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**COMMISSION STAFF WORKING DOCUMENT**

*accompanying the*

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND THE COUNCIL**

**on the 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 (recasting)**

**IMPACT ASSESSMENT**

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## TABLE OF CONTENTS

<b>Executive summary</b> .....	<b>4</b>
<b>Introduction</b> .....	<b>7</b>
<b>Section I: Procedural issues and consultation of interested parties</b> .....	<b>9</b>
I.1 Institutional background .....	9
I.2 Organisation and timing.....	10
I.3 Consultation and expertise .....	11
<b>Section II: Problem definition</b> .....	<b>14</b>
II. 1 The problems that may require action .....	14
II. 2 Who is affected? .....	23
II. 3 Further likely developments without EU action.....	25
II. 4 The basis for EU action .....	25
<b>Section III: Objectives</b> .....	<b>27</b>
III. 1 The general policy objectives.....	27
III. 2 The specific objectives of the initiative.....	27
III. 3 The consistency of these objectives with other EU policies .....	29
<b>Section IV: Policy options</b> .....	<b>30</b>
IV.1 First option: No new EU action .....	31
IV.2 Second option: Non-regulatory approach — additional promotion of best practices.....	33
IV.3 Third option: Review of existing legislation.....	36
<b>Section V: Analysis of impacts</b> .....	<b>40</b>
V.1 Likely economic, social and environmental impacts of each of the options.....	40
V. 2 Uncertainties and how impacts may be affected by changes in parameters .....	54
V. 3 Impacts in the EU and outside the EU .....	55
V. 4 Potential obstacles to compliance.....	56
<b>Section VI: Comparing the options</b> .....	<b>57</b>
VI. 1 Method for weighing the positive and negative impacts for each option .....	57
VI. 2 Results of the weighing.....	58
VI. 3 Added value of EU action .....	61
VI. 4 Ranking the options .....	61

VI. 5 Preferred option.....	62
<b>Section VII: Monitoring and evaluation .....</b>	<b>63</b>
VII. 1 Core indicators of progress towards meeting the objectives .....	63
VII. 2 Outline for possible monitoring and evaluation arrangements.....	63
<b>Annex 1-</b> European Works Councils — Compliance and figures .....	<b>64</b>
<b>Annex 2-</b> lessons learned on European Works Councils.....	<b>69</b>
<b>Annex 3-</b> Results of the 2008 second-stage consultation of the European social partners on the review of the European Works Councils Directive 94/45/EC .....	<b>72</b>
<b>Annex 4-</b> Detailed weighing of option 3 (review of legislation).....	<b>80</b>

## EXECUTIVE SUMMARY

The present impact assessment concerns the envisaged review of the European Works Councils Directive 94/45/EC and was carried out between October 2007 and June 2008. An inter-service steering group was set up to this end, with the participation of eleven services. An external study involving a survey of 10% of existing European Works Councils (EWCs) was commissioned. The second-stage consultation of the European social partners was launched in February 2008. While the Commission would have welcomed negotiations between the social partners as the solution with potentially the most positive impact, social dialogue talks were in the end not considered practical by the European Trade Union Confederation. The impact assessment has used external data and taken into account the results of academic research as well as the views expressed by social partners and other stakeholders in response to the consultation. It has been revised twice to take into account the opinions of the Impact Assessment Board.

The Directive establishes a right to transnational information and consultation of the workforce on the progress of business and any significant changes envisaged in large-scale (1 000+ employees) transnational companies. In 2007, 2257 companies employing 24 million workers fell within the scope of the Directive. EWCs, whether established before the Directive came into force, and hence excluded from compliance with the Directive, or set up through an agreement between a body representing the employees and the central management, were operating in 816 companies with some 14.5 million employees.

Fourteen years after the adoption of the Directive, there are three problems that may require action:

- The effectiveness of transnational information and consultation rights is not ensured, particularly as existing EWCs are not properly informed and consulted in over half of restructuring cases and, moreover, the take-up rate of EWCs is still relatively low and has not increased in recent years;
- There are legal uncertainties giving rise to shortcomings in the application of the Directive and entailing costs and delays, particularly in cases of mergers and acquisitions and as regards the interplay between the national and European levels of information and consultation,
- The concepts of information and consultation in the 1994 EWC Directive differ from those contained in the most recent Directives in the field of workers' information and consultation, and there are no clear rules for the interplay between these directives.

These problems affect workers, companies and territories to a significant extent, and the potential role of EWCs in anticipating and managing change in a sustainable way remains largely unexploited. The problems would worsen without new EU action in a context of increased internationalisation. Action is also necessary in order to support the completion of the internal market, sustainable competitiveness and social cohesion. Given the transnational nature of EWCs, effective remedies cannot be taken by the Member States. The legal basis for EU action is Article 137(1)(e) of the EC Treaty.

The main goal of this initiative is to put EWCs in a position where they can fully play their role with regard to developments in undertakings, the anticipation and socially responsible management of change, and the fostering of genuine transnational social dialogue. The specific objectives are as follows:

- To ensure the effectiveness of employees' transnational information and consultation rights in existing EWCs;
- To increase the take-up rate (the proportion of established EWCs compared to the number of companies falling within the scope of the Directive);
- To ensure legal certainty in the setting up and operation of EWCs ;
- To ensure better coherence and interplay between Community legislative instruments on information and consultation of employees.

In order to achieve these objectives, three main options have been identified and, for each of them, the main potential impacts have been assessed:

- The first option *No new EU action* does not present any ability to meet the specific objectives.
- The second option *Non-regulatory approach — additional promotion of best practice* would include an increase in communication actions, possibly followed by a proposal for an increase in existing financial support for promotion actions and a recommendation on the setting up and functioning of EWCs. It has the potential to improve the dissemination of best practice and encourage a more efficient functioning of EWCs, without entailing additional direct costs for companies. However, by nature, it can address only to a limited extent the objective of ensuring legal certainty and coherence in Community legislation and therefore needs to be associated with legislative action (third option). Also, one needs to take into account that non-regulatory measures are already in place and, therefore, any new measure could only have an additional impact.
- The third option *Review of existing legislation* would include amendments to the 94/45/EC Directive, mainly aimed at further specifying the concepts of information and consultation, defining what is meant by transnational competence, linking the national and European levels of information and consultation, adapting the subsidiary requirements, which are used as benchmarks for negotiation, establishing a right to training, introducing an adaptation clause in the event of significant change in the structure of companies, and recognising the role of trade unions. For each sub-option, the costs and benefits are discussed and a balance is established between the interests expressed by the different stakeholders. Two sub-options — lowering thresholds for the establishment of EWCs and registering agreements — are discarded as they are less cost-effective. The other sub-options have the best prospects of achieving the specific objectives and show greater cost-effectiveness. These sub-options should be implemented together as none would be sufficient by itself to achieve the desired result. The content of the third option has been adapted in some areas to take into account the results of the consultation and assessment exercise, as well as the interest of the various stakeholders particularly regarding the content of the subsidiary requirements. However, as the capacity of such option to improve

awareness-raising and disseminate best practices is limited, it should therefore be combined with awareness-raising actions from the second option.

Taking into account its impact on established objectives and cost-effectiveness, the preferred option is the third option *Review of existing legislation*, combined with awareness-raising actions from the second option *Non-regulatory approach — additional promotion of best practice*, starting with communication actions. The likely overall impact of this option would be to improve the quality of dialogue within companies and enable all parties to better anticipate and manage change, while imposing some additional direct costs. However, it is difficult to see this entailing significant additional costs for companies already complying with the requirements and aims of the existing Directive. It would also contribute to making the existing Community instruments on information and consultation more coherent (same definitions, interplay between national and transnational rules).

## INTRODUCTION

The present impact assessment concerns the envisaged review of the European Works Councils Directive, which establishes a right to transnational information and consultation of the workforce.

Directive 94/45/EC of 22 September 1994<sup>1</sup> requires Member States to introduce laws obliging large-scale (1 000+ workers) transnational employers, upon the request of 100 employees from two countries or on their own initiative, to establish a body or procedure to inform and consult with workers on the progress of their business and any significant changes envisaged. The composition, competences, and functioning of a European Works Council (EWC) are to be defined by agreement between the ‘special negotiating body’ (SNB) representing the employees and the central management (‘Article 6’ agreements). Subsidiary requirements (‘Annex’) apply only in the absence of such an agreement. Those companies that had in place an ‘agreed’ mechanism for informing and consulting their entire workforce on transnational issues when the Directive took effect in 1996 are excluded from compliance with the provisions of the Directive (‘Article 13’ agreements).

According to the available data, 2257 companies employing 24 million workers fell within the scope of the Directive in 2007. These companies are mostly headquartered in Germany (20%), the USA (16%), the UK (12%) and France (10%) and are active notably in the metal, services and chemicals sectors. In 2007, EWCs were operating in 816 companies with some 14.5 million employees (ETUI-REHS, details in Annex 1). Nearly half of the EWCs were established by a pre-existing agreement (Article 13 of the Directive), i.e. before the Directive entered into force in 1996. Since then, the number of companies with an EWC, mostly large multinationals, has grown slowly over the years.

The information and consultation process in EWCs mainly covers the economic and social topics set out in the Directive and is of particular importance in cases of restructuring. However, some councils discuss topics related, for example, to health and safety, the environment and equal opportunities.

### Main characteristics of European Works Councils (EPEC 2008<sup>2</sup>)

Companies with EWC	Worldwide employees per company: up to 207 000, average 49 000 Employees in EEA countries per company: 1 039 to 182 200, average 29 000 Turnover: €4 million to €202 billion, average €20 billion Transnational restructuring event in the last three years: 74%
Governing agreement	Under Directive (‘Article 6’): 52%, pre-existing (‘Article 13’): 48% Not modified since first signed: 53%, modified: 47%

<sup>1</sup> 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 L254 of 30.09.1994, p.64, as amended by Directive 97/74/EC and 2006/109/EC

<sup>2</sup> Study commissioned by the Commission and carried out by European Policy Evaluation Consortium — EPEC — under the coordination of GHK Consulting (see section I).

Employee members	Number: from 5 to 47, average of 23 Coming from 2 to 24 countries, average of 9 Coming from host country: from 7% to 87%, average of 33% Trend over the last three years: increase 62%, no change 30%, decrease 8%
Company representatives	Involved in meetings: from 2 to 13, average of 5 Top management, general and HR managers
Ordinary meetings	Number/year: one 60%, two 33%, three 1%, four 6% Length: average of 2 days Preparatory meeting between employee delegates: 96%; increasing de-briefings Role: discussing economic and financial situation, strategic orientations, employment trends
Extraordinary meetings	Provision in the agreement: 88% Face-to-face meeting held in the last three years: 59% With all members: 78%, with select committee or part of the members: 22% Role: addressing specific restructuring decisions
Total plenary meetings	Average number: 2.0 /year
Select committee	Present, with face-to-face meeting: 88% Employee members: from 2 to 15, average of 5 Managers in meetings: from 0 to 4, average of 2 Face-to-face meetings: from 0 to 12, average of 3/year Length of meeting: 1 day Role: planning, coordination, regular information exchange, discussion of restructuring decisions
Working groups	Present: 29% Members: from 3 to 20, average 9, mixed employee-management Face-to-face meetings: usually from 1 to 4/year Role: working out specific issues (e.g. health & safety) or specific restructuring events

Fourteen years after the adoption of the Directive, 57% of managers feel that the benefits of having an EWC in their company outweigh the costs in terms of time and resources spent, because it allows them to communicate information regarding company strategies and the rationale for certain decisions to employees, particularly in times of change. On the other side, all employee representatives consider the existence of EWCs to be very beneficial (EPEC 2008). However, expectations regarding the role of EWCs have grown over the years, with the increasing internationalisation of corporate activities, and are far from being fulfilled, particularly as regards the role of EWCs in anticipating and managing change. This has led various stakeholders and EU institutions to ask the Commission to review the legal framework in which EWCs operate.

## SECTION I: PROCEDURAL ISSUES AND CONSULTATION OF INTERESTED PARTIES

### **I.1 Institutional background**

Article 15 of the 94/45/EC Directive provides that ‘not later than 22 September 1999, the Commission shall, in consultation with the Member States and with management and labour at European level, review its operation and, in particular examine whether the workforce size thresholds are appropriate with a view to proposing suitable amendments to the Council, where necessary’.

In 2000, after consultation of the Member States and the social partners, the Commission reported on the application of the Directive (COM(2000) 188) and linked a future review of the Directive with the outcome of the debates in the Council and Parliament on pending legislative proposals providing for workers’ information and consultation, which were adopted in 2001, 2002 and 2003<sup>3</sup>.

In 2001, the Parliament adopted Resolution A5-0282/2001 (Report W. Menrad) on the Commission’s 2000 report, calling on ‘the Commission to submit a proposal for the revision of Directive 94/45/EC at an early date and to include in that proposal ‘precise definitions of information and consultation, an increased number of ordinary meetings, enhanced consultation in cases of restructuring, the role of trade unions, training and facilities, an adaptation clause in the event of changes, conditions for maintaining existing agreements, reduction of the negotiation period, lowering of the threshold to 500 workers, and sanctions in cases of non-compliance.

In 2002, the Commission requested the European Economic and Social Committee to draw up an exploratory opinion on the *Practical application of the European Works Council Directive (94/45/EC) and on any aspects of the Directive that might need to be revised*. In 2003 the EESC adopted an exploratory opinion on the EWC Directive (CESE 1164/2003 Report J. Piette), presenting a joint assessment of the added value of EWCs and the challenges facing their operation as well as identifying a number of open questions for the future.

In 2006, the EESC delivered an own-initiative opinion (CESE 1170/2006 Report E. Iozia) on EWCs, recommending a ‘rapid updating’ in respect of three points of the Directive: the definitions of information and consultation, the role of trade unions, and the maximum number of members in the bodies.

In 2006 and 2007 two Resolutions referring to EWCs were adopted by the Parliament: (i) the Resolution on *Restructuring and employment* (PA\_TA (2006)0088 Report J.L. Cottigny) reiterated its request for the Commission to submit a proposal to amend Directive 94/45/EC and called on the Commission to launch a specific second-stage consultation of the social partners on the revision of the Directive; (ii) the Resolution on *Strengthening European legislation in the field of information and consultation of workers* (PA\_TA (2007)0185 joint motion) called on the Commission to update this legislation in order to ensure a coherent and

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<sup>3</sup> Directive 2001/86/EC supplementing the Statute for a European Company with regard to the involvement of employees, Directive 2002/14/EC establishing a general framework for informing and consulting employees and Directive 2003/72/EC supplementing the Statute for a European Cooperative Society with regard to the involvement of employees.

efficient framework of law, guarantee legal certainty, improve the linking of social dialogue at national and European levels, and present a timetable for the ‘long-awaited revision of the Directive on European works councils’.

