

EUROPEAN WORKS COUNCILS ASSESSMENTS AND REQUIREMENTS

REPORT TO THE ETUC

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Results of a survey of EWC Coordinators prepared in the context of the project
“ETUC Action on Workers Participation” (VS/2014/0490)

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CONTENTS

| | |
|---|----|
| Introduction | 3 |
| Survey methodology | 4 |
| 1. Achievements: While some EWCs are making progress, the majority are falling back | |
| 1.1. Background, facts and figures | 5 |
| 1.2. Quantitative trends reported by EWC coordinators | 6 |
| 1.3. Qualitative trend 1: EWCs can have a clear added value for transnational companies | 6 |
| 1.4. Qualitative trend 2: Many EWCs are more professional and better equipped | 9 |
| 1.5. Qualitative trend 3: Doubts over the increase in well-functioning EWCs | 10 |
| 2. Deficiencies and challenges | |
| 2.1. Challenges in the context of establishing new EWCs | 12 |
| 2.2. Restructuring – a key issue for all EWCs | 13 |
| 2.3. Information and consultation - Effective functioning still more the exception than the rule | 13 |
| 2.4. Too many EWCs without basic resources and competences | 15 |
| 2.5. Most EWCs unable to fulfil their role in restructuring situations | 16 |
| 3. Needs and demands with regard to the review of the EWC Directive | |
| 3.1. Key areas where the EWC Directive and its implementation need improving | 18 |
| 3.2. Better enforcement of the Directive's provisions and stronger sanctions | 18 |
| 3.3. Still existing loopholes and deficiencies | 18 |
| 3.4. Suggestions on ways of improving EWC capacities in restructuring situations | 20 |
| 3.5. The need to anchor EWCs more firmly in the broader context of workers' participation and to strengthen European trade union coordination | 20 |
| 3.6. Is there a need for a revision? | 23 |
| 4. Conclusions: How to make the EWC Directive fit for purpose | |
| 4.1. Recalling key survey results | 24 |
| 4.2. Priorities and concrete demands regarding the EWC Directive | 25 |
| 4.3. The EWC in the broader context of workers' participation | 26 |
| 4.4. Conclusions with regard to legislative action | 26 |
| Literature | 27 |

INTRODUCTION

The EU Directive on European Works Councils (EWCs) that will have been in force for two decades on 22 September 2016 is probably the most important legislative framework in the field of European industrial relations. Reflecting the importance attached to workers' representation, involvement and social dialogue, EWCs are also a key element of the European "Social Model".

But the 20th anniversary is not the only reason for reviewing past EWC-related achievements and any deficits that still exist or have since emerged. 2016 will also be the year in which the European Commission evaluates the recast EWC Directive, and a debate can be expected on needs for further adjustments and/or revisions of the EWC Directive recast in 2009.¹

Long before the EWC Directive was first adopted, the ETUC, its national member organisations and the European Trade Union Federations were already major advocates of a legislative framework providing for an additional European level of workers' interest representation and involvement as a social dimension of the emerging European common market as well as accompanying the growing internationalisation of corporate structures.²

Ever since the EWC Directive came into force, the ETUC and its affiliates have been demanding that deficiencies in its implementation on the ground be addressed, and that the legal framework be adjusted in light of new needs and/or the Directive be tightened up to increase its effectiveness (see ETUC 1999, ETUC 2004, ETUC 2008). More recently, the ETUC has called for a fresh approach to strengthening workers' information, consultation and participation rights in Community-scale undertakings or groups in order to participate properly in decisions that affect them. Such a new framework of workplace democracy in Community-scale enterprises would in particular benefit EWCs and SEs (ETUC 2014 and ETUC 2016).

In light of the upcoming debate on the need to adjust, amend or revise the EWC Directive and against the background of the European Commission's own evaluation of the implementation of the recast Directive, the ETUC and the ETUFs deemed it important for the experience of trade unions at both European and national level to be taken into account as key sources of

information, assessment and opinion building. Trade unions at European, national, sectoral and company level have always been a key source of support, expertise and advice in the context of the establishment, negotiation and everyday practice and functioning of EWCs. This outstanding role is – at least partially – acknowledged in the recast 2009 Directive (Article 5).

Overview of the recast EWC Directive

After a long and difficult political debate on the need to improve the practical application of the EWC Directive by providing clearer rules and improving framework conditions on practical functioning, the recast EWC Directive was finally adopted in May 2009 and implemented in the national law of the Member States by June 2011. The ETUC assessment of the recast Directive is ambivalent: While providing improvements and clarifications likely to have a positive effect on the everyday practice of EWCs, a number of key demands of the ETUC and its affiliates were not or only partly implemented.³ However, major improvements from the ETUC point of view relate in particular to six aspects:

- 1. Stronger definitions, especially regarding information and consultation**
- 2. Some progress on clarifying an EWC's transnational competence**
- 3. Clearer rules on how to link the European and national level in information and consultation procedures**
- 4. Establishment of a clearer mandate of the EWC as the collective representation of workers' interests at European level**
- 5. A stronger role and rights for trade unions in assisting the establishment of an EWC as well as with regard to its everyday functioning by providing advice**
- 6. New provisions for the establishment of EWCs, guaranteeing higher quality agreements.**

Source and further details:

ETUC: *The New Works Council Directive ('Recast')*
https://www.etuc.org/IMG/pdf/CES-Depliant_The_New_Recast_Directive_def.pdf

¹ According to EWC Directive 2009/38/EC, Article 15, the European Commission shall report to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Directive no later than 5 June 2016, "making appropriate proposals where necessary".

² The first transnational employee representation structures date back to the 1980s. Even before the EWC Directive came into force, around 430 EWCs based on voluntary agreements already existed, many of them in France. As described elsewhere, the agreement reached at Thomson formed the template for the specific mode in which EWCs were to be established under Directive 94/45/EC. See: Hoffmann et al. 2002, p. 78.

³ Such 'left-overs' are particularly related to the issue of stronger mechanisms of sanctions, the obligation to have at least two plenary meetings per year and the demand to reduce the time limit for negotiations resulting in the establishment of an EWC from three to one year.

SURVEY METHODOLOGY

In this context, the following report aims at contributing to the European trade union movement's opinion-building on the review of the EWC Directive. It summarizes the results of a survey carried out on behalf of the ETUC and the European Trade Union Federations industriAll, UNI Europe, EFFAT, EPSU, EFBWW and ETF between autumn 2015 and spring 2016 in the context of the ETUC's EU-funded project "ETUC Action for Workers' Participation".

As part of the ETUC project on workers' participation and within the EWC section thereof, a thorough assessment of the implementation of the recast EWC Directive was foreseen, with the ETUC secretariat and representatives of the ETUFs agreeing to carry out a survey of EWC coordinators with the help of an external contractor. This target group was selected in order to benefit from the broad practical experience EWC coordinators have gained with regard to EWC practices and functioning as well as trends over time. The survey aimed at delivering evidence-based information and assessments as input for the 2016 review of the EWC Directive and possible legislative debates.

The survey and this report primarily address the recast Directive's impact on the quality of EWC functioning and efficiency with regard to working conditions, workers' rights and successful change management. Alongside positive effects (e.g. training, qualification and skill development), experiences and

aspects still characterized by shortcomings and unsatisfactory practices (e.g. the quality of information and consultation, articulation between local and EU-level practices, coordination, etc.) were to be highlighted.

On the basis of a jointly agreed interview guideline, the survey was carried out between autumn 2015 and spring 2016 and involved EWC trade union coordinators nominated by the six ETUFs as well as further EWC trade union experts of national union confederations in 13 EU member states, reflecting the experience and evolution over time of more than 100 EWCs in various national and economic contexts.

The following report is based mainly on the results of these interviews. However, it also takes into account discussions with trade unions and EWC representatives on preliminary findings in workshops and conferences.⁴ Furthermore, the compilation of the report and the references to empirical facts and figures benefited greatly from the author's close cooperation with researchers from the European Trade Union Institute (ETUI) and the EWC database resource centre.

⁴ For example, preliminary results were presented and discussed at an ETUC workshop on the review of the recast EWC Directive in Brussels on 30 June 2015, the ETUC Annual EWC Conference in Brussels on 15-16 September and at a workshop of the ETUC Workers Participation and Company Policy Committee in Brussels on 10 December 2015.

1. ACHIEVEMENTS: WHILE SOME EWCS ARE MAKING PROGRESS, THE MAJORITY ARE FALLING BACK

According to EWC coordinators, the recast Directive has not boosted the establishment of new EWCs. In a number of cases however, it has had a positive effect on the renegotiation of existing agreements.

In qualitative terms, the recast Directive – in combination with other factors – has brought improvements for those EWCs already seen as working quite well.

However, there is still a majority of EWCs not benefitting from the Directive’s provisions due to the fact that they are not covered or because rules are not implemented.

1.1 BACKGROUND, FACTS AND FIGURES

As of 1 May 2016, there were 1,091 known EWCs active in the EU, involving some 15,000 - 20,000⁵ employee representatives who work together in a more or less intensive and frequent way and are engaged more or less actively in communication and discussions with transnational management. Most of the EWCs and their members are very experienced, having built up competences and know-how over a long period – more than 60% of all EWCs were established before 2000 and have thus been in existence for more than 15 years.

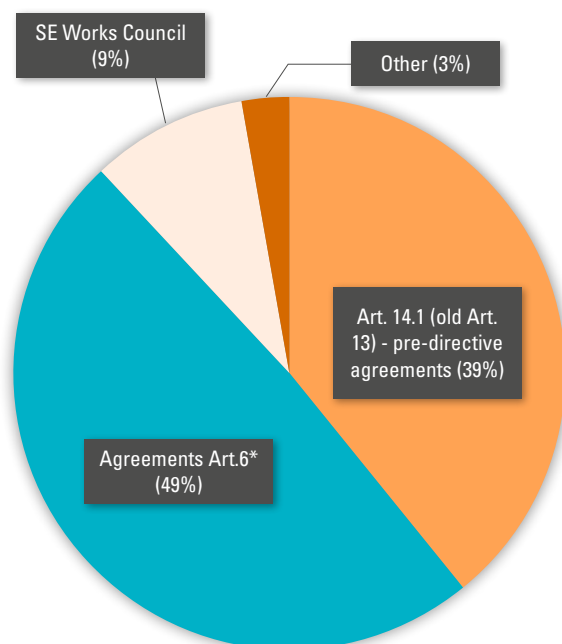
Looking at the quantitative side of EWC establishment, the following trends can be observed: Since the adoption of the 1994 EWC Directive, the number of EWCs has risen constantly though the increase has recently slowed down quite significantly. EWC creation peaked in 1996 when more than 400 bodies were set up, mainly to make use of a legal “window of opportunity” between 1994 and 1996 providing the possibility to conclude a “voluntary agreement” under Article 13 of the 1994 Directive and thus exempted from many of the requirements defined in the Directive.

The high number of EWCs created between 1994 and 1996 was clearly exceptional. In the following years the average number of EWCs was much lower, and has dropped significantly in recent years. Whereas in 2000 – 2004 the annual average was 50, it dropped to around 40 in 2005 – 2010 and to just 25 in 2010 – 2014.

