

POSITION



CEC is one out of the six cross-industry European social partners. Through its national member organisations and professional federations it represents 1.5 million managers in Europe. CEC represents the specific views of managers towards the European institutions and other stakeholders. CEC is also an independent social partner in the European Social Dialogue.

European Works Councils: Consultation of the European social partners on the revision of Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees

Introductory remarks

SAFEGUARDING THE PROPER REPRESENTATION OF MANAGERS AND EXECUTIVES

For the CEC, a consolidation of the European Works Council role can only take place if executives and managers are adequately represented within it.

The Directive of September 22nd, 1994 was aware of the need and interest to represent all categories of employees: indeed, the 16th whereas of its preamble expressed the wish for the different categories of employees to be represented in a balanced way. Hence it recognized the legitimate right of executives to enjoying wider and stronger representation in those bodies in charge of social dialogue.

Moreover, the Gil Roblès resolution from June 18th, 1993 demonstrated that in many European countries the notion of “executives” is organised around issues like liability, autonomy and power.

More recently, the European Economic and Social Committee (EESC) in its own-initiative opinion (SOC/220) on *European Works Councils: a new role in promoting European integration* recommends the “*participation in EWCs by all categories of employees, including executives and professional and managerial staff*”¹ (Paragraph 7.2 letter I).

¹http://eescopinions.eesc.europa.eu/viewdoc.aspx?doc=\\esp\pub1\esp_public\ces\soc\soc220\en\ces1170-2006_ac_en.doc

The Directive has to state, as in 1994 in its recommendations that the delegation representing employees in the EWC has to represent the diversity of professions and responsibilities within the enterprise.

To this extent, the Directive has to ensure that all the professional categories which have to implement the policy of the company, but which have to undergo its consequences as well as all the other employees, have the right to express their opinion and to receive the information within the representative body.

For CEC, a **specific representation of executives and managers** is therefore necessary for the following reasons:

- First of all, in all EU countries, we see a reduction in the number of unskilled jobs being replaced by skilled jobs occupied by executives and managers.
- Then, executives are a population that is more concerned by professional mobility within the EU, which makes them more sensitive to the European dimension of things.
- In a developed, knowledge-based economy, which requires increasing skills for its employees, it is essential to recognise that the principle of pluralism must also apply to employees and workers representation.
- Finally, management, organisation and administration functions executives are in charge of allow them to have a better understanding of the issues, challenges and evolutions of the company. There are quality partners for management since they are more qualified to make proposals and to defend the interests of all employees thanks to their general vision of the issues.

All employees legally or conventionally recognised in the Member States must have an opportunity to be represented at the level of the Works Council. By definition, executives are a minority group in companies and therefore need particular attention when it comes to their representation.

In order to guarantee the plurality of employees representation within the delegation and consequently the defence of the interests of executives at the level of the European Works Council, the directive should force Member States – which already legally or conventionally recognise executives and managers – to foresee the presence of a representative of executives in the employee delegation within the EWC and the other internal bodies (ex: selected committee, ...). Such clauses have already been written into some of the agreements establishing European works councils.

Currently in the majority of the Member States, managers and executives are under-represented within European Works Councils. This issue can not be tackled at national level, since some Member States do not believe that information and consultation rights are necessary for all categories of employees, whereas CEC believes it is fundamental for a united Europe. This is why the European legislator has to guarantee a seat for executives and managers in the EWC.

In order to remedy to this situation, the Directive could foresee some subsidiary dispositions, for example to ensure a place to executives in the delegation of every country counting at least three representatives for each country.

Another possibility could be the obligation for the delegation of the country that counts the highest number of executives (ex: the headquarters country) to include an executive among its representatives.

To this extent, CEC wants to underline that the procedure of designation adopted should ensure an authentic representation of managers: representatives of the managerial staff within the EWCs should therefore be designated by and amongst their own groups.

Again, another hypothesis, on the model of Germany representation, the «Sprecherausschuss» (speakers committee for managers) should have the possibility to propose members for the EWC. The members proposed should be automatically accepted. Moreover, the steering committee of the EWC should regularly consult the «Sprecherausschuss» for all questions regarding the managers and their functions. If no agreement is reached during the discussions, a second meeting should take place.