## **I.2 Organisation and timing**

During the preparation of this initiative, DG Employment, Social Affairs and Equal Opportunities sought the involvement of all relevant stakeholders. Within the Commission, an inter-service steering group was set up. The following services participated in the group: SG, LS, AGRI, COMM, ECFIN, ENTR, ENV, MARKT, REGIO and TRADE. In addition, COMP, EAC and TREN were invited to take part and were sent all related documents.

The steering group met four times: (i) 29 January 2008, when the main analytical steps, the work to be carried out and the document for the consultation of the social partners were presented; (ii) 13 March 2008, for the presentation of the first findings of the external study, and the outline of the IA study; (iii) 11 April 2008, when the results of the consultation of social partners and of the EPEC external study were presented, and the draft IA report was discussed; and (iv) 8 May 2008, to report back from the Impact Assessment Board meeting and review the impact assessment report.

The impact assessment work was organised as follows:

- 2000-2007: various reports and consultations (see consultation and expertise — I.3.b)
- October 2007: Request for services VT/2007/098 for a preparatory study on an impact assessment of the Europeans Works Councils Directive, under the DG BUDG Framework Services Contract; service contract signed at the end of 2007 with the European Policy Evaluation Consortium (EPEC)
- December 2007: Inter-service consultation on the document intended to launch the second-stage consultation of the social partners on the review of the Directive
- January 2008: First meeting of the inter-service steering group
- 20 February 2008: Adoption of document C(2008) 660 launching the consultation of the social partners in accordance with Article 138(3) of the Treaty on the content of a possible Community initiative to revise the 94/45/EC Directive; 3 April 2008: end of consultation period
- 3 March 2008 and 10 April 2008: Interim report and draft final report of the external preparatory study
- 7 May 2008: Meeting of the Impact Assessment Board, opinion issued on 14 May 2008.
- 22 May 2008: Submission of a revised draft impact assessment report taking into account the Board’s comments and recommendations, notably as regards the objective of increasing the take-up rate, the relationship between the specific objectives and the operational objectives, the implications of the second option for the Community budget, the division of the third option into sub-options sorted by potential to address the specific objectives and analysed separately, the detailed cost implications of the options and sub-options, and the way in which the interests of the stakeholders are balanced.

- 9 June 2008: Opinion of the Impact Assessment Board. Final changes to the impact assessment report taking into account the Board's comments and recommendations, notably as regards the demonstration of superiority of the preferred option, the way it should meet stakeholders' concerns, the reasons for discarding two sub-options and the readability, notably by transferring detailed tables to a new Annex 4.

### **I.3 Consultation and expertise**

Both external expertise and the views of stakeholders have been requested and fully taken into account in the process of reviewing the European Works Councils' Directive since 1999 and in the present impact assessment work.

#### **3.a External expertise**

The functioning of the EWCs is quite well documented.

- Reliable and updated databases with full texts and analyses of agreements establishing EWCs are monitored by organisations linked to the European Trade Union Confederation<sup>4</sup>. Main reference is: Kerkhofs, P., European Works Councils — Facts and Figures 2006, ETUI-REHS Brussels, 2006;
- Academic research and external sources useful for analysing European Works Councils are summarised up to 2003 in the 2006 exploratory opinion of the European Economic and Social Committee<sup>5</sup>. More recent sources bring further insight into the establishment and functioning of European Works Councils and the problems to be addressed<sup>6</sup>.

In addition to these data, the Commission organised another study, carried out by external consultants and providing additional input, enabling the Commission to gain a comprehensive view of the impact of the options envisaged, notably in terms of the operating and administrative costs for business. The consultants<sup>7</sup> carried out a survey of the actors (both management and employee representatives) in a random selection of 80 EWCs (about 10% of EWCs). The study provided data on:

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<sup>4</sup> ETUI-REHS, EWC database — full texts of agreements, Brussels, permanent update, <http://www.worker-participation.eu/>; Social Development Agency, online analysis of agreements at <http://www.sda-asbl.org/>; Stanzani, C. & Bernaert, J. Analysis of the Social Development Agency Infopoint database EWC agreements, SDA, Brussels, 2006.

<sup>5</sup> Opinion on the *Practical application of the European Works Council Directive (94/45/EC) and on any aspects of the Directive that might need to be revised* (CESE 1164/2003).

<sup>6</sup> Brian Bercusson, Kings College London, Background paper to EWC workshop 'information and consultation rights in jurisprudence', Brussels, March 2008; Blockland, A., Accounting for the 'missing' European works councils, University of Utrecht, Utrecht, 2002; Trinczek, R. et al., Technische Universität München, Understanding the European Works Council Deficit in German Multinationals, IIRA European Conference Manchester, 2007; European Foundation for the Improvement of Living and Working Conditions, Analysis of agreements and studies on evolution of European works councils, Dublin, regular update <http://www.eurofound.europa.eu/areas/participationatwork/ewc.htm>; Euroworkscouncils training and consulting net, review of events and literature, quarterly newsletter, Hamburg, online at <http://www.euro-workscouncil.net/en/111.php>; Industrial Relations Services (LexisNexis UK) and Industrial Relations Research Unit (IRRU) at the University of Warwick Business School, *European Works Councils Bulletin*, IRS, London, six times a year, 1996-2006; Social Development Agency, online studies and research on EWCs and related topics at <http://www.sda-asbl.org/>; Waddington, J (University of Manchester), results of a 2005 survey of 473 employee representatives summarised in 'The performance of EWCs 12 years after the Directive', *European Works Councils Bulletin*. No 65, IRS, London, September/October 2006, pp. 7-11.

<sup>7</sup> European Policy Evaluation Consortium (EPEC) comprising GHK Consulting as coordinator, the Tavistock Institute and Technopolis.

- (i) functioning/practices of EWCs, in particular in restructuring situations;
- (ii) the impact of EWCs on equal opportunities, health & safety and the environment;
- (iii) the impact of the legal framework and the promotion of best practices on the operation of EWCs
- (iv) costs/benefits for companies (present situation vs future scenarios)
- (v) administrative costs (present situation vs future scenarios)

The main findings of the study have been incorporated into the present report.

### **3.b Consultation of European social partners**

In 2004, the Commission launched the first stage of consultation of the social partners in accordance with Article 138(2) of the EC Treaty on a review of the Directive, in order to assess the need to fully realise the potential of EWCs and consult the social partners on how best to achieve this result. The employees' organisations were in favour of a rapid revision, especially as regards the definition and fundamental concepts of information and consultation, the role of the trade unions and what happens to agreements in the event of restructuring. The employers' organisations were against such a revision, preferring Community action to focus on implementing the Directive in the new Member States and on the exchange of best practice.

In 2004, the European social partners examined company cases in order to assess the functioning of EWCs. In 2005, they produced a joint document on *Lessons learned on European works councils* (in Annex 2), which highlights the usefulness of EWCs, the benefits of clear procedures, training for members and assistance from experts, and the positive role that trade unions can play. They noted that it is difficult to organise useful information and consultation without delays and uncertainties and that ensuring ownership of an EWC by all workers constitutes a challenge.

In 2005, through its Communication COM(2005) 120 *Restructuring and employment*, the Commission consulted the European social partners simultaneously on the restructuring of undertakings and on the 'best-practice' aspect of European Works Councils, encouraging them to negotiate with a view to reaching agreement on the promotion of best practices. The European social partners reiterated their 2004 positions on the revision of the Directive, and in 2006 decided to include the promotion and evaluation of their joint *Lessons learned on European works councils* in their 2006-2008 work programme.

On 20 February 2008, the Commission adopted document C(2008) 660, launching the second-stage consultation of the European social partners in accordance with Article 138(3) of the EC Treaty on the content of a possible Community initiative to revise the EWC Directive and inviting them to negotiate.

The Commission would have welcomed negotiations between the social partners as the solution with potentially the most positive impact for workers and companies. At the end of the consultation period, the European Trade Union Confederation (ETUC) and the European employer organisations, BusinessEurope, CEEP and UEAPME, declared their willingness to negotiate on the review of the EWC Directive. However, the ETUC concluded after a few

days that it was ‘not ready for negotiations within the framework of the social dialogue’ considering ‘the time constraints and the depth of differences with the employers’ and counted on the Commission to present a revised Directive. The employers’ organisations regretted this decision and asked the Commission not to start the legislative process by itself (see Annex 3). On 30 April 2008, the Commission made a last call to the social partners, inviting them to make their best efforts to negotiate on European Works Councils. A few days later, it was confirmed that there would be no such negotiation.

In addition to the positions regarding the opening of negotiations, the Commission received four responses to its consultation document from the consulted employers’ organisations CEEP, Eurocommerce, European Banking Federation EBF and Hotrec, two from the consulted workers’ organisations ETUC and CEC European Managers, as well as eleven other contributions from companies and employers, trade unions and European Works Councils<sup>8</sup>. Hotrec stressed there was no need to revise the Directive. EBF highlighted the importance of EWCs for the banking sector and the need for flexibility and hoped to make a positive contribution to future negotiations. Eurocommerce made detailed comments on the envisaged proposals, opposing most of them, but supporting the training of representatives and the further definition of competence on transnational issues. All other contributors shared the main orientations of the envisaged proposals and made suggestions for reviewing some of them and adding others. These responses are considered in detail in the analysis of impacts (section V) as well as in Annex 3.

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<sup>8</sup> Employers and companies: Association Française des Entreprises Privées (AFEP), American Chamber of Commerce in the European Union (AmCham EU), Confederación Empresarial Española de la Economía Social (CEPES), Generali; Trade unions: Confederation of the Nordic Bank, Finance and Insurance Unions (NFU), Finansförbundet; European works councils: Total, Handelsbanken, HeidelbergerCement, EADS, joint reply IF, Nordea and Danske Bank.

## SECTION II: PROBLEM DEFINITION

### II. 1 The problems that may require action

By establishing processes for transnational workers' information and consultation in Community-scale companies, EWCs are able to play a major 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. Where active, EWCs contribute to improving corporate governance in large transnational undertakings, a key factor for their competitiveness, and to reducing the negative consequences of unprepared restructuring for both the workers and the territories affected.

All employee representatives consider EWCs to be beneficial (EPEC 2008 survey). Despite the financial and the other non-quantifiable costs of operating an EWC, 57% of the companies with an EWC accept that the benefits of having an EWC outweigh its costs (while 35% consider that costs outweigh benefits and 8% give no clear answer). The reason for this is largely the ability of companies to communicate information regarding company strategy and the rationale for certain decisions to employees, particularly in times of change<sup>9</sup>.

#### Views of involved parties on the benefits associated with the operation of EWCs (EPEC 2008)

	Companies			Employees		
	Agree	Neutral	Disagree	Agree	Neutral	Disagree
Better ability to talk to employee reps from other countries	88%	4%	8%	96%	0%	4%
Better ability to talk directly to group management	79%	10%	10%	91%	4%	4%
Improved understanding of management decisions	82%	10%	8%	76%	15%	10%
Better exchange of information	80%	12%	10%	98%	2%	0%
Improved relations between management and employees	76%	22%	2%	63%	17%	20%
Increased trust	63%	29%	8%	61%	20%	20%
Better corporate culture at European level	62%	28%	11%	73%	22%	5%
More effective decision-making	23%	33%	44%	37%	22%	41%
Enhanced productivity	0%	38%	62%	19%	46%	35%

These benefits, although non-quantifiable, have very concrete impacts upon both workers and companies. For companies, they minimise the risks associated with social unrest in terms of the company's public image as well as costs and delays, which far more than outweighs the operational costs of running an EWC<sup>10</sup>. They reduce resistance to change, support adaptation

<sup>9</sup> Also: three-quarters of the managers it interviewed in 24 major, mainly American, multinationals felt that EWCs brought added value to the company. Results — Organization Resources Counselors Inc., *ORC EWC Survey 2002*, summarised in EIROnline 01/2003.

<sup>10</sup> For example, restructuring costs of €200 million at *Nokia* Bochum (up to €220 000 redundancy benefits per worker) instead of the €80 million initially planned for 2300 workers, with high-profile political interventions

on the part of workers, contribute to the building of an integrated corporate culture following mergers, convey qualitative root-level information about the company's life to top management, and help in attracting and retaining qualified employees.

As regards the operational costs of EWCs, given the considerable flexibility provided by the Directive, they vary between as little as €7 500 and €2.3 million a year, averaging €272 000<sup>11</sup> including management and employee time (EPEC 2008).

#### Operational costs associated with EWCs, in euros (EPEC 2008)

Annual ordinary costs	Total	Fixed	Time	Comments
Annual ordinary meeting	101 200	52 500	48 700	29% employee time, 22% interpretation & translation, 15% travel, 14% management time, 7% accommodation + 13% venue, subsistence, administration Fixed costs from €5 000 to €370 000
Second annual ordinary or extra meeting	101 200	52 500	48 700	Idem
3 select committee meetings	25 700	12 100	13 600	Average €860 per meeting
Training	43 800	43 800		From €1 300 to €150 000
Total ordinary annual costs	271 900	160 900	111 000	From €7 500 to €2.3 million

#### Additional costs in some EWCs, in euros (EPEC 2008)

	Total	Comments
Expert fees	Average 3 500 (non FR) 143 700 (FR)	Travel and subsistence of trade union experts (companies not headquartered in France) Accountancy, environmental and restructuring expertise (companies headquartered in France)
Legal assistance costs	0- 66 000	In half of cases, often linked to restructuring event
Labour disputes	0- 500 000	In 16% of cases; comprising costs of additional meetings and expert fees rather than sanctions
Working groups	Average 25 700	In 29% of cases; average €860 per meeting (4 000 fixed costs and 4 500 time costs); up to €1.5 million (13 different working groups)
Administration of ballot	0-25 400	In some cases
Dissemination costs	0-25 000	E.g. for setting up an internet or intranet platform
Costs of preparatory work	0-238 000	Estimated by some companies to be five days for HR team
Other costs	0-250 000	Small minority: Annual report, field visits, etc.

The non-financial costs are less clear than the benefits and operational costs. Employee representatives see few drawbacks with EWCs, with the exception of a regretted lack of decision-making powers and international solidarity generated in EWCs. From the employers' perspective, they relate mainly to raised employee expectations and the attempt made by some EWC members to use the forum to address what the employer considers to be purely national concerns. Other concerns relate to the perceived lack of preparation and dissemination of

calling for a boycott and risks of market losses, reflected in *Nokia* Q1 08 results, compared with an average fixed cost of €2 500 for an EWC plenary meeting.