And despite other expectations, the entry into force of the recast Directive in 2011 and the respective “window of opportunity” that existed for agreements signed between 2009 and 2011 similarly had no significant quantitative effect on the numbers of EWCs created.

The EWC landscape in Europe is divided into two broad groups: More than half of the EWCs are fully regulated by the 1994 EWC Directive and the 2009 recast Directive (49%) or established in the context of an SE company (9%). The remaining EWCs (39%) are not covered by either of the EWC Directives as they are based on voluntary agreements signed before September 1996 (former Art. 13 agreements, now covered by Art 14 of the Directive) or have another status (3%, e.g. global works councils or information and consultation procedure).

DIFFERENT TYPES OF EWCS AS OF JUNE 2015 (%, OUT OF 1,071)



⁵ All figures presented in this overview – if no other sources are indicated – are taken from the latest report of the ETUI database on EWCs, see: De Spiegelaere / Jagodzinski 2015 and the EWC database (<http://www.ewcdb.eu/stats-and-graphs>). The average number of members of EWCs is unknown. However, calculations of the EWC database show that most EWCs have 10-20 members.

*Article 6 agreements are fully regulated by both the EWC Directive of 1994 and the 2009 Recast Directive

Source: Author, based on De Spiegelaere /Jagodzinski 2015.

1.2 QUANTITATIVE TRENDS REPORTED BY EWC COORDINATORS

EWC coordinators from different national and sectoral backgrounds confirmed the facts and figures presented above, reporting only a slow increase in the number of EWCs. They also confirmed that, to their knowledge, the recast Directive as such has had no significant positive effect on the number of EWC bodies established from scratch.

However, those EWC coordinators coordinating a significant number of EWCs reported that the recast Directive triggered the renegotiation of existing EWC agreements in order to adjust them to new rules, despite the fact that it contained no obligation to renegotiate existing agreements in the light of the new provisions.⁶

Many EWC coordinators reported that the recast Directive was used as an occasion to adjust and improve an agreement, for example with regard to better defining the notion and procedure of information and consultation, including clauses on the training and qualification of EWC delegates or increasing the number of annual plenary meetings and strengthening the role of the select committee.

In view of these effects on the efficient functioning of an EWC and the resources available to it, the recast Directive has clearly had a positive effect in the opinion of many EWC coordinators. However, it is also interesting to look at those aspects where *no* such effect was reported. Fewer improvements were reported for example with regard to EWC competences⁷, the role of trade unions⁸, the better linkage of the different information and consultation levels and bodies, or dispute resolution and management misconduct.

A key finding of the interviews with EWC coordinators on quantitative EWC creation and renegotiation trends was that corporate

restructuring (on current restructuring trends, see Voss 2016) – and in particular mergers, takeovers and acquisitions – has been a major trigger for the renegotiation of EWC agreements and the adoption of the provisions of the recast Directive in recent years. This is in line with Article 13 of the recast Directive which stipulates that, in the case of any significant change to the company structure and if the existing agreement does not contain specific provisions in this respect, (re-)negotiation under the terms of the new Directive is compulsory – regardless of whether the obligations arising from the new Directive would otherwise apply to the agreement(s) in question.

1.3 QUALITATIVE TREND 1: EWCs CAN HAVE A CLEAR ADDED VALUE FOR TRANSNATIONAL COMPANIES

According to the experience and assessment of the majority of EWC coordinators involved in our survey, the quality of various aspects of EWC practice and functioning all in all has progressed positively. Achievements and positive developments are particularly linked to certain aspects such as a better and common understanding of those involved as to key terms of the EWC regulation, the EWC's role in transnational social dialogue, labour relations and human resources policy, or the resources made available to the EWC to carry out its work.

As discussed in greater detail below, the question whether the recast Directive has had any major impact on such positive developments and achievements is however not easy to answer. According to EWC coordinators, the recast Directive has facilitated positive changes in the quality of EWC practice. At the same time, other factors such as learning and growing professionalization, increasing expertise and the clarification of the EWC's role within a company's industrial and labour relations have been highlighted as further important drivers.

However, all EWC coordinators interviewed also stressed that qualitative achievements and progress were not spread equally among EWCs. In a nutshell, those EWCs that were already functioning comparatively well before 2009/2011 have made further progress, while those with constraints on their competences, resources, acceptance and other aspects were left further behind and still face significant difficulties and challenges. For these, the recast Directive has few positive impacts. As a result, the quality gap between EWCs, transnational workers interest representation and involvement has widened since 2009.

Positive impacts of the recast Directive: Definition of key terms and provision of resources

When asked about positive impacts of the recast EWC Directive on the ground, most EWC coordinators referred to an improved definition of key terms, in particular related to information and consultation, as the main positive impact on renegotiated agreements or those set up for the first time since 2009. It was also

⁶ Recital 41 of the recast Directive makes clear that “the agreements in force should be allowed to continue in order to avoid their obligatory renegotiation when this would be pointless”.

⁷ A number of articles in the Recast Directive refer to the competences of the EWC, e.g. Art. 1 (objectives), Art. 2 (information and consultation) or Art. 10 (role of employee representatives). The general notion of improved competences can be found in Recital 7 of the recast Directive: “It is necessary to modernise Community legislation on transnational information and consultation of employees with a view to ensuring the effectiveness of employees’ transnational information and consultation rights, increasing the proportion of European Works Councils established while enabling the continuous functioning of existing agreements, resolving the problems encountered in the practical application of Directive 94/45/EC and (...) ensuring that Community legislative instruments on information and consultation of employees are better linked.”. According to a recent overview of the implementation of key provisions of the recast Directive in the EU, only in six countries (Belgium, Hungary, Lithuania, Slovenia, Sweden and Spain) there is an explicit reference to Recital 7 in their national EWC laws. See: ETUI 2015, p. 90.

⁸ The recast Directive explicitly recognises the special role of European trade unions in supporting negotiations by providing support to the SNB and monitoring the establishment of new EWCs: Art. 5.2.c stipulates that the competent European workers’ and employers’ organisations shall be informed of the start of the negotiations to set up a EWC and of the composition of the SNB. Art. 5.4 includes the provision that representatives of EU-level trade unions have the right to participate in negotiation rounds in an advisory capacity if the SNB requests such. For further details see: Picard 2010.

emphasized that the recast Directive has had a positive influence on the provision of resources for the training and skill development of EWC members and has brought more clarity regarding the need for and role of a select committee.

Perhaps the most important impact has been on training, where nearly all EWC coordinators stated that the post-2009 EWC agreements included references to the right to training and skill development (in particular language training, but also for example with regard to providing EWC delegates with a better understanding of corporate financial and business figures and reporting). While in many EWCs this right was already implemented before the recast Directive came into force, the effect was most noticeable in those countries and companies where training and qualification courses (and their financing) were often a source of conflict between employee representatives and the management, e.g. in the United Kingdom or in the Central and Eastern European region. Here, the recast Directive has brought true added value according to EWC coordinators.

Organising the training and qualification of EWC delegates is no longer a source of struggle with the management thanks to the recast Directive.

(EWC coordinator industriALL, UK)

Training is often considered a local issue and some countries are not willing to allow it. In most renegotiation agreements the right to training is defined in a much clearer way.

(EWC coordinator industriALL, Slovakia)

Many agreements in Norway had no provisions on training. Many renegotiated EWC agreements now include provisions on training.

(EWC coordinator EFBWW, Norway)

Training has become more frequent and is less opposed by management. Management generally accepts costs related to these activities.

(EWC coordinator industriALL, Belgium)

Also with regard to the definition of key terms and objectives of an EWC agreement, in particular information and consultation, EWC coordinators appreciated the recast Directive for providing greater clarity and certainty.

EWCs today receive more information. The time frame and who gets information and when and how is better defined.

(EWC coordinator industriALL, Belgium)

The agreement of the XY EWC was renegotiated in 2014.

One main change was the introduction of a definition of information and consultation taken directly from the recast directive.

(EWC coordinator EFFAT, France)

The provision of greater clarity regarding information and consultation is a key component of the recast EWC Directive. Directive 2009/38/EC aimed not only to provide a clear definition of 'information' (not included in Directive 94/45/EC) but also to reinforce the management's information obligation by providing guidance on different aspects and procedures to be respected. It states for example that information must be given "at such time, in such fashion and with such content as are appropriate to enable employees' representatives to undertake an in-depth assessment of the possible impact" (Article 2).⁹ It also provides greater clarity regarding the linkage of informing transnational and national/local interest representation bodies, stipulating that the EWC has to be informed either before or at least at the same time as national bodies of interest representation.

However, EWC coordinators also stressed that any progress in definitions and terminology is no guarantee of information and consultation obligations and provisions working well in practice. In fact, many EWCs still face many difficulties in this respect, as will be described in the next section. The recast Directive has thus provided guidance for both management and employee representatives with regard to key information and consultation aspects, in particular for those EWCs that are already functioning quite well and where management has an interest in leveraging the added value of an EWC (as opposed to regarding this body merely as an administrative and financial burden able to slow down decision-making processes).

EWCs are increasingly seen as an institution and tool for dialogue in the majority of companies. Training and consultation are taken increasingly seriously. The possibilities to talk with top management and to have access to expertise are two important aspects that have improved over the years.

(EWC coordinator, industriALL, Belgium)

And for this group of already quite well-functioning EWCs, the recast Directive and its provisions on training and information and consultation as well as other elements seem to have contributed positively to a general trend towards greater professionalization and improved appreciation by management.

⁹ A recent comparative evaluation of national transposition practice regarding Art. 2.1(f) in combination with recitals 16 and 42 has however shown that there are significant differences between EU countries. The study highlights in particular the fact that in a number of countries the reference not only to a "actual" impact but also to a "possible" impact on workers' interests is a sufficient condition for the EWC to be informed. See Jagodzinski 2015, p. 91 and 182.

However, these positive developments mentioned by EWC coordinators should be regarded as a trend resulting not simply from the recast Directive but also linked to a number of further and more important factors.

Other factors more important than the recast Directive

According to EWC coordinators, a key factor for the effective functioning of an EWC (i.e. in line with the objectives of the EWC Directive) is the support it receives from the central management of a transnational company. As a general trend (which however coexists with contrasting experiences), the interviewed EWC coordinators were able to report positive developments.

EWCs are now more respected than at the beginning.

(EWC coordinator industriALL, Slovakia)

Management has gradually become less reluctant, seeing the positive aspects of an EWC. The EWC was able to establish contacts and a network between different countries and different sites. A real dialogue with management has been established.

(EWC coordinator EPSU, Austria)

Today, there is a better common understanding of the role of the EWC.

(EWC coordinator UNI Europa, Germany)

This however is said to result not so much from the recast Directive but instead from learning processes on the part of both employee and employer sides, often taking the form of a new pragmatism (*"The EWC is here to stay and thus we should make the best out of it"*).

As a result and according to EWC coordinators from different national and sectoral backgrounds, EWCs have proved to provide true added value.

Looked at from the perspective of corporate labour relations and culture, this added value is particularly linked to the coordination of different interests, the dissemination of information from the European to the local level, the mediation and prevention of conflicts, and other forms of balancing different interests within the various workers' representation structures and organizations.

