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CONSULTATION DOCUMENT

First-phase consultation of social partners under Article 154 TFEU on a possible revision of the European Works Council Directive (Directive 2009/38/EC)

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1. Introduction

The purpose of this document is to consult the social partners at EU level, in accordance with Article 154(2) of the Treaty on the Functioning of the European Union (TFEU), to obtain their views on the possible direction of EU action on a revision of the European Works Council Directive (Directive 2009/38/EC¹; hereafter the ‘recast Directive’).

This consultation is part of the follow up to the Article 225 TFEU resolution of the European Parliament on the matter, in line with the commitment of President von der Leyen that the Commission would present legislative proposals in response to Article 225 resolutions, in full respect of the proportionality, subsidiarity and better law-making principles². The Commission notes that the resolution of the European Parliament of 2 February 2023 with recommendations to the Commission on revision of European Works Councils Directive³ refers to core areas of social dialogue and acknowledges the importance of ensuring effective information and consultation of European Works Councils as well as providing for a balanced approach between the interests of employees and employers⁴.

Principle 8 of the European Pillar of Social Rights⁵ regarding social dialogue and involvement of workers provides that ‘*workers 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*’. Implementing this right implies the establishment of information and consultation rights, to provide the opportunity for a fruitful dialogue with the employer.

Where social dialogue is strong, economies are more competitive and socially resilient. It helps reconcile economic and social objectives within the single market. Information and consultation processes in companies play an important role in shaping economic transitions

¹ Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 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 (Recast) (Text with EEA relevance), OJ L 122, 16.5.2009, p. 28–44.

² [Political guidelines for the next Commission \(2019-2024\) - "A Union that strives for more: My agenda for Europe" | European Commission \(europa.eu\)](#), p. 20.

³ [2019/2183\(INL\)](#).

⁴ On 1 March 2023 the Commission sent its reply to European Parliament as regards this resolution (see also below on page 9).

⁵ Communication from the Commission Establishing a [European Pillar of Social Rights](#), 26.4.2017, COM/2017/250 final; jointly proclaimed at the Gothenburg summit on 17.11.2017 by the European Parliament, the Council and the European Commission.

and fostering workplace innovation. This is in particular so for the ongoing twin transitions, changes in the world of work and mitigation of the social and economic impacts of inflation and high energy prices. Constructive dialogue can help ensure ownership of reform and restructuring processes, find balanced solutions and promote trust and partnership. Fostering such dialogue is essential to support efforts to actively promote and modernise the EU industrial fabric notably as per the recent Green Deal Industrial Plan and long-term competitiveness strategy⁶, while being true to our ambitions to tackle climate change and to uphold social standards.

At EU level, a comprehensive set of directives on the information and consultation of workers⁷ establishes rules to protect their rights in restructuring processes. National authorities and social partners must respect these rules. The EU Quality Framework for anticipation of change and restructuring⁸ provides further support to employees, social partners and regional and national agencies to follow best practice in anticipating company change and restructuring.

More recently, the Directive on adequate minimum wages⁹, adopted in 2022, constitutes another major contribution to support social dialogue as an effective mechanism for wage setting. The Council Recommendation on ensuring a fair transition towards climate neutrality¹⁰ also encourages Member States, in close cooperation with social partners, to provide for the full and meaningful involvement, including information and consultation, of workers at all levels and their representatives as regards the anticipation of change and the management of restructuring processes including those linked to the green transition.

On 25 January 2023, the Commission adopted a new initiative¹¹ to strengthen and promote social dialogue across the EU, taking account of the autonomy of social partners and the diversity in the way in which social dialogue functions in the Member States. To this end, the Commission, based on its consultations with social partners, proposes a set of measures to support European social dialogue, strengthen the involvement of social partners in EU policymaking and improve the Commission's support for social dialogue. The Commission also proposed a Council Recommendation, which, reflecting Principle 8 of the European Pillar of Social Rights, sets out how EU countries can further strengthen social dialogue and collective bargaining at national level, e.g. by ensuring an enabling environment for bipartite and tripartite social dialogue, including collective bargaining at all levels.

European Works Councils are an important piece of this extensive policy framework, constituting the backbone of transnational social dialogue. They promote a shared understanding of the transnational challenges facing large multinational companies and the

⁶ Communication from the European Commission 'A Green Deal Industrial Plan for the Net-Zero Age', 1.02.2023, COM(2023) 62 final; Communication from the Commission 'Long-term competitiveness of the EU: looking beyond 2030', 16.3.2023, COM (2023)168 final.

⁷ For details about EU law on workers' involvement see section 2.

⁸ Communication from the European Commission 'EU Quality Framework for anticipation of change and restructuring, COM (2013) 0882 final.

⁹ Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union, OJ L 275, 25.10.2022, p. 33–47.

¹⁰ Council Recommendation of 16 June 2022 on 'ensuring a fair transition towards climate neutrality', 2022/C 243/04, ST/9107/2022/INIT, OJ C 243, 27.6.2022, p. 35–51.

