EUROPEAN
COMMISSION

Brussels, 26.7.2023
C(2023) 5054 final

# CONSULTATION DOCUMENT

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

{SWD(2023) 662 final}

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# 1. Introduction

A legislative own-initiative resolution (2019/2183 (INL)) on a revision of the European Works Councils Directive was adopted by the European Parliament on 2 February 2023. [1] 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 European Works Councils Directive 2009/38/EC (so-called 'recast Directive'). [2]

On 1 March 2023 the Commission welcomed the 2023 Parliament's resolution and, in accordance with the political commitment of President von der Leyen in her Political Guidelines as regards resolutions adopted by the Parliament under Article 225 TFEU, the Commission confirmed its commitment to follow up with a legislative proposal, in full respect of proportionality, subsidiarity and better law-making principles. The Commission further indicated that the Parliament requests would be assessed by the Commission in the light of ensuring legal certainty for workers and employers and of safeguarding and promoting employment and industrial activities in the EU. The Commission noted that this assessment would include data and evidence collection as well as a comprehensive evaluation of problems and drivers in relation to existing EWCs and to the issues highlighted in the Parliament's resolution. Finally, the Commission noted that, before presenting any legislative proposal for Union action in the social policy field, the Commission would consult with EU social partners following Article 154 TFEU.

The Commission has therefore carried out the first-phase consultation of European social partners to seek their views on the need for, and possible direction of, EU action to address the challenges outlined in the Parliament's resolution related to the operation of EWCs. [3] The first phase consultation was launched on 11 April and ended on 25 May 2023.

In the light of its response of 1 March 2023 to the European Parliament's resolution 2019/2183 (INL) and having considered the views expressed by social partners in the first-phase consultation, the Commission has concluded that there is a need for EU action.

The present document therefore launches **the second phase consultation of European social partners, in accordance with Article 154(3) TFEU,** on the possible content of the EU action. It brings together the main results of the first phase consultation (section 2), deepens the analysis of identified challenges (section 3), discusses the need for, and added value of,

[1] European Parliament resolution of 2 February 2023 with recommendations to the Commission on Revision of European Works Councils Directive (2019/2183(INL)). Available here: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0028_EN.html

[2] 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), OJ L 122, 16.5.2009, p. 28–44.

[3] C/2023/2330 final. https://eur-lex.europa.eu/legal-content/ES/ALL/?uri=PI_COM:C(2023)2330

EU action (section 4), sets out potential avenues for such action (section 5), and, finally, it seeks views of the European social partners on the objectives and the possible avenues for EU actions set out in document, as well as on the social partners' willigness to enter into negotiations with a view to concluding an agreement under Article 155 TFEU. The accompanying analytical document complements this consultation document with additional evidence.[4]

In parallel with this consultation, the Commission is continuing to gather evidence on the described challenges, which constitute aspects of the problem that the potential EU initiative could address.

# 2. Consultation of social partners - first phase

Eleven recognised social partners sent replies during the first-phase consultation.

Three trade union organisations contributed to the consultation:

- European Trade Union Confederation (ETUC)
- European Confederation of Independent Trade Unions (CESI)
- European Managers (CEC)

Eight employer organisations sent replies:

- BusinessEurope
- SGI Europe
- SMEunited
- European Chemical Employers Group (ECEG)
- Council of European Employers of the Metal, Engineering and Technology-Based Industries (CEEMET)
- European Cleaning and Facility Services Industry (EFCI)
- Hotels, Restaurants and Cafés in Europe (HOTREC)
- European Confederation of Woodworking Industries (CEI–Bois)

All three responding **trade union organisations** see a **need for a legally binding revision of Directive 2009/38/EC** to address the shortcomings of that Directive. **ETUC** expressly endorses the Parliament's resolution calling for such a revision and stresses that the information and consultation process at transnational level can be regulated only by an EU legal act guaranteeing a level playing field by means of minimum requirements. While **ETUC** welcomes the Commission's intention to take legal action to improve the Directive, it queries that the first stage consultation document does not take up all relevant issues. For instance, according to **ETUC**, the consultation document did not reflect on the need to ensure more efficient coordination between local, national and European levels.

**ETUC** also regrets that the Commission's consultation paper referred to the position of trade union representatives only under other issues, and recalls its view that the role of the trade union representative in Article 5(4) of Directive 2009/38/EC should be reflected in the subsidiary requirements. **ETUC** also submits that a right for trade union experts to participate

[4] SWD(2023)662. The accompanying Staff Working Document provides additional evidence on the problem that EU action should address, identifies impacts of the potential measures under consideration and explores the added value of EU action.

in all SNB, EWC and select committee meetings and to have access to all sites is a necessary condition for supporting and coordinating EWCs' work more effectively. It therefore calls for such rights to be laid down in Directive 2009/38/EC.

Furthermore, **ETUC** queries that the Commission's consultation paper does not address the issue of concretising the definition of 'controlling undertaking' to clarify the inclusion in the scope of the Directive of companies operating through management, franchise systems and 50:50 joint ventures. In addition, **ETUC** states that the consultation paper could have drawn certain links between EWGs and due diligence.

Amongst the responding employer organisations, **SGI Europe**'s members recognise that the Commission identified well the discrepancies in the implementation of the Directive and that it may be justified to revise the Directive in order to provide greater clarity of the rules and to organise regular genuine *ex ante* consultations of workers representatives in EWCs on transnational matters. **SMEunited** recognises the existence of a certain justification to amend the Directive without ignoring the current general good functioning of it.