As the quotes below show, if social dialogue is functioning well at the transnational level and is actively used by both sides as an effective tool of information, consultation and communications, the real added value it provides for management is at least as significant as for the employee side.

Where employers understand that the use of the EWC is a win-win situation, they can use the EWC to directly access information from different countries, making the EWC a real platform for communication and exchange. The EWC can spread good company culture also to national subsidiaries. An improved HR culture and the involvement of union representatives may be spread to the whole group.

(EWC coordinator EPSU Sweden)

The EWC's contact to local management and worker representatives has been improved and the EWC has better possibilities to influence standards.

(EWC coordinator UNI Europa, Sweden)

The EWC makes it possible for national managers and employee representatives to get more information on the different situations and working conditions in different countries. The EWC is able to prevent conflicts.

(EWC coordinator EPSU, Italy)

The management today regards the EWC as a trouble-shooter in situations of transnational restructuring.

(EWC coordinator UNI Europa, Austria)

Looking at the potential added value, the shift from a body used mainly as an information and consultation tool and for coordinating European and national information flows towards practices even going beyond the provisions of the EWC Directive is increasing, as illustrated by the following experiences and assessments of EWC coordinators.

The relationship between management and the EWC has improved over the last years and today favours the implementation of measures or projects.

(EWC coordinator industriALL, Finland)

The EWCs have very positive impacts concerning the definition of safety measures and procedures as well as on equality and equal opportunities, diversity and the promotion of training. They help improve international relations. The EWC enables national managers and employee representatives to get more information on the different situations and working conditions in different countries. The EWC is able to prevent conflicts. The EWC makes it possible to talk with management and to define procedures to follow, while promoting social dialogue in general.

(EWC coordinator EPSU, Italy)

At XY there was a change in the behaviour of management concerning topics on the agenda. At first they were very reluctant to give information and only provided

information at the last minute. The EWC is now informed at an earlier stage and even extraordinary meetings are organized in order to get the feedback of the EWC. The management uses the EWC to get in contact with the workforce and tests with them if for example study results prove true in reality.

(EWC coordinator industriALL, Belgium)

As mentioned above, the positive developments and experiences described by EWC coordinators should not be regarded as being true for the majority of EWCs. EWC coordinators stressed that an open-minded and positive notion of social dialogue and information and consultation procedures resulting in joint agreement within transnational companies are still much more the exception than the general rule. And as regards management, company culture and attitudes, the real world is still (and sometimes increasingly) too often characterised by approaches circumventing existing rules, mistrust and formalism or even worse practices.¹⁰

There are two sorts of companies: the ones where management does not believe in rules and will find a way to avoid them in order to avoid costs. In such cases the EWC has no influence. And the ones where management sees the benefits of an EWC. The values of top management are very important.

(EWC coordinator EFBWW, Germany)

Today there are fewer powerless EWCs. They have become more mature and gained in experience. However, there are still some EWCS with purely symbolic power.

(EWC coordinator, industriALL, Belgium)

1.4 QUALITATIVE TREND 2: MANY EWCS ARE MORE PROFESSIONAL AND BETTER EQUIPPED

Though not directly related to (but perhaps favoured by) the recast Directive, another trend was highlighted by many EWC coordinators – the growing professionalization of EWCs. This is seen as both a result of and a requirement for the effective functioning of an EWC with regard to consultation processes carried out in the context of restructuring or to the implementation of transnational programmes and framework agreements in such fields as HR, social policy or health and safety.

EWCs have triggered the creation of International Framework Agreements in some companies.

(EWC coordinator, EFFAT, France)

The EWC of XY Company is trying to sign a charter on stress and burnout. While management has agreed on the existence of the problem, they have not yet signed the charter despite the ongoing debate.

(EWC coordinator UNI Europa, Belgium)

The EWC has created a network where they know who needs what and where throughout the company. It has set up an information process between EWC members and workers. Moreover, informal contacts can create progress in health and safety or employee motivation. They have started programmes on health and safety, training, employee motivation and established a psychological help programme (also providing therapies when necessary).

(EWC coordinator, industriALL, Germany)

At XY Company, the EWC has initiated a health and safety project with training courses for management and workers. (Target: 0% accidents). They created the possibility to discuss problems and progress once a month all over Europe. (EWC coordinator EFBWW, Italy)

Big changes are today handled better. Restructuring is put on the agenda in good time and extraordinary meetings are guaranteed. (EWC coordinator EPSU, Sweden)

In the view of EWC coordinators, the growing professionalization has several reasons: It is related to the increase in experience, expertise and competences gathered over the years within EWCs as 'learning organisations'. A further reason is linked – at least in some cases – to a more supportive and positive perception of EWCs by central management with regard to corporate labour relations, human resources or to transnational relations between employees and management. In such companies, EWCs are increasingly being actively involved in transnational change projects, restructuring processes and initiatives, for example addressing health and safety or social security issues. An indicator of this trend is the increasing number of European Framework Agreements (see Pulignano 2014).

According to the experience of EWC coordinators, these developments and in particular the accelerated speed of corporate change and restructuring have directly resulted in the need to build up professional expertise in order to be able to assess and evaluate the information received from management, develop own positions and alternative options, and also to organise and coordinate communication processes within the EWC as well as downstream information and communication processes towards national and local interest representation levels.

¹⁰ These differences have been analysed in greater depth in a study on the Netherlands and Germany. See van den Bergh 2008, Vitols 2003.

In those EWCs with a more active role and described as ‘functioning well’, the requirements, competences and skills required of individual EWC members have increased significantly over the past few years according to EWC coordinators. Many EWCs today meet more frequently and, in many, restructuring has also resulted in an increasing number of extraordinary meetings and the establishment of joint employee-management committees or working groups. As a consequence, the working time and resources needed for transnational interest representation have also increased significantly.

According to EWC coordinators, apart from training and skill development for the whole EWC, an EWC’s select committee and secretariat play a crucial role in the professionalization of transnational interest representation and the ability of employee representatives to be at eye level with management representatives.

The situation of EWCs is quite good in Finland. At XY Company, they have a very well-functioning executive committee. Over the last years they focused on health and safety achieving a reduction in accidents at least at the Finnish sites. Dialogue with management is now good, having improved greatly over the years.

(EWC coordinator EFFAT, Finland)

In particular in restructuring situations, e.g. the merger of two transnational companies, the EWC coordinators see not only the respective select committees but also EU-level trade unions as playing an important role as facilitators and coordinators of interests. The interviews conducted in the context of this study show that the role of European Trade Union Federations is crucial in this context as well as in situations where an EWC is directly involved in negotiations on transnational framework agreements. Without the active involvement of European unions, all too often an EWC is unable to provide the necessary resources and expertise or to sufficiently coordinate existing interests, in particular in restructuring situations.

EWCs work better with high coordination of union representatives. As members come from different countries with different traditions and works council rights, consultation has to be coordinated. In the case of restructuring, there might be 2 EWCs involved. Renegotiation of agreements is necessary and local representation bodies have to be informed and involved.

(EWC coordinator industriALL, Belgium)

The EWC today handles a lot of issues, including Corporate Social Responsibility, Human Resources and gender equality, in addition to its involvement in change and restructuring processes. There is an increasing need for support by national and European trade unions.

(EWC coordinator industriALL, Finland)

The informal networking within the EWC, communication processes and the possibility to discuss issues are of major importance for the EWC.

(EWC coordinator, EFBWW Austria)

The trade union organised sectoral seminars where representatives from several multinationals discussed good practices in the sector. (EFBWW, Italy)

1.5 QUALITATIVE TREND 3: DOUBTS OVER THE INCREASE IN WELL-FUNCTIONING EWCs

With regard to the issue of whether the number and overall share of well-functioning EWCs has increased over the past years and in particular since the recast Directive came into force, the results of our survey are quite clear: According to most coordinators, the number and share of those EWCs that could be described as fulfilling the key objectives set forth in the Directive in terms of information, consultation and effective social dialogue on transnational matters has *not* increased over the years.

Instead, EWC coordinators from different sectoral and national backgrounds stressed that little progress has been achieved within the (majority) group of less well functioning EWCs, i.e. ones that receive only minimal support in their work, are informed but not consulted and do not play any significant role in corporate matters.

The share of well-functioning EWCs has not increased.

(EWC coordinators in Poland, Slovakia, Czech Republic)

Amongst those EWCs that I’m coordinating in the construction sector there are some that function very well, some that are doing fairly well but still face a lack of support or even opposition by management and around one third that still are purely symbolic. It is not possible to identify a distinctive trend over the years.

(EWC coordinator EFBWW, Germany)

The share has not increased in the energy sector, where there are still well-functioning and less well-functioning EWCs. While the EWC of company XY functions well and all European countries are represented, there are cases in Italy where management does not want an EWC to function properly.

(EWC coordinator UNI, Italy)

In the healthcare sector, the share of well-functioning has only marginally increased. Many companies are not complying with the Directive, and there are still a lot of EWCs with agreements governed by the old Directive. Even where there are new agreements, the old practice persists.

(EWC coordinator EPSU, Sweden)

The share has not increased in the metalworking sector, though there has been qualitative progress, with EWCs enjoying better access to top management and being better informed. However, information often comes too late and there is no real consultation.

(EWC coordinator industriALL, Belgium)

Amongst those EWCs in the metal and electronics sector I'm aware of, the share of well-functioning EWCs has not increased during the last years. There's rather another tendency: While those EWCs that are supported by the management as a "co-player" and have an active role within the company have moved further and even beyond the provisions of the Directive, the second and larger group EWCs that only receive information have experienced no positive development.

EWC coordinator
industriALL, Germany)

Against this background, the assessment of the recast Directive and its added value in terms of an EWC's functioning and effectiveness and transnational social dialogue are quite sobering: According to EWC coordinators the 'new rules' set forth in the recast Directive have given a new impetus neither to consultation nor to transnational dialogue in those companies where this was a problem before 2009. At best, those EWCs that were already functioning quite well before the 2009 recast Directive have improved further in terms of consultation and even negotiation processes at European level. However, these developments seem to be much more based on the practice and interests of key company players than on the recast Directive itself.

2. DEFICIENCIES AND CHALLENGES

Turning to deficiencies and the challenges faced in making EWCs fit for purpose, our main interest in this chapter is to summarize critical points highlighted by EWC coordinators. Key issues addressed here are:

- ▶ Main challenges faced when establishing new EWCs (2.1)
- ▶ The changing nature of restructuring as the key challenge EWCs are currently facing (2.2)
- ▶ Reasons for the limited impact of the improved provisions of the recast Directive – for example on information and consultation and on resources and competences – in the majority of EWCs (2.3 and 2.4)
- ▶ Reasons for most EWCs being unable to play a stronger role in restructuring situations (2.5)

2.1 CHALLENGES IN THE CONTEXT OF ESTABLISHING NEW EWCs

One of the objectives of the recast Directive was to increase the number of EWCs.¹¹

However, this target – as already mentioned in the first chapter – has not been achieved. From the interviews conducted in the context of this survey but also from evidence gathered in the context of a comparative evaluation of the national implementation of the new provisions set forth in the recast Directive it becomes clear that the new rules have not been transposed homogeneously in Europe. There are significant differences between countries (see Jagodzinski 2015, p. 69-84. As some of the quotes illustrate, the new rules have not helped simplify negotiations in sectors and companies not interested in establishing EWCs, and there is a lack of effective sanctions for not complying with the legal obligations (see the section 3.3 below for more details on this).

