms 'informing' and 'consulting' will increase the effectiveness as well as the recognition of EWCs, if it is made clear that it will be consulted when company decisions are taken rather than at the point where they are put into effect.
- The responsibility of management for properly informing employee representatives, both at transnational and national level, must be clearly stated. The aim of improving coordination of the right to information and consultation between the different levels should not result in new ambiguities or restrictions on this obligation.
- Maintaining existing thresholds for EWCs, or introducing new ones, conflicts with the basic European right of every employee to timely information and consultation.
- It must be made clear that new EWC agreements concluded during the period of transposition into national law must be at least of an equivalent standard to the current EWC Directive (Article 6 of Directive 94/45/EC or Article 3(1) of Directive 97/74/EC), so that the legal certainty requirement is met for all those concerned.
- In order to make EWCs work more efficiently and enable them to better fulfil their function in undertakings, a recast EWC Directive should at least encourage an increase in options for holding meetings; it should explicitly recognise that the legal standards are to be considered as minimum standards and that states can therefore, on any point, always set better ones when transposing the Directive into their national laws.

1.6 The EESC is convinced that such an improvement in Community legislation on employee participation would not only be a major contribution to ensuring good and therefore socially responsible management in Europe, but would also strengthen the competitive advantage of Europe's economy and at the same time be a key component of the European social model.

2. Introduction: criteria for assessing the Commission's proposed recasting of the EWC Directive

2.1 On 2 July the European Commission presented a proposal for recasting the directive on the establishment of a European Works Council (1).

The EESC is very pleased that the European Commission has taken steps to draft legislation with a view to adapting the rights of European Works Councils (EWCs) to the conditions of the European internal market. In this opinion, the Committee considers primarily the extent to which the objectives set by the European Commission in its proposal can be reached, and ventures to suggest additions or changes to that end.

2.2 The EESC bases its position on its own work on employee participation, and on the EWC in particular (2). The Committee again highlights the positive role of national and transnational employee participation in furthering social, economic and ecological integration in Europe (Lisbon objectives) and the particular role of the EWC.

The role of cross-border undertakings is very important for Europe's success. Europe will only hold its own in an environment of global competition if it pursues a qualitative strategy that not only looks at business costs, but also takes on board companies' social responsibility and their employees' involvement in the undertaking. The EESC therefore sees the EWC as an important EU policy instrument for strengthening the basis of cooperation between the main economic players within the context of a European sustainability strategy. This is how companies can make their contribution to European society. Since employees' commitment and skills are needed for the European quality strategy in international competition, their effective participation is therefore a decisive aspect of successful company management.

2.3 The EESC considers the European Commission's proposal for a directive to be the logical outcome of a long process of political discussion. Its opinion refers to of European Parliament

(1) COM(2008) 419 final.

(2) See EESC opinions on: *Practical application of the European Works Council Directive (94/45/EC) and on any aspects of the directive that might need to be revised*, rapporteur: Mr Piette, OJ C 10, 14.1.2004; *Social dialogue and employee participation, essential for anticipating and managing industrial change*, rapporteur: Mr Zöhner, OJ C 24, 31.1.2006; and *European Works Councils: a new role in promoting European integration*, rapporteur: Mr Iozia, OJ C 318, 23.12.2006.

resolutions adopted in 2001 ⁽³⁾, 2006 and 2007 ⁽⁴⁾, and to the joint declaration of the social partners of 2005 ⁽⁵⁾.

These documents focused attention on issues that are also referred to in the present agreement of the European social partners on improving the Commission proposal, namely: providing a better definition of the right to information and consultation, with the aim of giving employees real opportunities to influence company decision-making; improving trade union participation rights; and enhancing the functioning of EWCs, for instance by providing and paying for training opportunities. Another reason given for revising the directive was to create a coherent and efficient legal framework and overcome inadequacies in transposing the EWC into national law.

2.4 The EESC is pleased that in this context the European social partners accept the current Commission proposal as the basis for revising the directive and note common positions on several points of substance that should be taken into account in the further revision process. The EESC explicitly welcomes this consensus and is taking account of the points in question in its proposals, since this will help achieve the draft directive's objectives.

2.5 The EESC upholds the objectives of the recast EWC Directive, which were already identified by the Commission as crucial in its proposal of 2 July 2008 ⁽⁶⁾:

- enhancing *legal certainty* for all those concerned, i.e. employers and employees;
- ensuring that *employees' rights* to transnational information and consultation *are effective* in the EU/EES so as to improve the efficiency of the EWC;
- improving the *application of the EWC Directive* and so above all *increasing the number of EWCs being set up*;
- *improving coherence between European directives* on employee information and consultation.

3. Improving legal certainty — ensuring that EU lawmaking on information and consultation is coherent

3.1 The recasting of Directive 94/45/EC is intended to bring the definition of informing and consulting employees into line with other Community legal instruments and so simplify the legal framework.