The directive has to ensure that executives and managers' interests are represented. In particular, it should make sure that when managers do not have a specific representative within the EWC, the negotiation and discussion within the EWC should take into account the interests of all the categories of employees including the managers.

The directive should give an opportunity to the special negotiating body to be assisted by the right employees representatives and/or juridical experts representing executives at EU level, i.e. the European Federations of executives and, if not, CEC itself.

Those demands should be included in the directive to ensure effective information and consultation rights to executives and managers.

CONTENT OF THE PLANNED COMMUNITY INITIATIVE

1. Measures to ensure the effectiveness of employees' transnational information and consultation rights

1.1. Concepts of information and consultation

Some of the definitions found in — or absent from — the Directive lead to different interpretations which have a major impact on the clarity of the legislative framework, the effectiveness of the rights introduced by the Directive and legal certainty, even though these rights have the nature of fundamental rights. One possibility might be to clarify the definition of “consultation” and add a definition of “information” better linking it with the definitions in more recent directives concerning information and consultation of workers, which include the concepts of appropriate time, means and content and stipulate that “information and consultation procedures shall be established and implemented (...) so as to ensure their effectiveness”.

However, it will be necessary to ensure, in particular through the better linking of levels and agreement on information and consultation procedures, that these changes do not prolong consultation procedures to the point of slowing down decision-making processes within undertakings.

CEC indeed thinks that the revision of the directive is necessary to achieve harmonisation between Directive 2001/86/EEC and Directive 2002/14/EEC in terms of content and procedure for the information and consultation of employees. More recent directives like e.g. Directive 2002/14/EEC have expanded these rights more than the previous ones.

The definition of the concept of “consultation” according to the Directive 2001/86 on the European Company (SE) could be a good basis for harmonisation.

Nature of information:

In order to avoid management slowing down the process for the creation of a European Works Council, the directive should clarify the nature of the information central management must communicate to employee representatives.

This information should deal with:

- the structures of the group or the company at EU level,
- the number of employees not worldwide but distributed between the different entities concerned to be able to distribute votes inside the special negotiating body.

The EWC Directive must clarify the level of information and consultation to be provided and to set the content of the information and the timetable for its communication, which would allow turning it into a significant part in the decision-making process of the companies concerned. Indeed, CEC believes that a EWC must have sufficient time between the moment information and consultation is happening and the moment when discussions have to be made to take a particular decision.

It can be useful as well to guarantee the communication of documents in several languages, for example the three ones that are spoken the most within the group. The diversity, a fundamental value for the EU, has to be ensured also through the recognition of a multi-language approach.

Confidentiality:

On matters of confidentiality, this notion should not be used by management to circumvent the obligation to inform and consult employees. Confidentiality must always be respected vis-à-vis third parties.

Confidentiality must not be applicable for communications between people who undergo such obligation of information and consultation (i.e. supervisory board members – EWC members), as these cannot be considered as “third parties”.

Improving information circulation:

In order to facilitate the circulation of information, on the one hand between the members of the European Works Council and on the other between the European Works Council and all employees, it would be relevant to authorize the EWC to use new technologies and e.g. to create a website useable for external consultation as well.

Consultation:

The revision of the directive should at least pick up the progress made by the Directive on the European Company with a view to simplifying and providing greater consistency to EU law and to improving them further.

Today, the role of the European Works Council generally remains focused on information, whereas the objective of the Directive as written in its article 1 is to “*improve information and consultation of employees*”.

The revised directive should give a true power of consultation to the EWC by setting in the directive itself the respect of an information and consultation timetable, so that the European Works Council would have the time to formulate its proposals before a decision is taken.

1.2. Content of subsidiary requirements

Subsidiary requirements have been applied only in a very limited number of cases, as nearly all European works councils are constituted on the basis of an agreement. However, they play an important benchmark role, especially in the negotiation or renegotiation of agreements.