<sup>11</sup> In relation to an average €20 billion turnover and 29 000 EEA employees represented.

meeting information by employee representatives, which limits the added value of EWCs (EPEC 2008).

**Views of involved parties regarding non-financial costs associated with the operation of EWCs (EPEC 2008)**

	Companies			Employees		
	Agree	Neutral	Disagree	Agree	Neutral	Disagree
Increased bureaucracy	52%	23%	25%	12%	15%	73%
Raised employee expectations	51%	23%	26%	32%	10%	59%
Slowed down managerial decision-making	23%	19%	57%	5%	7%	88%
Introduced Unnecessary rigidities into employee relations	21%	26%	53%	0%	8%	92%
Led to Calls for transnational collective bargaining	19%	26%	55%	25%	8%	68%
Led to Breaches of confidentiality	15%	10%	75%	2%	17%	80%
Led to Coordinated industrial actions	10%	21%	69%	15%	20%	66%

The studies analysing the operation of EWCs (monographs or exchange of practices<sup>12</sup>) point to a dynamic process of development in successive stages, from initial reservations regarding the establishment of EWCs to wide recognition of the positive role they play in improving social dialogue and information/consultation in companies.

However, the effectiveness of transnational information and consultation rights is not guaranteed and social unrest and higher economic and social costs arise due the subsequent absence of anticipation and negotiated accompanying measures in a significant proportion of the companies where EWCs are established.

Legal uncertainties and practical problems encountered in the application of Directive 94/45/EC, notably as regards the interplay between national and transnational levels of dialogue and the consequences of mergers and acquisitions, are costly and may hinder or slow down the decision-making process in companies.

In addition, the current legislation governing the information and consultation of workers comprises a series of directives containing different definitions of information and consultation and lacking clear rules for their interplay.

**Drivers of the problems as identified**

The problems are not primarily caused by shortcomings in enforcement. The Commission has verified that the Directive is properly implemented by Member States and has carried out in-depth studies to that end. The results indicate that all Member States have adopted national implementing measures that are close to the text of the Directive and put in place sanctions in the event of infringements. As a general rule, the competent national authorities, including courts, have taken measures to ensure the correct and effective application of the national transposing rules and to ensure that companies meet their obligations.

Three main drivers of the problems may be identified:

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<sup>12</sup> References to the studies in I.3(a).

- Evolution of the economic context: growing internationalisation of corporate activities, increasing number and importance of transnational restructuring operations;
- Lack of awareness and competence on the part of the company actors: difficulties for smaller and less internationalised companies and their worker representatives, insufficient knowledge of EWC procedures and competences, insufficient coordination between EWCs and national information and consultation bodies, need for information on best practices<sup>13</sup>;
- Evolution of the legal framework at EU level, leading to the lack of clear and coherent legal rules: no interplay between different instruments, different sets of definitions, different outcomes of court cases.

### **1.a Lack of effectiveness of transnational information and consultation rights**

The lack of effectiveness of transnational information and consultation rights has two main aspects:

- EWCs are not sufficiently informed and consulted, in particular as half of the EWCs are not consulted before a restructuring decision is made public,
- Workers are not in a position to exert their rights, as no EWC has been established in their company although it falls within the scope of the Directive.

### **Shortcomings in the information and consultation of European Works Councils**

Fourteen years after the adoption of Directive 94/45/EC, all European stakeholders emphasise the added value of European Works Councils and the decisive role they play in the anticipation and responsible management of change. However, their potential remains all too often unexploited, particularly in the event of transnational restructuring.

A large-scale survey<sup>14</sup> in 2005 found that, where applicable, the EWC was consulted on restructuring:

- before the decision was finalised in 20% of cases,
- before the decision was made public in 30% of cases,
- after the decision was made public in 20% of cases,
- not at all in 30% of cases.

The 2008 EPEC survey<sup>15</sup> furthermore indicates that only 20% of company and employee representatives consider that the EWC consultation process did make a difference to the implementation of restructuring plans. The overwhelming view expressed by both employee

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<sup>13</sup> Despite considerable efforts to promote best practices, as described in section IV.1, only half of EWC actors are aware of best practice publications on EWCs, mostly issued by social partners at national level. Three years after their adoption, only every sixth/seventh company is familiar with the *Lessons learned on European works councils* published by the European social partners (EPEC 2008).

<sup>14</sup> Professor J. Waddington (University of Manchester) analysed the answers of 473 employee representatives in EWCs, see ref. in I.3.

<sup>15</sup> The results of the 2008 EPEC survey on 45 restructuring events are similar to those of Waddington 2005. The EWC was informed and consulted on restructuring at the same time as the board in 38% of cases, before the press release (in most cases just hours before) in 18% of cases, at the same time as the press in 20% of cases, after the press in 20% of the cases, not at all in 4% of cases.

and management representatives is that EWCs are largely information and not consultation bodies — let alone negotiation bodies.

Although 74% of companies with EWCs have experienced one or more transnational restructuring operations over the last three years, only 59% have held face-to-face extraordinary meetings to discuss them during this period (EPEC 2008). In addition to the regular exchange of information, the provisions of the agreements establishing EWCs regarding the right to request extraordinary meetings and the way to exercise this right are important in this regard<sup>16</sup>.

This limitation of the role of EWCs is evident in the public debate that occurs following every high-profile restructuring case (examples of *Nokia Bochum*, *Volkswagen Forest*, *Delphi Cadiz*) regarding the shortcomings in the information and consultation of workers.

### **Lack of transnational information and consultation in companies without European Works Councils**

The Directive provides for negotiations on setting up an EWC to start at the initiative of management or upon the request of at least 100 workers or their representatives in at least two Member States. Until such an initiative or request is forthcoming, there is no obligation to set up an EWC. 1441 companies falling within the scope of the Directive (64% of the companies concerned), employing 9.5 million employees (38% of the employees concerned), had not established an EWC in 2007 (ETUI-REHS database).

Smaller companies and companies with a more limited international character often do not have an EWC.

- There is a direct relationship between the degree of internationalisation of a company and the likelihood of an EWC being established. The percentage of companies falling within the scope of the Directive and having an EWC is 65% where internationalisation is highest (operations in 15 or more countries), decreases with the number of countries of operation and falls to less than 20% where internationalisation is lowest (operations in 2 countries).
- Size is a major factor in the variation in EWCs. 61.3% of relevant companies with a workforce larger than 10 000 employees have EWCs, 43.3% of companies with 5000 to 10 000 employees and only 23% of companies with fewer than 5000 employees.

The findings of academic research<sup>17</sup> regarding the absence of EWCs, particularly in the Netherlands and in Germany (with a low take-up rate of 27%), give two reasons for this, both related to the perception that EWCs have limited added value:

- The main reason is the lack of action on the part of home-country worker representatives on account of a lack of interest. This may be due to a lack of knowledge regarding EWCs, the fact that the representative bodies at headquarters are already informed and consulted by central management, or the view that EWCs may interfere with the powers of national

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<sup>16</sup> See III-2a.

<sup>17</sup> Bercusson 2008, based on case investigation, Blockland 2002 and Trinczek et al. 2007, based on systematic investigation of companies headquartered in the Netherlands and Germany and 9+6 in-depth case studies — references in I.3.

bodies, jeopardise home-country cooperative industrial relations or are too weak to bring any benefit. Without the support of the home-country representatives or European trade unions, it is difficult for worker representatives in subsidiaries to take the necessary steps towards the creation of an EWC.

- A second reason is the negative reaction of management to the establishment of EWCs because of a hostile attitude to participation, the desire to avoid costs or a concern that worker solidarity across company subsidiaries may increase as a result. However, this is not the main reason, as management often prefers to adopt a ‘strategic waiting position’. Still, such a reaction can be problematic, as documented in the three preliminary rulings brought before the European Court of Justice (see below) and the cases investigated.

According to research findings, set-up and operating costs do not seem to rank high among the factors influencing the take-up of EWCs. Furthermore, no statistically significant relation can be observed between cost levels and take-up rates on a cross-country basis<sup>18</sup>.

#### Set-up costs of EWCs, in euros (EPEC 2008)

Average set-up costs	Total	Fixed	Time	Comments
Before 1996 (‘Article 13’ agreements)	39 750	17 650	22 100	4 meetings 5 employee reps and 3 managers
Since 1996 (‘Article 6’ agreements)	124 360	72 120	52 240	4 meetings 12 employee reps and 7 managers

The absence of EWCs is therefore partly due to a lack of need<sup>19</sup>, e.g. in companies with a very decentralised structure or a low level of internationalisation, and partly a problem, where workers are prevented from exercising their rights by the hostile reaction on the part of company management or consider that the costs and barriers that they need to overcome in order to establish an EWC are not worthwhile, given the low perceived benefits .

### 1.b Legal uncertainties in the application of the Directive

A number of different court cases have highlighted important legal uncertainties, which have influenced the correct implementation of the Directive on EWCs and have entailed significant costs and delays in decision-making processes.

#### Information needed to open negotiations for setting up a new European Works Council

As regards the setting up of new EWCs, three cases brought before the European Court of Justice for a preliminary ruling<sup>20</sup> have established the principle that the managements of all undertakings located in Member States are required to supply any information required to open negotiations on setting up an EWC, in particular information on the structure or organisation of the group, to employee representatives, irrespective of where the headquarters

<sup>18</sup> Although based on small samples, comparing operating costs (fixed plenary meeting costs incl. experts) with take-up rate by country of headquarters does not show any relationship (France €155 000/38%, Germany €78 000/27%, Italy €72 000/38%, Finland €40 000/44%, UK €36 000/41% and non-European countries €24000/34% (EPEC 2008 — all countries with cost calculation for a sample greater than 4 — half of average annual costs for experts included (ETUI-REHS 2006 for take up rate).

<sup>19</sup> There is insufficient evidence to allow a quantitative assessment of the ‘lack of need’ for EWCs.

<sup>20</sup> C-62/99 *Bofrost*, C-440/00 *Kühne & Nagel*, C-349/01 *ADS Anker GmbH*.

of the group is located or of the central management's opinion as to the relevance of the Directive. This principle would need to be made clear.

### **Composition of the special negotiating body (SNB)**

The Directive (Article 5(2)) states that the special negotiating body (SNB) must have a minimum of three members and a maximum number of members equal to the number of Member States involved. It must have an employees' representative for each Member State in which the group has at least one establishment or undertaking, plus supplementary members in proportion to the number of employees. The original maximum number of 17 members, corresponding to the number of Member States when the Directive was adopted, was increased to 18 by Directive 97/74/EC (to include the United Kingdom) and in 2007 to the 'number of Member States', i.e. 30<sup>21</sup>, by Directive 2006/109/EC. Nonetheless, the application of this provision creates a practical difficulty, as it may lead to imbalances in the representation on the SNB, and a group employing workers in most Member States may not be able to comply with the maximum number stipulated or other provisions.

### **Validity, renewal and continuity of the agreements establishing EWCs**

Many 'Article 13' and some 'Article 6' agreements do not make any practicable provision for amendment and/or termination, thus reducing the ability to adapt the structure and functioning of EWCs as and where necessary, in particular in cases of merger, acquisition or changes in make-up. Indeed, just less than half of companies have renewed their agreement since it was first signed, the most frequent reason being reorganisation or changes in the company (EPEC 2008). National court cases also highlight legal uncertainties as to:

- the conditions for a pre-existing agreement under Article 13 of the Directive to be valid<sup>22</sup>,
- the possibility to amend 'Article 13' agreements in cases of changes in make-up<sup>23</sup>,
- the continued existence of the EWC when the make-up of the company changes<sup>24</sup>.

### **Capacity of the EWC to represent workers and act in legal proceedings**

The European Courts do recognise the competence of European Works Councils to represent employees, which is not restricted to the internal matters of the company in question<sup>25</sup>. However, national court cases highlight legal uncertainties as to the right of employee representatives to pursue complaints, in particular where the EWC includes management representatives<sup>26</sup>.

### **Concepts of information and consultation (see also definitions below)**

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<sup>21</sup> European Economic Area: Norway, Iceland and Liechtenstein included.

<sup>22</sup> *CEMEX* decision (Central Arbitration Committee, 11.7.2006); *Beiersdorf* (TGI Melun, 13.10.2006), *Marks & Spencer* (TGI Paris, 9.4.2001) and *Bouygues* (Cour d'Appel de Paris, 12.10.2006, Cour de Cassation, 5.3.2008).

<sup>23</sup> *CEMEX* decision (Central Arbitration Committee, 11.7.2006).

<sup>24</sup> *Global one/Equant* (Amsterdam District Court, 23.1.2003, Amsterdam Court of Appeal, 1.4.2004).

<sup>25</sup> For example, the Court of First Instance of the European Communities accepted the intervention of the *Legrand* European Works Council in the dispute over competition law connected with the merger with *Schneider* (CFI, T-77/02, *Schneider Electric*, Judgment of 6.6.2002).

<sup>26</sup> Preliminary hearing on the issue of court costs, *P&O* (Employment Appeal Tribunal, 28.6.2002); *Panasonic* (Appeal against Bobigny TGI, 4.5.1998).

The lack of a definition of information, the present definition of consultation in the Directive as well as the existence of other directives on information and consultation lead to different interpretations affecting the clarity of the legislative framework:

- National courts have had to deal with the lack of a definition of information in the Directive<sup>27</sup>;
- The more precise definition of consultation laid down in the other directives, particularly the Framework Directive 2002/14/EC, has already been used in some national court cases, but not in others<sup>28</sup>;
- The general EC law principle of ‘useful effect’ information and consultation processes, although it does not appear explicitly in the Directive, was highlighted in *Renault Vilvoorde*<sup>29</sup> and a series of further national court cases;
- As to timing, the principle set out in the Charter of Fundamental Rights of the European Union<sup>30</sup> that workers or their representatives must be guaranteed information and consultation ‘in good time’ is not clearly expressed in the present Directive and is therefore unclear to companies and workers;
- The *Gaz de France* rulings<sup>31</sup> state that the Board of Directors cannot take decision on a merger before consultation of the EWC and that national and European consultative bodies may have different information needs. The legal proceedings have delayed the planned merger between *Gaz de France* and *Suez* for over a year.

#### **Interplay between national and transnational levels (see also below interplay between directives)**

The interplay between national and transnational levels of information and consultation is a key legal uncertainty in the operation of EWCs in the event of restructuring:

- In a series of cases<sup>32</sup>, it has been ruled that national bodies cannot be consulted to useful effect in the event of transnational restructuring before consultation at transnational level is achieved. However, this route has not been followed in the more recent *Alcatel Lucent* case<sup>33</sup>.
- Given the absence of interplay between directives, information and consultation at European level may impede full compliance with procedures at local or national level under national measures implementing other directives, and may prove difficult to carry out in practice<sup>34</sup>.