Since the 1990s only few EWCs have been established, and the number of companies that could have an EWC but which don't have one because of management opposition remains quite high. In this respect, the recast Directive has had no positive effect.

(EWC coordinator UNI Europa, Austria)

¹¹ To this end, new and simplified rules with regard for example to the provision of information on the company and workforce distribution were established, potentially making it easier to establish an EWC. In doing so, the recast Directive responded to problems encountered in establishing EWCs under Directive 94/45/EC: In many cases (conflicts on this issue led to three cases at the CJEU: Bofrost (C-62/99), Kühne & Nagel (C-440/00), and ADS Anker (C-349/01)), workers' representatives were unable to receive sufficient information from management on the company's structure and workforce distribution, without which it is often hardly possible to initiate the establishment of an EWC under way.

Establishing an EWC has become more difficult. There are only small sites, and trade union organization there is often non-existent or weak, making the establishment of an EWC difficult – and even more so when the process is not supported by local management.

(EWC coordinator Poland, industriALL)

For company XY renegotiation was a problem, as trade union representatives are no longer as involved as was previously the case. There are now not as many trade union representatives in the EWC, making it very difficult to negotiate.

(EWC coordinator UNI Europa, Sweden)

There are more and more companies that have an EWC. While it has become a common standard in all large Norwegian-based companies, in smaller companies and also in some sectors (for example the hotel and restaurant sector) there is still work to be done.

(EWC coordinator EFBWW, Norway)

In Slovakia it is still very difficult to establish EWCs or to have Slovakian representatives present in an EWC, as EWC activities are not supported by local management. There is little or no knowledge about EWCs in management, and only basic legal provisions are respected. When the EWC was established at company XY, the management had no idea how EWCs function or how to deal with it. They tried to establish an EWC from 2008 onwards, but were only successful in 2014 on account of a judgement in the third instance.

(EWC coordinator industriALL, Slovakia)

From the interviews with EWC coordinators it becomes quite evident that the rules simplifying and facilitating the process of setting up an EWC through stating employer obligations more clearly and providing guidance on trade union involvement are likely to have a positive impact on those companies in which central management supports plans to establish a transnational body of interest representation. EWC coordinators also report positively on renegotiating or adjusting old Article 13 agreements (even when their duration is open-ended), though once more dependent on the willingness of the central management.

In cases where this support and willingness is lacking however, the new rules seem quite toothless. According to EWC coordinators the number of cases where a company is unwilling to establish an EWC is increasing and there are no serious and effective mechanisms to find a solution that works.

Establishing an EWC in Belgium is quite difficult. For example for company XY the legislation did not help. The national transposition in Belgium is not sufficient (only copy and paste from the Directive). There is a lack of facilities (interpreters and experts). Management is very reluctant to provide interpretation. The role of the SNB is not very clear. In addition, it is not a good idea to take a company to court as this will harm all future dialogue. The three years of negotiations at company XY ended with the minimum requirements being met. Some managers tried to renegotiate before the recast Directive entered into force in order to circumvent its provisions.

(EWC coordinator industriALL, Belgium)

Even in cases of fallback rules, i.e. when management has not provided the relevant information needed to set up a special negotiating body (SNB), it is extremely difficult or even impossible to carry out local elections or to prepare and organise the first meeting (sending out the invitation, coverage of travel/hotel costs, translation, etc.).¹²

2.2 RESTRUCTURING – A KEY ISSUE FOR ALL EWCs

The need to improve the functioning of European information and consultation procedures has increased significantly over the past two decades due to accelerating globalization and the expansion of the EU from 12 to 28 countries with its massive implications for cross-border and transnational economic activities fuelled by internal market liberalization. As highlighted in a recent report to the ETUC (Voss 2016), there has been an acceleration of corporate restructuring since 2008, driven by various factors and motives not solely linked to what is traditionally understood as ‘structural change’. As a consequence, we have seen a growth in asymmetries within Europe with regard to workers’ information and consultation rights and growing inequalities in their capacity to influence restructuring processes at company level and beyond. Furthermore, the social costs of restructuring have risen, with increasing gaps and divides within Europe. While workers in some parts of Europe (generally with a quite well-established system of industrial relations and with strong and influential organisations) are quite well off, workers in other countries pay an excessively high price in terms of unemployment, a lack of career opportunities for young people, worsening social conditions and unfair treatment.

The protection of workers’ rights thus requires a more effective transnational voice able to counterbalance economic and managerial power through information and consultation and a match for globalised corporate strategies and decision-making struc-

tures. This aspect has been highlighted in many research studies, reviews comparing the implementation of the EWC Directive as well as company-specific case studies (see Jagodzinski/Kluge/Waddington 2009 or Eurofound 2009).

Research emphasizes that proper and effective EWC functioning is essentially dependent on two conditions:

- ▶ First, the timely implementation of information and consultation procedures with EWC members given access to sufficient documentation to allow them to make an in-depth assessment and formulate an opinion on planned measures affecting employee interests.
- ▶ Second, the availability of assistance and resources, including more regular and frequent meetings and the right to extraordinary meetings and follow-up, as well as improvements with regard to the operations of select committees within EWCs, access to experts (and expert analyses), training and access to modern means of communication (including translation and interpreting services).

With regard to these requirements, the recast Directive includes a number of new rules and provisions seen by EWC coordinators as important improvements, notably on information and consultation processes and requirements, the establishment and role of a steering committee, skill development and training, and communications between European- and national-level employee interest representation.

2.3 INFORMATION AND CONSULTATION – EFFECTIVE FUNCTIONING STILL MORE THE EXCEPTION THAN THE RULE

As already highlighted in the overview in Chapter 1, the tightened-up definition of information and consultation together with guidance on its use, scope and timing are at the heart of the recast Directive. Under its Article 1 the arrangements for informing and consulting employees are to be defined and implemented in such a way as to ensure their effectiveness; and information and consultation of employees must occur at the relevant level of management and representation.

According to an ETUC leaflet on the recast Directive, the “*new definitions of information and consultation were designed to strengthen the role and the effectiveness of EWCs*”¹³ in particular via the following elements:

- ▶ Information and consultation procedures must fulfil fundamental timing and quality criteria.
- ▶ Information and consultation are two distinct procedures. Consultation cannot be conducted if the information phase has not been properly initiated.
- ▶ Consultation means that workers’ representatives have to be effectively involved in the management decision. This

¹² It should be mentioned here that this particular problem was stressed in certain countries, e.g. Belgium or Germany, while in other countries the situation seems to be better due to stronger implementation rules regarding fall-back mechanisms.

¹³ https://www.etuc.org/IMG/pdf/CES-Depliant_The_New_Recast_Directive_def.pdf

presupposes that there is sufficient flexibility as to the outcomes of management's decision-making.

Whether an EWC and transnational information and consultation processes function effectively is ultimately dependent on the content of the received information. Article 2.1 of the Directive stipulates that, "*information shall be given at such time, in such fashion and with such content as are appropriate to enable employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare for consultation with the competent organ of the Community-scale undertaking or Community-scale group of undertakings.*"

Consultation thus depends on workers' representatives receiving full and relevant information, ideally presented in a format understandable to the recipients.

The recast Directive provides practical guidance on the required contents of information and the subject matter of consultation. The new "subsidiary requirements" (which would govern an EWC's operations in the absence of agreement between the negotiating parties) requires the following: The information of the European Works Council shall relate in particular to the structure, economic and financial situation, probable development and production and sales of the Community-scale undertaking or group of undertakings. The information and consultation of the European Works Council shall relate in particular to the situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, anticipation of change and restructurings, and collective redundancies.

With regard to a possible limitation of the information provided by management, the recast Directive makes no change to the notion of confidentiality: Article 8 allows management to withdraw information completely or to demand that EWC members not disclose it if it is deemed confidential. The exemption from providing information applies when its nature is such that, according to objective criteria, it would seriously harm the functioning of the undertaking.

Effective information and consultation processes also require a certain degree of joint understanding between the parties. Here, however the recast Directive leaves the relatively vague Article 9 of the 94/45/EC Directive untouched, merely stating that central management and the European works council shall work in a "spirit of cooperation".

According to the EWC coordinators surveyed, key deficiencies and problems hindering the functioning of an EWC are related to the poor implementation or even the violation of rules and obligations. In the interviews it was very often stated that it is not the EWC Directive, its national transposition or the EWC agreement, but the implementation thereof on the ground that is

the key problem. Interview partners particularly referred to the following aspects needing urgent correction and improvement:

- ▶ insufficient implementation of information and consultation in practice – all too often information is provided too late;
- ▶ though improvements have been made, a clear notion of transnationality and transnational EWC competences is still missing;
- ▶ extensive use of confidentiality clauses;
- ▶ lack of a "spirit of cooperation";
- ▶ lack of a joint understanding regarding consultation and all too often a total absence of consultation;
- ▶ management unwillingness to accept a stronger role of trade unions in EWC matters;
- ▶ a lack of resources and competences to implement information and consultation processes in a meaningful way, for example limited timelines for consultation phases, no possibility to visit local sites, no opportunity to make use of external expertise or involve European trade union federations, etc.;
- ▶ significant inter-country differences in sanction mechanisms for breaches of rules, ranging from sanctions that really hurt a company to monetary fines that are far too low.

Despite the improvements on paper, many interview partners stressed that it is still very difficult in the majority of EWCs to receive sufficient information in good time. In a number of countries it was also reported that incidents where management is withholding information on grounds of confidentiality has increased.

The Directive stipulates that access to information shall be guaranteed. But there is no concrete time frame defined. A lot of information given can be found on the company's website. Often there is a lack of additional information.

(EWC coordinator industriALL, Belgium)

In particular when it comes to restructuring, most EWCs are only informed when the decision is already taken and when it comes to implementation.

(EWC coordinator, industriALL, Germany)

Information provided by management is often not sufficient. The EWC receives no written information before the meeting. In 80% of cases there is no information provided in advance. As a consequence, EWC members receive information and have to express their opinion in one and the same meeting. The two steps should be separated. While the directive provides for this, practice shows that there is still work to be done in order to have the proper information to prepare sessions.

(EWC coordinator EFFAT, France)

Incidences where management refuses to provide information on grounds of confidentiality have increased greatly.

(EWC coordinator, UNI Belgium)

Most interview partners went on to state that consultation hardly takes place, and even when it does it is often under too restricted circumstances. EWC coordinators stated that in those cases the agreements contained more detailed procedures regarding consultation processes, though management had often tried to include clauses on time limits for consultation processes (e.g. four weeks or even less). At the same time, the lack of any hint or guidance in the Directive for situations in which consultation does not lead to a joint understanding and orientation is perceived as a weakness thereof.

