

## European Works Councils at a turning point

**Romuald Jagodziński of the European Trade Union Institute** *is critical of a recent revamp of the legislative framework for European Works Councils. He argues that implementation of the new rules has ‘castrated’ the Directive’s potential to produce positive change and calls on the Commission to try again*

In 2009 European Works Councils (EWCs), the main institution of transnational information and consultation rights for workers, received a revamped legislative framework. The Recast Directive 2009/38/EC addressed some shortcomings of the original directive (1994) for the purpose of, among other things, giving new impetus for the creation of further EWCs and improving the functioning of the existing ones. In 2016 the European Commission is required to present an official evaluation of implementation of this Recast Directive and to stipulate any further amendments that might be required.

Here we have a case in which implementation – obviously a critical stage in determining the ultimate effectiveness of legislation – has actually served to castrate the EWC Recast Directive’s potential to produce the desired changes; the Recast, subjected to copy-paste as the main implementation technique, and further marred by often incomplete transposition, including omission of the Directive’s preamble, stands next to no chance of further empowering EWCs or boosting their numbers.

We strongly reiterate that copy-pasting of the Directive’s provisions is an inappropriate legislative technique for implementation of a directive. We argue, furthermore, that the consequences of poor transposition are counterproductive in relation to the Recast Directive’s goals of more and better EWCs. Lastly, we show that, in case of dispute and potential litigation, workers are deprived of easy access to courts and, in any case, the sanctions provided for are neither effective nor dissuasive.

Although the transposition stage is the real conveyor belt for provisions set in directives and, in this case, the critical mechanism for enabling making workers’ rights to be applied in practice, it is often overlooked by the stakeholders. The European Trade Union Institute has just published (October 2015) a book dealing with this very question. The results are telling and point out how much more effort is needed to ensure a proper legal framework for EWCs.

### **Background: Where do EWCs come from?**

Until 1994, workers in multinationals had little or no chance of finding out what the company that employed them was up to. Even though they were employed by globally operating companies, the information they received about the firm’s future restructuring, employment and production plans was local or at best national. The 1994 EWC Directive was the first instrument that gave workers an opportunity to obtain information and to consult with the central management on issues of key importance for their future.

The original EWC Directive was, however, not ideal, being a pioneer in the EU domain of social rights and a frail child of political consensus. The directive’s main shortcomings soon surfaced and were amplified by the ever increasing company restructuring that became the staple pastime of many multinationals. Weak definition of consultation; no specification on ‘information’; inadequate guarantees for protection of workers’ representatives; too few own resources; non-existent possibility of leverage against consistently poor quality and timing of information and consultation: such were some of the main frequently mentioned shortcomings.



The European Commission's official rationale in adopting the Recast Directive in 2009 was to improve the (effectiveness of) workers' transnational information and consultation rights; to increase the number of EWCs; to resolve some of the familiar problems encountered (such as information and consultation that was of insufficient quality and/or took place too late, or too few new EWCs being set up); and to improve linking with other workers' information and consultation directives.

Coming up with the Recast Directive was a politically fraught exercise but in 2009 the efforts bore fruit: the revamped version featured better definitions of transnational information and consultation, as well as of the transnational competence of EWCs; clearer principles for defining EWCs' resources (from legal capacity to practical means of working); and new rules for linking up differing information and consultation levels.

## 2016: where do we go from here?

Many proponents of EWCs proclaimed the exercise a major success, and essentially they were not mistaken. Yet whether it would actually deliver on its promises and achieve any significant impact on EWCs and their practices would depend on its national transpositions. In 2016 the European Commission will present to the European Parliament, the European Council and the European Economic and Social Committee an evaluation of the implementation of the EWC Recast Directive. The conclusions drawn from this exercise will be decisive for whether the EWC directive will undergo further improvement in the foreseeable future or whether it will be shelved for a number of years.

## Did Member States do their homework?

Findings from recent **research** completed by the **ETUI** in October 2015 shows that Member States have tended to regard transposition of the directive at national level as an exercise in copy-pasting. This approach appears most blatantly, albeit not exclusively, in the implementation of the definition of transnational competence of EWCs and the so-called 'articulation' (linking) between the national and European levels of information and consultation. Such legislative techniques are unacceptable; they cannot be regarded as 'proper transposition' since any directive sets out goals and methods to attain these goals at national level. The European Court of Justice (ECJ), what is more, set out in its case law on the matter criteria which the implementation laws in many of the Member States simply fail to meet.

