

ETUC reply to the first phase of the Social Partner Consultation on a possible revision of the European Works Council Directive (2009/38/EC)

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The European Trade Union Confederation (ETUC) welcomes the European Commission's intention to address the shortcomings of the European Works Council Directive (Directive 2009/38/EC) through a legally binding initiative. Before submitting proposals in the social policy field, the Commission must consult management and labour on the need for, and possible direction of, Union action (Article 154(2) TFEU).

The European Commission has invited the Social Partners to answer the following questions in relation to its consultation documents dated 11 April 2023:

- (1) Do you consider that the issues and possible areas for further EU action are correctly identified in this document?
- (2) Do you consider that EU action is needed to address the identified issues? If so, what should be the direction and scope of that action?
- (3) Would you consider initiating a dialogue under Article 155 TFEU on any of the issues identified in this consultation?

ETUC is therefore pleased to contribute to this first phase consultation.

Before answering the questions, the ETUC would like to recall that democracy at work is an essential part of the European social model with its social market economy. Social dialogue is a cornerstone of the European social model and strong social partners are essential for well-functioning labour markets. Information and consultation of workers, their representatives and trade unions are the indispensable minimum floor of democracy at the workplace. ETUC would like to recall that the Union and the Member States, having in mind fundamental social rights such as those set out in the Council of Europe European Social Charter and the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives, amongst others the promotion of dialogue between management and labour (Article 151 TFEU), and that in order to achieve these objectives, the Union shall support and complement the activities of the Member States including in the field of information and consultation (Article 153(1) TFEU). Furthermore, the Charter of Fundamental Rights of the European Union (CFREU), underlines this impressively in its Article 27 which states that "*Workers or their representatives must, at the appropriate level, be guaranteed information and consultation in good time*". The ETUC is therefore surprised that the European Commission does not refer to the CFREU in its consultation document. It only quotes Principle 8 of the European Pillar of Social Rights, which does not have any legally binding status, in contrast to the CFREU. The CFREU has the same legal status as the EU Treaty and is legally binding for the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States when they are implementing Union law.

In the first Directive on European Works Councils (Directive 94/45/EC), the European legislator had already stated in the recitals that the functioning of the internal market involves a process of concentrations of undertakings, cross-border mergers, take-overs, joint ventures and, consequently, a transnationalisation of undertakings. However, this politically intended Europeanisation of undertakings and groups of undertakings may affect purely nationally defined information and consultation rights. In short, European companies need European, transnational information and consultation bodies. The ETUC stresses that EWCs are key transnational information and consultation bodies and represent a key feature of EU law for the effective exercise of democracy at work. In

order to strengthen the European Social Model and democracy at work the EU institutions must therefore create the legal conditions to enforce and strengthen the rights of European Works Councils.

Against this background, the ETUC welcomes the European Parliament legislative-initiative report on the revision of the European Works Council directive (2019/2183 (INL)), adopted with a qualified majority by the European Parliament on 2 February 2023. As mentioned above, the ETUC also welcomes the intention of the European Commission to take legal action to improve the EWC Directive. However, the ETUC is surprised by the wording on page 10 of the consultation document. The European Commission intends to assess the European Parliament's proposals with a view to ensuring legal certainty for workers and employers and to safeguarding and promoting employment and industrial activity in the Union. The ETUC stresses that more democracy at work and the associated rights to information, consultation and participation are in no way an obstacle, neither do they have a negative impact on the promotion of employment or industrial activity. In fact, there is substantial scientific evidence proving the contrary. Worker and trade union involvement supports the resilience of companies and contributes substantially to their long-term success. This notwithstanding, a question of fundamental rights must never be considered in purely economic terms, which risks fundamental rights and, in the long run, endangers democracy at work itself.

On Question 1: Do you consider that the issues and possible areas for further EU action are correctly identified in this document?

The ETUC would like to stress that the European Parliament reports cited in the European Commission's consultation paper, in particular the legislative initiative report on the revision of the European Works Council Directive (2019/2183 (INL)), identify the main issues and possible areas for further EU action. The ETUC believes that the European Parliament has struck the right balance in its selection of issues and that its proposal focuses on the one hand on better defining the rights guaranteed in the 2009 Directive and on the other hand making them effectively enforceable. Unfortunately, the European Commission's consultation paper does not take up all of these important points.

The application of information and consultation rights of workers in EWCs in practice is often inadequate, too late and meaningless. The ETUC requests effective enforcement of EWC rights and considers the questions related to proper enforcement and access to justice as highly important issues.