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<sup>27</sup> *Alcatel Lucent* (TGI Paris, 27.4.2007).

<sup>28</sup> *Beiersdorf* (TGI Melun, 13.10.2006); *Alcatel Lucent* (TGI Paris, 27.4.2007).

<sup>29</sup> Cour d’Appel Versailles, 7.5.1997.

<sup>30</sup> Article 27.

<sup>31</sup> TGI Paris 21.11.2006, Cour d’Appel Paris 21.11.2006, Cour de Cassation 16.1.2008.

<sup>32</sup> *Alstom* (TGI Nanterre, 1.8.2003), *Altadis* (TGI Paris, 10.10.2003) and *Beiersdorf* (TGI Melun, 13.10.2006).

<sup>33</sup> TGI Paris, 27.4.2007.

<sup>34</sup> For example *Marks & Spencer* (TGI Paris, 9.4.2001).

The American Chamber of Commerce to the European Union (AmCham EU) underlines that companies of American parentage have often encountered complexities and confusion in linking the different levels of information and consultation due to a lack of specificity in the Directive and conflicting court cases at national level and stresses that it is critical that the process at European level should not interfere with but be complementary to the process at national level.

## **1.c Shortcomings in the coherence and interplay between Community legal instruments**

### **Definition of information and consultation**

The EWC Directive does not include a definition of information. The Framework Directive 2002/14/EC defines information as the ‘transmission by the employer to the employees’ representatives of data in order to enable them to acquaint themselves with the subject matter and to examine it’ and states that ‘information shall be given at such time, in such fashion and with such content as are appropriate to enable, in particular, employees’ representatives to conduct an adequate study and, where necessary, prepare for consultation’. Equivalent provisions are also found in the directives on the involvement of employees in a European Company (‘SE’) and European Cooperative Society (‘SCE’) — Directives 2001/86/EC and 2003/72/EC.

The EWC Directive defines consultation as ‘the exchange of views and establishment of dialogue between employees’ representatives and central management or any more appropriate level of management’. A more precise and concise definition is used in Directives 2001/86/EC and 2003/72/EC, i.e. ‘the establishment of dialogue and exchange of views between the body representative of the employees and/or the employees’ representatives and the competent organ [of the Company], at a time, in a manner and with a content which allow the employees’ representatives, on the basis of information provided, to express an opinion on measures envisaged by the competent organ which may be taken into account in the decision-making process within [the Company]’. This definition corresponds to the provisions of the Framework Directive 2002/14/EC, which also states that consultation must take place at the relevant level of management and representation, depending on the subject under discussion, in such a way as to enable employees’ representatives to meet the employer and obtain a response, and the reasons for that response, to any opinion they might formulate, and with a view to reaching an agreement on decisions within the scope of the employer’s powers which may bring about substantial changes in work organisation or in contractual relations.

More recent directives also include the concepts of appropriate time, means and content and stipulate that ‘information and consultation procedures shall be established and implemented (...) so as to ensure their effectiveness’.

### **Transnational competence of the EWC**

The concept of ‘transnational’, which distinguishes the area of competence of an EWC from that of national bodies, as set out in other directives<sup>35</sup>, is not defined in Directive 94/45/EC. It is a regular issue for dispute between employee and management representatives, especially where a company’s restructuring occurs in different stages affecting one country after another.

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<sup>35</sup> In particular: the Framework Information And Consultation Directive 2002/14/EC, Collective Redundancies Directive 98/59/EC, Transfer Of Undertakings Directive 2001/23/EC.

In the *British Airways* case<sup>36</sup>, for example, the Court ruled that the EWC had to be consulted over a decision to outsource activities in Austria, as the decision was taken in another Member State.

### **Interplay between directives governing national and transnational levels of information and consultation**

The interplay between national and transnational levels of information and consultation, which is not addressed by any of the directives concerned, is a major challenge as well as a key legal uncertainty in the operation of EWCs (see above).

According to the 2008 EPEC survey, three quarters of companies have undergone a restructuring that has affected more than one European country in the last three years. In a very high proportion of cases (60% — to be further researched), company and employee representatives had differing views on which level had been consulted first for the *same* past restructuring event. In those cases where there were no divergent views:

- in 51% of cases, information and consultation took place at national or local level first,
- in 16% of cases, EWCs were consulted first,
- In 33% of cases, all levels were consulted at the same time.

Companies needed to seek legal advice as to which level had to be informed and consulted first in 27% of cases, and, in as many as 39%, companies had already been challenged by employees on this issue.

## **II. 2 Who is affected?**

The problems identified affect workers, companies and territories.

### **2.a Workers**

The EWC Directive establishes a transnational information and consultation right for workers. The Charter of Fundamental Rights of the European Union also defines the information and consultation of workers as a fundamental right.<sup>37</sup> 24 million workers are directly affected.

The existence of EWCs is considered overall to be very beneficial by employee representatives, for whom the benefits of having an EWC always outweigh the costs (2008 EPEC survey). Actual benefits of EWCs include: information on company strategies and the direction of companies, provision of information in a structured format, ability to put questions directly to company management, enhanced communication between employees and company management, and sharing of knowledge, lessons learned and good practice with employee representatives from other countries.

The problems identified affect workers in particular, mainly as regards:

- the anticipation of company developments, the acceptance of change, and the capacity for mobility and adaptability,
- the existence of negotiated accompanying measures in cases of corporate restructuring,

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<sup>36</sup> Brussels Labour Court, 6.12.2006.

<sup>37</sup> Article 27 of the Charter of Fundamental Rights of the European Union.

- the development and quality of dialogue with the employer and of cross-border relationships.

## 2.b Companies

The problems encountered with EWCs affect the 2257 large transnational companies falling within the scope of the Directive in that they do not gain any benefit from these bodies or suffer from shortcomings in their operation.

The problems affect companies and the capacity of EWCs to bring added value to them in particular as regards:

- The control of social risks, the avoidance of social unrest and the image of the company (example of *Nokia Bochum*<sup>38</sup>),
- The cost, design and use of appropriate accompanying measures in the case of corporate restructuring (example of *Volkswagen Forest*<sup>39</sup>),
- Legal certainty, the related protection and balance issues and the timing of decision-making processes (example: the delay of over a year in the *Suez-GDF* merger),
- The anticipation, acceptance and proper management of change, the related social and economic costs, the impact on the company's competitiveness over time,
- The mobility and adaptability of workers and the related quality of the company's human resources,
- The quality of social dialogue,
- Cost-efficiency in the operation of the EWCs.

## 2.c Territories, related companies and workers

The EWC Directive and the problems encountered in its application affect not only the workers and the companies coming directly under its scope, but also the territories in which these companies operate. Proper anticipation and management of change and negotiated accompanying measures in cases of corporate restructuring are of major importance for the local economic and social situation, especially where the territory specialises in a particular sector, is facing high unemployment or where the multinational is locally the only or the major employer. The recent vigorous reactions to planned plant closures without proper anticipation through information and consultation of the EWCs (such as with the automotive plants in Azambuja-Portugal and Cadiz-Spain in 2006-2007) illustrate this impact.

Similarly, subcontractors and networks of small and medium-sized businesses, with which the directly affected companies coexist and which they support, are affected along with their workers. For example, subcontractors and their workers at the Forest-Belgium automotive plant in 2006-2007 were heavily hit by the sudden major restructuring announced without notice and the subsequent strike, without being in a position to take the necessary measures to face its consequences.

The identified shortcomings in the anticipation of change and the capacity to build partnerships for managing it in a sustainable way therefore have a significant impact on competitiveness and social cohesion in Europe.

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<sup>38</sup> See consequences above.

<sup>39</sup> Immediate and long strike, redundancy benefits up to 144 000 euros per worker, absence of appropriate measures for subcontractors, risk of market losses.

## **II. 3 Further likely developments without EU action**

Without EU action, the number of companies with an EWC would probably continue to increase but slowly and the take-up rate would remain around 35%<sup>40</sup>.

The increasing transnational character of economic activities, companies and restructuring processes is intensifying the need for proper information and consultation at transnational level. Despite the internal learning process within the EWCs, the gap between needs, workers' expectations and the actual operation of EWCs will probably continue to grow, as observed over the last ten years.

The legal uncertainties and shortcomings in the interplay between levels and Community instruments governing the information and consultation of workers are likely to persist without new EU action.

## **II. 4 The basis for EU action**

### **4.a Legal basis**

Directive 94/45/EC establishing EWCs was adopted in 1994 on the basis of Article 2(2) of the Social Policy Agreement, annexed to Protocol 14 on Social Policy, in turn annexed to the Treaty establishing the European Community (as amended by the Maastricht Treaty). This corresponds to the present Article 137(1)(e) of the Treaty (as amended by the Treaty of Nice), which states that 'with a view to achieving the objectives of Article 136<sup>41</sup>, the Community shall support and complement the activities of the Member States in the following fields (...) the information and consultation of workers'<sup>42</sup>.

The right of workers to information and consultation within undertakings is now also a fundamental right. According to Article 27 of the Charter of Fundamental Rights of the European Union: 'Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.' Any Community legislation in this field therefore has to be interpreted in the light of these principles and must respect them.

### **4.b Necessity of EU action**

The problems described affect workers, companies and territories in a significant way: the potential role of the EWCs in anticipating and managing change in a sustainable way is at

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<sup>40</sup> As it has done since 2000 — See Chart 'Evolution in the take-up rate' in Annex 1.

<sup>41</sup> 'The promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.'

<sup>42</sup> Article 137(2) of the Treaty states furthermore that, in these fields, 'the Council: (a) may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States; (b) may adopt, (...) by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.'

present largely unexploited and the legal uncertainties entail costs and problems for companies and workers alike. The problems would worsen without new EU action in a context of increased internationalisation. The action is therefore necessary, particularly with a view to sustainable competitiveness, social cohesion, acceptance of globalisation and developments in international trade, completion of the internal market and better regulation.

The EU action potentially has a major added value, as

- the problems to be tackled are of a transnational nature,
- the set of rules for transnational workers' information and consultation is already provided by a directive,
- individual action by Member States cannot sufficiently respond to the problems identified.

## SECTION III: OBJECTIVES

### **III. 1 The general policy objectives**

European Works Councils must be in a position to play their full part with regard to developments in undertakings, in anticipating and accompanying change and fostering genuine transnational social dialogue in a rapidly changing economic and social context. Sustainable competitiveness for large transnational undertakings and also for the network of small and medium-sized businesses with which they co-exist, and which they support, depends on this, as does social and territorial cohesion.

### **III. 2 The specific objectives of the initiative**

EU action should have the following specific objectives in order to address the different aspects of the problems identified.

#### **2.a To ensure the effectiveness of employees' transnational information and consultation rights in existing EWCs**

The existing EWCs are not properly informed and consulted in over half of restructuring cases and transnational information and consultation rights are not exercised where no EWC has been established.

Looking at the key factors for the effectiveness of EWCs, the 2003 EESC opinion singles out the timing, content and frequency of transnational information and meetings, in particular:

- the quality of regular information and actual access to such information for interested parties,
- early intervention by EWCs in the decision-making process,
- broad acceptance of the transnational nature of issues addressed by EWCs

The EESC furthermore considers that the establishment of real, fruitful dialogue within an EWC is linked to its mode of operation, as this determines how information is circulated and its capacity to coordinate and respond, in particular:

- the select committee, the frequency of meetings, the contacts with national representative bodies, the possibility of contacts with the company's various sites, and translation facilities;
- the skills and competence of EWC members and the resources at their disposal.

A 2005 survey on restructuring in German-based companies in the metal sector highlights the importance of the EWC's right to request an extraordinary meeting to ensure proper consultation<sup>43</sup>.

The operational objectives that need to be achieved in order to ensure the effectiveness of employees' information and consultation rights include:

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<sup>43</sup> As reported in EWC Bulletin, No 66, November 2006.

- To develop the concepts of information, consultation and transnational competence;
- To enlarge the scope of matters that can be dealt with in an EWC;
- To enhance references as to the operation of EWCs, including the number of ordinary meetings, the rules regarding extraordinary meetings, the role of the select committee;
- To increase the circulation of information within the EWC, notably by having representatives report back to their members;
- To develop the capacity of EWC through training and support;
- To clarify sanctions in cases of non-compliance;
- To raise awareness of best practices for information and consultation at transnational level.

## **2.b To increase the take-up rate**

The previously quoted studies identify the key factors that might boost the number of EWCs by increasing the likelihood of requests from employees and acceptance by employers: the awareness of the added value of EWCs, the availability of information on the company to workers and the capacity to take the initial steps, particularly for employee representatives within subsidiaries.

The operational objectives that need to be achieved in order to increase the take-up rate include:

- To raise awareness of the role of information and consultation at transnational level;
- To make information on companies falling under the scope of the Directive and existing agreements establishing EWCs easily available;
- To clarify the responsibility of local management in making the information needed to request the opening of negotiations on the establishment of a new EWC available to employee representatives, especially in subsidiaries, as the lack of action on the part of home-country workers’ representatives is a key to low take-up rate<sup>44</sup> (see also legal certainty below);
- To shorten the negotiating period;
- To recognise the role of trade unions.

## **2.c To ensure legal certainty in the setting up and operation of European Works Councils**

Legal uncertainties in the application of the Directive, particularly as regards the consequences of mergers and acquisitions and the interplay between national and European levels of information and consultation, need to be addressed. With regard to the operational objectives, the following need to be clarified:

- the information to provide to enable a new EWC to be set up,
- the composition of the Special Negotiating Body,
- the concepts of information, consultation and transnational competence,
- how to adapt agreements to changes in make-up,
- how to link the national and transnational levels of information and consultation,
- the legal standing of EWCs.

## **2.d To ensure better coherence and interplay between directives in the field of information and consultation**

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<sup>44</sup> See section II 1.a p.18-19.

The concepts of information and consultation in the EWC Directive differ from those contained in most recent directives in the field of workers' information and consultation, and there are no clear rules for the interplay between these directives. In order to ensure better coherence between different EU instruments, the initiative should define:

- coherent concepts of information and consultation across the applicable directives,
- the transnational competence of EWCs and the way in which the national and transnational levels of information and consultation are linked,
- lower thresholds for the establishment of EWCs, in line with the thresholds in other directives.

### **III. 3 The consistency of these objectives with other EU policies**

The proposed action is consistent with the Commission's policies on social dialogue, corporate restructuring and industrial policy. It is also in line with the better regulation agenda by improving the quality of EU legislation, which needs to be adapted to the increasing number and scale of transnational restructuring operations.