In this context EWC coordinators also remarked that the definition of transnationality and EWC competences in transnational matters is still rather unclear, in particular with regard to those agreements that have simply copied and pasted Article 1.4 of the Directive (with its rather narrow interpretation of the concept) without referring to the broader concept described in the new Recital 16. Whereas Article 1.4 states that matters are to be considered as transnational when at least two countries are affected, Recital 16 clarifies that it is not the formal number of countries directly affected which is to be taken into account but the “potential effect” of a management decision which allows a quite broad interpretation.

Again, EWC coordinators highlighted the major differences existing between companies in terms of their willingness to cooperate and establish a real dialogue with employee representation bodies and the EWC. The interview partners not only stressed the significant differences between EU-based and third country-based EWCs but also referred to a company's size and national labour relations and entrepreneurship cultures in this context. From our interviews it became clear that Central and Eastern European countries remain a difficult region from the point of view of EWC functioning. By contrast, the development of a joint understanding on an EWC's role as a transnational body of meaningful information, consultation and workers involvement seems to be easier to achieve in countries characterised by cooperative forms of labour relations and workers' participation (see also section 3.5).

At the same time EWC coordinators also referred to more recent trends undermining dialogue and cooperation cultures, such as the stronger influence of financial and legal interests and the growing influence of institutional investors.

For American companies it is difficult to understand Europe and its 28 different member states; they do not grasp the use of EWCs. In Japanese-owned companies the situation is worst. There is almost no participation of

experts, followed by Anglo-Saxon companies. But even Belgian companies (with one exception) are not open to debate and unwilling to give proper rights to the EWC.

(EWC coordinator industriALL, Belgium)

Management thinking and attitudes are very different. There's one company that accepts the role of EWC in the German tradition of co-determination. By contrast it took five years at a South Korean company to even establish contact with management.

(EWC coordinator industriALL, Slovakia)

There are also problems in family-owned companies as well as in private equity where resources are very bad.

(EWC coordinators Poland, Belgium and Italy)

With regard to ownership there is a growing presence of investment funds and banks also in top management. They often do not know the business and have no long-term strategy for the company (or even do not want any contact with workers representatives). Shareholders often do not deal with trade unions at all.

(EWC coordinator EFFAT, France)

Constant changes in management and the increasing tendency for EWC matters to be dealt with by legal staff have a negative effect on working relations and climate.

(EWC coordinator industriALL, Germany)

2.4 TOO MANY EWCS WITHOUT BASIC RESOURCES AND COMPETENCES

As a result of these “spirit of cooperation” differences, the basic resources and competences of EWC bodies vary significantly according to EWC coordinators. These gaps still exist despite the improvements the recast Directive has delivered, for example on the right to qualification or the provision regarding the establishment of a select committee as a standard practice in EWC agreements.

Despite EU law the most important factor is company culture. The establishment and functioning of EWCs depends on company culture and management willingness to improve transparency. If there is a good company culture the EWC can play a very important and active part.

(EWC coordinator EPSU, Sweden.)

If the headquarters are located in the USA, normally the EWC is set up in the “UK way”, as UK legislation is quite weak and only minimum requirements are complied with. The EWC is unable to act in a proactive way in these cases.

(EWC coordinator UNI Europa, UK)

Article 6 of the new Directive stipulates that negotiations “in a spirit of cooperation” should lead to an agreement on detailed arrangements for implementing information and consultation rights. Article 10 of the Directive addresses the “role and protection of employees’ representatives”, and includes a new provision that “*the members of the EWC shall have the means required to apply the rights arising from this Directive, to represent collectively the interests of the employees (...)*”. Article 10 also refers to the entitlement to training in order to prepare the EWC for properly fulfilling its functions. Furthermore, Article 10 of the recast Directive also includes the obligation for EWC members to report back to employee representation bodies or the whole workforce at national level on the content and results of information and consultation procedures. To fulfil this EWC task, necessary requirements include the right to visit local sites and efficient methods of communication (Picard 2010).

Though in the view of EWC coordinators the recast Directive has had a positive impact on those EWCs that were already functioning quite well before the recast, little to no improvement is reported for those EWCs where the provision of resources for training and qualification measures, external experts or additional resources for the select committee was a problem. As basic rights are often not respected or implemented in an unacceptable way, with even travel costs for training sessions often a source of conflict, several EWC coordinators demanded that the EWC be equipped with its own budget for its work.

Local management is not sufficiently informed about the rights of the EWC. The national EWC members have to explain that they have the right to travel to meetings or training sessions.

(EWC coordinators in Slovakia and Poland)

In order to function adequately, we need to ensure better support for EWCs. Hence, a budget and access to experts should be guaranteed.

(EWC coordinator Belgium, industriAll)

Two meetings are not enough to make an EWC a functioning group working together.

(EWC coordinator EPSU, Sweden)

An important issue concerning the operation and practice of EWCs is the duty of EWC members to report back to all workers in their country. It is often difficult for them due to disputes in the respective country and a lack of communication channels. Representatives from Southern European and Central and Eastern countries in particular do not have that much contact with the workers they represent.

(EWC coordinator EFBWW, Norway)

2.5 MOST EWCs UNABLE TO FULFIL THEIR ROLE IN RESTRUCTURING SITUATIONS

Restructuring has become a permanent feature of company life in transnational firms. Although Europe has always seen phases of accelerated restructuring in specific sectors (e.g. steel, textiles) or national economies (e.g. the transformation process in Central and Eastern Europe), post-2008 restructuring is different (see Voss 2016). The crisis of 2008 abruptly ended a comparatively long phase of net job creation and resulted in a sharp and continuous increase in unemployment still affecting most Member States. It also accelerated corporate restructuring which has now become a constant feature of economic life. Resulting from technological progress and innovation, the societal and political changes are affecting the labour market and social policies in particular. A recent joint project of the ETUC and European trade unions¹⁴ revealed evidence of restructuring cases in transnational corporations across all sectors and indicated a strong increase in purely cost-driven restructuring and the dominance of short-term financial objectives. In most cases, corporate-level restructuring lacked any serious attempt to reach a joint understanding and conduct restructuring in a socially responsible manner.

The interviews with EWC coordinators made it quite clear that the ability of EWCs and transnational information and consultation processes to tackle restructuring is much more than a “litmus test” of an EWC’s proper functioning and efficiency. Restructuring is no longer an exception but a permanent feature of EWC practice.

At the same time, EWC coordinators remarked that the EWC Directive and most agreements in this context were not “fit for purpose” when it came to dealing with restructuring or even to anticipating change. Multiple challenges were stated by interviewees with regard to restructuring, including a sharp increase in the number of mergers or the emergence of new problems in the context of dependent companies, franchises or sub-contractors, all of which were resulting in new tasks and requirements for the EWC.

The EWCs do not actively participate in restructuring processes. They are only informed after the decision has been taken. They do not have much influence on strategies. Though they receive proper information, consultation is very weak.

(EWC coordinator, industriALL, Germany)

¹⁴ See the results of the project “Anticipating change and restructuring in multinational companies through stronger transnational trade union coordination” jointly conducted between late 2012 and June 2014 by the ETUC and industriAll, UNI Europa, EFFAT and EFBWW. Focussing on concrete cases of transnational restructuring in different sectors, the project aimed to enhance transnational coordination among trade union and employee representatives. See: https://www.etuc.org/IMG/pdf/MNC_restructuring_EN_.pdf.

Information is often provided too late. In the case of the YX's takeover of company XY, the EWC learned about it in the press. In June, there were some rumours and the EWC asked management in a meeting whether they were true. The management denied it and did not disclose any information. On August 4th the decision was taken. The management said that they had not been in a position to give the information to the EWC as this would have caused problems on the stock exchange. The company is not providing the necessary information and thus the EWC is unable to intervene. Consultation is completely missing and only exists on paper.

(EWC coordinator EFBWW, Italy)

The most important problem again is that the EWC is often not informed in advance. They often learn about planned restructuring measures from the media before being informed by management. They do not get information before the final decision is taken (often justified by management referring to confidentiality) and therefore are unable to manage change. All they can do is to reduce damage. (EWC coordinator EFFAT, France)

In cases of restructuring and mergers the EWC is very rarely informed on time. (EWC coordinator, EFBWW, Austria)

In cases of restructuring, an EWC faces pressure on two fronts: As a transnational body of interest representation it strives for the best possible solution for the European workforce, while at the same time it has to take into account national and local interests and related consultation processes. This not only requires properly functioning information and consultation processes, but also additional resources and expertise that often do not exist in practice. As a result, even in those companies where information and consultation works comparatively well, the EWC would not be able to organise proper involvement due to a lack of time and resources. Here, the need for external support from trade unions and professional experts has increased significantly in order to facilitate sufficient functioning. At the same time, EWC coordinators stressed that the framework provided by the Directive with regard to the role of trade unions, the right to consult external experts and the role of the select committee is still too weak. In the experience of many of them, management too often blocks the involvement of supporting staff and external experts, referring to costs and the fear that such involvement will slow down the process.

It is very difficult for EWCs to anticipate restructuring as discussions are held behind closed doors. Intervention is often not possible as information is given to the EWC too late. The EWC has no power to intervene. There is information but this is not enough.

(EWC coordinator EPSU, Italy)

In cases where the EWCs are quite large (25 to 30 people) and when the restructuring measure only concerns two countries it is a problem to involve the whole EWC as foreseen even if management accepts it. It is important to strengthen the role of the working/select committee as it is much easier for a smaller body to handle this.

(EWC coordinators Norway and Germany)

With the recast Directive one aspect became worse: the introduction of the transnationality aspect. In one of three EWCs in Italy they managed to exclude the transnationality aspect from the EWC agreement.

(EWC coordinator EFBWW, Italy)

As the quotes illustrate, the challenges associated with deficiencies, violations of legal requirements and other problems are huge. Interviewed EWC coordinators from all EU countries and all sectors quite unanimously refer to corporate cultures and management styles as a key problem, more or less openly opposing any interference and involvement in decisions by employee representations, social dialogue or even effective consultation.

Against this background, EWC coordinators view the lack of effective sanctions and vague formulations as key factors hindering the better implementation of the Directive's provisions. The interviews confirm the results of a comparative evaluation of national sanction rules (Jagodzinski 2014) which show large differences and an overall insufficient implementation of the Directive's provision that sanctions should be "effective, proportionate and dissuasive".

According to EWC coordinators, the existing regime of enforcement and sanctions provides no real incentives or grounds for companies to respect statutory information and consultation provisions or other requirements of the EWC Directive. They remarked that the only reference to sanctions, administrative and judicial procedures is in Recital 36 of the Directive and not in the main text.

Belgian law does not provide for appropriate sanctions. General unwillingness of management cannot be sanctioned. The lack of sanctions is a Belgian problem. The transposition only consisted of copy and paste without any further definitions or clarifications.

(EWC coordinator, UNI Europa, Belgium)

A major problem is that there are no sanctions when management blocks the establishment of an EWC or its operation. (EWC coordinator industriAll Slovakia)

With regard to provisions for sanctions and judicial procedures it is important to highlight that a recital in the Directive may influence the interpretation given to a legal rule but does not constitute a rule as such.