¹¹ Communication from the Commission 'Strengthening social dialogue in the European Union: harnessing its full potential for managing fair transitions', 25.01.2023, COM(2023)40 final, and proposal for a Council Recommendation on strengthening social dialogue in the European Union, 25.01.2023, COM(2023)38 final.

involvement of employees in the decision-making process, with the objective of exchanging on possible solutions, facilitating their implementation and increasing the impact of strategic choices made by the employer. Their potential should be fully exploited in the current context of the twin transitions and profound industrial transformations, bearing in mind the need to preserve competitiveness, the ability of undertakings to react to rapidly changing market circumstances and the need to ensure adequate working conditions.

Against this background, this consultation aims at defining issues and possible areas for further EU action, for consideration by representatives of management and labour at EU level.

2. EU legislative framework and state of play

2.1. EU law in the area of information and consultation

In accordance with Article 153 TFEU, the EU shall support and complement the activities of Member States in the field of information and consultation of workers.

The EU's legal framework in the field of information and consultation at national level has developed over several decades. Directive 98/59/EC¹² sets out rules on the information and consultation of workers' representatives before collective redundancies are made. Directive 2002/14/EC¹³ establishes a general framework for information and consultation of workers at national level. Directive 2001/23/EC¹⁴ contains provisions ensuring workers employed in businesses that are transferred to a new owner are informed and consulted.

Additional safeguards are provided by setting out also the rights to participation in the company board, in companies adopting the European Company Statute or the European Cooperative Society Statute¹⁵, or in companies resulting from cross-border operations¹⁶.

2.2. European Works Councils

European Works Councils (EWCs) are an instrument for organising transnational social dialogue in multinational companies of a certain size. EU law on EWCs 'aims to bridge the gap between increasingly transnational corporate decision-making and workers' nationally defined and nationally confined information and consultation rights'¹⁷.

EWCs can issue non-binding opinions on management decisions on transnational matters within the multinational undertaking. While EWC rights to information and consultation apply to all transnational topics affecting workers' employment conditions, EWCs are not a negotiating body, and so have a different objective than information and consultation

¹² Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225, 12.8.1998, p. 16–21.

¹³ Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ L 80, 23.3.2002, p. 29–34.

¹⁴ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.3.2001, p. 16–20.

¹⁵ Directives 2001/86/EC, 2003/72/EC

¹⁶ Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, OJ L 321, 12.12.2019, p. 1–44.

¹⁷ Catherine Barnard, *EU Employment Law*, 4th Edition, Oxford 2012, p. 664.

processes at national or local level which aim to reach an agreement between employees' representatives and management.

For reasons of effectiveness, consistency and legal certainty, there is an established link between European and national levels of information and consultation¹⁸. This link may be specified in agreements establishing the EWCs themselves, with due respect of the provisions of national law and/or practice on information and consultation of workers. If the agreement does not cover this interaction, the process must be conducted both at national and European level in such a way that it respects the competences and area of action of the employee representation bodies. In any case, the EWC process shall be without prejudice to national information and consultation procedures set out in EU law¹⁹. The European information and consultation process through the EWC is to take place either before or at the same time as the national information and consultation process²⁰.

Historical background

As regards information and consultation processes in large transnational companies, the origins of the currently applicable EU law date back to the 1980s with the very first proposal known as the 'Vredeling directive'. While this proposal was ultimately not adopted due to a lack of agreement between European social partners, several multinational companies voluntarily started creating transnational bodies to facilitate exchanges between management and worker representatives. Such experiences were subsequently taken into consideration by the Commission when preparing the proposal for the first Directive on European Works Councils, put forward following the lack of agreement between social partners in this area. The first EWC Directive²¹ was finally adopted in 1994 as a Council directive under the Agreement on social policy²².

However, several shortcomings became evident following the entry into effect of the 1994 EWC Directive, such as the low number of new EWCs created²³ and the legal uncertainty preventing the proper implementation of some provisions. In 2008, an agreement was reached to recast the 1994 EWC Directive following the consultation of social partners. While the new Directive 2009/38/EC ('recast Directive') was not formally the outcome of an agreement between the social partners, its content reflected their joint advice submitted to the co-legislators²⁴.

¹⁸ Article 12 of Directive 2009/38/EC 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 (Recast) (op.cit.).

¹⁹ Directive 2002/14/EC Directive 98/59/EC and Directive 2001/23/EC (op.cit.).

²⁰ Recital 37 of Directive 2009/38/EC 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 (Recast) (op.cit.).

²¹ 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, OJ L 254, 30.9.1994, p. 64–72.

²² Agreement on social policy annexed to Protocol 14 on social policy annexed to the Treaty establishing the European Community.