The other employer organisations argue against a revision of the Directive, as they consider that it is fit for purpose. **BusinessEurope** stresses in particular the need to give the social partners at enterprise level the space to negotiate agreements that suit their circumstances. According to **ECEG**, the heterogeneous landscape of EWCs is an accurate reflection of the original intention of the European co-legislators and should be preserved as a key element of the European system of information and consultation of workers in multinational companies. **CEI-Bois** considers that EWCs' practices need to remain flexible to be applied affectively to different sectors and companies across the Member States and that the Commission should refrain from adding additional regulatory burden on companies that have already opted for the creation of EWCs. **CEEMET** cautions that during a time when companies are facing unforeseen economic consequences and are suffering from a huge loss in terms of trade and international competitiveness, a revision of the EWC Directive would be another setback in the competitiveness of European businesses. If the Directive was nevertheless to be revised, **CEEMET** urges to propose specific measures alleviating companies' administrative and financial burden and adapting to the new reality of online meetings. **EFCI** thinks that a legislative intervention increasing companies' responsibilities would weaken EWCs' prospects to serve as a shared and constructive solution for all parties involved. **HOTREC** and **CEI-Bois** call on the Commission to present a Commission Recommendation and a code of practice / handbook on the matter instead of revising the Directive. **CEI-Bois** argues that a revision would create uncertainty for companies and employees to change already well-functioning EWCs and emphasises that the Commission should refrain from adding additional regulatory burden on those companies who have already opted for the creation of an EWC. Rather, it should aim at simplifying the implementation of the existing rules. **BusinessEurope** also maintains that a code of practice could be a good basis to help social partners at company level to identify ways of improving their own practice. **BusinessEurope** queries that the consultation document did not address important issues for the business community, such as increasing discretion for social partners at the company level and reconsidering the Directive's provisions on EWC meetings to provide more flexibility and save costs by making use of improved digital communications.

Further details of the replies of social partners to the first stage consultation, including their views on the specific challenges, can be found in sections 1.2, 2 and 5 of the accompanying analytical document

# 3. The challenges

Fourteen years after the adoption of the recast Directive, the importance of transnational information and consultation has become even greater. **Social dialogue on transnational matters at company level is important to successfully make the structural changes required by the digital and green transitions and to address the consequences of changed geopolitical perspectives and their economic and social impacts.**

By establishing processes for the transnational information and consultation of workers in Union-scale undertakings, EWCs are able to play an important role in the anticipation and proper management of change and in developing European dialogue at corporate level in a context where the cross-border dimension is becoming more and more important. EWCs can contribute to improving corporate governance in large transnational undertakings, and thus can contribute to their competitiveness, and to reducing the negative consequences of restructuring for both the workers and the territories affected.

According to available data, in 2021, 3676 multinational undertakings or groups fullfilling the thresholds under the recast Directive[5] were operational in the EEA, employing close to 30 million employees.[6] Out of those, around 1000 undertakings have either an EWC agreement or a 'voluntary' pre-Directive agreement (see section 1.6 of the accompanying analytical document).

Against this background, and drawing on the 2018 Commission evaluation and on the 2023 Parliament resolution, the information and consultation of employees at transnational level has not always been effective. This is driven by the existing EU rules on EWCs and, partially, by external factors to the scope and reach of the EWCs, including phenomena intrinsic to industrial relations.

This section presents the challenges related to the EU rules on EWCs, as identified by the 2018 Commission evaluation or the Parliament's 2023 resolution. They are further detailed in the accompanying analytical document (see section 2.2.2). The external factors are also described in section 2.2.1 of that document. Once available, the ongoing evidence gathering will complete the analysis.

## 3.1 Challenges related to the scope of application of minimum rights on the establishment and operation of EWCs

### *3.1.1 Exemptions of undertakings with legacy agreements from the scope of the recast Directive*

[5] Pursuant to Article 2(1)(a) of Directive 2009/38/EC, 'Community-scale undertaking' means any undertaking with at least 1 000 employees within the Member States and at least 150 employees in each of at least two Member States; and 'Community-scale group of undertakings' means a group of undertakings with the following characteristics: at least 1 000 employees within the Member States, at least two group undertakings in different Member States, and at least one group undertaking with at least 150 employees in one Member State and at least one other group undertaking with at least 150 employees in another Member State.

[6] Source: Eurostat, ad-hoc extraction from the EuroGroups Register. For further information, please see: Employment in large-scale multinational enterprise groups - Statistics Explained (europa.eu).

The existing exemptions of undertakings with legacy agreements from the scope of the recast Directive have led to differences in coverage. The information and consultation agreements covering the entire workforce in these exempted **Union-scale undertakings are not required to provide for the same minimum elements and rights as EWC agreements concluded under the recast Directive**[7].

According to the latest available data (ETUI, 2023), slightly over one third of Union-scale undertakings with existing agreements are exempted from the scope of the recast Directive. A large majority of these undertakings has 'voluntary agreements', which were first concluded prior to September 1996 (ie. before the first 1994 Directive entered into application). This exemption continues to apply to these undertakings as long as the agreement remains in force, including when these agreements are renewed or revised by the parties.[8] Aside from undertakings with 'voluntary agreements', a very small number of undertakings remains subject to the exemption under Article 14(1)(b) of the recast Directive, which applies to undertakings with agremeenent concluded or revised during the transition period from June 2009 to June 2011.[9]

The 2018 Commission evaluation did not conclude whether and to what extent exemptions under Article 14 create legal uncertainties or prevent effective information and consultation in these undertakings. A 2016 ETUI study,[10] which examined possible differences between agreements functioning under different legal frameworks, noted that the pre-Directive (voluntary) agreements are less likely to include definitions of transnational matters and clauses on reporting to the national employee representatives. On the other hand, they are more likely to provide for the involvement of trade union representatives. In a 2018 ETUI survey of EWC representatives[11] relatively fewer members of 'voluntary' EWCs than of EWCs subject to the Directive say they have experienced a serious dispute with management over the functioning of their EWC over the previous three years: 10,4% v. 17,8%. According to a recent ETUI publication,[12] this may reflect the longer-standing nature of the relationships within the EWC.

The issue is being further assessed through the ongoing evidence gathering.

*3.1.2 Structurally independent undertakings influencing one another's operation and business decisions*

The Parliament requested to *"explore the merits of including contracts which enable structurally independent undertakings to influence one another's operation and business decisions (such as franchising or management contracts) within the scope of Directive 2009/38/EC"*. The Commission is continuing to gather evidence on the appropriateness of the existing Directive's definition of "controlling undertaking" (Article 3) and on whether the

[7] See internal drivers 1 and 2 described in section 3.2 of the accompanying analytical document
[8] Article 14(2).
[9] This exemption formally applies to 28 undertakings (i.e. approximately 3% of those with existing agreements). However, for 16 of them, their EWC agreement stipulates that Directive 2009/38 should be applied to the agreement after the transposition period; source: ETUI (unpublished analysis, 2023
[10] De Spiegelaare S. (ETUI) (2016) Too little, too late? Evaluating the European Works Councils Recast Directive.
[11] Overview published on the ETUI website: Can anybody hear us? An overview of the 2018 survey of EWC and SEWC representatives, p. 83.
[12] De Spiegelaere S., Jagodzinski R., Waddington J. (ETUI)(2022) European Works Councils: contested and still in the making, p. 229.

level of influence exercised by means of such contracts warrants the application of information and consultation requirements at transnational level.