The Commission rightly underlines that sanctions must be effective and dissuasive. The European Parliament's resolution concurred and called for EWCs to enjoy the "right to request a preliminary injunction in national courts or other competent authorities for a temporary suspension of the implementation of management decisions until the procedure for informing and consulting the EWC has taken place at the relevant level of management and representation and in such a way as to enable a reasoned response from the management in accordance with that Directive". The ETUC supports the call for a **right to a temporary suspension** of company decisions in case of breach of information and consultation procedures, or even nullification of company decisions in the event of recurrent breaches, with a national trade union prerogative. Experience in Member States that have implemented such a system clearly shows that the deterrent effect alone is sufficient to make companies comply with the rules. Such a system requires that an administrative or judicial system is in place that allows for swift decisions 24/7 in a few hours. The ETUC calls on the Commission to integrate such a system in its upcoming proposal.

In addition the question of **financial penalties** occurs. The Commission's 2018 evaluation report already showed that, in most Member States multinational companies face maximum fines of a few thousand euros. In Germany, the member state with the

most EWCs, the maximum fine is 15,000 EUR. Far from being effective and dissuasive, such low penalties could be even seen as an invitation to disregard the rights of EWCs. The ETUC supports 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 those penalties as dissuasive.

However, the best sanctions are ineffective if the claimant's path to the courts is not possible or made difficult. The Commission noted already in its 2018 evaluation report the overall weaknesses of the means in place to enable EWCs to enforce their rights. The ETUC regrets that at that time the Commission decided not to act despite clear evidence brought to the Commission amongst other by the ETUC. The ETUC questions in the consultation document of the Commission the fact that the litigation level had been low (p.8), while not referring to the many obstacles EWCs have to face to access justice. Founded on authoritative scientific evidence, the ETUC has already demonstrated that the low litigation level is due to the manifold hurdles put in the way of EWCs, that de facto led to the lack of effective access to justice for EWCs. The ETUC and its affiliates have repeatedly brought blatant cases of breach of EWC's rights to the Commission's knowledge since the Recast Directive came into force (e.g. at Caterpillar, ArcelorMittal, Nokia, Legrand, Whirlpool, GKN, Honda, Nissan, etc.). If those cases have not translated into court proceedings it is exactly because of the challenge it remains too often to bring a case to court. For these reasons, the ETUC considers that action should be taken to address the lack of effective access to justice by EWCs, and it reminds that the European Parliament rightfully calls on the Commission as the guardian of the Treaties to ensure effective **access to justice** for EWCs. This includes amongst other things recognition of the legal personality of EWCs, the need for central management to provide the necessary financial support for legal proceedings.

The Commission identifies correctly the definition of "**consultation**" as another issue to address. The ETUC supports the view of the European Parliament, which noted: "*the timely manner of consultation remains an issue where the employees' representatives opinion may be requested or delivered at a point in time where no meaningful consideration can be taken or when the management decision on the proposed measure has already been taken.*" This observation is supported by scientific research by the ETUI and by complaints brought forward by EWCs to the ETUC and the ETUFs.

The ETUC underlines that information and consultation must be an integral part of company decision-making at all levels: local, national and transnational. Before management takes a final decision, the transnational information and consultation process must be properly conducted and completed. Thus, a meaningful consultation has to be timely, to enable the EWC to have sufficient time to carry out an in-depth assessment of the information provided, including when needed with the support of experts, as well as to consult national and regional workers' representatives to come to an informed opinion. Sufficient time and resources are also needed to prepare the EWC opinion depending on the potential impact of the envisaged measure. The opinion shall be taken into account by management and the EWC shall receive a reasoned response before the final decision is taken. The current provisions in the directive do not ensure enough legal clarity on these essential steps and need to be strengthened in order to reflect this principle. The ETUC stresses that the European Parliament's proposal to amend Article 2 of Directive 2009/38/EC is a viable way to strengthen the consultation procedure.

The notion of "**transnational character** of a matter" needs clarification. The current directive already provides a comprehensive definition in recitals 12 and 16: "*Appropriate provisions must be adopted to ensure that the employees... are properly informed and consulted when decisions which affect them are taken in a Member State other than that in which they are employed.*" (Recital 12 of Directive 2009/38/EC) and further "*The transnational character of a matter should be determined by taking account of both the scope of its potential effects, and the level of management and representation that it*

involves. For this purpose, matters which concern the entire undertaking or group or at least two Member States are considered to be transnational. These include matters which, regardless of the number of Member States involved, are of importance for the European workforce in terms of the scope of their potential effects or which involve transfers of activities between Member States.” (Recital 16 of Directive 2009/38/EC).