In order to take account of developments in European works councils’ practices and needs, and to reinforce their role and relevance, the following changes could be envisaged. In the absence of a specific agreement within the undertaking or group, they would establish:

- the right of the European works council to obtain a response, and the reasons for that response, to any opinions they have expressed;
- a precise definition of exceptional circumstances by the social partners, in order to foster anticipation;
- the possibility of a second meeting to seek an agreement in the event of exceptional circumstances,
- the possibility of adapting the number of ordinary meetings of the European works council, for example from one a year to two a year, in certain circumstances;
- the possibility of introducing new subjects for the information and consultation of the European works council, in line with practical developments (changes in responsibilities, mobility, health and safety at work, work organisation, environment).

CEC agrees that preparing transnational meetings calls for wider competencies and prerogatives. In order to provide the European Works Council with true powers, it needs to be allowed to elaborate common positions and to think about actions to be undertaken. The directive should allow for the organisation of a preparatory meeting on the eve of the main EWC meeting and for a debriefing meeting at the end of the EWC meeting.

It is also necessary to allow the European Works Council to meet more than once a year.

The Directive on the European Company recognises this need in part 2 of its Annex. It foresees that the representation body may meet with the management delegation “*at least once a year*”, whereas the 1994 Directive in its article 2 mentioned that the EWC “*had the right to meet with central management once a year*” only. The new European Works Council Directive should pick up the provision of the Directive on the European Company.

The Directive should clearly define the resources to assign to the EWC functioning, the notion of exceptional circumstances and the way they come into act. At the same time, it should foresee the possible intervention of European federations upon invitation by EWC members.

New information and consultation topics could be introduced, for example mobility, health and safety at work, work organisation.

1.3. Role of trade union organisations

As jointly acknowledged by the European social partners, European trade union federations have played an active role, directly or indirectly, in the negotiations for European works councils against a background of diverse systems of industrial relations. It would appear appropriate to recognise explicitly the special role which trade union organisations can play in negotiations and support for European works councils, recognition that is rendered effective by the inclusion, in Directives 2001/86/EC and 2003/72/EC¹³, of trade union organisations among the experts who may be present at meetings of the special negotiating body.

CEC agrees that the revised Directive should explicitly recognize the special role played by European Managers’ Professional Federations and, if not, CEC itself, including them among the experts assisting the special negotiating body.

In this regard, the directive should give an opportunity to the special negotiating body to be assisted by the right employees representatives and/or juridical experts representing executives at EU level, i.e. the European Federations of executives and, if not, CEC itself.

In this frame, the agreements installing or adapting EWCs should undergo the signature of European Professional Federations representatives.

The Directive should also allow to European professional Federations to launch the proceeding of constitution of a SNB in order to collect the information necessary to install a EWC.

1.4. Role and competence of employees’ representatives

In order to allow employees’ representatives to perform their duties to the full, it might be appropriate to introduce:

- an obligation for European works council representatives to report to the workers they are representing;
 - a right to training for employees’ representatives¹⁴ (already provided in nearly half of European works councils), and an extension of the competence of employees’ representatives, thus helping to optimise the functioning of European works councils and reduce the costs, a point made jointly by the social partners.

CEC agrees with those proposals. CEC believes that an obligation for the European works council representatives to report to the workers they are representing would increase the ownership of all employees towards the issues discussed.

On the other side, it needs to be guaranteed that the members of the European Works Council have the right to training, making explicit the subjects concerned (economic training, training with regard to the enterprise's structures, training related to the different workers representation systems within the Member States, languages, etc.) and whose financing has to be covered by the employer. Indeed the members of the European Works Council find it hard to understand each other because of the language barrier, because of the different workers representation systems and because of differences in management.

This is also why the presence of managers in EWCs is important since they have, thanks to their position, a better understanding of the issues, challenges and evolutions of the company.

At the same time, it would be interesting to recognize to workers representatives within EWCs a right of access to the quarters of the European enterprise, according to the principles of "full effectiveness of the proceeding", under the obligation of notice and while respecting confidentiality.

1.5. Protection of rights

Disputes relating to the operation of a European works council or the validity of the agreement establishing it are difficult to deal with owing to the complexity of the circumstances from the legal, linguistic, financial and industrial relations points of view.