## 3.2 Challenges related to the setting-up of EWCs

### *3.2.1 Delays in the establishment of the Special Negotiation Body (SNB)*

The current procedures for setting up of EWCs may lead to inefficiencies and ineffectiveness by allowing the establishment of the Special Negotiation Body (SNB) to be delayed due to unclearly defined legal obligations. The recast Directive provides that where the central management refuses to commence negotiations within six months of the request to establish an EWC, an ad-hoc EWC based on subsidiary requirements (Annex I of the recast Directive) shall be created.[13] This provision has not been amended when the original 1994 EWC Directive was recast. Since it refers to a 'refusal' of the management to commence negotiations, this can create legal uncertainty in situations where such refusal is not explicit, but at the same time the negotiations have not been initiated.

The issue is being further assessed through the ongoing evidence gathering.

### *3.2.2 Lengthy period for concluding an EWC agreement*

The procedure for setting up of an EWC can be lengthy. The recast Directive provides that subsidiary requirements shall apply and a default EWC created where the central management and the SNB are unable to conclude an EWC agreement within 3 years of the request.[14]

The Commission 2018 evaluation states that it takes on average 2 to 3 years from the establishment of the Special Negotiating Body to the conclusion of the EWC agreement.[15]

The Commission continues to collect evidence and stakeholders' views on whether the existing 3-year deadline is appropriate and effective. The use of digital technologies could ease operational burden and reduce the length of time needed to conclude negotiations.

### *3.2.3 Risk of insufficient resources for Special Negotiating Bodies during the negotiation phase*

In the process of setting-up an EWC, the Special Negotiating Bodies (SNBs) may lack necessary support and resources. This may cause inefficiencies in the set-up process, as well as leading to EWC agreements which do not reflect sufficiently the objectives of the recast Directive.

The recast Directive provides that expenses related to the negotiation of the EWC agreement and the set up of the EWC shall be borne by the central management.[16] The recast introduced new provisions in order to guarantee that SNBs and EWCs have access to the necessary resources.

[13] Article 7(1).
[14] Article 7(1).
[15] SWD(2018) 187 final, p. 21
[16] Article 5(6).

The 2018 Commission evaluation concluded that Member States have properly transposed the provisions on the role, protection and training of EWC and SNB representatives (Article 10)[17] and that the use of experts in negotiations increased (to nearly 70 %) under the recast rules and was considered helpful in providing advice on the legislation also in sharing expertise encountered by other existing EWCs.[18] The evaluation noted that the national rules on financial means and the legal costs of proceedings generally reflect the provisions of Article 10(1) of the recast Directive. No legislation lays down an explicit requirement for a contingent allocation for potential court fees for SNBs or EWCs in cases of potential litigation between SNBs or EWCs and the management, although these costs could generally be part of the operating expenses of EWCs obligatorily covered by the management.[19]

Article 10(4) provides that EWC and SNB members shall have access to training without loss of wages. The 2018 Commission evaluation found that the transposition of this provision has not been problematic, nor its implementation controversial according to social partners.[20]

The issue of SNB resources is being further assessed through the ongoing evidence gathering.

#### *3.2.4. Gender imbalance in the composition of EWCs*

The recast Directive provides that gender balance shall be reflected in the composition of EWCs.[21] A recent review[22] of national rules transposing the recast Directive has shown that most Member States have transposed the Directive's provision on the composition of EWCs, including the criterion of gender, while eight Member States[23] have not included a reference to gender balanced representation in the EWCs into their laws.

Available evidence suggests that the Directive's requirement to negotiate, where possible, a balanced composition of EWCs with regard to their gender is not effective in achieving an equal representation of men and women. The majority of EWC members participating in a recent survey of EWC representatives were men, and female EWC members are less likely to be found in more senior functions.[24] The scale of the issue is subject to further evidence-gathering.

### 3.3. Challenges related to information and consultation of EWCs

#### *3.3.1 Legal uncertainty regarding the concept of transnational matters*

Procedural and material obstacles to the effective information and consultation of EWCs may be caused by the unclarity of the concept of transnational matters, which determines the scope of activities of EWCs under the Directive.

[17] SWD(2018) 187 final, p. 13.
[18] SWD(2018) 187 final, p. 38.
[19] SWD(2018) 187 final, p. 34.
[20] SWD(2018) 187 final, p. 31.
[21] Article 6(2)(b)).
[22] Mapping of Member States' laws done by European Centre of Expertise in the field of labour law, employment and labour market policies (ECE)(2023), unpublished.
[23] CY, DE, ES, FI, IE, NL, PL, SK.
[24] https://www.etui.org/publications/guides/can-anybody-hear-us

The concept of 'transnational matters' distinguishes the area of competence of an EWC from that of national bodies set out in other directives.[25] To improve the clarity of the legal framework, the recast Directive defined the concept of 'transnational matters' in Article 1(4), to be read together with recitals 15 and 16. This concept had been left undefined in the 1994 Directive.

The 2018 Commission evaluation concluded that the concept of transnationality is better defined in the recast Directive and has been transposed by all Member States, but it often remains difficult for EWC practitioners to interpret in concrete cases.

According to that evaluation, employee representatives reported a lack of clarity about the transnational competence of the EWC as one of the shortcomings of the information and consultation procedure.[26]

Though the probability of including transnationality definitions in EWC agreements increased to around 85 % due to the recast Directive[27] and good practices have been developed, such as the inclusion of a transnationality clause in the agreement going beyond Article 1(4),[28] disputes have continued to arise between employee and management representatives, especially where a company's restructuring occurs in different stages affecting one country after another.

In light of the ongoing evidence-gathering, the Commission will assess whether the Directive's current concept of transnational matters is fit for purpose, or whether the concept causes disputes in practice beyond what can reasonably be expected in a corporate setting, and needs to be clarified to take better account of the different transnational issues, such as restructuring, arising in practice.

### *3.3.2 Insufficiently effective consultation processes*

Improving the effectiveness of consultation is one of the objectives of the recast Directive.[29] EWCs must be informed and consulted on management decisions with transnational effects affecting their employment and working conditions. In practice, the EWC can address a wide range of topics such as the introduction of new technologies, development of a new branch of activity, or mergers, acquisitions and restructuring.