(EWC legal expert DGB Germany)

3. NEEDS AND DEMANDS WITH REGARD TO THE REVIEW OF THE EWC DIRECTIVE

3.1 KEY AREAS WHERE THE EWC DIRECTIVE AND ITS IMPLEMENTATION NEED IMPROVING

Though assessments of the need for improvements and adjustments to the Directive varied between EWC coordinators, all stressed that the current EWC Directive is not “fit for purpose” and that there is an urgent need for improvements, given the challenges European countries are currently facing (insecurities within the global economy, disruptive technological changes such as digitalisation, still persisting social and employment crises in large parts of Europe, etc.).

This chapter highlights survey results regarding demands and needs to be taken into account when reviewing the EWC Directive. In the opinion of EWC coordinators, further action, adjustments and regulatory changes are needed in particular in the following fields:

- ▶ Better enforcement of the Directive is key to making it fit for purpose
- ▶ Addressing still existing deficiencies and loopholes in the Directive
- ▶ Better anticipating change and managing restructuring
- ▶ Liaising between EWCs and other workers’ participation and employee interest representation structures

3.2 BETTER ENFORCEMENT OF THE DIRECTIVE’S PROVISIONS AND STRONGER SANCTIONS

As shown in the previous section, the practical implementation not only of information and consultation but also of other Directive provisions only takes place to a sufficient degree in those EWCs supported by management and embedded in a cooperative and dialogue-orientated corporate culture. This is not however the case in most EWCs, leading EWC coordinators to stress the urgent need to define more precisely what happens in cases of misconduct and violating the legal provisions, and to provide for much stronger sanction mechanisms. As regards consultation, they also refer to the good practice in some countries which requires proper consultation before any decision is implemented.

Furthermore, as remarked by some EWC coordinators, weak enforcement mechanisms and sanctions also have a negative

impact on EWC establishment in a situation where this process is blocked or obstructed by central or local management.

For companies it is easier to ignore the rules as sanctions are not harsh enough. There should be higher fines. By only providing for very mild sanctions the Directive signals that complying with it is not that important.

(EWC coordinator EPSU, Sweden)

The legislation does not provide for sanctions when companies do not respect the regulation. The Finnish legislation has not closed this gap in the Directive.

(EWC coordinator EFFAT, Finland)

There are plenty of cases where establishing an EWC by law failed, simply because management did not provide the obligatory support, for example information on employment figures in order to elect delegates or send out invitations to the initial EWC meeting, or provide the necessary infrastructure.

(EWC coordinator industriAll, Germany)

3.3 STILL EXISTING LOOPHOLES AND DEFICIENCIES

Looking further at information and consultation processes but more in relation to individual EWC agreements, the interviewees also stressed the need to define the requirements and different steps of the information-consultation process in a more precise and binding manner.

Against a background of management all too often not providing sufficient information, most EWC coordinators also called for the Directive to include more precise provisions on the application of confidentiality clauses. Moreover, in their view the definitions of ‘transnationality’ and ‘transnational matters’ still allow for misinterpretation, despite the clearer guidance found in Recital 16. Unfortunately this is all too often not applied in practice.

With the recasting of the Directive one aspect became worse: the introduction of the aspect of transnationality. In one of three EWCs in Italy they managed to exclude the aspect of transnationality from the EWC agreement. (EWC coordinator EFBWW, Italy)

All EWC coordinators stressed the need to adjust the Directive in terms of assigning greater qualification, skill development and training rights to EWCs (as a company obligation rather than an EWC right). There is a major need to professionalise the work not only of a select (or steering) committee but of the whole EWC in light of the multiple challenges now facing transnational companies in Europe.

The Directive has to ensure that EWC members are given more time for their EWC activities. In practice they are often not able to complete their tasks due to a lack of time. (EWC coordinator EPSU, Sweden)

The EWC Directive does not provide for assistance and staff. (EWC coordinator IndustriAll, Belgium)

In this context, EWC coordinators stressed the need to comprehensively improve available resources as they no longer match the requirements and tasks EWC delegates are facing. EWC delegates currently perform their work on top of their involvement and functions at national and local level, a fact no longer matching professionalisation requirements.

Furthermore, despite the recast EWC Directive acknowledging the crucial role played by an active select committee, many EWC coordinators see a need for an improved provision and guidance on the establishment, composition, minimum duties and resources of the steering committee.

Select committee members should be allowed to talk to workers at all sites, especially ones with no EWC representative. (EWC coordinator EPSU, Italy)

The challenge is to have a more active select committee as the plenary body – only meeting once a year – is not flexible enough to react to accelerated trends and processes. Select committees are able to handle these aspects in a better way. (EWC coordinator EFBWW, Norway)

The Directive states that experts from trade unions shall be involved. In the opinion of most EWC coordinators, this provision is not clear enough and has to be clarified, as management interprets it as it wishes. If a trade union expert is appointed, he or she should be allowed to participate in all meetings.

It is not always clear how trade unions are involved in the EWC, what their competences and responsibilities are, and how to distribute tasks between EWC members and trade unions. The trade unions' role should therefore be further emphasized in the Directive. (EWC coordinator industriAll Slovakia)

Against the need to professionalise EWC work, the role of the select committee – as well as of working committees in larger EWCs – has increased. Apart from increased skill requirements to perform high-quality work, the select committee also plays a crucial role in communicating and coordinating interests within the EWC and between the transnational and national interest representation bodies. While EWC coordinators welcome the Directive's provision that the EWC has to inform local representative, there is a lack of clarity regarding how this should be implemented concretely. There is thus a need for clarification and an explicit reference to the right of EWC members to visit local sites in the Directive.

Finally, with regard to matching the more concrete tasks and the overall increase in the requirements an EWC now faces, EWC coordinators consider it impossible to run a well-functioning EWC on the basis of an agreement that foresees just one annual meeting – even 2 meetings might not be enough. The Directive thus should provide more concrete guidance on regular and extraordinary meetings.

Further demands

A number of further demands for improvements to the EWC regulation and specific provisions were raised by EWC coordinators:

- ▶ Quite unanimously, EWC coordinators remarked that the timeframe for (re)negotiating agreements – currently three years – was too long. It should be much shorter, for instance one year, before the fall-back provisions apply.
- ▶ Moreover, the overwhelming majority of EWC coordinators were strongly in favour of finding a solution to terminate old Art. 13 agreements. This demand comes in particular from interviewees in the UK, Belgium and Italy, where Article 13 agreements with an indefinite duration are often used to freeze a standard of transnational information and consultation significantly below the provisions of the recast Directive.

Finally, EWC coordinators in a number of countries stated the wish that provisions on establishing an EWC from scratch should be adjusted to provide greater flexibility, reflecting trends and structural changes in the context of transnational production and service provision in Europe. The suggestion here is for lower thresholds for establishing an EWC - with regard to both the overall company workforce threshold and national thresholds.

The possibilities for EWC participation and thus thresholds should be lower. For instance, company XY operates in 20 countries but only four of them meet the national threshold and are eligible to send delegates to the EWC.

(EWC coordinator industriAll, Austria)

3.4 SUGGESTIONS ON WAYS OF IMPROVING EWC CAPACITIES IN RESTRUCTURING SITUATIONS

As highlighted in the previous chapter, the current practice and functioning of EWCs – with few exceptions – in restructuring situations is unsatisfactory and calls for significant improvements in the view of all EWC coordinators involved in this survey. These are also necessary as EWCs, under the current EU framework for improved and socially responsible change anticipation and management (the so-called “Quality Framework”, see EU Commission 2013), have a key role to play here.

EWC coordinators see an urgent need for substantive change in the handling of restructuring at company level and for increasing both the capacity and involvement of employee representatives at transnational level in anticipating future change and restructuring.

A key demand in this context is to ensure better implementation of management information and consultation obligations. Here again sanctions and the possibility to block decisions until EU-level consultation has been completed are regarded as key tools.

Confronted with a reality in which the majority of EWCs face management styles and corporate cultures out of tune with the “spirit of cooperation” called for by the EWC Directive, EWC coordinators also demanded a strong legal obligation for cooperation and workers’ involvement in matters that directly affect them.

To better anticipate restructuring, information and consultation should become obligatory and should be enforced by sanctions. EWC members should be able to participate in board meetings when social matters are discussed. The EWC should be involved in the elaboration of social plans. The EWC should be allowed to assess social matters and management conduct and ethics. It should have power of control in this respect.

(EWC coordinator EPSU, Italy)

Against the background of the limited resources available to an EWC that – given the permanency of change and restructuring programmes – increasingly make it impossible to act in a sat-

isfactory way, EWC coordinators also stated that, in addition to improved rights to engage external experts, the role of trade union advisers at both national and European level in EWCs needs to be strengthened in restructuring situations.

EWC coordinators also pointed to requirements with regard to EWC members and their competences: EWC members should be better prepared and more proactive in collecting the right information from management (where there is a willingness to share information). To be able to pose well-informed questions and be better prepared for anticipating change and restructuring, there is a major need for both training (e.g. on business and financial reports and figures) and better and more continuous trade union support at both national and European level.

In Norway, cooperation between management and an EWC generally works very well; however EWCs often do not confront management with questions. This is more an issue of training and cooperation within the EWC than of legislation.

(EWC coordinator EFBWW, Norway)

Several EWC coordinators, for example in the private service sector, also highlighted the need to adjust the EWC regulation to better cover dependent companies such as franchise companies or joint ventures. EWC coordinators regard the current definition of “controlling undertakings” as not precise enough to provide clear guidance for national transposition and individual EWC agreements on how to deal with dependent companies.

3.5 THE NEED TO ANCHOR EWCs MORE FIRMLY IN THE BROADER CONTEXT OF WORKERS’ PARTICIPATION AND TO STRENGTHEN EUROPEAN TRADE UNION COORDINATION

Many surveyed trade union coordinators highlighted a problem gaining significance due to increased restructuring, in particular since the 2008 crisis and the intensified cost competition between companies and indeed between different plants within transnational companies: the “isolated” character of an EWC”, i.e. the lack of communication, exchange and coordination with local and national bodies of interest representation and workers’ participation. It was stressed that overcoming this isolation would be not only important for better anticipating change and restructuring, but also – in light of an EWC’s unique role – for developing socially responsible restructuring and change management strategies to the benefit of the whole European workforce. As regards better anticipation, EWC coordinators highlighted the positive effect of greater EWC cooperation with board-level employee representatives, an aspect all too often neglected in their view.

EWC coordinators from various national backgrounds (reflecting different traditions of board-level employee participation, see figure below) stressed the need for greater stronger cooperation between EWCs and board-level representatives with regard to restructuring and better anticipation. Communication should be designed systematically, and downstream information flows – in particular to those countries outside the home country – should be made more permanent.

In any restructuring situation, access to board-level information is crucial. The EWC coordinator also participates in board meetings (12 times a year) and has a lot more information. But in many cases EWC members do not have any access to board-level information.

(EWC coordinator EPSU, Sweden)

To better anticipate structural change, the EWC should have closer links to the supervisory board. As the EWC chairman is located at the company's headquarter, he is involved in the supervisory board and is much better informed.

(EWC coordinator EPSU, Austria)

EWCs tend to be isolated within companies, without links to board-level representatives and national representatives. To better anticipate change, local and central trade union representatives should be involved.