⁽³⁾ Based on the European Parliament report of 16 July 2001, rapporteur: Mr Menrad (A5-0282/2001 final).

⁽⁴⁾ P6-TA (2007)0185.

⁽⁵⁾ Joint Work Programme of the European Social Partners 2003-2005. See also the joint declaration of 7 April 2005 *Lessons learned on European Works Councils*, in which on the basis of their own comprehensive studies, which among other things underlined the importance of social dialogue in companies, the European social partners highlighted the positive development of social dialogue through EWCs.

⁽⁶⁾ See Commission document on consultation of the European social partners, C/2008/660, 20.2.2008.

The EESC explicitly welcomes this aim, which is stated several times in the explanatory memorandum to the proposal, but notes that closer examination of the Commission's text shows that the intention is only partly fulfilled.

3.2 Take for example the recast version of the restriction on EWC competence to transnational matters:

3.2.1 Moving the provisions relating to the cross-border nature of company decisions from the current subsidiary requirements of the directive to Article 1(4) of the Commission proposal means that the EWC can now only deal with a matter if a company decision concerns either the undertaking as a whole or at least two undertakings or establishments in two different Member States.

3.2.2 This restriction to transnational competence introduced into the text of the directive is impracticable and in the Committee's view injudicious. For instance, it could result in employees in one EU Member State being cut off from the top decision-making level in the case of a multinational company with its head office in another EU Member State taking a decision that involved major changes in the employment conditions of those employees. In such a case the undertaking would not be obliged under the new definition to inform and consult the EWC.

3.2.3 In the Committee's view, there must still be a guarantee that the EWC will also become routinely involved if a company decision at first sight only appears to have effects in one EU Member State but is part of a decision that has transnational implications. The EESC would therefore recommend that Article 1(4) be changed so as to ensure that — in accordance with recital 12 of the new version — 'employees of Community-scale undertakings or Community-scale groups of undertakings are properly informed and consulted when decisions which affect them are taken in a Member State other than the one in which they are employed' or affect the undertaking as a whole. At any rate, the scope of the EWC must not be limited by the recasting of the EWC Directive.

3.3 The recast definitions of informing and consulting in Article 2 can be considered good in principle, but they still do not measure up to the Commission's claim that it is adapting the Community legal basis in this area.

3.3.1 Although it is made clear in the subsidiary requirements annexed to the EWC Directive, as required by law, that consultation must take place in such a way as to enable employee representatives to discuss a management response to an EWC opinion before an envisaged decision is taken, this does not automatically make these rules a standard for all EWCs.

3.3.2 Only the joint proposal of the European social partners, which would introduce the following precise definitions into Article 2, will ensure clarity and legal certainty here:

- The form and content of information provided must be such that it allows employee representatives to consider in detail any possible effects of decisions envisaged in order to prepare for possible consultation with the competent management representatives.
- Consultation should be understood as a procedure that allows the EWC to submit its own proposals within a period of time that permits the company management to take them into account, as long as the decision-making process is ongoing.

3.3.3 In this context, the EESC also wishes to point out a textual inconsistency in point 3 of the subsidiary requirements (Annex I), where the rights of employee representatives are upheld during exceptional circumstances:

The new Commission proposal states that these rights also apply when 'decisions' are taken that affect employees' interests to a considerable extent. The EESC thinks the reference should be to 'measures envisaged'. Otherwise the text will be inconsistent with the idea in the rest of the Commission text of timely information and consultation. The Committee asks that the wording be clarified in this sense.

3.4 The EESC welcomes the European Commission's intention in Article 12 to improve coordination of competences and thus work-sharing between the transnational body and national level of interest representation, and to draw a clearer distinction between them. However, it also has reservations here as to whether the objective has been adequately achieved.

It is in the interests of all those concerned that employee representatives at different levels should not receive information on the same issue at different points in time. It must therefore be ensured in the text of the directive that the EWC as well as employee representatives at national level is informed about decisions envisaged that are likely to lead to substantial changes in work organisation or contractual relations. This was also emphasised by the European social partners in their agreement.

3.5 The EESC is pleased that under Article 12(5) of the Commission proposal the improved standards in the revised EWC Directive may not be used — through harmonising national and European legislation — to curtail higher standards that have already been established under national law.

The EESC believes that the wording 'not *sufficient* grounds for any regression' in the Commission proposal is open to misunderstanding and does not guarantee this aim. The EESC would like the text of the directive to make it clear that this refers to the requirement in point 36 of the explanatory memorandum that there must be no reduction in the 'general level of protection of employees' at national level.

3.6 The EESC welcomes the proposed amendments in the provision which stipulates that an EWC agreement is no longer feasible to inform and consult all employees to the agreed standard (Articles 6(2)(g), 13(2) and 13(3)).

