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A POSSIBLE REVISION OF THE EUROPEAN WORKS COUNCIL DIRECTIVE 2009/38/EC

POSITION OF THE PRESIDIUM OF CESI

The European Confederation of Independent Trade Unions (CESI) is a confederation of more than 40 national and European trade union organisations from over 20 European countries, with a total of more than 5 million individual members. Founded in 1990 and a European sectoral social partner, CESI advocates improved employment conditions for workers in Europe and a strong social dimension in the EU. Most of CESI's affiliates are employed in the different fields of the European, national, regional & local public services, and in privatised services of general interest. CESI also represents private sector unions.

ON THE NEED TO REVISE THE CURRENT EU DIRECTIVE ON EUROPEAN WORK COUNCILS (EWCS)

As a European trade union umbrella organisation, **CESI has for long advocated a functioning information and consultation framework for the EU and its Member States** and stressed that strong, inclusive social dialogue and collective bargaining is a key to maintain and further enhance a conciliation of competitive business and decent working conditions.

CESI has always emphasised that economic competitiveness and strong inclusive social dialogue which brings social resilience of working conditions and labour markets **go hand in hand and are mutually reinforcing**. Where major challenges impact economies and enterprises – including green and digital transformations – workers often know best how their work and job functions can be adapted and adjusted to the mutual benefit of both the enterprise and the workers. Strong, meaningful, and inclusive social dialogue also enhances the ownership and identification of workers with their employer, which further contributes to positive work experiences and productivity. When social dialogue is strong, economies tend to be more competitive and labour markets socially resilient.

The EU has a key role to ensure functioning and effective information and consultation and social dialogue frameworks. Art. 153(e) and (f) TFEU endow the EU with regulatory competences in the areas of information and consultation of workers and the representation and collective defence of the interests of workers and employers. Article 28 of the EU's Charter of Fundamental Rights also establishes a right to collective bargaining. More specifically, principle 8 of the European Pillar of Social Rights[1] on social dialogue and involvement of workers clearly sets out the EU's objective that "workers

[1] https://ec.europa.eu/social/main.jsp?catId=1606&langId=en

or their representatives have the right to be informed and consulted in good time on matters relevant to them, in particular on the transfer, restructuring and merger of companies and on collective redundancies."[2]

Due to its inherent transnational character, there is a special role for the EU to address transnational social dialogue in the EU. In this context, the EU has developed a regulatory framework for European Works Councils (EWCs) since the 1990s – standing bodies to facilitate the information and consultation of employees on transnational issues in multinational companies that operate in Europe.

Adaptations of the regulatory framework for European Works Councils have led to the currently applicable EU's EWC directive 2009/38/EC.[3]

Shortcomings in the rules under the EU's EWC directive 2009/38/EC mean that **EWCs face deficiencies and obstacles in their set-up procedure and effective and meaningful operation**.

CESI therefore welcomes the initiative of the European Commission to revise the current EWC directive 2009/38/EC to strengthen their role and capacity, following a legislative initiative report of the European Parliament of February 2 2023.[4]

The European Commission should swiftly issue a proposal for a revision of the directive unless the recognised European cross-sector social partners can come to an understanding on an ambitious agreement to address the priorities identified below in a meaningful way. In this latter case, any new social partner agreement should be timely transposed into a Council directive upon proposal of the European Commission.

CESI notes as priorities for a revision of the EWC directive 2009/38/EC:

1. The definition of 'transnational matter' must be sharpened.
2. The definition of 'consultation' must be made more stringent.
3. The scope and nature of 'confidentiality restrictions' must be clarified.
4. The process and the conditions to set-up new EWCs must be simplified to allow a swifter establishment.
5. The provisions on sanctions for non-compliance with the directive must be reinforced.
6. An adequate financial, material and legal support for EWCs should be ensured.
7. Exemptions from the scope of the directive must be reduced.

[2] https://ec.europa.eu/social/main.jsp?catId=1606&langId=en
[3] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02009L0038-20151009
[4] https://www.europarl.europa.eu/doceo/document/TA-9-2023-0028_EN.html

ON CESI'S PRIORITIES IN DETAIL

On 1.: The definition of 'transnational matter' must be sharpened.

Art. 1(3) specifies that EWCs shall only be involved in transnational matters of an enterprise. Art. 1(4) further defines that "matters shall be considered to be transnational where they concern the Community-scale undertaking or Community-scale group of undertakings as a whole, or at least two undertakings or establishments of the undertaking or group situated in two different Member States." All national matters shall be left to local works councils following a subsidiarity-type principle.

An obstacle that EWCs encounter frequently is that management abuses the vagueness of this definition and does not consider an issue as transnational matter and does not consult and EWC, even if it should.

In a revised directive, Art. 1(4) should set out a clearer definition of 'transnational matters' so that companies can no longer circumvent a consultation of an EWC in a relevant matter because of a blurry interpretation of what constitutes a 'transnational matter'.

A definition should in particular clarify which level of scope and effects of an issue/decision on how many workers of an enterprise in different Member States are needed for an issue to be classified as being 'transnational'.

On 2: The definition of 'consultation' must be made more stringent.

