ON THE OFFENSIVE FOR STRONGER EUROPEAN WORKS COUNCILS

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EWCs seeking justice

Directive 94/45/EC is the core European legislation on European works councils. It sets out rules that must be put into the national laws of all EU countries and so creates a 'level playing field' across Europe for EWCs. However, many crucial aspects of the rules governing EWCs are not explained clearly in the directive. This has led to all sorts of problems and unpredictability for European works councils. Some workers have had to take cases to court in order to have these problems resolved while other EWCs wanting to seek justice never even get their day in court. Of course, court cases should remain an action of last resort for EWCs. After all, legal actions are not only costly and time-consuming, they are also unpredictable. However, in the last resort the possibility of recourse to justice must always be there. As part of our ongoing campaign for improved EWC legislation, the ETUC is demanding that the directive is not only made fairer but also more clearly understandable. We think it is important for everyone involved with EWCs to have effective and transparent rules that we can all follow with confidence.

Legal proceedings are costly and time consuming

- **In 2007, the average duration of ECJ proceedings was 18.7 months**
- **After 5 years of legal proceedings and a positive judgement of the ECJ, the dispute in the Kühne & Nagel case is yet to be settled!**

When courts have had to fill in the gaps

Since the directive came into force a number of national judges across the EU as well as the European Court of Justice (ECJ) have had to decide on EWC cases. These judgements can help to provide the clarity we need on EWC issues when the directive is too vague. They can also help us to formulate more clearly explained rules to improve the directive. There are three key points where the ETUC is asking for such court rulings to be reflected in the new Directive:

1. Setting up an EWC
The ECJ has ruled on several occasions (*Kühne & Nagel, Bofrost*) that there is a clear obligation on management to provide interested parties with the information they need to assess the possibilities for setting up an EWC. This must cover the structure of the group, a breakdown of the numbers of workers and contact details of the key representatives of employees who would be concerned.

2. Information and consultation
Judges are often called upon to rule on what information and consultation really means, because the definitions in the Directive are too vague. In the *Gaz de France* case, the French Supreme Court stopped the merger process with Suez because the EWC had not been informed properly, completely and in a timely manner on a restructuring plan. This ruling emphasises the necessity to provide the EWC with complete information in sufficient time for the EWC to formulate an opinion that management must then take into account. To make this clearer, the ETUC is demanding that the definitions of European information and consultation are improved at least to the point achieved in the more recent 'SE Directive'.

3. Transnational decisions
The directive tells us that EWCs are entitled to be informed and consulted on transnational decisions but it is not always clear what this means. In the *British Airways* case, a Belgium judge ruled that the decision to restructure in one country is transnational if it is taken by management in another country. This has always been the understanding of the ETUC but again the vague wording of the current Directive has led to this being disputed by management in a number of cases. This misreading should also be corrected by a better drafting for the new directive.

When courts deliver bad news

Of course, judges can rule against the interests of the workforce of a company just as they can rule in their favour. However, even unwelcome judgments can at least alert us to the current shortcomings of the EWC directive and help us to identify the substantive changes which need to be made to the legislation.

For instance, the French *Alcatel-Lucent* judgement highlighted the unclear status of so-called Article 13 EWC agreements - which were concluded before the Directive came into force. The French court in this case decided that these agreements are not covered by the Directive or by the French law which transposes it. This raises questions about the possibilities for renegotiation of these agreements when they do not sufficiently protect workers' interests. The ETUC believes that the Directive must now be changed to expressly allow this to happen.

Another serious concern was flagged up the Grongaard and Bang case. The problem here arose because the text of the Directive fails to give precise

guidelines on what information can be designated as confidential and how it should then be treated. When the ECJ heard the case it gave a very restrictive interpretation of confidentiality. This led the ETUC to increase its concerns that an over cautious view of confidentiality could undermine the fundamental rights of EWCs to effective information and consultation. So, we demand that confidentiality must now be more carefully defined in a new directive, in a way that will safeguard workers' rights as well as protecting the company and its shareholders.

We can also learn from cases that don't quite make it to court. It should be clear to anyone that the workers' side of an EWC must have the possibility to go to court if management don't honour the agreement. However, the directive doesn't mention this. In one case this led to members of the *P&O* EWC being told by a judge that their case would be thrown out if they proceeded. The problem was that a member of senior management was chair of the EWC and (of course) he wasn't in favour of acting against the company. This case might still have been pursued further if it hadn't run into another crucial problem: that there is no clear entitlement for an EWC or its members to have their legal costs covered in such a case. This is a factor which often prevents EWCs from defending their rights before the courts.

ECJ cases

- **Kühne & Nagel,** 13.01.2004 (C-440/00)
- **Bofrost,** 29.03.2001 (C-62/99)
- **ADS Anker,** 15.07.2004 (C-349/01)
- **Grongaard & Bang,** 22.11.2005 (C-384/02)

www.ewcdb.org

We need sanctions with teeth

Another obstacle to justice for EWCs comes from the fact that sanctions against employers who fail to meet their legal obligations are left entirely for the different national governments to decide. This has led to vagueness and weakness in some national laws. The ETUC wants a new directive to ensure that sanctions are effective, proportionate and dissuasive. It is important that there can be no impunity for companies which want to ignore their obligations, especially when this leads to grave and persistent violation of workers' rights. Whilst financial sanctions are important, it is dubious that a maximum fine of a few thousand Euros can have a dissuasive effect on big multinationals. The Belgium courts, in the *British Airways* case, and French judges, in the *Gaz de France* case, have ruled that decisions by central management with an important impact on employees must be suspended while the information and consultation procedure is not terminated. This is an effective way to ensure that companies meet their obligations and the ETUC is asking that this principal be incorporated into revision of the Directive. We also need to look at the problems of timing for EWCs. Quick redress procedures such as injunctions should be available to the workers' representatives who have to ensure that they are informed and consulted before their companies put decisions into effect irreversibly.

The vanishing act

Some EWCs do not even get the chance to make a legal complaint about not being properly informed and consulted because the decision they weren't consulted on can actually make them disappear. When a company no longer exists because of a merger or a takeover, the new employers can declare that the EWC also no longer exists. So it is clearly important for an improved Directive to make sure that when there are changes to the structure of multinationals, the old EWC will remain in place until a new agreement has been concluded. In a fast moving business environment, this is the only way to secure workers' involvement and access to justice in the crucial months following the change of structure.

Tip of the Iceberg: the problem of EWC access to justice

We can learn a lot by looking at legal cases but we must remember that they reflect only a tiny minority of the problems encountered by EWCs across Europe. Problems relating to legal costs, the legal personality of EWCs to act in court, weak sanctions and insufficient time to make effective interventions all act as obstacles to justice. The directive also fails to remove the obstacles of fear and ignorance. The lack of any training provision in the directive and the limitations on experts certainly mean that some EWC members do not have a sufficient background in EWC law to even begin to defend their positions. The failure to offer adequate protection to employees' representatives who initiate legal proceedings has also led to cases where retribution measures have been taken against the EWC members involved. The ETUC is very concerned about all these problems which act as powerful deterrents for EWC members trying to defend their rights. So, until the Directive is revised in order to tackle these issues, we will have to keep questioning the quality of justice available for EWCs and the effectiveness of the law itself.

Useful links:
The ETUC website: http://www.etuc.org/
The ETUI-REHS database on EWC agreements: http://www.ewcdb.org
Social Development Agency (SDA) database: http://www.sda-asbl.org/DbInfo/inizio.asp
For further information, contact: **Séverine Picard**, ETUC Legal Adviser – spicard@etuc.org