It is vital that the rights referred to by the Directive are implemented. It might therefore be useful for the Directive to reiterate the general principle according to which, in the event of infringement of the provisions applicable, sanctions must be effective, proportionate and dissuasive, as described in the Framework Directive 2002/14/EC15.

As for their responsibilities, European works councils are called upon with increasing frequency to represent European employees' interests in dealings with authorities or other parties outside the undertaking, also in disputes relating to competition law. It might therefore be useful to explicitly recognise the European works council as the representative of the undertaking's or group's employees.

CEC agrees with those proposals, under the condition that the EWCs are representative for all employees including managerial staff, whose representatives should be designated by and amongst their own groups.

Moreover, as regards the sanctions for the non-respect of the directive, a (minimum) early warning procedure could be established, in order to inform the Supervisory Board of severe lacks likely to put the enterprise into danger.

As a supranational body independent from the national employee representation structures, the European Works Council should be recognised a right of its own to go to court to defend its interests and the interests of the wage-earners it represents to guarantee the effectiveness of the Directive.

In this frame, and in relation with the EWC representatives' obligation to report to workers, such action should be accompanied by information interventions through local representative bodies.

2. Measures designed to resolve problems encountered in the practical application of the Directive and to rectify gaps in legal certainty

2.1. Adaptation clause

Many agreements do not include adaptation arrangements for when major changes take place within a group (for example as a result of mergers or acquisitions) or procedures for termination. This applies sometimes to anticipatory agreements concluded before September 1996, as referred to in Article 13 of the Directive, which account for more than half of existing European works councils and are not subject to the obligations arising from the Directive.

The introduction of an adaptation clause to stipulate what should happen to representative bodies in the event of a change in make-up could help improve legal certainty and be useful in relation to the introduction of transitional arrangements to ensure information and consultation of workers at key moments in reorganisation and in modifying operational frameworks which have become obsolete.

It might thus be useful to introduce arrangements to the effect that:

- all new agreements must include procedures for their adaptation and termination, and also for their renegotiation, especially in the event of a change in make-up;
- in the absence of provisions in existing agreements or in the event of conflicts between the relevant provisions of two or more agreements, an obligation should be introduced to open negotiations on the new make-up within an appropriate timescale, together with transitional arrangements for the existing body or bodies for the duration of negotiations, at the request of employees or on the initiative of the central management;
- a request for the opening of negotiations with a view to adapting or replacing an anticipatory agreement that has become obsolete may be acceptable under certain conditions.

CEC agrees and thinks that the Directive should include an obligation to negotiate the creation of a single European Works Council or a single information and consultation procedure for the merged or acquired entities.

It could impose the creation of a liaison structure between both EWCs which would be the core of the special negotiating body.

2.2 Central management and responsibilities of local managements

In three cases referred to it for preliminary rulings, the Court of Justice of the European Communities has established the principle that all information which is essential to the opening of negotiations for the setting up of a European works council must be supplied to the employees' representatives by the managements concerned in the Member States, regardless of the location of the group's headquarters or the opinion of the group's management concerning the applicability of the Directive. It would appear useful for these principles to be incorporated into the revised Directive.

CEC agrees to include these principles into the revised Directive.

European Managers' Professional Federations and, if not, CEC European Managers, should have the right to obtain the necessary information by the concerned Directions and be authorized to provide assistance to workers' representatives within enterprises likely to install a European Works Council.

In case of non-respect of the Directive by the enterprises, the European Managers' Professional Federations and, if not, CEC European Managers, must have the possibility to obtain juridical and financial restrictions.

2.3. Composition of the special negotiating body and organisation of negotiations

The Directive states that the special negotiating body (SNB) must have a minimum of three members and a maximum number of members equal to the number of Member States. It must have an employees' representative for each Member State in which the group has at least one establishment or undertaking, plus supplementary members in proportion to the number of employees. The original maximum number of 17 members, corresponding to the number of Member States when the Directive was adopted, was increased to 18 by Directive 97/74/EC (extension to the United Kingdom) and in 2007 to the "number of Member States", i.e. 3020, by Directive 2006/109/EC.