According to Art. 2(g) of the currently applicable EWC directive, consultations of EWC by management must take place "at such time, in such fashion and with such content as enables employees' representatives to express an opinion."

In practice a recurrent problem that numerous EWCs face is that consultations only take place pro-forma. It also occurs that decisions have even already been taken by management before consultations take place. A further problem relates to the absence of an obligation for management to take opinions of EWCs into consideration: Art. 2(g) of the currently applicable directive merely stipulates that opinions "may be taken into consideration." In this way, opinions of EWC can be rendered absolutely meaningless even if they are delivered timely.

In a revised directive, the definition of 'consultation' in Art. 2(g) should therefore be strengthened to specifically require that (1) consultations must take place timely so that opinions of EWCs can still have an impact on decisions by management, that (2) consultations cannot simply be a formality after management has already made decisions, and that (3) opinions must necessarily be taken into account by management, and this in a meaningful way.

In the longer-term, ways could be envisaged to turn EWCs more into negotiating bodies, where its opinions could have even more weight and are not only 'taken into consideration'. According to CESI, substantial involvement of workers always yields the most sustainable results – for the workers and for business too.

On 3: The scope and nature of 'confidentiality restrictions' must be clarified.

Currently, Article 11(3) of the directive specifies that management is not obliged to transmit information to EWCs in situations "when its nature is such that, according to objective criteria, it would seriously harm the functioning of the undertakings concerned or would be prejudicial to them." Further details are left for regulation (or not) by the Member States. The result is a plethora of national rules, and many of them are not strong enough to prevent situations of misuse where management refuses to share information in order to pre-empt a (legitimate) involvement of EWCs. This leads to an (illicit) obstruction of the involvement, work and functioning of EWCs.

A revised EWC directive should set a clear definition of what confidentiality restrictions apply and in which situations it is legitimate for management to withhold information. This will avoid companies uses confidentiality restrictions in an abusive way and as a pretext to circumvent a consultation of EWCs.

On 4: The process and the conditions to set-up new EWCs must be simplified to allow a swifter establishment.

The initiation process of EWCs should be simplified to facilitate the set-up of new EWCs. In particular, the maximum duration of negotiations of three years between workers' representatives and management representatives should be shortened. Practical experience has shown that long before the lapse periods of three years it is usually clear if management has a genuine interest to set up an EWC or not. If both workers and management are willing and engage constructively, negotiations can be concluded in a shorter timeframe and the process of the setup of new EWCs be speeded up considerably.

Moreover, the scope of the directive which provides for possible EWCs in companies with at least 1000 employees in the EU and with at least 150 employees in each of two Member States should be widened to have more workers covered under EWCs.

On 5: The provisions on sanctions for non-compliance with the directive must be reinforced.

The directive is so far not always effective in ensuring in all Member States effective, deterring sanction and penalties for non-compliance – even if Art. 11 specifies that "each Member State shall ensure that ... management and employees abide by the obligations laid down by this Directive" and that "Member States shall provide for appropriate measures in the event of failure to comply with this Directive." A

mere recital which states that “sanctions that are effective, dissuasive and proportionate in relation to the seriousness of the offence, should be applicable in cases of infringement of the obligations arising from this Directive” (Recital 36) is not sufficient.

A revised directive should spell out a concrete framework with minimum sanctions for Member States to respect.

On 6: An adequate financial, material and legal support for EWCs should be ensured.

Numerous EWCs lack the necessary financial, material and/or legal support to fulfill their work and purpose because of a failure or unwillingness of management to provide this. This appears as a practical and very concrete obstacle which obstructs the effective operation of many EWCs.

Regardless of relatively tight rules that exist in certain Member States or in individual EWC agreements on resources of EWCs beyond the directive, a revised EWC directive must clearly stipulate that the central management is responsible to provide the necessary and adequate financial (e.g. travel and meeting costs, external judicial advice) and material (e.g. meeting facilities and equipment) resources to ensure that EWCs can effectively, timely and meaningfully pursue their mission. The current articles 10(1) and 6(2)(f) are too vague in this respect.

On 7: Exemptions from the scope of the directive must be reduced.

Currently, EWCs are diverse in their operational organisation not only because each EWC has its own rules and modalities as negotiated between management and workers based on general content-related categories set out in Article 6 of the EWC directive. They are also diverse because EWCs (established before the first EWC directive, after the first directive in 1996, and following the latest revision in 2011 respectively) all operate under their original directives. New rules established by the revisions of the EWC directive did not apply to EWCs that were already in place. For instance, an EWC that was established before 1996 still operates under the rules of the pre-1996 version of the EWC directive and not under rules of the latest consolidated version of the directive which apply to EWCs that are being newly established.

This three-tier constellation is causing a plethora of confusing settings. Above all, it also means that improvements achieved in revisions of the EWCs following 1996 and 2011 do not apply to previously established EWCs.

A renewed revision of the EWC directive should not only apply to new EWCs that will be established in the future. Indeed, a central objective of a revision should be a harmonisation of existing EWCs to ensure that all EWCs agreements fall under the latest consolidated version of the directive. Existing EWC agreements might need to be required to be adapted to this end.