However, not all member states have transposed the recitals into national law and contrary to what is described in the Commission's consultation document (p.11), the recitals are not read together with Article 1(3) and (4). Practice shows that there are often disagreements with central management on how to define the transnational character. The ETUC therefore proposes, in line with the European Parliament's proposal, to consolidate and incorporate the provisions of the recitals in the main body of the Directive. This would ensure legal clarity in the interest of both management and labour. There must be an enforceable comprehensive right of the EWC to be informed and consulted on transnational matters throughout the decision-making process, and legal certainty must be ensured.

The ETUC strongly underlines the importance of guaranteeing access to recognised **trade union** organisation expertise, not only for the SNB, but also for the EWC in its daily work. Building on the most accurate knowledge of the branch, sector and transnational matters, as well as a thorough understanding of the functioning of an EWC, European and national trade union assistance provide valuable and accurate expertise, including legal advice, where relevant. Even though the current directive provides for the possibility for EWCs to call in experts, and explicitly refers to trade union representatives as possible experts for the SNB, most member states limit this possibility to one expert only as per reference in the Subsidiary requirements. In practice, this very often means that trade union representatives are simply excluded from participating in any SNB or EWC meeting.

The ETUC regrets that the Commission's consultation paper does not analyse the position of trade union representatives in detail and only deals with them under other issues. This does not give adequate attention to the key role of the trade union representatives. The role of the representative in Article 5.4 needs to be reflected in the subsidiary requirements. A right for trade union experts to participate in all SNB, EWC and select committee meetings and to have access to all sites is a necessary condition for supporting and coordinating the EWC's work more effectively. In addition to trade union representatives, however, EWCs may consult other experts on specific issues. Furthermore, attempts by central management to exclude trade union representatives from official EWC meetings between management and EWC should be forbidden. The ETUC therefore advocates clarification in the EWC Directive to ensure that other experts in addition to the trade union representative can be called in by the SNB and the EWC and attend meetings, should the workers' representatives so wish. ETUC supports in this regards the proposed changes to the directive by the European Parliament.

Preventing abuse of **confidentiality** clauses is rightly identified by the Commission as one major issue of possible action. Evidence shows that the confidentiality clause is often misused for objectively non-confidential matters and hinders EWCs in their effective work, especially in the communication with European and national workers' representatives and/or workers. The ETUC clearly identifies the need to clarify with objective criteria more precisely on what grounds, under what circumstances and how long a company may withhold information, and on what grounds EWC members' right to share information with stakeholders (particularly workers' representatives) can be restricted. Even though the current directive provides for in Article 11(3) the requirement for member states to provide a judicial or administrative appeal procedure to challenge the central management attempt to classify a matter as confidential, this procedure, however, is not fit for purpose. In line with the ETUC's remarks on the temporary suspension of management decisions, the procedure in place must be accessible 24/7 and be able to decide on the matter within 48 hours. In addition, it's important that a strengthened EWC allows for the necessary sharing of information between the EWC

worker representatives and national or local trade union representatives, and not only works councils.

The Commission does not reflect on the need to ensure **more efficient coordination** between local, national and European levels. As underlined above, information and consultation rights must guarantee that the EWC can deliver its opinion before consultation is finished at the respective levels. The EWC must be able to communicate with the national level workers' representatives, whenever necessary, especially before and after EWC/SE meetings. The necessary resources and rights, such as access to sites and additional time off from work, must be ensured.

After more than 25 years, there is no longer justification for exempting old, so-called voluntary (**Pre-Directive, "Article 13" agreements**). The ETUC calls for double standards to be ended by bringing them into the scope of the Directive. To ensure a level playing field and legal clarity, provisions laid out in the Directive must apply to all agreements. The European Parliament's approach to follow this call by including all agreements automatically and without any need for renegotiation in the scope of the revised directive is promising and supported by the ETUC. The proposed "most favourable provision clause" would ensure that those provisions that are more favourable for EWCs are not affected.

The procedure for **setting up an EWC** needs to be improved and clarified. After the request to establish an EWC has been received by central management, it is not uncommon for central management to delay the establishment of the SNB and only start negotiating shortly before the end of the three-year obligation. To prevent this common delaying tactic, the ETUC calls for a new deadline of 6 months for the constitution and organisation of a first meeting of the SNB. If this deadline is not met, the subsidiarity requirements should automatically apply. Unlike the European Parliament, the ETUC sees no need to shorten the three-year deadline for negotiations. It has to be taken into account that on the workers' side an understanding has to be established between workers' representatives from different member states with very different industrial relations systems. Thus, proper coordination, training and agreement on common demands take time.

The ETUC sees the need to **strengthen the subsidiarity requirements**, in particular to foresee at least two annual meetings in person of the EWC. Further meetings shall be possible if needed.