The present initiative is part of the renewed Lisbon strategy, the aim of which is to create more growth and jobs in Europe, and in particular to create more better-quality jobs in a more dynamic and competitive Europe. It supports the development of a flexicurity approach in that it aims to enhance the capacity of companies and workers to adapt to changing patterns while ensuring security through better anticipation and management of change. It forms part of the initiatives related to the completion of the internal market included in the Commission's 2007 Communication *A single market for 21<sup>st</sup> century Europe*<sup>45</sup>.

It may in addition constitute a first step towards the simplification of information and consultation directives as planned in the Social Agenda 2005-2010.

The initiative would contribute to the effectiveness of the right of workers to information and consultation at the appropriate levels and in good time as required by Article 27 of the Charter of Fundamental Rights of the European Union.

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<sup>45</sup> COM(2007) 725 of 20.11.2007, chapter 2.4.

## SECTION IV: POLICY OPTIONS

### Presentation of the possible options

Three possible options for meeting the objectives and tackling the problems are identified:

- First option: No new EU action,
- Second option: Non-regulatory approach with additional promotion of best practices,
- Third option: Review of existing legislation.

It has to be underlined that the second and third options do not exclude each other and can be used in combination. The main measures envisaged in each of the options are set out in the following table and discussed in more detail further below.

Specific objectives — aspects and operational objectives	Main measures		
	Option 1  No new EU action	Option 2  Non-regulatory approach	Option 3  Review of existing legislation
<b>Objective: to ensure the effectiveness of employees' transnational information and consultation rights</b>			
Remedy shortcomings in the information & consultation of EWCs	<ul style="list-style-type: none"> <li>- Monitoring implementation</li> <li>- Financing projects with exchange of best practices</li> <li>- Participation in conferences</li> <li>- Consultation of social partners and support for social dialogue</li> </ul>	<ul style="list-style-type: none"> <li>- Increased communication</li> <li>- Additional financing of projects</li> <li>- Guidance on information and consultation processes</li> <li>- Guidance on EWCs' mode of operation</li> <li>- Guidance on training for and reporting back by employee representatives</li> </ul>	<ul style="list-style-type: none"> <li>- Information for social partners when opening negotiations</li> <li>- Definition of information and transnational competence</li> <li>- Further developed concept of consultation</li> <li>- Adapted content of subsidiary requirements used as benchmark for negotiations</li> <li>- Right to training</li> <li>- Duty for representatives to report back</li> <li>- Clarification of sanctions</li> </ul>
<b>Objective: to increase the take-up rate</b>			
Increase the take-up rate	<ul style="list-style-type: none"> <li>- Financing of database</li> <li>- Financing of projects to set up new EWCs</li> <li>- Support for social dialogue</li> </ul>	<ul style="list-style-type: none"> <li>- Increased communication</li> <li>- Additional financing of projects</li> <li>- Guidance on setting up new EWCs</li> </ul>	<ul style="list-style-type: none"> <li>- Clarification of information to provide to workers</li> <li>- Shorten negotiation period</li> <li>- Recognition of the role of trade unions</li> <li>- Registering agreements</li> </ul>

<b>Objective: To ensure legal certainty in the setting up and operation of EWCs</b>			
Address legal uncertainties as to - Information for opening negotiations	- Monitoring implementation of the Directive - Financing of information and observation points - Consultation of social partners	- Guidance on information to provide to workers	- Incorporation of ECJ rulings in information to provide to workers
- Composition of Special Negotiating Body (SNB)			- Reviewed composition of SNB
- Validity, adaptation and continuity of agreements		- Guidance on adaptation to change	- Adaptation clause - Transitional provisions - Registering agreements
- Capacity of EWC to act			- Capacity of EWC
- Concepts of information and consultation			- Definition of information and transnational competence - Precise concept of consultation
- Interplay between national and transnational levels		- Guidance on information and consultation processes	- Rules on linking levels - Adaptation of requirements for national-level information and consultation
<b>Objective: To ensure coherence and interplay between directives in the field of information and consultation</b>			
Ensure coherence as to - Definition of information and consultation			- Align definitions of information and consultation
- Transnational competence of EWC			- Define transnational competence
- Interplay between instruments regulating national and transnational levels		- Guidance on information and consultation processes	- Rules on linking levels with adaptation provisions for national legislation
- Coherent scope			- Lower thresholds

#### **IV.1 First option: No new EU action**

Important actions have already been taken at European level in order to address the problems identified. *No new EU action* would imply

- the continuation of the Commission's monitoring of the implementation of the EWC Directive, as well as the
- continuation of EU awareness-raising activities and promotion of best practices for EWCs.

##### **1- Monitoring of the Directive's implementation**

The Commission has carried out extensive monitoring of the Directive's implementation since 1994. In particular, it has:

- organised a working party with national experts and provided clarifications and guidance where necessary to support Member States in their implementation of the Directive,

- commissioned a series of studies on the practical implementation of the Directive in the Member States, in 1999 (EU-15) and 2007 (EU-10),
- adopted a report on the application of the Directive (COM(2000)188), in 2000,
- verified continuously the proper implementation and notification of national implementing measures and launched infringement procedures where necessary<sup>46</sup>,
- followed on an ongoing basis cases relating to the EWC Directive brought before the national courts.

This has resulted in an in-depth knowledge of the Directive and its implementation and ensured the good quality of national implementing measures. Good cooperation between national experts on this issue has also been developed.

## 2- Awareness-raising and promotion of best practices

Since 1994, the European Union has provided substantial support for awareness-raising and the promotion of best practices.

The main financial instrument is budget heading 04.03.03.03 (previously B3-4003 and B3-4004) *Information, consultation and participation of representatives of undertakings*, which provides support for measures fostering the development of employee involvement in undertakings by promoting in particular Directive 94/45/EC, to which a sum of €8.1 million has been allocated for 2008. This budget heading, like the others relating to social dialogue, is 'autonomous' and depends entirely on decisions taken by the European Parliament and the Council on an annual basis.

The appropriation for budget heading 04.03.03.03 covers in particular the funding of measures to strengthen transnational cooperation between workers' and employers' representatives in respect of information, consultation and participation. It also provides for the setting up of information and observation points to inform and help the social partners and undertakings to set up European Works Councils and to foster relations with EU institutions in this respect. The appropriation may also be used to fund short training courses for negotiators and representatives working with transnational information, consultation and participation bodies as well as for representatives of social partners in the candidate countries. It may also be used to finance measures to enable the social partners to exercise their rights and their duties as regards information, consultation and participation in Community-scale undertakings, especially within European Work Councils, and to strengthen their cooperation at Community level.

Priority objectives include

- For transnational cooperation projects: promoting the setting up of new European Works Councils, improving transnational information and consultation processes, and enabling

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<sup>46</sup> Now all closed as the Member States have taken the necessary measures, except reasoned opinions sent in February 2008 to three Member States for not having notified the measures implementing Directive 2006/109/EC amending Directive 94/45/EC as to the maximum number of members of the Special Negotiating body by reason of the accession of Bulgaria and Romania to the European Union.

the social partners to exercise their rights and their duties as regards information, consultation and participation, especially within European Work Councils;

- For information and observation points: providing support for the preparation, launching and monitoring of transnational cooperation projects for the information, consultation and participation of workers; monitoring, analysing and assessing the experience with the establishment of transnational representative bodies at enterprise level and the extent to which the objectives for information, consultation and participation have been effectively met within such bodies.

The allocations and commitments for budget heading 04.03.03.03 over the past ten years have been as follows:

Year	Allocated in call	Appropriations	Commitments
1998		6 000 000	5 982 000
1999		5 000 000	4 964 000
2000		4 000 000	3 977 000
2001		4 000 000	3 809 000
2002		6 000 000	5 840 000
2003		6 350 000	5 819 000
2004		7 288 000	7 253 500
2005	7 600 000	7 600 000	6 898 000
2006	7 700 000	6 200 000	5 250 000
2007	8 000 000	6 540 000	5 427 000
2008	8 100 000	8 100 000	

Since 2005, the Commission has organised annual meetings with project promoters, at an average cost of €20 000, to improve the monitoring and promotion of the projects financed.

The Commission further promotes awareness and best practices, principally in support of social partners, through:

- consultations of social partners and follow-up activities, including joint consultation on best practices in corporate restructuring and EWCs (2005), the restructuring forum and the partnership for change in the automotive sector;
- information on texts produced by the social partners on best practices in the field of EWCs,
- support for social dialogue, at cross industry and sectoral levels,
- participation in numerous seminars and conferences.

#### **IV.2 Second option: Non-regulatory approach — additional promotion of best practices**

All contributions and studies point to the need to promote the exchange of experiences and best practices to help speed up the learning process of EWCs. The promotion of best practices has therefore been an important element in the EU's action to date (see previous chapter).

However, there is still work to do, as the 2008 EPEC survey shows that only half of EWC actors are aware of best practice publications on EWCs, mostly issued by social partners at national level. Three years after their publication, only every sixth/seventh company is familiar with the European *Lessons learned*.

As substantial support for awareness-raising and the promotion of best practices has already been provided, this option would focus on additional measures aimed at ensuring the effectiveness of employees' transnational information and consultation rights and solving problems identified in the practical application of the Directive.

This option includes:

- An increase in communication actions, possibly followed by a proposal for an increase in the sum allocated to the budget heading 04.03.03.03. *Information, consultation and participation of representatives of undertakings*,
- A recommendation for the setting up and functioning of EWCs.

### **1- Increase in communication actions and proposed increase to budget heading 04.03.03.03**

The projects financed under budget line 04.03.03.03 on the information and consultation of workers are recognised as a major instrument in awareness-raising and the promotion of best practices. The objectives of the budget heading (see previous chapter) are shared by stakeholders. In 2007, a total of 92 applications were submitted for co-financing, and a total of 46 projects were approved by the Authorising Officer by Sub-delegation on the basis of the proposals of the Evaluation Committee. Most of the projects approved were submitted by European and national trade union organisations.

Increasing the resources allocated to this budget heading (€8.1 million for 2008) would allow more projects to be developed, in particular to facilitate the setting up of new EWCs, to exchange experiences and promote best practices for the functioning of EWCs, and to foster relations between stakeholders in order to develop the role of EWCs. As the average grant for a cooperation project was €18 000 in 2007, an increase of €1.2 million would, for example, support 10 new annual projects<sup>47</sup>. However, the number of applications in response to the call for proposals under this budget heading decreased slightly from 102 in 2006 to 92 in 2007. Furthermore, the insufficient number and quality of the projects submitted in 2006 and 2007 have led to a decrease in commitments as compared to the levels reached in 2004 and 2005. A proposal to increase the allocated sum can only be made on the grounds that the current amount is insufficient to support all the good-quality projects submitted.

Any action in this direction therefore needs to be preceded by increased communication measures to improve public awareness of this budget heading, particularly through better access (web portal, links on specialised websites) and increased cooperation with stakeholders. The public debates surrounding the 2008 initiative to reinforce EWCs will also probably contribute to enhancing the interest in EWCs and encouraging the submission of more projects, as was already evident in 2004-2005.

Increased communication actions by both the Commission and other stakeholders would also be useful to increase awareness and promote best practices. In particular, the results of activities

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<sup>47</sup> The increase in the number of projects will have mainly an impact upon the EU budget as the projects are supported up to the level of 80% of eligible costs.

by the social partners in this field at cross industry and sectoral levels as well as the results of projects financed by the budget heading should be made easily available<sup>48</sup>.

A communication plan would be established in cooperation with social partners and key actors in the field of EWCs and could be financed under the PROGRESS programme, which may be proposed to dedicate a sum of €1 million to that aim.

## **2- Recommendation on the setting up and functioning of European Works Councils**

On the basis of the actions already undertaken to support the social partners, the Commission may also produce a recommendation on the setting up and functioning of European Works Councils to provide the guidance needed by employers and employee representatives. The following aspects would be covered.

Guidance on the setting up of new EWCs:

- Mechanisms to inform workers of their right to ask for the opening of negotiations in order to set up an EWC,
- Possible role of experts,
- Arrangements for the conduct of negotiations.

Guidance on the EWC's mode of operation:

- Ways to ensure the effective continuity of the EWC and the respective roles of ordinary and extraordinary meetings,
- Role of a select committee,
- Arrangements for communication and translation facilities, use of expertise.

Guidance on information and consultation processes:

- Specific role of transnational information and consultation,
- Interest of including the subjects of mobility, health and safety at work, work organisation and environment in the information and consultation of the EWC,
- Justification and use of confidential information,
- Ways to achieve effective consultation following an anticipatory approach,
- Arrangements for the linking of information and consultation levels.

Guidance on the adaptation of EWCs to change:

- Possible procedures for adaptation and termination to be included in new agreements,
- Methods for negotiating new arrangements following a merger or acquisition,
- Arrangements for transition mechanisms during periods of important change.

Guidance on the role and competence of employee representatives:

- Methods enabling employee representatives to report back to the workers they represent and to gather their views,
- Effective training.

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<sup>48</sup> The Europa website where the budget heading is publicised should in particular make the main results of projects centrally accessible in order to enhance their multiplier effect.

Benchmark on the way to deal with new topics such as health and safety at work, work organisation, environment or mobility within the remit of an EWC should have a particularly positive impact on the promotion of best practices in this area.

### **IV.3 Third option: Review of existing legislation**

The Commission launched a second-stage consultation on possible changes to Directive 94/45/EC in February 2008. The responses to the consultation are described in section I and detailed in Annex 3.

None of the envisaged changes in this consultation are intended to modify the general framework of the Directive, which provides for considerable flexibility at company level. This flexibility is necessary in order to adapt EWCs to the wide variety of company structures and activities and systems for management-employee relations. In particular, the fact that the Directive mainly provides a framework for negotiating at company level all the practical arrangements for the composition and operation of EWCs, with hardly any minimum requirements, is considered as a key positive factor to be maintained. Moreover, the priority given to negotiated solutions at company level is reinforced.

An additional principle for the review is to support good practice and to limit the necessary adaptation to new rules to those companies or EWCs for which improvements are deemed necessary to achieve the objectives. Well-functioning EWCs should not have to change and should only benefit from the review of the Directive.

An underlying principle of the review is to contribute to improving the rights of workers to transnational information and consultation through means that are efficient and balanced, taking into account the interests of all stakeholders, in particular companies.

The changes envisaged include the following sub-options 1 to 10, in order of increasing potential to meet one or more of the specific objectives. Most of these sub-options were presented in the second-phase consultation. A few, however, were suggested by the stakeholders themselves in reply to the consultation.