²³ For more details, see SWD (2018) 187, pages 21-22

²⁴ ETUC and Business Europe (2008), Joint advice by the social partners on the European Work Council 'recast' Directive. See key documents (<http://www.worker-participation.eu/European-Works-Councils/Recast-Directive/Chronology-of-the-EWC-Recast-review-Key-docs>)

The recast Directive and EWCs today

The recast Directive aimed at addressing the implementation shortcomings of the original instrument:

- ensuring the effectiveness of employees' transnational information and consultation rights,
- increasing the proportion of EWCs established while enabling the continuous functioning of existing agreements,
- resolving the problems encountered in the practical application of Directive 94/45/EC and remedying the lack of legal certainty resulting from some of its provisions or the absence of certain provisions,
- and ensuring that Union legislative instruments on information and consultation of employees are better linked.

The Directive provides a procedure for setting up information and consultation agreements between the central management and workers' representatives in large multinational companies.

In accordance with the recast Directive, the right to establish EWCs exists in companies or groups of companies with at least 1 000 employees in the EU²⁵ and with at least 150 employees in each of two Member States.

The process of creating a new EWC can be initiated by a request from at least 100 employees from two countries, or on the initiative of the employer. Eligible multinational companies are not obliged to set up an EWC on their own initiative; however, their central management must respond to requests by employees by setting up a Special Negotiating Body ('SNB') with the aim of establishing an EWC. The composition and functioning of each EWC is adapted to the company's specific situation by a signed agreement between management and workers' representatives of the different countries involved. If no agreement is reached within a period of three years, then an EWC has to be created under the 'subsidiary requirements' set out in Annex I to the recast Directive (i.e. in accordance with a standard default EWC agreement).

There are currently around 1 000 companies or groups of companies with active EWCs²⁶, representing around half of all eligible companies.

Germany has the strongest EWC tradition with 281 active EWCs, followed by companies with central management in the United States²⁷ and France, with 184 and 134 EWCs respectively. At the same time, more than ten EU Member States have either none or only one established EWC body. Since the entry into force of the recast Directive, the creation of

²⁵ For EEA countries, the right exists by virtue of the EEA agreement, as the Directive is addressed to EU Member States only.

²⁶ Source: [EWC Database \(ETUI\)](#). The database lists currently 1 195 active EWCs and European Company (SE) works councils, of which around 1 000 are EWCs and the remaining are SE, SCE works councils or other types of information and consultation bodies.

²⁷ For more details, see Article 4(2) of the of Directive 2009/38/EC 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 (Recast) (op.cit.).

the new EWCs has been rather stable, with slightly more than 20 new EWCs created each year²⁸.

By sector of activity, the large majority of EWCs are concentrated in metal, services or chemical companies.

A varied landscape

Both Directives (the 1994 Directive and the recast Directive) did not require systematic renegotiations of already existing information and consultation agreements or mechanisms in the large multinational companies eligible under applicable EU law. Undertakings with agreements already in place were excluded from the scope of the (revised) EU rules, the aim being to protect pre-existing agreements and avoid unnecessary renegotiations.

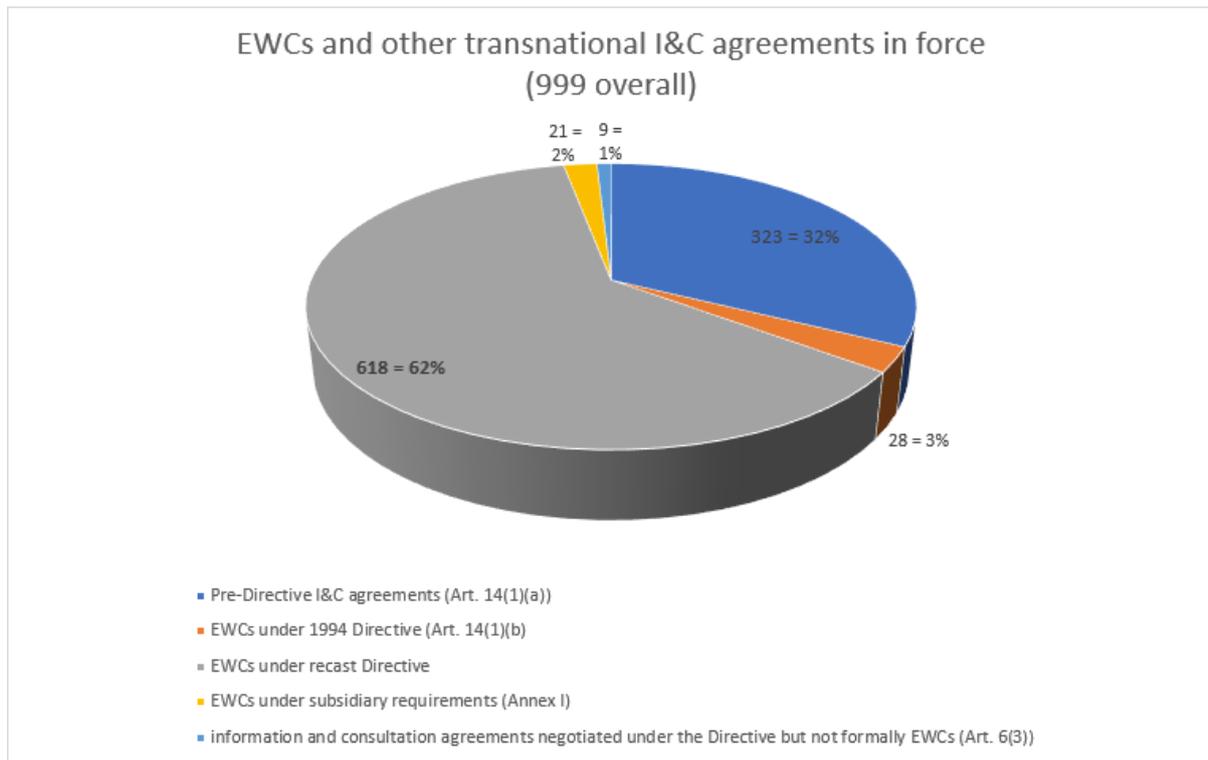
In addition, the recast Directive allowed an exemption for undertakings with EWCs negotiated during the transition period between June 2009 and 2011. As a consequence, the obligations arising from the recast Directive do not apply to these undertakings. The law transposing the 1994 Directive remains applicable to agreements concluded under that Directive. Indeed, the objective of the recast Directive was to increase the proportion of eligible undertakings establishing an EWC while ‘enabling the continuous functioning of existing agreements’ (Recital 7). In 2018, 40% of active EWCs were still functioning under pre-recast rules²⁹.