In its consultation paper the European Commission does not address the issue of concretising the definition of "**controlling undertaking**" to clarify the inclusion in the scope of the directive of companies operating through contract management, franchise systems and 50:50 joint ventures. The ETUC stresses the need for a comprehensive definition to ensure that multinational companies with complex business structures are clearly included in the scope of the directive. Objective criteria to determine the location of the "representative agent" and "central management" must be laid down to avoid regime shopping and use of letterbox companies.

The consultation paper of the European Commission is missing an opportunity to draw links between **due diligence** and EWCs. The ETUC strongly believes that involvement of workers' and trade unions representatives are necessary for the company to build a strong and effective due diligence process. Thus EWCs must be fully involved in all steps of companies' due diligence plans and policies. This includes the involvement in mapping potential risks on human rights and the environment across the company operations as well as its supply and subcontracting chains.

Question 2: Do you consider that EU action is needed to address the identified issues? If so, what should be the direction and scope of that action?

After more than a decade of working with the Recast EWC Directive, developing guidelines, training and awareness, the ETUC and its affiliates concluded that additional actions are needed to remedy the shortcomings of the current EWC Directive and considered different options. Following in-depth discussions it became clear that only a legislative action at EU level could be relevant. The ETUC acknowledges that the European Commission tried to provide some forms of support through EU budget lines devoted to EWC projects or dialogue with Member States. The ETUC however stresses that the EU budget line for EWC projects was substantially downsized in 2023, and that only one meeting of the Commission's expert group of Member States representatives took place to address the issues with the EWC Directive. The ETUC therefore supports the European Parliament's call for addressing the shortcomings of the EWC Directive through a legally binding initiative.

In its consultation document, the EU Commission points out that EWCs are unevenly distributed among member states and that 10 member states have no EWC at all. The ETUC does not support this very limited view. While it is true that Germany and France have by far the most EWCs, this ignores the fact that there are members in EWCs from all member states and even from countries beyond the EU, in particular from the UK and Switzerland. More importantly, workers in all member states are affected. Poor implementation of the Directive's provisions in one member state thus curtails information and consultation rights in other member states – a situation that we are currently facing in the context of mis-transposition of the EWC Directive in Ireland, for example. Such situations incentivise forum shopping practices by companies leading to a lack of effective exercise of EWC rights. Such a situation requires the interventions of the European legislator in order to ensure that all workers in the EU benefit from clear provisions, regardless of the member state in which the company has its central management.

EWCs have an exclusive focus on transnational issues in companies and exist only in multinational undertakings. Recital 45 of the Directive states that “the improvement of the right to information and consultation in Community-scale undertakings and Community-scale groups of undertakings cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level”. In other words: the information and consultation process at transnational level can be regulated only by an EU legal act and afterwards transposed into national law. EU minimum requirements in this area should guarantee a level playing field for companies and the same minimum level of protection of workers in all Member States, where respect and due regard of course must be taken to different labour market systems when implementing the directive.

The ETUC and its affiliates have emphasised the need to improve the EWC Directive, based on a wide range of scientific and practical evidence. This position has been continuously presented to the European Commission. In addition, contrary to what is presented in the Commission's consultation document, the ETUC is aware of at least three official complaint procedures related to inappropriate national EWC legislation and lack of possibilities to properly enforce EWC rights in Finland (Nokia case), Ireland (Kingspan case) and Spain (IAG case). So far, the Commission has only followed up on the Irish case and sent a reasoned letter to the Irish government as a first step in the infringement procedure. Confidential talks between the Irish government and the Commission have been going on for a year without any result so far. The ETUC and its affiliates are very concerned about the slow development and lack of transparency in particular towards the parties directly concerned and the democratically elected members of the Irish and European Parliaments. The unsatisfactory results underline the need for legal action at European level.

The ETUC has reiterated on several occasions the need for **an EU legally binding initiative** and strongly insists that a raising awareness campaign, a handbook, a code of practice, or any other non-legally-binding interpretative guidance documents will not help solve the issues identified concerning the operation and enforcement of the EWC Directive. While the need to act is clearly identified, the ETUC is convinced that any EU initiative should be an EU legally binding act, possibly a recast or an enforcement directive, as long as it properly addresses the issues identified above under question one.

Question 3: *Would you consider initiating a dialogue under Article 155 TFEU on any of the issues identified in this consultation?*

Reaffirming its full commitment to social dialogue and Article 155 TFEU, the ETUC is in principle open to starting negotiations with the employers. The ETUC believes that the current legal framework provided by the Recast EWC Directive is not fit for purpose and needs to be adapted through an EU legally binding initiative. The ETUC underlines that, should negotiations take place, they must be bound by the condition that both social partners agree to negotiate meaningfully a legally binding instrument on the issues identified in this reply to the Commission.