#### **Sub option 1 — Lower thresholds for setting up EWCs**

Directive 94/45/EC applies to companies and groups with at least 1 000 employees in the European Economic Area, including 150 in two different Member States. The European Parliament in its 2001 Resolution as well as the European Trade Union Confederation have asked for the threshold to be lowered to 500 and 100 employees, respectively. However, this change was not included in the document for the consultation of the European social partners for the reasons described in section V.

#### **Sub option 2 — Registration of agreements**

At present, the monitoring of European Works Councils relies on data collected by the trade unions. A compulsory mechanism for the registration of agreements would be useful for legal certainty, and has been requested by the ETUC. However, this change was not included in the document for the consultation of the European social partners for the reasons described in section V.

### **Sub option 3- Technical update of the composition of the special negotiating body (SNB) and clarification of the organisation of negotiations**

In order to address the legal uncertainties (described in II.1(b)) and clarify the process for the negotiation of agreements establishing EWCs, the proposal here is to:

- simplify the composition of the SNB by deleting the reference to the maximum number of members and introducing a system that allows the SNB to better reflect the number of employees in the company: 1 member per 10% of the workforce (as in the SE Directive, 2001/86/EC),
- provide that Member States with only a small number of employees could be represented through a group arrangement or indirectly,
- clarify the right of employees' representatives to meet without the employer being present, with the linguistic facilities necessary for communication, before and, where appropriate, after negotiation meetings with the employer,
- clarify the right of SNB experts to be present at such negotiations.

### **Sub option 4- Clarifications regarding the protection of rights**

In order to improve compliance by making clear to company actors the existence of sanctions in the event of violations of information and consultation rights and to address legal uncertainties regarding the capacity of the European Works Council to represent workers' interests and regarding the information needed to open negotiations to set up a new EWC, and therefore contribute to increasing the take-up rate, the proposal here is to:

- reiterate the general principle according to which, in the event of infringements, sanctions must be effective, proportionate and dissuasive,
- explicitly recognise the European Works Council as the representative of the undertaking's or group's employees,
- incorporate the principles established in preliminary rulings by the Court of Justice that all information essential for the opening of negotiations to set up a European Works Council must be supplied to the employees' representatives by the managements concerned in the Member States.

### **Sub option 5- Recognition of the role of trade union organisations**

It is proposed in the consultation document to recognise explicitly the special role that trade union organisations can play in negotiations and support for European Works Councils, by including trade union organisations among the experts who may be present at meetings of the special negotiating body, at the request of the latter.

### **Sub option 6- Adaptation of the subsidiary requirements (applying in the absence of an agreement)**

Subsidiary requirements are fall-back provisions that regulate the operation of EWCs in the absence of an agreement. They are not minimum requirements all EWCs would have to

observe, and have been applied up to now only in a very limited number of cases (about five), as nearly all European Works Councils are established on the basis of an agreement. However, they play an important benchmark role, especially in the negotiation or renegotiation of agreements. The following changes could be envisaged. In the absence of agreed mechanisms within the undertaking or group, these would establish:

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

#### **Sub option 7- Introduction of an adaptation clause and transitional provisions**

The introduction of an adaptation clause to stipulate what should happen to representative bodies in the event of a significant change in make-up (merger, acquisition, take-over) could help improve legal certainty and be useful for the introduction of transitional arrangements to ensure the information and consultation of workers at key moments in reorganisations and for modifying operational frameworks that have become obsolete. A proposal could therefore provide that:

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

The proposal could include provisions to ensure that European Works Councils which operate to the satisfaction of the parties involved are able to continue. The review of legislation should not entail compulsory changes or obligations to renegotiate existing agreements in such cases.

#### **Sub option 8- Clarification of the role and reinforcement of the competence of employees' representatives**

In order to allow employees' representatives to perform their duties to the full, a proposal could introduce:

- an obligation for European Works Council representatives to report to the workers they are representing;
- a right to training for employees' representatives.

#### **Sub option 9- Alignment of the concepts of information and consultation across the directives**

Adding a definition of 'information' and clarifying the definition of 'consultation' would clarify the concepts and better link them with the definitions in more recent directives concerning the information and consultation of workers (2002/14/EC, 2001/86/EC, 2003/72/EC). This would also significantly enhance the role and effectiveness of EWCs.

#### **Sub option 10- Definition of the transnational competence of European Works Councils, linking information and consultation levels and organising the interplay between the directives**

In line with the principle of dialogue at the relevant level of management and representation depending on the subject under discussion, the transnational competence of European Works Councils could be defined as relating to issues going beyond the powers of decision-making bodies in a single Member State.

Information and consultation levels could be linked through a procedure taking into account the diversity of situations and allowing both an anticipatory approach and consideration of the employees potentially most affected by decisions, based on:

- the principle of dialogue 'at the relevant level of management and representation, depending on the subject under discussion',
- priority for negotiations on procedures for linking the information and consultation of the European Works Council and national representative bodies, in compliance with the above principle;
- the introduction of provisions applicable in the absence of an agreement on the subject under discussion in exceptional circumstances, which would allow the information and consultation of the European Works Council and the national bodies to start in parallel.

## SECTION V: ANALYSIS OF IMPACTS<sup>49</sup>

### V.1 Likely economic, social and environmental impacts of each of the options

#### 1.a Impact of first option: No new EU action

##### Overall analysis and position of stakeholders

As described in section II, the identified problems most likely cannot be tackled without EU intervention. Therefore, the *No new action* option would meet none of the three specific objectives.

The most likely impact of the *No new EU action* option is an increasing gap between the lack of proper anticipation and the need to respond to changes in economic reality through company restructuring. This has considerable economic and social consequences for companies, workers and regions, as this may undermine the conditions for sustainable competitiveness, social cohesion and a well-functioning internal market.

*No new EU action* was the option preferred by the European employers' organisations until 2007, and is still preferred by the employers' organisation HOTREC.

The absence of new EU action would result in only slow improvement of existing EWCs in the face of increased needs and expectations, very few new EWCs being set up, and continued legal uncertainties.

##### Benefits (data EPEC 2008)

- Cost savings: companies without an EWC would continue to save average yearly total direct costs of €72 000<sup>50</sup>, including management and employee time, and those with EWCs would not have to bear more expenses.
- Unquantifiable benefits: companies without EWCs would not have to bear the costs of increased internal bureaucracy, removing employees and management from their 'normal' work, risks of breaches in confidentiality, and interplay with stock-market regulations.
- Flexibility and absence of interference: companies with an EWC would continue to enjoy considerable flexibility in organising their EWC with no external interference in the learning process of the EWC.

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<sup>49</sup> This report is not intended to be an ex-ante evaluation under the Financial Regulation.

<sup>50</sup> Annual EWC expenditure ranges from €7 500 to €2.3 million. Companies without EWCs are on average smaller and less internationalised than companies with existing EWCs, so new EWCs would therefore entail less travel and lower translation costs.

## Disadvantages

- Limitations in information and consultation: workers in companies without an EWC or with limited EWC activity would not be informed on company strategies, be able to put questions directly to company management, share knowledge with employee representatives from other countries, be in a position to give their views so as to anticipate and manage transnational change, or benefit from a clear understanding of company decisions, which is likely to limit the acceptance of such decisions.
- Limited anticipation and management of change with its consequences for the capacity of workers and companies to adapt and the subsequent impact on human resources, sustainable competitiveness and territorial development.
- Costs due to social unrest: companies would bear the growing costs of collective actions due to social unrest consequent upon unprepared restructuring processes as well as the higher economic costs of corporate restructuring in the absence of anticipation and negotiated accompanying measures (examples: €144 000 package *per worker* made redundant at *Volkswagen Forest* or €220 000 at *Nokia Bochum*, compared to the average *total* cost of €101 000 for an EWC plenary meeting, including management and employee time, or an average € 600 for an EWC select committee meeting).
- Uncertain and slower decision-making process due to legal uncertainties (delay of over one year for the planned *Suez-GDF* merger),
- Litigation instead of dialogue, as 40% of companies have already been challenged by their EWC over which level to consult first in cases of restructuring.
- Growing costs of labour disputes (at present affecting every sixth company, with costs ranging from €10 000 to €500 000 per company) and legal fees due to legal uncertainties (at present included in overall legal costs or varying from €1500 to €6 000 a year for specific fees, particularly important in merger cases).

In addition, the absence of new EU action would not result in any improvement in the coherence and interplay between directives in the field of information and consultation.

### **1.b Impact of second option: Non-regulatory approach — additional promotion of best practice**

#### **Overall analysis and position of stakeholders**

The *Non-regulatory approach* option is likely to enhance the effectiveness of the right to transnational information and consultation and may encourage the setting up of new EWCs. However, it addresses only to a limited extent the two other specific objectives of EU action, i.e. legal certainty and coherence in Community legislation, and therefore has to be seen as complementary to action in the field of legislation.

According to the 2008 EPEC survey, over a quarter of management representatives and all employee representatives are in favour of further guidance and regulation. Employer representatives prefer guidance over further legal regulation, whereas employee representatives are split between guidance, legal rules and a combination of both.

## **1- Impact of an increase in communication actions and a proposed increase in budget heading 04.03.03.03**

Increased communication action, notably through a web portal, would raise awareness, facilitate the availability of information and increase the lasting impact of best practices. This is likely to have a positive impact in terms of the setting up of new EWCs and the improved operation of existing EWCs.

The cost of such communication action would amount for €1 million, be proposed to be financed under the PROGRESS programme and be coordinated with in the overall communication arrangements already in place in the Commission. Its potential impact would be higher if social partners as well as Member States were to contribute with their own communication actions.

Increased communication is also likely to increase the number of projects submitted under the budget heading 04.03.03.03 and therefore improve its use. By further increasing the amounts allocated to budget heading 04.03.03.03 (€8.1 million already in 2008), a larger number of projects<sup>51</sup> could be supported, thereby enhancing the exchange of information and good practice with a positive impact on the functioning of existing EWCs. However, given the decline in the use of the available funds, such an increase could only be justified by the submission of more good-quality projects.

Both measures would have a direct effect on the EU budget, which will have to be increased in order to cope, first, with communication costs and, in a second stage, with a an increase in the number of funded projects

## **2- Impact of a recommendation on the setting up and functioning of European Works Councils**

A recommendation would provide further guidance so as to:

- Provide easier access to information for employees and employers who are not familiar with transnational social dialogue and clarify the rules for setting up new EWCs;
- Increase awareness of the major principles for effective transnational information and consultation activities, raising the proportion of companies and worker representatives familiar with the best practices identified by the European social partners (currently one in every six/seven companies — EPEC 2008);
- Promote best practices, thus increasing the effectiveness of EWCs, particularly in the anticipation and management of change.

Depending on how transnational information and consultation is implemented and developed, best practices could impact on business (short-term costs as against long-term benefits), on workers (increased protection in times of restructuring in return for acceptance of change, increased mobility and adaptability) and on the social dialogue between them.

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<sup>51</sup> €1.2 million could support about ten new projects.

As regards environmental impact, at present over half of EWCs deal with environmental concerns (EPEC 2008), for example reviewing environmental guidelines or the design of more environmentally friendly products. Promoting the integration of environmental issues within the work of EWCs in the guidance provided may ensure better mainstreaming of the environmental dimension in the economic and social policies of the large multinational companies concerned.

The new recommendation should take into account the action already taken by the European social partners: in March 2006 they decided to include the promotion and evaluation of their joint *Lessons learned on European Works Councils* in their 2006-2008 work programme, although they failed in April 2008 to launch negotiations on the review of the EWC Directive. For this reason, the design of the recommendation in this context should be extensively discussed with the social partners.

### **1.c Impact of third option: Review of existing legislation**

#### **Position of stakeholders**

Legislative review has been the option preferred over the last ten years by the trade unions, EWC representatives, the EESC and the European Parliament, which have produced detailed proposals on the content of such a review. In 30 letters sent to the Commission at the end of 2007 and in early 2008, European and national trade unions organisations as well as European Works Councils detailed the need for a legislative review and the measures they suggested that the Commission should propose.

According to the 2008 EPEC survey, a small proportion of management representatives and over half of employee representatives in existing EWCs are in favour of further legal regulation on EWCs in relation to restructuring.

The Commission would have welcomed negotiations between the social partners in response to its 2008 consultation, as this would have been a positive sign of the dynamism of European social dialogue and also an important new impetus to EWCs. However, as explained in detail in Annex 3, this did not happen.

In addition to the positions regarding the opening of negotiations, the Commission has received four answers to its consultation document from the consulted employers' organisations CEEP, Eurocommerce, European Banking Federation EBF and Hotrec, two from the consulted workers' organisations ETUC and CEC European Managers, as well as eleven other contributions from companies and employers, trade unions and European Works Councils<sup>52</sup>. Hotrec stresses there is no need to revise the Directive. EBF stresses the importance of EWCs for the banking sector and the need for flexibility, and hopes to make a positive contribution to future negotiations. Eurocommerce makes detailed comments on the envisaged proposals, opposing most of them, but supporting the training of representatives and the requirement for them to report back. The other contributors support the main orientations of the envisaged proposals and make suggestions for reviewing some and adding

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<sup>52</sup> Employers and companies: Association Française des Entreprises Privées (AFEP), American Chamber of Commerce to the European Union (AmCham EU), Confederación Empresarial Española de la Economía Social (CEPES), Generali; Trade unions: Confederation of the Nordic Bank, Finance and Insurance Unions (NFU), Finansförbundet; European works councils: Total, Handelsbanken, HeidelbergerCement, EADS, joint reply IF, Nordea and Danske Bank.

others. The responses are detailed in Annex 3 and, where specific to a particular point, are discussed below.

The impact of the legislative review option can be broken down into the impacts of the ten different sub-options, listed in order of increasing potential to meet the specific objectives. As indicated in section IV, most of the sub-options correspond to the proposals made in the consultation document of February 2008. A few were prompted by the responses to the consultation.

### **Sub option 1 — lower thresholds for the setting up of EWCs**

Only 23% of companies with between 1000 and 5000 employees have established EWCs. Therefore, the impact of lowering the threshold on the establishment of new EWCs is likely to be very limited, as the take-up rate decreases with the size of the workforce<sup>53</sup>. Before such measure could be proposed, increasing the take-up rate in the lower range already covered by the Directive would have to be achieved first<sup>54</sup>. By increasing the number of established EWCs less than proportionally to the number of covered companies, this measure would lower the overall take-up rate in the new scope of the directive and therefore be contrary to the specific objective of increasing it.