Consequently, several types of information and consultation agreements in large multinational companies co-exist today (see also chart below):

- *Pre-1996 agreements (‘voluntary agreements’)*: undertakings with these agreements are not subject to the Directive. When jointly renewed or revised by the parties upon their expiry, these agreements continue not to be subject to the 1994 Directive (nor to the recast Directive);
- *1996-2011 agreements, including those newly signed in the transition period 2009-2011*: undertakings with these agreements are subject to the law applicable when the agreements were signed/revised (i.e. the law transposing the 1994 Directive). When subsequently renewed or revised by the parties, these agreements continue not to be subject to the recast Directive;
- *Post-2011 agreements*: undertakings with these agreements are subject to the recast Directive.

²⁸ See [SWD\(2018\) 187 final](#), p. 21-22.

²⁹ [SWD\(2018\) 187 final](#), p. 21.



Data source: ETUI (2023)

Under Article 13 of the recast Directive, workers can request renegotiation of an existing EWC agreement where the structure of the undertaking changes significantly and the agreement does not provide for relevant provisions to address this situation.

The recast Directive, under Article 6(3), also allows the negotiating parties (i.e., workers' representatives and management) to conclude an information and consultation procedure ('ICP') instead of an EWC³⁰.

3. Recent developments in respect of the recast Directive

3.1. The 2018 Evaluation of the recast Directive

In 2018, the Commission published an evaluation of the implementation of the recast Directive³¹ that confirmed its EU added value and the improvements it had brought to the quality and scope of information to workers. The Directive was considered relevant by all stakeholders, and the need to develop further transnational dialogue was acknowledged by social partners.

In terms of subsidiarity, EWCs have a genuine EU transnational dimension. The evaluation points out that '*only an EU legal act, transposed into national legislation, can regulate the issue of information and consultation procedures and foster transnational social dialogue for workers in transnational companies*'³².

³⁰ For more details, see Article 6(3) of the of Directive 2009/38/EC 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 (Recast) (op.cit.).

³¹ [COM\(2018\) 292 final](#) and [SWD\(2018\) 187 final](#)

³² [COM\(2018\) 292 final](#), p. 7.

With regard to proportionality, the recast Directive allows Member States flexibility to adapt some of its provisions to suit their national industrial relations and legal systems, particularly in determining the arrangements for designating or electing employees' representatives, their legal protection and determining the most suitable sanction and remedy system at national level in case of breaches in the application of the legislation.

The 2018 evaluation found that the large majority of Member States have properly transposed the recast Directive. While most provisions have been implemented verbatim in national legislation, some countries have legislated more detailed provisions, going beyond the minimum requirements of the recast Directive.

The evaluation also found that the volume of litigation at national level had been low, and showed no change compared with the trend under the original 1994 Directive. Over the years, the Commission has received few formal complaints against Member States alleging incorrect transposition and implementation, and one infringement procedure has been launched by the Commission on the incorrect implementation of the enforcement provisions.

Nonetheless, a low volume of case law does not necessarily signify that practical problems are not encountered in the practice of applying the recast Directive. This may be the case when negotiating or applying the provisions of the EWC agreement at company level.