- The clarifications in Article 13(3) are particularly welcome here, since they ensure that existing arrangements continue to have effect during the negotiations.
- However, the EESC would like there to be an obligation to apply the subsidiary requirements should negotiations fail, as is the case under Article 7 for failure to conclude an agreement. The legislation must provide certainty that there are no gaps in representation at transnational level during new negotiations.

3.7 Finally, the EESC also welcomes the Commission's endeavour in its proposal to establish a collective representation mandate for the EWC. This is also explicitly welcomed by the European social partners, although they emphasise in their declaration that the EWC must have the necessary resources to fulfil its mandate arising from the directive.

4. Ensuring that the European Works Council is effective — improving efficiency in everyday business operations

4.1 The EESC has already drawn attention to the key role played by European Works Councils, noting that their members are 'directly and actively committed to creating a new [European] society' (7).

European lawmaking must therefore ensure that that the EWC has the means to effectively fulfil both its democratic and economic role. In particular, the conditions must be established for providing the EWC with the necessary resources, and communication and training possibilities. The European social partners have also stressed this.

4.2 The Commission's proposal meets these requirements by for the first time explicitly conceding to EWC members from all the EU Member States the facility to pursue further training without loss of salary, based directly on the EWC mandate.

The opportunity to broaden skills will certainly help to improve efficiency and performance. But it would also have been more consistent to make clear that the costs of such training are to be borne by the company in accordance with usual practices.

(7) See EESC opinion on *European Works Councils: a new role in promoting European integration*. Rapporteur: Mr Iozia. OJ C 318, 23.12.2006.

4.3 The intensity and frequency of any communication between the members of the EWC is another factor affecting its performance. The EESC therefore also welcomes some improvements contained in the Commission proposal in this regard:

- Thus the EWC can include a ‘select committee’ in the agreement (Article 6(e)) to perform management and coordination tasks; the committee can have up to five members and meet on a regular basis, in line with the new provision in point 1(d) of Annex I to the directive.
- This provides both employees and company management with a reliable and permanent contact point at transnational level, especially during exceptional circumstances.

4.4 However, the EESC feels that this wish to streamline the practical work of the EWC is not consistently followed through:

- Practical experience suggests that EWCs work efficiently when an undertaking provides adequate communication facilities. The EESC observes that this is achieved above all in undertakings where there is usually more than one meeting a year, accompanied shortly before and after by preparatory and follow-up meetings without management. This approach is frequently agreed on a voluntary basis, going beyond the legal requirement. The EESC therefore believes that a recast EWC Directive should at least encourage an increase in opportunities for meetings by explicitly recognising the legal standards as minimum standards.

4.5 The EESC wishes to make the general observation at this point that when the EU Member States transpose the new EWC Directive into national law they can go beyond the minimum requirements of the directive when fixing the resources necessary for the EWC’s work:

- This is relevant for instance to the obligation on EWC members — set out in recast Article 10(2) and a welcome addition — to inform employees’ representatives in the establishments or, in their absence, the workforce as a whole, of the content and outcome of the information and consultation procedure in the EWC.
- The EESC considers that when implementing the directive the Member States are called upon to ensure efficient transmission of information between the European and national/local level of employee representation. For instance, it would make sense here to provide for rules allowing direct access to establishments, at least for country representatives and the members of a EWC’s steering committee. It should also be possible to organise a meeting of employees’ representatives at national level in order to pass on information if there are more establishments than EWC representatives in an EU Member State and employee representation bodies have not been set up across establishments.

4.6 Practical experience from the EWC’s work suggests that the range of subjects covered by the consultation should not be definitively restricted to the list mentioned in the subsidiary requirements (point 1(a), Annex I). Experience has shown that the EWC can be consulted on many more matters than structural change.

Dialogue with a large number of company managements indicates that a much broader spectrum is possible, e.g. including matters such as further training, or workplace health and safety and data protection. The EESC would have expected this to have been incorporated into the revision of the EWC legal base, and the EWC also to be given the right to propose issues.

4.7 The EESC endorses the Commission’s idea of encouraging all categories of employees to join EWCs. In this connection it draws attention to its proposal in previous opinions that executives and professional and managerial staff also be included.

5. Improving the application of the directive and increasing the number of European Works Councils

5.1 Europe’s democratic infrastructure is currently being vitalised by over 12 000 members of European Works Councils in some 850 companies operating transnationally. There is a consensus that EWCs improve social dialogue in those companies and contribute to better decision-making and implementation of decisions. It is in the declared self-interest of the European Commission to increase the number of EWCs covered by the directive. This idea is also supported by the EESC.