In addition, despite the very considerable flexibility offered by the Directive, there are few economies of scale in the operation of EWCs and the relative cost of their operation is higher on average for smaller companies than for bigger companies. This effect would run counter the objective of reducing the compliance costs of SMEs that is central to the Small Business Act proposed. Lowering the threshold, as requested by Parliament in 2001 and the ETUC in its response to the consultation, would therefore not be a proportionate measure in relation to the objective of implementing transnational information and consultation rights.

### **Sub option 2 — Registration of agreements**

The existing database maintained by the trade unions and already partly financed under Budget Heading 04.03.03.03, already provides a good knowledge base, although it is not exhaustive.

Apart from the ETUC, stakeholders have not expressed the need for registration, and the introduction of a central registration mechanism would not be welcomed by either company or employee representatives (2008 EPEC survey).

In addition, this would entail administrative compliance costs (an annual €200 per company on average — EPEC 2008).

The information of both employers' and workers' organisations at the starting of new negotiations to establish EWCs (included in sub-option 3) should improve the knowledge about EWC agreements and thus address the objective of enhanced legal certainty a registration mechanism is intended to meet, without entailing such costs. Social partners can use the support possibilities provided by Budget Heading 04.03.03.03 in order to put in place their own registration scheme. This would in addition allow social partners to promote the

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<sup>53</sup> See Section II 1.a p18 and Annex I.

<sup>54</sup> As for the overall take-up rate, there is insufficient evidence to assess the proportion of *absence of need* explaining the present situation and therefore to determine a precise rate to be achieved.

dissemination of the best practices they have identified to new EWCs and therefore also address the objective of enhanced effectiveness.

### **Sub option 3- Technical update of the composition of the special negotiating body (SNB) and clarification of the organisation of negotiations**

The main impact of changes in the **composition of the special negotiation body** and the organisation of negotiations would be improved legal certainty and the related savings on legal fees and proceedings. The present rules would also be simplified.

The calculations by EPEC in 2008 suggest that updating the Directive with regard to the composition of SNBs, bringing it into line with Directive 2001/86/EC, should have a minimal impact on set-up costs (present average of €124 400, including time, see II.1.a). It should only lead to a limited increase in the number of SNB members and therefore in the costs for larger companies established in a large number of Member States.

This change in the composition of the SNB is not controversial.

As regards the proposal for grouped or indirect representation to address the **situation of countries with very few employees**, the fact that the election or appointment of employee representatives is organised country by country may lead to new legal uncertainties, so an alternative solution could be to:

- set a threshold for the representation of workers in a particular country as proposed by CEEP, which would also reduce set-up costs by some €8 000 for each country under the threshold. This threshold may be set at the level for employee representation in undertakings under the Framework Directive 2002/14/EC, i.e. 50 employees;
- provide for majority rules for the signature of an agreement (as suggested by the trade unions), requiring a majority of both the members and a majority of workers represented from at least two countries, which would also clarify the present unclear rules for adopting agreements and contribute to reinforcing their legitimacy

The **information of both employers' and workers' organisations** at the starting of new negotiations to establish EWCs should be proposed to improve the monitoring of EWCs, via the social partners, instead of a administrative registering mechanism (see sub-option 2). This information would also allow social partners to promote the dissemination of the best practices they have identified to the parties starting negotiations to establish new EWCs.

As regards the impact of the envisaged **clarifications relating to SNB meetings and the presence of experts** during negotiations, where requested by the employee representatives, they should help workers' representatives get to know each other, in particular workers from subsidiaries, and facilitate the development of working relations during the initial starting period. The presence of experts at negotiations is also useful as this could help raise awareness of best practices. Even if opposed by some individual companies wishing to reduce the negotiating power of their counterparts, the presence of experts is not controversial for the European social partners, which recognise its positive role in their joint *Lessons learned*<sup>55</sup>.

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<sup>55</sup> Point 4 'reconciling different cultures' and point 5 'ensuring ownership of the EWC by the workforce' — see Annex 2.

In addition to the measures envisaged in the consultation document, CEC European Managers proposes different systems for the **representation of managers** in the SNB. This proposal is difficult to take on board, given the very considerable differences in industrial relations systems between Member States and the principle of subsidiarity governing the election or designation of employee representatives. A recital in the Directive already states that Member States, if they consider this appropriate, may provide for a balanced representation of different categories of employees. However, it could be envisaged that the composition of an EWC established by agreement should ensure, where possible, a balanced representation of the workforce in terms of employee categories, as well as gender and company activities.

ETUC proposes **shortening the negotiation period** from three years to one. The negotiation process for ‘Article 6’ agreements takes less than 6 months in 21% of cases, 7-12 months in 37% of cases, 13-24 months in 26% of cases, and more than 24 months in 16% of cases (EPEC 2008). The number of meetings varies from 1 to 13, with an average of four. This average number of meetings is the same as for ‘Article 13’ agreements, which were concluded faster (43% in less than 6 months) and SE agreements, which have to be concluded within 6 months, with a possible extension to one year by joint agreement. The limitation of the length of the negotiation process is therefore likely to speed up the establishment of new EWCs without entailing more costs or preventing the conclusion of agreements. However, the risk of shortening the negotiation period would be the more frequent application of the subsidiary requirements (at present very rare).

#### **Sub option 4- Clarification of the protection of rights**

Measures proposed for the protection of rights are in general likely to improve legal certainty, with the related benefits, and the effectiveness of these rights.

As regards the clarification of **local management’s responsibility** for information needed to open negotiations on setting up new EWCs, in line with ECJ rulings, this is not controversial. It is likely to ease the first steps for workers in subsidiaries, a key to boost new requests for EWCs<sup>56</sup>, and therefore contribute to increasing the take-up rate.

As regards the **clarification on sanctions**, it is likely to make clearer to company actors the existence of sanctions in the event of violations of information and consultation rights, and therefore increase compliance. However, this would not necessarily require adding anything to the present Directive, as the need for Member States to provide for appropriate, dissuasive and proportionate sanctions is already a general principle in Community law.

Trade union and EWC contributions as well as Parliament resolutions have insisted on the need for sanctions, given the numerous breaches of the right of workers to be informed and consulted at transnational level. However, AmCham EU considers that sanctions are already provided for and CEEP that they should remain national. In addition, 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.

As regards the **capacity of the EWC to represent workers’ interests**, this sub-option is likely to help this body express employees’ interests more effectively, at cross-border level

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<sup>56</sup> See sections II 1.a p.18 and III 2.b p.28.

where necessary. It will be useful in clarifying the legal standing of the EWC in court proceedings in the event of violations of information and consultation rights, so is likely to increase compliance, while potentially increasing legal fees for some companies. It is also likely to bring about legal certainty regarding the role of the EWC in expressing employees' interests in decisions affecting them but where the decision-maker is not only the company itself (such as in insolvency or competition proceedings).

. In its response to the consultation, CEC agrees that EWCs could represent workers provided they also represent managerial staff. CEEP would oppose granting a legal personality to the EWC. Eurocommerce considers that managers should represent employees' interests vis-à-vis the outside world. However, this would be contrary to the principles established by the European Court and the Commission's proceedings in competition matters.

### **Sub option 5- Recognition of the role of trade union organisations**

Through the provision of expertise, trade unions already do play a role in the negotiation process and in giving support to EWCs. This role has been recognised by European social partners — the main cross industry employer and trade union organisations — in their joint 2005 publication *Lessons learned on European works councils*, particularly in answering the challenges of reconciling different cultures and ensuring ownership by the workforce<sup>57</sup>.

Recognising a specific role for trade unions in the Directive is likely to increase the awareness, coordination, promotion of best practices and the creation of new EWCs, notably in smaller companies or where workers from the home country have not requested the launching of negotiations. It may also lead to increased opposition from companies without EWCs to the establishment of such bodies, as they may be reluctant to countenance the involvement of trade unions.

All trade union and EWC contributions sent to the Commission over the past few years, as well as Parliament's resolutions, insist on this recognition. The 2006 EESC opinion, although adopted against the opposition of the employers' representatives, proposed the same route. ETUC considers that trade unions should have the right to attend SNB meetings and EWC meetings where requested by members and that full-time officers should not be prevented from becoming EWC members. In addition, ETUC and CEC propose that the European trade unions should be able to trigger the opening of negotiations for setting up new EWCs. CEC proposes that agreements may be signed by European trade union federations. AmCham EU stresses that employee representation and external expertise are and should remain different concepts, and that the role of experts, including European trade unions, should be agreed on a voluntary basis between the SNB or the EWC and central management. CEEP and AFEP agree with trade unions being considered as experts, where needed, but not as members of the bodies. Eurocommerce considers that the role of trade unions should not be made compulsory.

Taking into account the interests of both workers and companies, the position of the stakeholders and the principle of subsidiarity regarding the determination of who the employee representatives are to be, the following conclusion may be drawn:

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<sup>57</sup> See text in annex 2 as above.

- the role of trade unions should be recognised in supporting company employee representatives but not as members — if not considered as employee representatives under national legislation — nor as signatories of the agreements,
- the employee representatives should have the choice whether to ask trade unions to assist them or not, and to decide whether or not to exert their right to transnational information and consultation, so trade unions that are not considered to be employee representatives under national legislation should not be allowed to trigger themselves the opening of negotiations, and their role should not be made compulsory.

Under these conditions, without entailing significant fixed costs for companies (average annual cost of trade union assistance to EWCs is € 500), recognising the role of trade unions is likely to contribute to the objective of increasing the take-up rate and to making existing EWCs more effective.

This would also bring the EWC Directive into line with the other transnational information and consultation directives (2001/86/EC and 2003/72/EC) on this aspect.

### **Sub option 6- Adaptation of the subsidiary requirements**

Changes in the content of subsidiary requirements would not have a direct impact, as they are fall-back provisions for new negotiations and not minimum requirements. However they have an indirect impact to the extent that they provide a benchmark for parties during the negotiation of new agreements or amendments to existing agreements.

As a general rule, adapting the subsidiary requirements would:

- Contribute, through their benchmark role, to setting objectives for the content of agreements, with all the associated direct costs as well as the economic and social costs and benefits,
- Risk preventing companies from entering into new negotiations or preventing companies and workers reaching an agreement if they are too ambitious.

More specifically, the changes envisaged in the consultation document would have the following impact:

- A second ordinary plenary meeting costs on average some €101 000, half for fixed expenses, half for employee and management time. 40% of companies already have two or more ordinary meetings a year. An ordinary meeting is considered to be more effective for dialogue than an extraordinary meeting because it takes place in a more favourable environment and allows the more general context of the company's projects to be taken into account. Most EWCs already have on average one annual extraordinary meeting, either with the whole EWC present or with the select committee (EPEC 2008).
- The right of the European Works Council to obtain a response, and the reasons for that response, to any opinions they have expressed would contribute to more effective consultation and quality of dialogue but might slow down the decision-making process.
- The change in the definition of exceptional circumstances would indirectly ensure better anticipation, with the associated economic and social benefits, notably as regards the acceptance and management of change, and increased legal certainty. However, it could involve increasing the number of extraordinary meetings (with an associated cost of € 600 where held with a select committee).

- The second meeting to seek an agreement in the event of exceptional circumstances would lead indirectly to more extraordinary meetings (with an associated cost of € 600 where held with a select committee), and more effective consultation. However, it might slow down the decision-making process and effectively lead to a negotiation process at European level.
- The possibility of new subjects for the information and consultation of European Works Councils would have only an indirect impact. Some EWCs have already extended the scope of information and consultation to include measures relating to health and safety (72% of companies in 2008), equal opportunities (50% of companies in 2008) and the environment, notably as part of discussions on corporate social responsibility (53% of companies in 2008). Promoting the inclusion of these topics would bring benefits in terms of effective policies in the areas of health and safety at work, equal opportunities and environment, without incurring specific additional costs.

This sub-option is the most controversial. ETUC agrees with the changes proposed in the consultation document and proposes additional elements: a select committee with up to five members where the EWC has nine or more members, follow-up meetings, facilities, experts, interpretation and translation as needed, and topics to include disability, discrimination, gender and data protection. Eurocommerce opposes the proposed changes as non-relevant, as the EWC is not supposed to be a body that delivers opinions, and liable to incur additional costs. CEEP considers that a second ordinary meeting and new topics are helpful but should remain voluntary and that any requirement on the employer to give a response to questions posed by the EWC must not hamper or delay decision-taking nor lead to negotiation. AFEP opposes also the provision for a second meeting to seek agreement in the exceptional circumstances as it does not consider the EWC to be a negotiating body, and suggests reinforcing the select committee instead of plenary meetings. AmCham EU expresses similar opinions.

In order to meet the objectives of increased effectiveness while minimising costs, to avoid setting barriers to the take-up of new EWCs, to take into account as much as possible the views of stakeholders and to balance the interests of workers and companies, the following conclusions may be drawn:

- Even if, under the present conditions, a majority of companies disagree with the assertion that the EWC slows down managerial decision-making (EPEC 2008, see II.1), the operation of the EWC has to contribute to an efficient decision-making process allowing companies to adapt as necessary. This should be made clear as a general principle in the Directive.
- Reinforcing the role of the select committee may be more cost-effective than increasing the number of plenaries and should therefore be favoured.
- Anticipation, as a key element in the effectiveness and positive economic and social impact of EWCs, should be promoted, so the change in the definition of exceptional circumstances should be supported.
- The right to a reasoned answer to any opinion expressed appears to be a more important element in effective consultation than the imposition of additional meetings with the consequent increase in costs, and should therefore be favoured.

- As environmental issues will have to be increasingly mainstreamed in all company policies, the addition of this topic to the items for the information and consultation of EWCs appears necessary.

### **Sub option 7- Introduction of an adaptation clause and transitional provisions**

The introduction of an **adaptation clause** would ensure:

- Legal certainty, with the related benefits,
- An effective information and consultation process during mergers and acquisitions, diminishing social unrest, allowing the negotiation of appropriate accompanying measures and favouring the emergence of a unified group within the new boundaries.

The adaptation clause is likely to meet the needs of both workers and companies and the envisaged measures are not controversial in themselves. CEEP considers that renegotiations should be limited to cases of significant changes in company structure and conflicts between two or more agreements and proposes shortening the negotiation period in that case. AFEP agrees with the general aim of the measures proposed, provided that the negotiations are carried out by the members of the existing EWCs and not by a new Special Negotiating Body, and that only one EWC is to exist after a merger or acquisition. CEC also supports this latter position. AmCham EU would welcome guidelines on the way to deal with EWC agreements in cases of mergers and acquisitions.

The envisaged clause would indeed enable two EWCs to be merged when the companies merge, so would save on the costs of two EWCs continuing to operate because of the absence of adaptation provisions in one of the pre-existing agreements.