(EWC coordinator EPSU, Sweden)

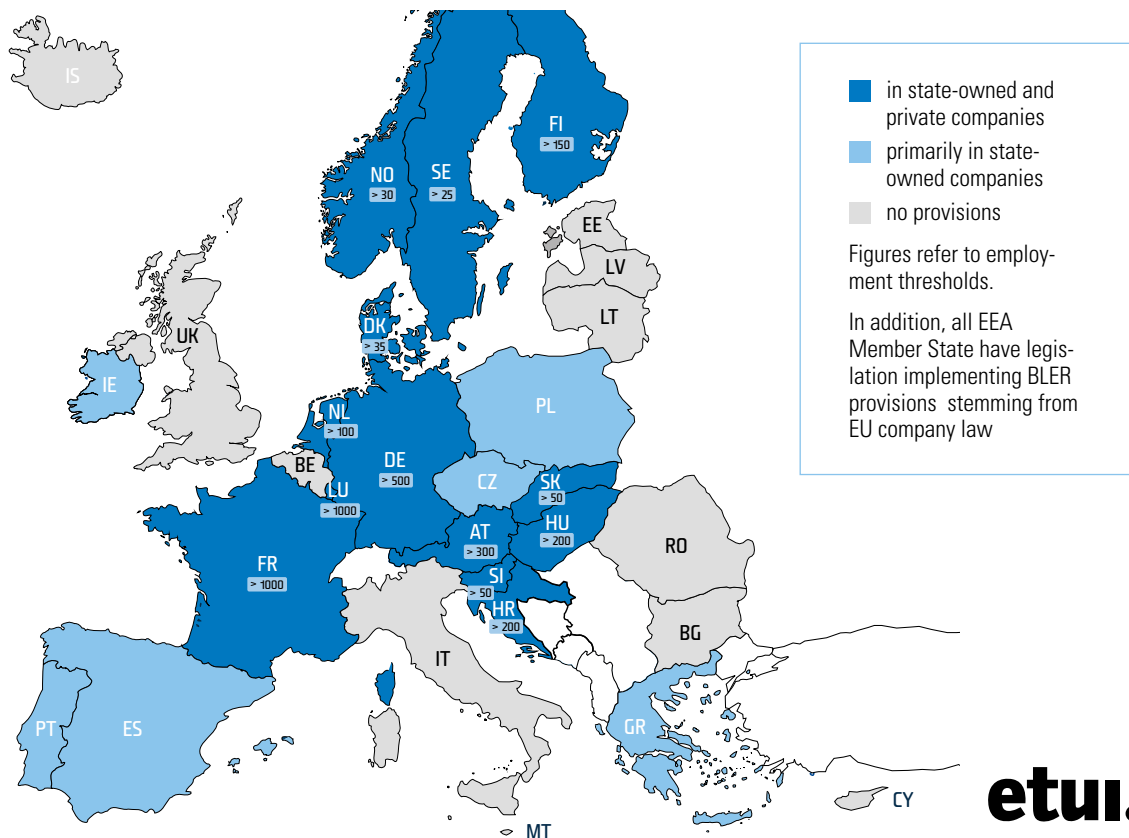
It is quite normal for senior EWC delegates to also be members of the company board. This dual role makes it possible to gather and disseminate information on likely changes or adjustments at an early stage.

(EWC coordinator, UNI Europa Germany)

EWC agreements should provide for employee-elected board members to take part in EWC meetings and working committees as observers. It is important to link them as closely as possible (as they have managed to do with great success in a number of Norwegian companies). Board members are well informed by the EWC and able to inform EWC in their dual role.

(EWC coordinator EFBWW, Norway)

BOARD LEVEL EMPLOYEE REPRESENTATION IN EUROPE



Based on: "Worker board-level participation in the 31 European Economic Area countries", Conchon, Kluge, and Stollt. ETUI. Worker-participation.eu. Last updated August 2015

Though the national industrial relations frameworks on the board-level representation of employees currently existing in 18 EU Member States differ for example with regard to the possibility for representatives to hold positions in the EWC and the board at the same time (allowed in most countries, but not in France for example), EWC coordinators highlighted the practical benefits of strong close strong links, in particular in the context of anticipating and managing restructuring in a social balanced way. Such links not only allow information to be gained at an early stage but also enable key workers' concerns and interests to be projected within the board, thereby influencing strategic boardroom decision-making.

Apart from demanding the continuous exchange of information between the EWC and other workers' interest representation bodies and institutions within a company, EWC coordinators also stressed the importance of national and European trade unions at sectoral level for the EWC.

EWC work better with high coordination of union representatives. As members come from different countries with different traditions and works council rights, consultation has to be coordinated.

(EWC coordinators in Germany, Austria and Sweden)

European trade unions are very important for EWC work: they are guides and consultants to the EWC and they should represent the EWCs at European level.

(EWC coordinator EPSU, Italy)

Trade union involvement should be improved, with a straight line from the national to the EU level. A network including the national levels is crucial to an EWC's success.

(EWC coordinator, UNI Europa, Sweden)

There should be at least one coordinator per EWC. It is the duty of national unions to live up to this expectation. Unions need to be more structured to support EWC members. In day-to-day business EWCs are not at the centre of attention and are often the last item on the agenda. This has to be changed. The interaction of different players already works well when there is a representative of a European trade union (e.g. IndustriAll) in the EWC. This involvement should be guaranteed.

(EWC coordinator IndustriAll, Belgium)

A trade union network should be created in order to ensure an exchange of information with European trade unions from other sectors (while for instance the Italian cement industry is part of the construction sector, it belongs to the chemical sector in Spain). For better anticipation, communication is essential.

(EWC coordinator EFBWW, Italy)

As stressed by EWC coordinators from various national backgrounds, EWC characterized by strong union coordination at both national and European level function better and are more effective in terms of performance, transnational information and consultation and outcomes in terms of shaping restructuring and change processes. Given the variety of national interest representation systems (for instance different models of employee interest representation at workplace and company level, workers co-determination and participation, the role of unions in this context), unions and their European affiliation in sectoral union federations are the only player able to coordinate and develop joint platforms, networks and strategic orientations. In this context EWC coordinators also remarked that the involvement of European industry federations as signatories to European framework agreements at company level is regarded as a key element for successful and comprehensive implementation.

Several other positive effects deriving from a strong involvement of national and European trade unions in EWC practices were highlighted by EWC coordinators in this survey, for instance with regard to skill development, providing expertise and advice, supporting the coordination and articulation of interests or organizing exchanges between EWCs within specific sectors.

Against this background, EWC coordinators are strongly in favour of strengthened efforts of national and European trade unions to support EWCs. Each EWC should be supported at both national and European level by a trade union coordinator and advisor.

But not only should EU-level trade unions play a stronger role. Looking at the management side there is a need for stronger support by national and EU-level employer organisations in terms of competence development and exchange, as pointed out by EWC coordinators from Central and Eastern European countries in particular. All too often EWCs members find themselves confronted by management representatives who are poorly informed about the Directive and its national implementation.

Coordination and communication between employee representatives are not enough. The employers' side should also be better informed. Management knowledge on EWCs needs to be improved. European employer organizations should also engage in training and informing management.

(EWC coordinator industriALL, Slovakia)

In countries with no tradition of works councils and where information and consultation are not defined in national legislation, it is much more difficult.

(EWC coordinators Bulgaria, France and the UK)

3.6 IS THERE A NEED FOR A REVISION?

The previous chapters of this study feature a large number of demands, requests and suggestions from EWC coordinators regarding improvements to the EWC Directive and its implementation on the ground. Our survey and the interviews conducted also included the question whether EWC coordinators saw the need for a comprehensive revision of the Directive or whether there were other possible solutions. The answers were remarkably detailed and sophisticated, taking not only into account deficiencies, weaknesses and shortcomings of the Directive itself, problems regarding its national transposition, and the implementation of agreements on the ground, but also the current EU-level political climate and power constellations.

There were also quite different assessments as to where the main problem lies: Is it the legal text and provisions set forth in the Directive or rather the national transposition? Are there legal loopholes and deficiencies in the Directive itself that need to be corrected via a revision or another recast, or should the focus be more on adjustments, providing clearer guidance and stricter rules for implementation on the ground?

Transposition is not the problem. The current Directive is quite vague and it is difficult to work with it.

(EWC coordinator EFBWW, Italy)

Problems are related to loopholes in the Directive. The Directive does not define any real EWC power of intervention. The provisions are not very precise. In addition, there is a lack of sanctions. Consequently, management is not forced to respect the provisions. National implementation has not caused any problems.

(EWC coordinator EPSU, Italy)

In contrast to these assessments, the majority of interviewees suggested that the key problem lay with the Directive itself rather than its inadequate national transposition and enforcement of major provisions. While seeing certain weaknesses in the Directive's body (still existing uncertainties with regard to definitions such as 'transnational matters', the need to better clarify the conditions for declaring certain information as confidential, guidance on reporting procedures, the role of trade unions, etc.), the majority of EWC coordinators stressed that the key problem faced by EWCs at the moment is the inadequate enforcement of what is already stipulated in the Directive.

Transposition is a problem. The main challenge is to implement the Directive properly, imposing the provisions that already exist.

(EWC coordinators in Belgium, Germany, the Nordics and Central and Eastern Europe)

Transposition into national law differs greatly, also with regard to fines and sanctions. It remains cheaper to break the law. The Recast was a step forward but still a compromise.

(EWC coordinator EPSU, Sweden)

Here again, all EWC coordinators referred to the issue of sanctions and measures in response to violations of the Directive's provisions as a key aspect requiring improvement: not only are there significant variations and differences with regard to sanctions and the extent to which they have any real influence on company policy. Thus, improvements in the field of enforcement and sanctions should be a key priority.

Against this background, the majority of EWC coordinators argued for targeted adjustments of those provisions proved to be too vague rather than for a full revision of the whole Directive.

We should start with the existing text, remedying its deficiencies. In general, the provisions are good but there are a lot of misunderstandings and misinterpretations. The European Commission should campaign more on content, preventing employers from acting as if the Directive does not exist.

(EWC coordinator, UNI Europa, Belgium)

If we were to start from scratch it would take too long to come up with a new Directive. It's easier to improve the existing one even if only a compromise. It is uncertain whether both sides really want improvements.

(EWC coordinator EPSU, Sweden)

The current Directive already includes important aspects; therefore the focus should be on improvements to the existing text.

(EWC coordinator EFFAT, Finland)

All in all, our survey of EWC coordinators reveals a clear message for European policymakers: On the one hand the recast EWC Directive has led to a number of improvements, at least with regard to certain aspects of transnational social dialogue and information and consultation. On the other hand, there are a number of issues and aspects where the Directive still lacks clarity and requires stricter rules laying down concrete requirements and obligations as well as enforcement provisions in order to guarantee effective EWC functioning and practice. In the view of EWC coordinators, such adjustments are crucial to improving the quality of *all* EWCs and to strengthening their role in anticipating change and upgrading the information and consultation process in the context of restructuring.