Overall, the evaluation highlighted persisting issues, mainly related to the low creation rate of new EWCs for various reasons³³, limits to the effectiveness of the consultation process, weaknesses in the means in place allowing EWCs to enforce their rights (e.g. as regards their capacity to bring legal action), and significant differences across Member States in the type and level of sanctions.

To address these issues, the Commission focused its efforts on supporting a more effective application of existing rules, notably by:

- Continuing to provide grants to social partners to support the implementation and functioning of EWCs.

The Commission provides financial support to social partners for social dialogue on an annual basis and continued to fund various projects on information and consultation in enterprises, including in relation to EWCs³⁴.

- Proposing the creation of a handbook for EWCs' practitioners to help in establishing new EWCs and contributing to a more effective operation of existing ones.

The work on the handbook was put on hold in April 2019, following a refusal of trade unions to participate in a group of experts, which would contribute to it.

- Ensuring the full and correct transposition of the recast Directive by engaging in a structured dialogue with Member States.

³³ SWD(2018)187 pages 21-22.

³⁴ The Commission habitually supports the European Trade Union Confederation's work on EWCs through its dedicated grants program, notably the ETUC annual EWC conference. Other projects, such as those carried out by sectoral European Trade Unions Federations, are also regularly co-financed to help support better functioning of EWCs (e.g. to consolidate good practices of EWCs in a particular sector).

The Commission services held a meeting with Member States' experts with a focus on enforcement and sanctions in 2019, while an infringement procedure concerning the Irish enforcement system was launched in 2022³⁵.

On 13 October 2020, national ministers gathered in the Council of Employment, Social Policy, Health and Consumer Affairs Council (EPSCO) held a policy debate on 'Worker participation and support for workers in restructuring', with a view to ensure that workers' rights to information and consultation as laid down in EU law, including rights of EWCs as set out by the recast Directive, are effectively enforced when addressing the economic consequences of the pandemic. The Commissioner in charge of jobs and social rights followed up to this ministerial discussion on 1 December 2020, with a letter addressed to Member States, to reiterate the importance of ensuring that respect of these rights is monitored, and any breaches acted upon accordingly by competent national authorities, including courts.

3.2. The resolutions of the European Parliament

In 2019, the European Parliament decided to prepare two own-initiative reports with regard to the involvement of workers at company level as a way to support democracy at work, and particularly to reinforce the operation of EWCs.

The first report is the non-legislative report on Democracy at Work, published in December 2021 (2021/2005 (INI))³⁶. It covers areas of worker information, consultation and participation, trade unions, works councils as well as some aspects of company law and corporate governance.

The second report is the legislative own-initiative report on revision of European Works Councils Directive (2019/2183 (INL)) which was adopted by the European Parliament on 2 February 2023. It aims at '*strengthening EWCs and their ability to exercise their information and consultation rights, as well as to increase the number of EWCs, while taking into account the different industrial relations systems in the Member States*'. It contains an annex setting out proposals for legislative amendments to the recast Directive, including:

- a wider concept of 'transnational matters' on which information and consultation of the EWC should take place;
- an amended definition of 'consultation', i.e. requiring that EWCs receive a reasoned response to their opinion prior to management adopting the decision, and providing that that opinion must be taken into account by management;
- an obligation on Member States to provide for a possibility to request an injunctive relief whereby a company's decision may be suspended where information and consultation requirements were infringed, and for financial sanctions of up to EUR 20 million or 4% of annual turnover, and exclusion from public procurement and subsidies;
- an obligation on companies to provide EWCs with objective criteria for determining if a matter is confidential and for which duration, and requiring companies to secure

³⁵ A letter of formal notice was issued to Ireland in May 2022.

³⁶ European Parliament resolution of 16 December 2021 on 'democracy at work: European framework for employees' participation rights and the revision of the European Works Council Directive'.

prior judicial authorisation before restricting access to information which they consider could seriously hamper the company's activities;

- stricter deadlines for setting up an EWC to 18 months for negotiating an EWC agreement;
- an end to the exemption of undertakings with pre-Directive agreements from the scope of the Directive and making undertakings with all types of existing information and consultation agreements subject to the revised rules.

On 1 March 2023, in its response to the European Parliament, the Commission welcomed the Article 225 resolution of the European Parliament. In accordance with the political commitment made by President von der Leyen in her Political Guidelines as regards resolutions adopted by the European Parliament under Article 225 TFEU, the Commission is committed to follow up with a legislative proposal, in full respect of proportionality, subsidiarity and better law-making principles. The Parliament requests, including the concrete proposals made in the annex to the resolution, will be assessed in the light of ensuring legal certainty for workers and employers and safeguarding and promoting employment and industrial activities in the EU. This assessment will include data and evidence collection and a comprehensive evaluation of problems and drivers in relation to existing EWCs, and on the issues highlighted in the Parliament's resolution. In its response, the Commission further informed that, in line with Article 154 TFEU, it will launch a two-stage consultation of EU social partners and that social partners may also decide to act by means of agreements under Article 155 TFEU.