The recast of the Directive aimed to improve effectiveness of the information and consultation of EWCs by introducing a definition of information and amending the definition of consultation in Article 2(f) and (g).

The Commission 2018 reported that a vast majority of agreements concluded under the recast Directive reflect the new definition of consultation and that some agreements contain additional provisions beyond the requirements of the recast Directive. During the evaluation, most social partners considered that the recast Directive improved the legal framework for

[25] In particular: the Framework Information and Consultation Directive 2002/14/EC, Collective Redundancies Directive 98/59/EC, Transfer of Undertakings Directive 2001/23/EC.
[26] SWD(2018) 187 final, p. 27.
[27] De Spiegelaare S. (ETUI) (2016) 'Too little, too late? Evaluating the European Works Councils Recast Directive', p. 62.
[28] Study ASTREE IR Share 2016.
[29] Article 1(2).

the information and consultation process. However, the evaluation recognised that there is evidence that in some cases the consultation remains only a formal step rather than an opportunity to seek and consider a substantive opinion from the EWC.[30]

In the 2018 ETUI survey of EWC representatives,[31] 20 % of respondents said that they received information and/or consultation took place before the decision on the relevant issue was finalised, for 44% information and/or consultation took place after that decision was finalised but before its implementation, and for 19% during the implementation process. Close to 10% of EWC representatives reported that they were informed and/or consulted only after the implementation of the relevant decision.

The recast Directive also provides that "*the functions and the procedure for information and consultation of the EWC and the arrangements for linking information and consultation of the EWC and national employee representation bodies*" shall be defined in the EWC agreement, in accordance with the principle of autonomy of the parties.[32] According to the recast Directive, it is therefore for the parties to define what follow-up (if any) is to be given to the opinion of the EWC. Annex I of the Directive defines subsidiary requirements that apply to EWCs that have not been established on basis of an agreement. The subsidiary requirements include an obligation of the management to provide a response, and the reasons for that response, to any opinion that the EWC might express. While this obligation does not apply to EWCs for which management and employee representatives concluded agreements, the Commission will assess, in light of the ongoing evidence gathering, to which extent a reasoned response to the EWC's opinion is provided in practice.

Finally, in accordance with the current Directive[33], Member States are to ensure, in the absence of different rules in the relevant EWC agreement, that the processes of informing and consulting are conducted both in the EWC and in the national employee representation bodies in cases where decisions likely to lead to substantial changes in work organisation or contractual relations are envisaged. However, the Directive does not prescribe a specific order or timing of the information and consultation of EWCs in relation to national employee representation bodies, and in any event, the process of consultation of EWCs cannot affect information and consultation of national employees' representatives carried out in accordance with Directives 2002/14/EC, 98/59/EC and 2001/23/EC.[34] The Commission is therefore examining whether the current arrangements sufficiently ensure an efficient coordination between the information and consultation of the EWC and national employee representation bodies.

### *3.3.3 Risk of insufficient resources during the operation of EWCs*

The recast Directive provides that costs (material, financial, training, expertise, as well as the time devoted by EWC members to performing their duties) of EWCs' operations are to be covered by the company. It sets a general obligation to provide EWCs with the means to exercise their rights[35] and provides that EWC agreements must include information on the

[30] SWD(2018) 187 final, p. 26-28.
[31] Cf. fn. 22 above
[32] Article 6(3)(c).
[33] Article 12.
[34] Article 12(4).
[35] Article 10(1).

financial and material resources allocated to the EWC.[36] For EWCs operating based on subsidiary requirements, Annex I of the Directive 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. Member States may lay down budgetary rules regarding the operation of the EWCs. Article 10(4) provides that EWC members shall have access to training without loss of wages.

The 2010 report of the Expert Group on implementation of the recast Directive concluded that, owing to the range of different national legal regimes on costs linked to legal actions involving social partners, flexibility is needed to determine who is to bear the costs related to legal actions, national practice or EWC agreement is to be taken into account.[37]

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. In most cases, national laws contain a general provision concerning the operating costs of EWCs. In some Member States there is a legal obligation to provide EWCs with a budget for its operation, whereas in others, although the statutory frameworks for EWCs do not provide for an autonomous budget, other approaches have been introduced, such as cooperation with national trade union organisations.

Member States have properly transposed the provisions on the role, protection and training of EWC and SNB representatives.

The 2018 Commission evaluation found that the transposition of the provision on access to training has not been problematic, nor has its implementation been controversial according to social partners.[38] There is consensus that under the recast Directive costs are not to be borne by the employee representatives themselves.[39]

Almost 70% of EWC agreements contain provisions on the EWC's right to solicit expert advice, with over 80% of these agreements providing for the choice of an independent external expert, around 18% referring to an in-company and/or independent expert, and less than 2% allowing only for support by an in-company expert.[40]

During the Commission 2018 evaluation, employee representatives reported a lack of resources and competences to support information and consultation processes (no possibility to use external expertise, limited timelines for consultation phases) as one of the shortcomings of the information and consultation procedure.[41]

The Commission is in the process of gathering evidence to confirm the existence and scale of these challenges.

[36] Article 6(2)(f).
[37] Implementation of Recast Directive 2009/38/EC on European Works Councils – Report of the Group of Experts – December 2010, p. 39-40
[38] SWD(2018) 187 final, p. 31.
[39] Implementation of Recast Directive 2009/38/EC on European Works Councils – Report of the Group of Experts – December 2010, p. 44.
[40] Source : ETUI's EWC database.
[41] SWD(2018) 187 final, p. 26.

### *3.3.4 Confidentiality imposed by management and non-disclosure of information to EWCs*

An excessive use of confidentiality provisions by the management may hamper effective information and consultation. The provisions of the recast Directive regarding confidentiality and non-disclosure of information[42] originate from the 1994 EWC Directive, and were not modified by the 2009 recast Directive. They are consistent with the provisions relating to confidentiality in other labour law directives, namely Article 6 of Directive 2002/14/EC, Article 8 of Directive 2001/86/EC and Article 10 of Directive 2003/72.