The Committee believes that in order to increase the potential for EWCs to be set up in the future, the recast version of the directive should contain rules and effective measures in Article 11(2) that make its application more attractive and avoidance, as well as irregular failure to apply it, more difficult, as already intended in a Commission document on consultation of the social partners ⁽⁸⁾.

5.2 This draft recast version shows that the European Commission considers the European social partners to have a very important and responsible role to play in the practical implementation and application of the EWC Directive.

- Article 5(2)(c) therefore introduces a new obligation to inform the social partners at European level about the start of negotiations and the composition of the special negotiating body that has to be set up.
- Thus the positive role which (European) trade unions and employers’ associations are known from previous experience to play in supporting negotiations and renegotiations of EWC agreements (Article 5(4) and point 39 of the explanatory memorandum) is explicitly recognised.

⁽⁸⁾ The document in question suggested that the new directive should call on the EU Member States to provide for ‘effective, proportionate and dissuasive’ sanctions (see C/2008/660, p. 7).

5.3 In this connection, the EESC also welcomes the definite improvement made by the Commission proposal in the situation during the phase of setting up an EWC.

- Thus company management must transmit to all parties the information on the company structure and workforce required for starting negotiations (Article 4(4)).
- This necessary clarification should in future help to avoid potential disagreements over this point. Previously, problems have had to be brought before the ECJ on several occasions ⁽⁹⁾.

5.4 The EESC believes that European Works Councils could be set up more quickly if the legal deadline set for concluding an agreement once negotiations have started were considerably shorter.

- The current three-year negotiating period has not proved very useful in practice because it is too long. Most EWC negotiations have been concluded in a much shorter time.
- In crucial cases, the long deadline has led to interruptions and delays in negotiations. This has meant that agreements meeting the standards set out in Article 6 of the EWC Directive have not been concluded in some cases.

The EESC therefore suggests that in the new directive the maximum length of negotiations should be reduced, for instance to 18 months, as the European Parliament already proposed in 2001.

Brussels, 4 December 2008.

The President of the European Economic and Social Committee

Mario SEPI

5.5 Finally, the EESC stresses its hope that new EWCs will also be set up during the period when a revised directive is being transposed into national law. The Committee is assuming that agreements to set up new bodies during this period will fully conform to the standards set out in Article 6 of the existing Directive 94/45/EC, or their transposed versions under national law, and that such agreements will also have legal validity under the new directive.

5.6 Current threshold and restrictions: The EESC notes that the recast version of the EWC Directive proposed by the Commission maintains thresholds for setting up EWCs, excludes groups of employees from particular sectors (e.g. merchant shipping), and limits information and consultation in economic affairs (ideological guidance). A new threshold is even introduced of 'at least 50 employees' per Member State for representation at transnational level. This does not take into account the fact that in a variety of Member States employee representation bodies also have to be set up when the number of employees is below this threshold. Therefore the wording of Article 5 2) b) (Establishment of a special negotiating body) and 5 1) c) of Annex 1 — Subsidiary Requirements (Membership of the European Works Council) — of the Commission proposal should take national worker representation into account.

The EESC sees here a significant conflict with the basic right of any employee under European law to timely information and consultation when he or she is affected by a decision. The EESC would also have expected this to be taken into account in the recast directive.

The Secretary-General of the European Economic and Social Committee

Martin WESTLAKE

⁽⁹⁾ See ECJ judgments on Bofrost (C-62/99), Kühne & Nagel (C-440/00) and ADS Anker GmbH (C-349/01).

APPENDIX

to the Opinion of the European Economic and Social Committee

The following amendments, which were supported by at least a quarter of the votes cast, were rejected in the debate:

Point 1.5

Amend 4th indent to read as follows:

‘— *The responsibility of management for properly informing employee representatives, both at transnational and national level, must be clearly stated. The aim of improving coordination of the right to information and consultation between the different levels should not result in new ambiguities or restrictions on this obligation or in slowing down the decision-making process.*’

Result of the vote	Votes in favour: 43	Votes against: 91	Abstentions: 5
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Point 3.2 to point 3.2.3 inclusive

Delete.

Result of the vote	Votes in favour: 35	Votes against: 100	Abstentions: 5
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Point 3.3.2

Amend 1st indent to read as follows:

‘— *The form and content of information provided must be such that it allows employee representatives to consider in detail any possible effects of decisions envisaged in order to prepare for possible consultation with the competent management representatives without slowing down the decision-making process in companies.*’

Result of the vote	Votes in favour: 43	Votes against: 91	Abstentions: 5
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Point 4.2

Amend second paragraph as follows:

‘— *The opportunity to broaden skills will certain help to improve efficiency and performance. ~~But it would also have been more consistent to make clear that the costs of such training are to be borne by the company in accordance with usual practices.~~*’

Result of the vote	Votes in favour: 37	Votes against: 98	Abstentions: 9
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