4. Issues and potential areas for action

The issues highlighted in the 2018 evaluation of the recast Directive are still relevant. At the same time, the importance of transnational information and consultation has become even clearer. Social dialogue at company level is essential to successfully undertake the structural changes brought by the digital and green transitions and address the consequences of the energy crisis. This requires assessing the issues that may prevent the recast Directive from fulfilling its objectives, i.e. providing for arrangements for informing and consulting employees defined and implemented in such a way as to ensure their effectiveness and to enable the undertaking or group of undertakings to take decisions effectively.

Against this background, and drawing on the 2018 Commission evaluation and the resolution from the European Parliament, challenges have been identified regarding the following main topics:

- the notion of 'transnational matter';
- the definition of 'consultation';
- 'confidentiality' restrictions;
- the framework for setting up EWCs;
- enforcement (redress and sanctions); and
- exemptions from the scope of the recast Directive.

Other issues are also presented in Section 4.7.

4.1. The notion of ‘transnational matter’

The recast Directive (Article 1(3) and (4)) provides that the competence of EWCs and the scope of the information and consultation procedure shall be limited to transnational issues. Specifically, 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.

These provisions are to be read together with recital 16 of the recast Directive, which clarifies that the transnational character of a matter should be determined by taking account of both the scope of its potential effects, and the level of management and representation that it involves. For this purpose, matters which concern the entire undertaking or group, or at least two undertakings or establishments of the undertaking or group situated in two different Member States, are considered to be transnational. These include matters which, regardless of the number of Member States involved, are of importance for the European workforce in terms of the scope of their potential effects, or which involve transfers of activities between Member States.

The 2018 Commission evaluation acknowledged that, while the concept of transnationality is better defined in the provisions of the recast Directive as compared with the 1994 Directive, it remains difficult for EWC practitioners to apply the concept in some concrete cases.

The EP resolution points to comparable difficulties when underlining that: *‘the definition and consequential interpretation of what matters are to be regarded as ‘transnational issues’ remains vague and subject to interpretation, thus resulting in a fragmented transposition and implementation of Directive 2009/38/EC by the Member States and a resulting fragmented application by undertakings; [the European Parliament] highlights the fact that the definition needs to be precise and comprehensive and that the scope of possible effects, as well as the relevant level of management and representation it involves, are missing elements which need to be considered when determining the transnational character of a matter; [it] reiterates its call to clarify the concept of the ‘transnational character of a matter’ in Directive 2009/38/EC’.*

4.2. The definition of ‘consultation’

Ensuring the effectiveness of employees’ consultation rights is one of the main objectives of the recast Directive, alongside enabling the undertaking to take decisions effectively (Article 1(2)).

In its Article 2(g), the recast Directive defines ‘consultation’ as: *‘the establishment of dialogue and exchange of views between employees’ representatives and central management or any more appropriate level of management, at such time, in such fashion and with such content as enables employees’ representatives to express an opinion on the basis of the information provided about the proposed measures to which the consultation is related, without prejudice to the responsibilities of the management, and within a reasonable time, which may be taken into account within the Community-scale undertaking or Community-scale group of undertakings’.* Several recitals (22, 23 and 37) of the recast Directive also provide elements which are useful in relation to this definition.

In its 2018 evaluation, the Commission concluded that, while the recast Directive improved the information for workers in terms of quality and scope, it had been less effective as regards consultation.

The European Parliament notes in its resolution that: *‘the timely manner of consultation remains an issue where the employees’ representatives opinion may be requested or delivered at a point in time where no meaningful consideration can be taken or when the management decision on the proposed measure has already been taken; [it] regrets that the lack of management obligation to take an opinion into account often results in the input being disregarded or failing to have an actual impact on the proposed measure at hand; [it] reiterates its call on the Commission and the Member States to promote the strengthening of information and consultation rights, and meaningful consultation processes; [it] calls for a revised definition of the term ‘consultation’ in Directive 2009/38/EC, in order to ensure that the EWC’s opinion is taken into account in the decisions of undertakings and that opinion is delivered before the completion of the consultation at the relevant level, before the governing bodies of the undertaking come to a decision, and in such a way as to enable the EWC to obtain a reasoned response to its opinion in accordance with Directive 2002/14/EC’.*

4.3. Confidentiality restrictions

The provisions of the recast Directive regarding confidentiality (including about cases where central management is not obliged to transmit information *‘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’*) originate from the 1994 Directive and were not modified in 2009. They are consistent with the provisions relating to confidentiality in Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community (Article 6). Under the existing rules, protection of confidential information is to be determined by Member States. The recast Directive requires the Member States to provide in their laws for appropriate procedures if conflicts arise in this area. Specifically, Article 11(3) requires administrative and judicial appeal procedures to be available in the case of disputes.