Under the existing rules, protection of confidential information is to be determined by the Member States. Member States are to provide that members of SNBs or EWCs are not authorised to reveal information which has been expressly provided to them in confidence. Moreover, in specific cases and under the conditions and limits laid down by national legislation, the 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'*. The recast Directive also requires the Member States to provide in their laws for appropriate procedures in case conflicts arise in this area.[43]

In the Commission 2018 evaluation, workers' representatives cited extensive use of confidentiality clauses as one of the shortcomings in implementation of information and consultation processes in practice.[44] However, the scale of or reasons for the issue were not identified in the evaluation.

Around 87% of EWC agreements contain provisions on the question of confidentiality.[45]

A recent mapping[46] of Member States' laws in this area has shown that in about half of Member States, undertakings are allowed to require confidentiality or refuse disclosure of information subject to stricter conditions than those existing in the recast Directive[47]. At the same time, no Member State requires that central management obtains a *prior* authorisation from a court or an administrative body before it withholds information under the conditions set in the national law. Dispute resolutions mechanisms are available *following* the management's refusal to disclose information (see internal driver 9 described in section 3.2 of the accompanying analytical document).

Overall, very few legal cases concerning alleged abuse of confidentiality clauses have been reported in Member States. However, nearly 40 % of EWC representatives reported in a survey carried out in 2018 by ETUI that their management often refuses to give information due to confidentiality.[48]

The issue is being further assessed through the ongoing evidence gathering.

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[42] Article 8.
[43] Article 11(3).
[44] SWD(2018) 187 final, p. 27-28.
[45] Source: ETUI's EWC database.
[46] Mapping of Member States' laws done by European Centre of Expertise in the field of labour law, employment and labour market policies (ECE)(2023), unpublished.
[47] Article 8.
[48] In the ETUI 2018 large-scale survey of EWC representatives, over 39% of respondents replied that their management often refuses to give information due to confidentiality (sum of 'agree' + 'absolutely agree'), compared to around 34% who disagreed or 'absolutely disagreed' with that statement.

## 3.4. Challenges in enforcing the Directive

### *3.4.1 Insufficient access to justice and lack of effective remedies*

The EU labour and social *acquis* provides general provisions on enforcement of the minimum rights set by Union law, in line with the procedural autonomy of the Member States.

In addition to the general requirements of the 1994 Directive for the Member States to provide for '*appropriate measures in the event of failure to comply with this Directive*', and more specifically, to ensure that '*adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced*', the recast Directive added two elements on enforcement and sanctions. Firstly, it added a general obligation to provide EWCs with the means required to apply rights arising from the Directive, to represent collectively the interests of the employees of the Union-scale undertaking or group of undertakings.[49] Secondly, it added two new recitals clarifying that Member States must take appropriate measures in the event of failure to comply with the obligations laid down in this Directive and that *'[i]n accordance with the general principles of Community law, administrative or judicial procedures, as well as 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.'*[50]

The 2018 Commission evaluation revealed a variety of situations in Member States regarding the capacity of EWCs to access the courts and noted overall weaknesses in the means in place allowing EWCs to enforce their rights.[51] The evaluation reported that there is no consistent practice across Member States as to whether EWCs have the legal status to bring an action before the national courts and the capacity of EWCs to seek legal redress varies across Europe and often depends on trade unions' capacity to act.[52] Access to court also tends to depend on the type of dispute or offence.

Given the concentration of EWCs in certain Member States (EWCs have been established mainly under the laws of Germany, UK[53], France, Belgium, Sweden, Netherlands, Ireland), Member States with a low number or no EWCs under their laws generally lack experience in enforcement of the recast Directive under their laws.[54]

In several Member States, disputes for which judicial proceedings are available are limited only to certain EWC-related matters, such as confidentiality (Croatia, Malta, Lithuania, Poland). Problems of access to justice are known to arise in two Member States, namely Ireland, against which the Commission launched infringement proceedings in May 2022,[55]

[49] Article 10(1)
[50] Recitals 35 and 36
[51] COM(2018) 292 final, p. 6-7
[52] SWD (2018) 187 final, p. 34-36. See Annex 5 of the Staff Working document, providing overview of the EWCs' capacity to bring actions before the courts in the Member States.
[53] Source: ETUI database. The data relies on information made available to ETUI. Reliable post-Brexit data are not yet available. The UK's withdrawal from the EU had the consequence that the EWCs based in the UK had to be established in another EU Member State. Based on available information, about half of the EWCs (70) formerly based in the UK have moved to Irish law.
[54] The current ETUI collection of national case-law (160 national cases have been noted since 1995 until the first quarter of 2023) contains EWC-related cases decided by the courts in France (50), Germany (32), UK (29), Spain (14), Belgium (10), Netherlands (7), Austria (4), Czechia, Romania and Italy (3), Sweden (2), Slovakia, Luxembourg, Norway (1).
[55] Section 10 of the press notice: https://ec.europa.eu/commission/presscorner/detail/en/inf_22_2548.

and Finland.[56] According to the information available to the Commission, neither in Ireland nor in Finland can an EWC or SNB themselves (or by trade unions on their behalf) bring a legal action before a court.[57]

### *3.4.2 Ineffective penalties / sanctions for non-compliance*

Under the recast Directive, the determination of sanctions falls within the procedural autonomy of Member States. This autonomy is subject to the general requirement of Union law for penalties relating to breaches of EU law to be 'effective, dissuasive and proportionate'.[58] This approach is coherent with other EU labour law directives. Recital 36 of the recast Directive mirrors the general principle of effective remedy, enshrined in the first paragraph of Article 47 of the Charter of Fundamental Rights, as interpreted by the jurisprudence of the Court of Justice of the European Union.[59] Under this principle, 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')*.

The 2018 Commission evaluation highlighted significant differences in the type and level of sanctions and remedies available in Member States.[60] 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 upper thresholds in national systems shows a significant difference in terms of levels of fines, also reflecting the diversity of the legal procedures and practice in the Member States more broadly. Depending on the type of breach, a comparison between the concrete upper thresholds shows that these range from EUR 290 in Lithuania or EUR 850 in Romania to EUR 190,000 in Spain. In case of repeated violation, higher sanctions (usually up to twice the basic threshold) are envisaged in Austria, Bulgaria, Lithuania and Luxembourg. Stricter sanctions may be imposed in case of criminal rather than administrative proceedings (Belgium, Germany, Spain) or by the (tripartite) Labour Dispute Commission in Lithuania. In this case, sanctions may be as high as EUR 800,000 (Belgium). The sanctions also vary according to the degree of violation of the law.

National laws provide for more dissuasive sanctions for violations relating to the establishment of the EWC than violations relating to its operation (including information and consultation obligations).