4 CONCLUSIONS: HOW TO MAKE THE EWC DIRECTIVE FIT FOR PURPOSE

4.1 RECALLING KEY SURVEY RESULTS

The key message from this survey is that the EWC Directive is still not fit for purpose: Even though the 2009 recast of the Directive brought a number of clarifications and improvements regarding information and consultation processes and positively impacted on new post-2009 agreements, the general picture from the trade union point of view remains unsatisfactory: the overwhelming majority of EWCs are still not functioning in accordance with the key Directive objectives and major provisions are not being implemented as intended. As a result, most EWCs are unable to fully play their role when it comes to information and consultation in the context of managing change and restructuring at company level.

A further important message of our survey is that the recast Directive has had no effect on closing the gap between those EWCs regarded as functioning well and those that aren't. The contrary is the case: in the view of the EWC coordinators, the divide between these two groups has increased over the last eight years.

Those EWCs that were already functioning quite well before the Directive was recast have made further progress in terms of functioning, capabilities and professionalization. As shown in the previous chapters these positive trends were mainly the result of both sides' acknowledgement that EWCs have a concrete added value when it comes to anticipation, exchange and consultation as well as to the negotiation of socially responsible solutions on corporate change, labour-related adjustments and restructuring. According to EWC coordinators these achievements were triggered only indirectly by the recast Directive. For the most part, the recast consolidated certain elements (not all) of already existing good practices.

The survey of EWC coordinators also revealed that "well-functioning" EWCs have further progressed over the last eight years, in particular with regard to greater professionalization in organising consultations with management and increasingly resulting in the negotiation of transnational agreements establishing, strengthening and institutionalising interlinkages between European and local levels of interest representation and trade union activities, and boosting EWC integration into the broader structure of various forms of company-level workers' participation from the shopfloor to the board.

On the other hand, EWC coordinators stressed that the impact of the recast Directive on the functioning and quality of those

EWCs still not functioning in a satisfactory way was limited. Positive impacts were mainly reported in such formal and technical aspects as procedures and rules for establishing an EWC, SNB composition or the right to training.

At the same time, the EWC coordinators see the recast Directive as having much less or no positive impact on the majority of EWCs when it comes to information and consultation and other aspects regarded as key prerequisites for an EWC to function in a satisfactory manner. Key challenges and problems included:

- ▶ Increasing difficulties in establishing new EWCs due to management opposition and a lack of effective enforcement rules.
- ▶ Though the recast has clarified information and consultation with regard to contents and processes, there are still problems implementing it in practice, related *inter alia* to still persisting ambiguities, the lack of clarity regarding the notion of transnationality, and extensive use of confidentiality clauses.
- ▶ Similar assessments were made with regard to the European mandate of EWCs and the interlinkage between the European and the local levels of interest representation.
- ▶ While the recast Directive acknowledges that for an EWC to function properly sufficient resources together with external support and advice by trade union advisers and experts are necessary, the situation in most EWCs is not viewed as satisfactory: well over half of all EWCs have just one plenary meeting per year and are unable to bring in external experts, conduct qualification and training activities in a satisfactory manner, or are not entitled to visit local plants.
- ▶ In the experience of EWC coordinators, most EWCs that they deal with are therefore unable to play their role effectively, in line with the objectives set forth in the Directive in restructuring situations. Consultation hardly ever takes place, and the lack of the resources necessary for anticipating change remains a challenge even in better functioning EWCs.

It should be noted here that EWC coordinators still see cases of good practice as the exception rather than the rule. According to the overwhelming majority of EWC coordinators, the number and share of those EWCs that could be described as meeting key objectives of the Directive in terms of functioning have definitely not increased over the years.

It should also be mentioned that the recast Directive has resulted in neither a significant upturn in new EWCs estab-

lished after 2009 nor a significant reduction of the share of old and voluntary agreements which, in terms of their key provisions, are often significantly below the standards defined by the recast Directive.

4.2 PRIORITIES AND CONCRETE DEMANDS REGARDING THE EWC DIRECTIVE

Formulating their demands in the context of the current review of the Directive, most EWC coordinators argued in favour of taking a pragmatic “targeted” approach to improving and tightening up the EWC Directive. In this respect, they also referred to the overall political conditions in the EU which make a comprehensive revision of the Directive less feasible. However, the survey indicates that EWC coordinators have a set of clear priorities with regard to the review of the Directive:

- ▶ At the top of the priority list are **measures to improve the enforcement of the Directive and to better implement key provisions through more concrete and binding rules.**
- ▶ The need to tighten up **enforcement and sanction mechanisms** in the case of insufficient information and/or consultation in restructuring situations or when management obstructs the establishment and satisfactory functioning of an EWC. EWC coordinators are strongly in favour of foreseeing the **possibility of court injunctions and the temporary suspension of a management decision.**
- ▶ Given the experience of EWC coordinators that establishing an EWC is becoming increasingly difficult due to management opposition, EWC coordinators highlighted a number of deficiencies and loopholes in the Directive when the negotiation of an EWC agreement fails and the **subsidiarity requirements** defined in the Directive need to be enforced. In practice, the provision of necessary information by central and/or local management, the establishment of an SNB or elections of EWC delegates are not possible when management is unwilling to cooperate and obstructs the process. While EWC coordinators have experienced an increase in such practices, they also stressed the need to significantly reduce the **time limit for EWC negotiations** on the establishment of an EWC (currently three years), for example to one year.
- ▶ With regard to information and consultation, many EWC coordinators remarked that, despite improvements through the Recast Directive, there is still a need to better define the concept of **‘transnational matters’**, as in practice the question whether a management decision has a transnational character is all too often a source of conflict and prevents an EWC from functioning properly. The concrete suggestion was to apply the broader notion of transnationality enshrined in Recital 16 of the Directive to the main body of the Directive (Article 1.4).
- ▶ In particular with regard to EWCs in companies showing little support for workers’ involvement and consultation,

the **confidentiality of information** is regarded as a problem and source of conflict. According to EWC coordinators, confidentiality clauses are often used as a reason for not providing information to EWC members. Therefore, the Directive needs to specifically stipulate under which conditions the provision of information can be restricted by referring to confidentiality.

- ▶ With regard to the functioning and resources of transnational interest representations, EWC coordinators quite unanimously stressed a number of demands for improving the current regulatory framework. With a view to consolidating good practices, key demands include the introduction of an obligation to hold at least two **EWC plenary meetings** per year, and an EWC’s right to rely on the support of **external expertise** in restructuring situations and when preparing for consultations.¹⁵
- ▶ As regards restructuring and the new role the EWC should play in **anticipating change** before restructuring becomes necessary, EWC coordinators demand that the Directive specifically refers to this task, thereby acknowledging and consolidating EU policies on managing corporate change and restructuring in a socially responsible way.
- ▶ Referring to the increasing experience that EWCs are involved in concluding **European framework agreements (EFAs) with management** in the context of anticipating change and managing restructuring but also as to social and employment issues in general, EWC coordinators stressed the need for the EWC Directive to reflect an EWC’s negotiating role, e.g. by referring to the two main types of negotiated agreements – those concluded as a result of consultation on specific issues related to managing change and restructuring; and European framework agreements covering a broader range of labour relations and employment issues. Consolidating such good practices, the Directive should include provisions on the roles of the different players, including European trade union federations, as well as requirements and obligations regarding internal information and implementation.
- ▶ Finally, the overwhelming majority of EWC coordinators suggested that, to implement key provisions of the current regulation, **old Article 13 agreements** be terminated, as most of them are clearly below certain standards of the Directive. A possible exception from such an obligation to renegotiate former Art. 13 agreements would be for cases where both parties are satisfied with their old voluntary agreement.

While these priorities and demands were highlighted by all interviewees, a number of further requests were made in particular by EWC coordinators from countries or companies with a negative reputation in terms of management cooperation and

¹⁵ In the current EWC Directive the provision relating to the right of the EWC and its select committee to involve experts is only included in the subsidiary requirements. In the view of EWC coordinators this is inconsistent and thus the provision should be moved to Article 6 of the Directive.

the provision of basic resources to the EWC. Again, the key theme is better enforcement, and the following improvements are suggested:

- ▶ More concrete requirements regarding the **timing of information and consultation procedures** in order to ensure the fulfilment of key provisions of the Directive – early and timely information and meaningful consultation.
- ▶ Strengthening **skill development and resources** by making them not just a right but an employer **obligation**; a number of EWC coordinators also suggested that EWCs should have their own budgets.
- ▶ Extending the Directive to more companies by lowering **thresholds for establishing an EWC**. This demand was put forward in particular by EWC coordinators in smaller countries experiencing a continuous increase in the number of smaller transnational companies. It was pointed out that such companies are not covered by the EWC Directive even though there is a major need here to establish transnational information, consultation and dialogue structures and processes. In this context, lowering thresholds or introducing provisions for greater flexibility with regard to the establishment of ‘minor EWCs’ were suggested.

4.3 THE EWC IN THE BROADER CONTEXT OF WORKERS’ PARTICIPATION

EWC coordinators highlighted the positive impacts the recast Directive has had on the interaction and articulation between various levels of employee representation and on the role of European trade union federations. As underlined by EWC coordinators, both aspects are essential for the proper functioning and effective fulfilment of key EWC roles and objectives.

Learning from good practices and from situations where the Directive’s provisions have not been implemented satisfactorily, EWC coordinators formulated the following demands and suggestions for improvements:

- ▶ A provision is needed explicitly **entitling EWC delegates to visit local plants** as this is a *sine qua non* for disseminating information and taking account of local workers’ interests and concerns in the context of information and consultation processes as well as with regard to other EWC tasks.
- ▶ The recast EWC Directive acknowledges that **trade unions play an important role** in providing practical support, expertise and advice for the establishment and functioning of an EWC. In reference to good practices, EWC coordinators stated that **EU-level trade unions** not only play an important and positive role in the context of establishing an EWC but also in everyday business by providing expertise and advice and also in linking up the different levels of employee interest representation. This role should be clarified by the Directive. Furthermore, the provisions of Article 5.4 on the role of trade unions should also be reflected in

the subsidiary requirements where it is currently lacking.

- ▶ Finally, and also in reference to their positive practical experiences, EWC coordinators stress the need to **strengthen links between the EWC and other company-level of workers’ participation bodies and institutions, in particular in supervisory or administrative boards**. Where such links exist and are actively used, the EWC will have better access to early and more complete information, a prerequisite for anticipating change and restructuring processes and becoming involved in them. A much more regular exchange of information and systematic reporting is therefore needed, for example by entitling an EWC to be represented at board level (which would consolidate a practice that – according to our survey – already exists in many cases).

4.4 CONCLUSIONS WITH REGARD TO LEGISLATIVE ACTION

EWC coordinators acknowledge the progress made by the recast Directive with regard to important issues of transnational information and consultation as well as the interest representation and articulation of workers’ interests.

By also highlighting still existing loopholes and deficiencies as well as emerging challenges in particular in the context of business acceleration, changing patterns and drivers, and restructuring, EWC coordinators also strongly expressed the need for the regulatory framework to be improved and adjusted. Looking at concrete ways of adopting such adjustments and making EWCs better fit for purpose – alternatives include a revision of the Directive, another recast or other forms of legal amendments – EWC coordinators are pragmatic, giving preference to the route that is most likely to achieve the expected results.

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The ETUC is the voice of workers and represents 45 million members from 89 trade union organisations in 39 European countries, plus 10 European Trade Union Federations.



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