In its proposals for legal amendments to the recast Directive, the European Parliament suggests reducing the scope of the existing confidentiality provisions with a view to preventing possible misuse by management. Its resolution points to *‘the fact that the Member States’ implementation of confidentiality provisions is fragmented due to the lack of a clear definition and therefore calls for a clear definition of confidential information; [the European Parliament] stresses in this context that further efforts by Member State are needed in order to specify and clarify precisely the conditions under which the central management is not required to pass on information which could be harmful; [it] reiterates its call to prevent the abuse of confidentiality rules as a means to limit access to information and effective participation, and calls on the Commission in the context of the revision of Directive 2009/38/EC to require Member States to clearly define in what cases confidentiality is justified in order to restrict the access to information’.*

4.4. The procedure for setting up EWCs

The recast Directive provides that, where the central management refuses to commence negotiations within six months of the request to establish an EWC, or where they are unable to conclude an agreement within three years of the request, an ad hoc EWC based on subsidiary requirements shall be created. Currently, 22 EWCs have been established under such subsidiary requirements.

In its 2018 evaluation, among the multiple and complex factors which may explain why the recast Directive did not lead to an increase in the rate of creation of EWCs, the Commission

mentioned the duration of EWC negotiations, which take on average 2 to 3 years from the establishment of the Special Negotiating Body to the conclusion of the EWC agreement³⁷.

In its resolution, the European Parliament notes that: *'the three-year delay following a request before the subsidiary requirements apply, in the event of a failure to conclude an agreement, is excessive, is often not used effectively and is to the disadvantage of workers'* and proposes stricter deadlines for setting up an EWC (e.g. an 18-months deadline for concluding the EWC agreement).

4.5. Enforcement (redress and sanctions)

The recast Directive (Article 10(1)) provides that the EWC members shall have the means required to apply the rights arising from the Directive, to represent collectively the interests of the employees of the Community-scale undertaking or group of undertakings. Since the Directive does not specify how those means are to be provided to EWCs, various practices have been identified among the Member States.

The recast Directive also sets the obligation for Member States to provide for appropriate measures in the event of failure to comply with its provisions; in particular, Member States shall ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from the Directive to be enforced. These provisions were not amended in the recast Directive (Article 11) with the exception of the insertion of recitals 35 and 36. Recital 36 of the recast Directive in particular 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 the Directive. The recital mirrors the general principle of effective remedy, which is laid down in the first paragraph of Article 47 of the EU Charter of Fundamental Rights, as interpreted by the jurisprudence of the Court of Justice of the European Union. This principle means that Member States have the obligation to provide for effective remedies whenever rights guaranteed under Union law are not respected, having regard to the procedural autonomy of Member States, the principles of proportionality and subsidiarity and EU competence under Article 153 TFEU (i.e. EU competence for *'minimum requirements for gradual implementation'*).

On enforcement, the 2018 Commission evaluation revealed a variety of situations in Member States regarding the capacity of EWCs to access the courts. In half of the Member States, alternative dispute resolution mechanisms are in place. The Commission noted overall weaknesses in the means in place to enable EWCs to enforce their rights³⁸.

The Commission also highlighted significant differences in the type and level of sanctions and remedies available in Member States³⁹. Some countries consider a violation of EWC rights as an administrative or labour law offence, while others consider it a criminal offence.⁴⁰ In most Member States, sanctions usually consist of a fine imposed on the employer, the amount of which is predetermined by law. A comparison between the concrete upper thresholds in national systems shows a significant difference in terms of levels of fines.

In its resolution, the European Parliament underlines concerns about *'the fragmented and insufficient compliance with Directive 2009/38/EC across the Union'* and stresses *'the need to ensure proper, effective and timely compliance, implementation and enforcement of the*

³⁷ [SWD\(2018\) 187 final](#), p. 21.

³⁸ [COM\(2018\) 292 final](#), p. 6-7.

³⁹ [SWD\(2018\) 187 final](#) p. 33-36, 57-63.

⁴⁰ [SWD\(2018\) 187 final](#), p. 35.

Directive for the benefit of workers throughout the Union. It notably ‘regrets that in many Member States penalties for non-compliance are not effective, dissuasive or proportionate as required by Directive 2009/38/EC’.

Furthermore the resolution from the European Parliament highlights *‘the importance of EWCs having access to courts or national competent labour authorities; deplores the fact that EWCs experience obstacles to exercise their rights to information and consultation as defined in Directive 2009/38/EC; [the European Parliament] regrets that in some Member States the courts or authorities competent to provide advice or to hear or determine disputes related to EWCs do not have the expertise in the issues provided for in that Directive; [it] reiterates its call on the Member States to ensure facilitated administrative and legal proceedings for an effective access to justice for EWCs and special negotiating bodies, and for the specification of legal status, including granting legal personality, of EWCs and special negotiating bodies, as part of the Commission’s impact assessment’*.