The Commission 2018 evaluation concluded that in many cases the nature and level of sanctions are not effective, dissuasive and proportionate.[61] However, the national rules may not rely only on sanctions to provide for an effective remedy. Exclusive reliance on certain

[56] A complaint against Finland was submitted to the Commission in November 2022.
[57] Based on national laws, certain breaches can be subject to criminal proceedings in Ireland and Finland, depending on whether the prosecution institutes them, based on the violation of rights in question (to date, no such proceedings have been launched in either Member State).
[58] As recalled in recital 36 of the recast Directive.
[59] In the Impact Assessment for the recast Directive, the Commission considered that "*a further reinforcement or more detailed prescription of sanctions would not be in conformity with the subsidiarity principle, as the responsibility for establishing appropriate, dissuasive and proportionate sanctions lies, as a general principle, with the Member States*" (Impact assessment SEC(2008)2166 page 46).
[60] SWD (2018) 187 final, p. 33-36, 57-63 p. 33-36, 57-63.
[61] SWD (2018) 187 final, p. 36.

administrative sanctions has been criticised by some stakeholders as ineffective in the context of the German legal system. On the other hand, for example, the French courts have granted sometimes cease and desist orders in cases concerning EWCs and obliged companies to comply with the information and consultation rules before implementing a decision.

### 3.5. Consequences of identified challenges

The identified challenges affect primarily workers and large transnational undertakings. The most relevant stakeholders can be identified by reference to the type of undertakings directly concerned and the territories where transnational information and consultation through EWCs is to produce its effects. Indirectly, the effectiveness of the information and consultation of EWCs is also relevant for companies linked to Union-scale undertakings in the value chain, as well as the regional economic systems depending on those undertakings more broadly.

For workers, the above-described challenges are likely to have negative effects on their involvement by means of more limited social dialogue in their company, for instance with respect to the anticipation of company developments and acceptance of change; reduced possibility to provide input on accompanying measures in case of corporate restructuring (e.g. because consultation not launched); reduced effectiveness of social dialogue with the employer on transnational matters (e.g. dialogue not held). Ultimately, these consequences can lead to lower employment levels in the companies operating in the EU, less motivated workforce, and suboptimal working conditions.

For companies, the challenges could in certain cases lead to higher direct costs relating to the creation or administration of EWCs due to inefficient process; potentially higher indirect costs of implementing measures in case of corporate restructuring (due to lack of common understanding and lack of compromise solutions); loss of business due to a risk of delays on decision-making and decision-implementation (including due to possibly unclear obligations and disputes) or risks pertaining to the transfer and handling of sensitive information; fines for non-compliance with information and consultation requirements, linked to legal uncertainty resulting in divergent interpretations of the current rules.

The identified challenges **affect workers and companies across all Member States**. While some of the challenges – such as deficits regarding access to justice or a lack of sufficiently deterrent sanctions – are more relevant in certain national legal systems than in others, their effects nevertheless propagate across borders due to the **inherently transnational nature** of EWCs.

The existence and scope of these consequences are currently subject to ongoing evidence gathering by the Commission.

## 4. Need for EU action

Given the cross-border nature of the undertakings and of the matters at stake, common **minimum requirements at EU level** are necessary to ensure the effective information and consultation of employees on transnational matters.

Challenges which reduce the effectiveness of workers' right to information and consultation at transnational level have to be addressed at EU level, in particular where they relate to the

scope and substance of information and consultation requirements laid down in the existing EU provisions.

In the context of the twin – digital and green – transitions, it is all the more important to harness, through coherent action at EU level, the full potential of EWCs in anticipating and managing change in a socially and environmentally sustainable way. The specific EU added value of a possible initiative on EWCs lies in contributing to upwards convergence in employment and social outcomes between Member States by facilitating social dialogue on transnational matters in multinational companies of a certain size.

The applicable legal basis Article 153(2)(b) TFEU provides that "minimum requirements" can be enacted at EU level in social policy. Accordingly, possible adjustments to the existing EU rules would be without prejudice to Member States' responsibility and discretion to integrate the minimum requirements into their respective legal and industrial relations systems. Moreover, any EU action would preserve the principle of **autonomy of social partners**, which is set out specifically in Directive 2009/38. Therefore, as a basic approach, the framework for EWCs would continue to rely on a combination of minimum EU level requirements and decentralised implementation through agreements between employee representatives and central management, giving the latter sufficient leeway to tailor the information and consultation process on transnational matters to their specific needs and circumstances.

**In line with the proportionality and subsidiarity principles, possible EU action would not exceed what is necessary** to achieve its objectives and would respect the competences of Member States and social partners with respect to social dialogue. By reinforcing the effectiveness of the existing minimum requirements for EWCs, while avoiding unnecessary burdens on business and allowing for flexible solutions, possible EU action would improve the added value of a level playing field for companies and a consistent minimum level of protection of workers.

In the absence of EU action, the challenges identified are likely to persist and gaps between needs, workers' expectations, and the actual operation of EWCs are likely to continue to grow, in a context of increased internationalisation.

# 5. Possible directions of EU action

## 5.1. Proposed objectives

The **overall objective** of the initiative would be to further **improve the effectiveness of the information and consultation of employees at transnational level**, responding to the basic challenges identified in section 3 above. It would confirm the existing principles set out in Directive 2009/38: to improve the right to information and to consultation of employees in Union-scale undertakings and groups (Article 1(1)), and to define and implement the arrangements for informing and consulting employees in such a way as to ensure their effectiveness and to enable the undertaking or group of undertakings to take decisions effectively (Article 1(2)).

In order to reach the general objective stated above, the **specific objectives** of the EU initiative would be as follows:

- To avoid unjustified differences in workers' **information and consultation rights** at transnational level: a possible EU initiative would aim to apply one set of rules to all

Union-scale understakings and their workforce, and to overcome the existing exemptions of certain undertakings from the common minimum requirements.