In spite of the latter change, application of this provision causes problems:

- it creates a practical difficulty, as a group employing workers in most Member States cannot comply with both the maximum number stipulated and the other provisions;
- it may lead to imbalances in representation on the SNB.

It would therefore seem appropriate to delete the maximum number of SNB members from the Directive and replace it by a system which allows better adaptation to the number of employees.

It would also be useful if Member States with only a small number of employees could be represented through a group arrangement or indirectly.

As already stated, an adequate representation of executives and managers has to be guaranteed. Thus CEC recommends that whenever no seat is ensured to a representative of executives and managers, the negotiation and discussion within the SNB should take into account the interests of all the categories of employees including the executives and managers.

Concerning SNB meetings, the Directive does not explicitly lay down either the right of employees' representatives to meet without the employer being present, with the linguistic facilities necessary for communication, before and where appropriate after negotiation meetings with the employer, or the right of SNB experts to be present at such negotiations. It would appear useful to add a provision to this effect, which corresponds to normal practice.

CEC agrees with this proposal. Moreover, CEC proposes that the possibility for the management to limit the coverage of the costs to one expert as laid down by article a. 5, § 6 should be removed since practice has demonstrated that the special negotiating body often needs several experts.

3. Measures designed to ensure coherence of Community legislative instruments in the field of information and consultation of employees

3.1. Linking of definitions of information and consultation

An improved linking of the levels of definitions, as referred to in section 1.1, may help to establish a better interplay between the Community legislative instruments in the field of information and consultation of employees.

3.2. Transnational competence of European works councils

In order to differentiate between the area of competence of a European works council and that of national bodies and to place constituent agreements in a coherent framework, it might be useful to state that the Directive establishes a right for employees to information and consultation on transnational issues. In line with the principle of dialogue at the relevant level of management and representation depending on the subject under discussion, this transnational nature could be defined as relating to issues going beyond the powers of decision making bodies in a single Member State.

CEC thinks that the fact that the European Works Council may only be consulted with on cross-border matters can be a source of trouble when some decisions might affect only one site or subsidiary in a single country, although the decision was made at a transnational level.

The Directive on the European Company has solved this difficulty in part 2 of its Annex by stating that the employee representation body is competent for all transnational matters and – in some instances as well – for all issues of concern for a subsidiary or site only, as long as the powers of national employee representation structures are respected.

3.3. Linking of information and consultation levels

Linking the national and transnational information and consultation levels is one of the difficulties in the practical application of the Directive. In cases of restructuring, apart from the Directive on European works councils, the Framework Directive 2002/14/EC, Directive 98/59/EC on collective redundancies and Directive 2001/23/EC on transfers of undertakings also apply where such redundancies or transfers are specifically envisaged. Cases brought before the national courts concerning the relationship between legal acts and links between information and consultation levels have produced different responses in this respect.

To ensure legal certainty and the effectiveness of Community law, it would be appropriate to find the best way to set out the principles of linking information and consultation levels.

The procedure envisaged, in line with the diversity of situations and allowing both an anticipatory approach and consideration of the employees potentially most affected by a decision, could for example be based on:

- maintaining the principle of “at the relevant level of management and representation, depending on the subject under discussion”, as facilitating the agreement between the social partners in order to find a time-scale ensuring the “effectiveness” of information and consultation;
- giving priority to negotiations on procedures for linking information and consultation of the European works council and national representative bodies, in compliance with the above principles;
- introducing provisions applicable in the absence of an agreement on the subject in exceptional circumstances, which could allow a parallel start to the processes of informing and consulting the European works council and the national bodies.

CEC agrees with these principles that will allow a better linking of the information and consultation levels.

4. Transitional provisions

The Commission considers that European works councils which operate to the satisfaction of the parties involved should be able to continue.

CEC agrees as long as the representation of executives and managers is considered satisfactory by its National Member Organisations or European Professional Federations.

Negotiation procedure (articles 138, paragraph 4 and 139, EC Treaty)

CEC European Managers and its member organizations, in quality of participants to social dialogue and to the related responsibilities, wish that European Social Partners start a negotiation procedure on the basis of the Commission's proposals and of CEC's responses. Moreover, CEC wishes to actively take part to the negotiations within the drafting group.

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