4.6. Exemptions from the scope of the recast Directive

As explained in Section 2.2 above, the current EWC landscape can be described as a three-tier constellation of EWCs and/or transnational information and consultation bodies existing in eligible companies (i.e. pre-1996 agreements, 1996-2011 adapted/renewed agreements, post-2011 agreements).

The Directives of 1994 and 2009 permanently exempt from their provisions undertakings with agreements already in place at the time of their entry into force, including after their possible subsequent renegotiation. Currently, some 40% of existing EWC agreements still operate under one of the previous legal regimes.

In its resolution, the European Parliament stresses that: *‘more than 25 years after the adoption of the first EWC Directive, many pre-Directive agreements are still in force and have not been adapted to the requirements of Directive 2009/38/EC; [it] believes that it is essential that all EWC agreements are governed by the same rights and obligations, in order to ensure equal treatment of workers, access to the application of high Union standards, and legal certainty’*.

4.7. Other issues

Capacity and resources of EWCs and SNBs

In addition to Article 10(1) of the recast Directive which sets a general obligation to provide EWCs with means to exercise their rights (see under section 4.5), Article 6(2)(f) states that EWC agreements must include information on the financial and material resources allocated to the EWC. Articles 5(4) and 5(6) provide that representatives of recognised trade union organisations may act as experts and advise workers’ representatives during the negotiation of the agreement, and that any expense related to the negotiation shall be borne by the central management.

Annex I on subsidiary requirements states that the operating expenses of the EWCs shall be borne by the central management to enable EWCs to perform their duties in an appropriate manner (e.g. cost of meeting organisation, of interpretation, of accommodation and travelling). Member States may lay down budgetary rules regarding the operation of the EWCs.

Article 10(4) provides that EWCs shall have access to training without loss of wages. According to social partners, the transposition of this provision has not been problematic, nor its implementation controversial⁴¹.

The 2018 Commission evaluation noted that the national rules on financial means (including legal costs of proceedings) are generally limited to the general provisions of Article 10(1) of the recast Directive. The vast majority of Member States have introduced a general regulation concerning the operating costs of EWCs. Additionally, in some Member States there is a legal obligation to provide EWCs with a budget for its operation, whereas in others, although statutory frameworks for EWCs do not provide for an autonomous budget, other solutions have been introduced, such as cooperation with national trade union organisations. Lastly, provisions guaranteeing financial resources have been introduced in some EWC agreements, but this seems to be very rare.

In its resolution, the European Parliament *‘stresses the importance of sufficient [...] resources to assess, evaluate and discuss the information received with the support of available experts’*. Furthermore, it also *‘highly regrets that the financial, material and legal resources needed to enable EWCs to perform their duties in an appropriate manner are not always provided by the central management’*.

Subsidiary requirements

Annex I to the recast Directive sets out subsidiary requirements which govern the functioning of ad hoc European Works Councils (i.e. those for which no EWC agreement was concluded).

The rules provide minimum requirements that have to be transposed in Member States’ legislation – they define procedural rules for consultation, composition of EWC, one annual EWC meeting on progress of the undertaking and its prospects; set requirements for information and consultation if there are exceptional circumstances (e.g. restructuring); set requirements on resources for the EWC.

In its resolution, the European Parliament *‘reiterates its call to strengthen the subsidiary requirements in Directive 2009/38/EC which provide a basis for negotiated agreements; underlines that the right of EWCs to have an annual meeting with the central management is insufficient and should be increased to biannual meetings in order to improve the practical functioning, impact and management of EWCs’*.

Protection of employees’ representatives

The recast Directive contains provisions on the role and protection of employees’ representatives, for example providing them with *‘protection and guarantees similar to those provided for employees’ representatives by the national legislation and/or practice in force in their country of employment’* (Article 10(3)).

In its resolution, the European Parliament stresses *‘the right of workers and employers, or their respective organisations, to engage in collective bargaining and the freedom of assembly, and that there should be no interference from employers which would restrict those rights and that employees’ representatives in EWCs should be protected in the exercise of their rights against any retaliation practices’*.

⁴¹ [SWD\(2018\) 187 final](#), p. 31.

Gender balance in EWCs

The recast Directive, in its Article 6(2)(b), provides that gender balance shall be reflected in the composition of EWCs.

In its resolution, the European Parliament underlines *'the importance of ensuring a gender balanced composition in EWCs and stresses that EWC members and other employees' representative bodies can be useful tools in this context'*.

5. Aim of the consultation

Under Article 154(2) TFEU, before submitting proposals in the social policy field, the Commission must consult management and labour on the possible direction of Union action.

The Commission will examine the views expressed by the social partners and will then decide whether there is a case for EU action. If the Commission decides that there is such a case, it will launch a second-phase consultation of the social partners at EU level. That phase will cover the content of any proposal for action, in accordance with Article 154(3) TFEU.

The questions on which the Commission is consulting the social partners are the following:

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