- To ensure an **efficient and effective setting-up of EWCs**: a possible EU initiative would aim to further streamline the process following the employees' request to establish an EWC as contained in the recast Directive and remove any risks of unnecessary delays or of lack of employee representatives' resources during the negotiations process. The initiative would also strive to achieve a more equal gender composition of EWCs.
- To ensure an **effective process for the information and consultation of EWCs and appropriate resourcing** for their operation: a possible EU initiative would seek to address the challenges hampering the practical effectiveness of EWCs' information and consultation rights, for instance by promoting more genuine exchanges of views; providing more certainty to the concept of transnational matters; ensuring that the confidentiality or non-disclosure clauses are applied by management only in justified situations; protecting the confidentiality of information shared with EWCs; strengthening the existing rules on providing resources for EWCs' operations.
- To promote the **more effective enforcement of the Directive**, including for instance through effective, dissuasive and proportionate sanctions and access to justice for employee representatives, SNBs and EWCs: well-functioning and accessible enforcement mechanisms being key for the practical effectiveness of information and consultation rights, a possible EU initiative would aim to ensure that sanctions/penalties laid down in the applicable national law provide a genuine deterrence of violations of those rights, and that the rightsholders can effectively assert those rights by means of administrative and/or judicial remedies.

To put these objectives into a broader social policy context at EU level, it should be recalled that a possible initiative on EWCs would be directly related to several principles set out in the European Pillar of the Social Rights, most importantly:

- Principle 8 on **social dialogue and involvement of workers**: "[...] 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 undertakings and on collective redundancies. [...]"

- Principle 2 on **Gender Equality**: "Equality of treatment and opportunities between women and men must be ensured and fostered in all areas, including regarding participation in the labour market, terms and conditions of employment and career progression."

## 5.2. Avenues for EU action

This section presents the possible avenues for EU action under consideration. The avenues and related explanations are organised in accordance with the problem areas and policy objectives outlined above. Considerations regarding the choice of the appropriate type(s) of EU policy instrument for the purposes of a possible initiative are set out under the subsequent section 5.3.

**A possible EU initiative would be designed in full respect of national competence, the diversity of national industrial relations, and the autonomy of social partners**. The

possible avenues for EU action have been developed with due regard to any evidence available at this stage of the policy-making process, the relevant resolution by the European Parliament, and the results of the first-stage consultation of social partners. An EU initiative would in any case ensure that the nature and basic purpose of EWCs remain in line with the objectives enshrined in Article 153(1)(e) TFEU on the information and consultation of workers.

*5.2.1. Same minimum information and consultation rights for all EWCs*

Regulatory complexity could be reduced, for instance, through **phasing out exemptions from the scope of the Directive of undertakings with pre-existing agreements**. Such a measure would affect the **stakeholders** to which the rights and obligations under that Directive would apply as a consequence, that is to say, previously exempted **Union-scale undertakings or groups of undertakings** as well as their **employee representatives**. It would have to be accompanied by carefully calibrated transitional provisions to preserve the principle of autonomy of the parties and maintain functioning agreements that are already in conformity with the (revised) minimum requirements of the Directive, while at the same time achieving the desired simplification and clarification of the legal framework. It may be appropriate to differentiate, in particular for the necessary transitional provisions, between the exemption of undertakings with 'voluntary' pre-Directive agreements and that of undertakings with agreements concluded during the transposition period of Directive 2009/38.

Moreover, as mentioned aboved under point 2.1.2, the Commission is gathering evidence on the appropriateness of the existing Directive's definition of "controlling undertaking" and whether it should be adapted to **apply transnational information and consultation rights also to structurally independent undertakings that can influence one another's operation and business decisions by virtue of contractual arrangements**. If the inclusion of undertakings linked only by such arrangements in the scope of Directive 2009/38 proves to be warranted, the existing provisions on the concept of 'controlling undertaking' could be adapted. However, defining the group of stakeholders potentially affected by such a measure is at this stage challenging due to a lack of data on contracts that might be considered to involve dominant influence over the operation and business decisions between structurally independent undertakings.

*5.2.2. Conditions for an efficient and effective negotiation and conclusion of EWC agreements*

Policy measures being considered to improve the process for the setting-up of EWCs relate to the timeframe for the initiation and completion of negotiations as well as the resources available to the special negotiating board.

More specifically, a **clear requirement to establish the special negotiating body and convene the first meeting within a certain timeframe** could be laid down. Moreover, the negotiation period currently set at 3 years could be shortened.

Furthermore, it could be clarified that central management's existing obligation to bear the expenses relating to the negotiations of a new EWC agreement includes also the reasonable – in other words non-frivolous – **costs of legal assistance and legal representation related to special negotiating bodies**.

In addition, certain other aspects of SNBs' entitlement to assistance by experts and training could be clarified or complemented.

With respect to the issue of gender imbalance, the avenues of EU action could include requiring central management and the SNB, when establishing a new EWC or renegotiating an EWC agreement, to negotiate the necessary arrangements in order to ensure that the underrepresented sex comprises a certain proportion of EWC and select committee members.

Regarding the stakeholders targeted by these policy options, the conditions for negotiating EWC agreements under Directive 2009/38 are most immediately relevant for **members of the Special Negotiating Body and central management involved in such negotiations**. The Union-scale undertakings or groups, where these negotiations take place, bear the associated costs.

*5.2.3. Possible avenues to ensure an appropriate resourcing of EWCs and an effective procedural framework for their information and consultation*

Reflections as to how the effectiveness of the information and consultation process at transnational level could be further improved pertain to various contributing factors, such as:

- the issue of legal certainty regarding the **concept of 'transnational matters'**,
- the **requirements for consultation** set out in the definition of that term,
- the appropriate **resourcing of EWCs** to carry out their role effectively, and
- the matter of confidentiality or non-disclosure of sensitive information.

Regarding the **concept of transnational matters**, possible avenues of EU action range from a clarification to a targeted broadening of the concept. The Commission will scrutinise any such measures to ensure the respect of the principle that information and consultation must occur at the relevant level of management and representation, which implies that the procedure for EWCs is to remain limited to genuinely transnational issues. The clarity of the concept is essential to ensure legal certainty for management and employee representatives.

The existing definition of 'consultation' includes some minimum requirements guiding employee representatives and central management when designing the consultation process in their respective agreement. A possible EU initiative could clarify and develop the minimum procedural issues to be covered by EWC agreements, to ensure that an **effective consultation** of employees' representatives is established. Avenues for action considered include an obligation for management to provide a reasoned response to EWCs' opinions on the proposed measures and the timing of the consultation with respect to the decision-making process. Another element being considered is the timing of the EWCs consulation procedure in relation to related national and local consultation processes. Any policy measures would have to give due regard to the respective competences and areas of action of EWCs and of the national employee representation bodies, and be without prejudice to the responsibilities of the management and its ability to take decisions effectively, as well as to the provisions of national law and/or practice on the information and consultation of employees.