To make matters worse, the copy-paste technique, being a merely technocratic approach, eliminates the essential 'spirit of the directive', which is expressed in its Preamble. Only very few Member States made the occasional reference to the valuable explanations provided by the directive's preamble; arguably the purpose and ultimate goal of the legislation was thus forfeited. Such an approach can hardly be expected to improve the transparency or efficiency of these rights or to boost the number of EWCs (only 59 new EWCs have been established since 2009, source: [www.ewcdb.eu](http://www.ewcdb.eu), see also 'EWC Facts and Figures 2015' by the ETUI).

## More EWCs?

Another area of concern is the setting up of new EWCs. As the ETUI's EWC database shows, the pace of creation of new EWCs has slowed to between 20 and 30 new bodies each year. The Recast Directive set out to boost this number in a twofold manner: first, by re-introducing a window for establishing a special category of EWCs 'outside the law' that would thus not be subject to its requirements; secondly, by requiring employers to provide all the information on company structures needed to start negotiations. Another supporting measure was the welcome and highly deserved recognition of the role of social partners who are to be informed about new negotiations to enable them to assist workers in bargaining and improve the quality of agreements. While such recognition of the role of the social partners is a welcome and important improvement, this contribution to the Recast's success was killed off by national implementation. Again, as in other areas, (too) many Member States applied merely formal, as opposed to substantial and **effective**,

implementation, while some even failed to include the obligatory regulations in this regard stipulated by the Directive. As a result we see as many – or as few? – new EWCs created as in previous years, with Social Partners receiving no information whatsoever about new negotiations.

### **Better functioning EWCs?**

If not in setting up new EWCs, some consolation might have been hoped for in terms of advancement in the functioning of existing ones. The Recast Directive provided some important improvements here, such as reiterating the principle of information and consultation *at a time and with a content* that allow EWC members to perform an in-depth assessment and formulate an opinion; the presence and operation of the select committee within the EWC to improve its coordination; access to experts (and expertise) and training; or the right to obtain a reasoned response from management.

Unfortunately, in spite of an overall frequent transposition of these new rights, some Member States either did not include all of them in their legislation or did so in an unclear and incomplete manner (again, formal copy-paste only). In other cases, significant novelties supplied by the Directive were included as mere options.

### **Can workers go to court?**

Lastly, there is the burning question of EWCs' search for justice in cases of dispute with management. There is, apparently, considerable potential for conflict in this area: reportedly management still on many occasions refuses to provide quality information at an appropriate time (see results of [J. Waddington's survey](#) among EWC members from 2004). While only three cases involving EWCs have received ECJ rulings, more than 60 lawsuits have been tried in national courts ([www.ewcdb.eu](http://www.ewcdb.eu)).

While the Recast Directive attempted to improve enforcement, little improvement in this respect is to be found in national implementation laws. Many Member States made no change at all to rules after the Recast Directive. Some Member States do not even provide for a requisite legal status that would allow EWCs to go to court. Many Member States require, on the basis of general national rules, that fees be paid by EWCs when they appeal to courts; yet there is no corresponding provision for an independent budget that would enable EWCs to finance these fees.

The expectation is thus that EWCs will request from multinational companies funding to finance litigation against the companies in question. Lastly, in numerous Member States the sanctions faced by companies guilty of violating EWC law are in many cases utterly trivial. They start as low as a couple of euros (e.g. Poland), rising to over 180 000 euros in Spain as a maximum penalty, with maximum penalties in many countries significantly lower. No statutory sanction for 'undoing' a company decision taken without proper information for workers is foreseen in any of the EU countries (though such sanctions have been applied by courts in France). The whole area of enforcement thus appears as the opposite of the directive's goal of providing sanctions that are 'effective, proportionate and dissuasive'.

### **Shooting political canons to guard the treaties**

A directive, surely, is not intended to be transposed word for word by the national authorities. National transpositions need to steer a course between the European standard and principles and the national tradition of industrial relations and existing institutions. If and when they fail to do this, it is up to the European Commission – in its role as 'Guardian of the Treaties' – to intervene. It is undoubtedly difficult for the Commission to shoot treaty canons at Member States; however, with such evidence to hand, the trade unions, practitioners and stakeholders should not allow a blind eye to be turned to these problems when the Implementation Report of 2016 sees daylight.



For more democracy in the workplace we need better EWCs and better legislation at both European and national level.

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