For EWCs operating under the **subsidiary requirements** defined by the Directive, certain clarifications regarding the Annex to Directive 2009/38 could be considered with a view to ensuring the effectiveness of the information and consultation of those EWCs. For instance, it might be appropriate to increase the number of regular annual meetings with central

management, or to strengthen the participation rights of concerned EWC members in select committee meetings. Such measures would affect directly the EWCs currently subject to subsidiary requirements but also indirectly EWC agreements being newly negotiated, as the provisions in the Annex often serve as a benchmark for such negotiations.

Concerning the question of **resources available to EWCs** for the purposes of fulfilling their role in the information and consultation of employees, it is primarily a prerogative of employee representatives and central management to negotiate and agree on those resources, within the minimum requirements laid down in the national legislation transposing Directive 2009/38. The Directive requires in Article 6 that the parties determine certain aspects in their agreements, including the financial and material resources to be allocated to the EWCs. However, it may be necessary to clarify in more detail some of the elements to be addressed by the parties in EWC agreements with respect to resourcing, for instance as regards expenses for experts, training, legal advice and litigation.

It could also be expressly clarified that Directive 2009/38/EC leaves social partners full discretion to agree on the practical arrangements of the information and consultation process, including the use of modern IT technologies such as virtual meeting software, with a view to improving efficiency and save costs.

Finally, the Commission is exploring the need to specify further the conditions under which management can impose the **confidentiality** of information shared with EWCs, or withhold information from EWCs. In this respect, also the policy options considered with a view to enabling effective access to court, remedies and sanctions (see heading 5.2.4. below) could help to counter the possibly unjustified imposition of confidentiality or refusal to disclose information, as well as other infringements of information and consultation requirements.

As regards the **confidential information** shared by management with EWCs, the sharing by EWCs of such information with national or local works councils could be facilitated, provided that the latter are themselves subject to appropriate rules protecting confidentiality. Consideration could also be given to the systems used for sharing, accessing and retrieving information to ensure that they are able to uphold confidentiality, including with respect to cybersecurity risks. Moreover, central management could be required to specify the duration of confidentiality restrictions it imposes on information shared with the EWC, and to inform the EWC of the objective criteria for determining whether revealing the relevant information would seriously harm the functioning of the undertaking. Finally, in a more far-reaching intervention, it might also be considered to turn the existing possibility for Member States – so far unused – to make non-disclosure of certain information subject to prior administrative or judicial authorization into an obligation.

*5.2.4. Effective enforcement of the Directive through sanctions and access to justice*

Effective procedural mechanisms enabling the enforcement of information and consultation rights are key to ensure the envisaged dialogue and exchange of views between employee representatives and their employers on transnational matters. The effective enforcement of the minimum rights guaranteed by the Directive depends essentially on the availability of **effective judicial and/or administrative remedies** for the stakeholders entitled to the rights set out in the Directive, and on appropriate sanctions administered by national competent authorities.

As regards access to justice, the possible approaches under consideration include:

- Commission recommendations as to how Member States can comply with their existing obligations arising from general principles of Union law and Directive 2009/38/EC.
- Laying down in the enacting terms of the Directive an obligation for Member States to provide effective and timely access to courts to enforce rights under the Directive.
- Laying down in the enacting terms of the Directive more specific rights (for example, preliminary injunctions) for relevant infringements of the Directive's requirements.

As regards sanctions, the possible approaches under consideration include:

- Commission recommendations as to how Member States can comply with existing obligations arising from the broader Union law and Directive 2009/38/EC.
- Laying down in the enacting terms of the Directive an obligation on Member States to provide for effective, dissuasive and proportionate sanctions.
- Laying down in the enacting terms of the Directive additional specific references (for example, size of undertaking) that could be used to guide the determination of fines.

Importantly, measures strengthening the requirements on access to justice and fines could be accompanied by a provision requiring Member States to inform the Commission about the procedural elements by which their national law ensures that all the rights set out in the Directive can be effectively asserted through administrative or judicial proceedings. Such information would enable the Commission to identify effectively any gaps in Member States' enforcement systems, and address them by means infringement proceedings if necessary.

## 5.3. Relevant EU policy instruments

By definition, some of the policy options under consideration would need to be pursued by means of binding instruments, as they necessarily imply amendments to existing requirements. The possible initiative on a revision of the recast EWC Directive would therefore take the form of an amending Directive. Article 153(2) TFEU provides for the possibility of adopting a directive in the area of the information and consultation of workers pertaining to Article 153(1)(e) TFEU[62], involving minimum requirements for implementation by Member States. This legal basis would enable the EU to adapt the minimum requirements laid down in Directive 2009/38/EC in a binding manner.

For some of the avenues of EU action under consideration, non-binding measures could also be envisaged to contribute to the objectives set out above. Non-binding measures could for instance take the form of a Commission Recommendation addressed to Member States and/or interpretative guidance in the form of a Commission Communication.

As possible EU legislative action can only set minimum standards in the labour and social affairs field and cannot ensure full harmonisation in the internal market, a possible initiative would be combined with the continued efforts of the Commission in monitoring the compliance with and enforcing the applicable requirements.

[62] Article 153(1)(e) TFEU lays down that the Union shall support and complement the activities of the Member States in the field of information and consultation of workers. Activities related to co-determination laid down in Article 153.1(f) are not envisaged in this initiative.

# 6. Next steps

In accordance with Article 154(3) TFEU, the Commission must consult management and labour on the content of the envisaged initiative. This initiative could address the challenges related to the procedure of setting up of European Works Councils in multinational undertakings and their information and consultation. For this second phase of the consultation, the Commission would welcome the views of social partners on the questions set out below.

1. What are your views on the objectives of possible EU action set out in Section 5.1?
2. What are your views on the possible avenues for EU action set out in Section 5.2?
3. What are your views on the possible legal instruments presented in Section 5.3?
4. Are the European social partners willing to enter into negotiations with a view to concluding an agreement under Article 155 TFEU with regard to any of the elements set out in Section 5.1?

The Commission will take into account the results of this consultation for its further work on an EU initiative on Directive 2009/38/EC. In particular, if the social partners decide, as provided for under Article 154(4) TFEU, to negotiate between themselves on these matters, the Commission will suspend its work.