As to the composition of the negotiating body, while favouring continuity by involving members of the existing EWCs, all possible changes in make-up should be taken into account, including where some of the workers were not previously represented at transnational level. This would provide for both the setting up of an SNB and bringing together the leaders of the existing EWCs.

The controversial point is the **renegotiation of existing agreements**, whether ‘Article 13’ or ‘Article 6’ agreements. Trade unions and EWCs have asked for the compulsory renegotiation of Article 13 agreements and an obligation to renegotiate all agreements upon request, whereas companies and employers’ organisations consider that the agreements, in particular the pre-existing agreements, should be better protected.

Retaining those EWCs that work to the satisfaction of the parties involved would limit the changes to those EWCs where changes are needed. Disproportionate changes would therefore be avoided and best practices supported. Transitional provisions were proposed to that end in the consultation document.

Providing for pre-existing agreements to be maintained in all cases would limit the potential impact of changes in the Directive to new EWCs to be established. This would not allow legal uncertainties to be addressed in the event of changes in make-up. This would also risk preventing the creation of new EWCs while bringing no improvement to those that already exist, and should therefore be avoided.

Allowing any request to trigger the renegotiation of a pre-existing agreement may on the other hand risk encouraging ‘freerider’ actions and destabilising well-functioning EWCs, so should be avoided too.

Limiting requests for renegotiating pre-existing agreements to those situations where significant changes in make-up and structure occur (such as mergers, take-overs or acquisitions) should avoid these two opposing risks.

### **Sub option 8- Clarification of the role and reinforcement of the competence of employees’ representatives**

An obligation for European Works Council representatives to **report back to the workers** they represent would increase the quality of dialogue and the EWC’s added value, as well as improve the interplay between local/national and European levels, with a major impact on anticipation, adaptability and mobility. It would entail limited costs, mainly related to the potential need for EWC members to travel to local sites in order to report back to the workers.

It would meet one of the main employers’ concerns relating to the lack of preparation of employee representatives and their dissemination of meeting information (EPEC 2008).

The 2005 *Lessons learned* published by the European social partners states that ‘ensuring a real sense of ownership of the EWC by the whole workforce (is) a considerable challenge’. Indeed, the obligation to report back would help meet this challenge, and is likely to be welcomed by all stakeholders. In their response to the consultation, CEEP, Eurocommerce and AFEP agree with this proposal, provided that the reporting respects confidentiality.

As regards the **training of employee representatives**, the present situation is as follows (EPEC 2008)

Training	Right to training: 60% of EWCs Training for at least some EWC members in the previous year: 79% of EWCs Where provided, training is offered: to entire EWC, 46%, to 10 or more EWC members, 38% Average length of training where provided: 1.6 day/year Training expenditure where provided: from €1 300 to €150 000, average of €43 800 <sup>58</sup>
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Introducing a right to training for employees’ representatives would therefore entail extra costs for companies not already providing it, i.e. for one fifth of companies, with an average of €43 800 per company. Introducing a right to training for employee representatives is the envisaged measure with the most direct and significant impact on costs for companies.

However, this measure is not controversial and meets the interests of both workers and companies. All stakeholders have expressed their support, while the 2005 *Lessons learned* published by the social partners states that ‘the ability to understand complex issues discussed in the EWC determines the quality in communication. Investing in language as well as technical/content training helps to optimise the functioning of the EWC and to reduce overall functioning costs’.

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<sup>58</sup> Average of €76 700 for companies headquartered in France, €24 800 for others.

Provided that the efficiency of such training action is ensured, a right to training is likely to have a positive impact in the 20% of companies not providing EWC members with any training.

### **Sub option 9- Alignment of the concepts of information and consultation across the directives**

Introducing a definition of information and expanding the definition of consultation, in line with Directive 2002/14/EC establishing a framework for information and consultation, would bring about:

- Legal certainty, thus reducing labour disputes (in every sixth company, with associated costs ranging from €10 000 to €500000 per company — EPEC 2008) as well as the risks of uncertainty and delays in decision-making (e.g. the delay of over one year in the *Suez-GDF* merger),
- Better acceptance and management of change, reduced social unrest (avoiding companies such as *Nokia* in Bochum having to pay very high redundancy benefits), improved image of the company, enhanced adaptability and mobility,
- Improved perception of the added value of EWCs, which is likely to improve the interest of workers' representatives in EWCs and therefore the take-up rate,
- A coherent set of Community rules on these matters, which is likely to develop the role of the transnational level of information and consultation on transnational matters, to clarify the rules and facilitate the linking of national and transnational levels of the dialogue.

All trade union and EWC contributions sent to the Commission over the past few years, as well as Parliament's resolutions, insist on the adoption of these definitions. The 2006 EESC opinion, (although adopted against the opposition of employers' representatives) proposed the same route. Eurocommerce opposes changes to the definitions, as they would bring no clarification and risk slowing down the decision-making process. CEEP and AmCham EU favour agreements at company level on consultation mechanisms going beyond the present definition of 'exchange of views and establishment of a dialogue' rather than changes in the definitions, and underline that consultation should not be associated with collective bargaining or any obligation by central management to reach an agreement. AFEP sees no problem in using for EWCs the definition of consultation in Directive 2002/14/EC.

At present, a majority of companies disagree with the assertion that an EWC slows down managerial decision-making. On the other hand, it is clear that the operation of EWCs should contribute to an efficient decision-making process allowing companies to adapt as rapidly as necessary. It is particularly important for companies, as recalled by AmCham EU, that any changes preserve the speed of decision-making in order to enable undertakings to compete in the global economy. This should be achieved by:

- adopting as a general principle of the Directive that EWCs should contribute to the goal of efficient decision-making at company level,
- establishing an appropriate interplay between national and transnational levels of dialogue, in order to avoid overlaps that risk lengthening the decision-making process.

## **Sub option 10- Definition of the transnational competence of European Works Councils, linking information and consultation levels and organising the interplay between the directives**

Defining the transnational competence of EWCs and linking the levels of information and consultation are the measures most likely to contribute to all specific objectives of the initiative.

**Defining the transnational competence** of the EWC as relating to issues going beyond the powers of decision-making bodies in a single Member State would:

- Increase legal certainty, thus reducing labour disputes on the issues to be addressed in EWCs and their associated costs as well as the risks of uncertainty and delays in decision-making,
- Facilitate dialogue at the relevant levels of management and representation and help ensure a better link between the levels of information and consultation, thus enhancing the quality and effectiveness of dialogue,
- Reduce the reluctance of national representation bodies to accept EWCs by limiting clearly their sphere of competence, thereby facilitating the creation of new EWCs,
- Allow the development of coherent and linked Community rules.

The potential risk of bringing up local issues at European level (with a subsequent increase in the number of meetings and the associated costs) where decision-making is centralised would nevertheless need to be avoided. CEEP favours agreements at company level to define the transnational competence or refers to issues where two or more Member States are involved. AmCham EU is opposed to the inclusion of any provision for consultation on single-country events whether or not decisions are taken outside the affected country. AFEP proposes defining transnational competence with reference to the effects of a decision and not the body taking the decision in order to avoid the risk described. However, this solution may present an equivalent risk of any decision with a direct or indirect impact in other Member States being unduly brought before the EWC.

Trade union and EWC contributions sent to the Commission over the past few years propose defining 'transnational' as covering issues going beyond the powers of decision-making bodies in a single Member State. In its answer to the 2008 consultation, the ETUC proposes putting the burden of proof that an issue is not transnational on management. However, this provision would constantly oblige companies to justify themselves and would be contrary to the principle of subsidiarity. Eurocommerce agrees with the proposed definition, while considering that it requires co-determination rules at national level to be adapted.

In order to take into account as much as possible the views of the stakeholders and to avoid the various risks, the solution envisaged in the consultation document may be adapted in order to provide a definition of transnational competence:

- based primarily on the effects of a decision;
- recalling the principle of dialogue 'at the relevant level of management and representation, depending on the subject under discussion'.

In exceptional circumstances, where, for example, the decision to close down an establishment in a subsidiary is taken by headquarters and the management of the subsidiary has no major involvement in that decision, the latter principle should lead to a solution enabling a meaningful consultation to take place.

Defining the transnational competence of EWCs goes hand in hand with **linking information and consultation levels**.

Favouring company-agreed mechanisms for linking levels, with, as a fall-back, the parallel start of information and consultation processes at national and EWC levels, would:

- Limit litigation and reduce labour disputes on the timing of consultation at national level. The associated costs, as well as the risks of uncertainty and delays in decision-making, would also be reduced (at present almost 40% of companies have been challenged by employees on who to consult first in cases of restructuring),
- Allow the development of coherent and linked Community rules,
- Ensure better acceptance and management of change, reduced social unrest, enhanced adaptability and mobility,
- Increase the interest of national representation bodies in EWCs, thereby facilitating the creation of new EWCs,
- Enhance the added value and cost effectiveness of EWCs.

Trade union and EWC contributions sent to the Commission over the past few years insist on the need to address the uncertainties in the links between the levels of information and consultation.

CEEP supports the proposal. AmCham EU underlines that companies of American parentage have often encountered complexities and confusion in linking the different levels of information and consultation due to a lack of specificity in the Directive and conflicting court cases at national level, and that it is critical that the process at European level should not interfere with but be complementary to the process at national level. It would therefore welcome confirmation of the approach of parallel or simultaneous consultation at the various levels as a legitimate method for linking the levels. AFEP also agrees with the general aim of the measure envisaged and proposes in addition that the national group works council be dissolved where an EWC exists. In order not to slow down the decision-making process, Eurocommerce considers it should not be possible to consult at national level first.

These non-controversial measures for the linking of levels have potentially the most important positive impact on both existing EWCs and the creation of new EWCs.

## **V. 2 Uncertainties and how impacts may be affected by changes in parameters**

The position and/or involvement of the social partners might change the content of the non-regulatory approach and the application of the revised legislation, and therefore its impacts.

### **V. 3 Impacts in the EU and outside the EU**

Most impacts would be measured in the European Union. However, the impacts of setting up and operating EWCs would also be felt outside the EU, as:

- The Directive fully applies to the EEA states (Norway, Iceland and Liechtenstein) with 22 companies falling under the scope of the EWC Directive headquartered in these countries and 626 with operations in these countries (ETUI-REHS 2006);
- 562 companies falling under the scope of the EWC Directive are headquartered outside the EEA, notably 344 in the United States, 104 in Switzerland and 56 in Japan (ETUI-REHS 2006); The Directive only applies to EEA workers, but most of the companies headquartered in Switzerland and many companies with operations in that country provide for the inclusion of Swiss employee representatives in their EWCs<sup>59</sup>. Companies of American parentage account for over 120 of existing EWCs. Those companies, through the American Chamber of Commerce to the European Union (AmCham EU), have therefore expressed their particular interest in EWCs and the proposed revision of the Directive and wish to contribute to the debate.
- Companies with an EWC employ on average 49 000 employees, including 29 000 employees in the EEA (EPEC 2008), so the non-European proportion, accounting for 2/5 of the global headcount, is likely to be influenced by the 3/5 European share.
- EWCs have contributed to the development of social dialogue including worker representatives from candidate and neighbouring countries, thus preparing for and helping to consolidate the economic and social integration of new Member States, as observed in the case of the 2004 enlargement<sup>60</sup>; 19 EWC agreements currently include Turkey in their scope, 4 Croatia, 1 FYROM, 3 Serbia, 2 Bosnia Herzegovina, 1 Moldova, 7 Ukraine<sup>61</sup>.
- Some of the European Works Councils have become World Works Councils.
- EWCs play a major role in the signing of global framework agreements on fundamental rights and corporate social responsibility, the impact of which extends far beyond the EU.

Thus, the impact of EU action covers:

- the building of partnerships and the dissemination of the European model and ‘decent work’ policies in non-EU countries,
- the integration of new Member States and candidate countries,
- the acceptance of internal market rules, globalisation and changes in international trade rules,
- the development of corporate social responsibility policies.

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<sup>59</sup> 19% of EWC agreements include Switzerland in their scope, meaning usually that they include Swiss worker representatives (141 EWC agreements out of 762 in the SDA database on 14.05.08).

<sup>60</sup> See in particular studies by the European Foundation for the Improvement of Living and Working Conditions- ref. I-3.

<sup>61</sup> SDA database 14.05.08.

#### **V. 4 Potential obstacles to compliance**

Potential incentives or obstacles to compliance are primarily linked to the positions of the social partners at European and national levels, contributing either to promoting or hindering compliance. Their involvement in any future action is crucial from this perspective.

## **SECTION VI: COMPARING THE OPTIONS**

### **VI. 1 Method for weighing the positive and negative impacts for each option**

For the three options and for every sub-option of the third (legislative) option, the following elements are taken into account, each being given an assessment from zero to three, with a negative (–) or positive (+) impact, on the basis of the detailed analysis carried out in section V:

- Ability to achieve the specific objectives
  - to ensure the effectiveness of employees’ transnational information and consultation rights in existing EWCs;
  - to increase the take-up rate;
  - to ensure legal certainty in the setting up and operation of EWCs;
  - to ensure a better coherence and interplay between Community legislative instruments on the information and consultation of employees.

For options 2 and 3 and for every sub-option of the third (legislative) option, the following elements are taken into account, each being given an assessment from zero to three, on the basis of the detailed analysis carried out in section V, compared to the baseline scenario of non-EU action (option 1):

- likely decrease (–) or increase (+) in set-up costs, operational costs, dispute-related costs, non-financial costs for companies.
- Likely negative (–) or positive (+) economic and social impact.

As regards the impact on the EU budget, the impact of options 2 and 3 are taken into account, each being given an assessment from zero to three, on the basis of the detailed analysis carried out in section V, compared to the baseline scenario of non-EU action (option 1):

- Likely decrease (–) or increase (+) in the EU budget

The environmental impact of EU action regarding EWCs is limited to promoting the inclusion of a company’s environmental policies in the topics discussed at EWC meetings and the projects that might be developed in this context. It is more positive, but not significantly so, under the second and third options.

## VI. 2 Results of the weighing

### 2.a Ability to achieve the specific objectives

Options	Effectiveness of information and consultation rights in existing EWCs	Increase in take-up rate	Legal certainty in the setting up and operation of EWCs	Coherence and interplay between directives
<b>1.No new EU action</b>	+	No progress	No progress	No progress
<b>2.Non-regulatory approach</b>	++ - Increased awareness leading to better practices - Increased lasting impact and additional projects to promote best practices - Benchmark for best practices	++ - Increased awareness leading to new initiatives - Additional projects to support setting up new EWCs	+	+
<b>3.Review of legislation</b>	++ - Reinforced role and competence of EWCs - Increased added value through better relations between EWC and national bodies and workers -Adapted benchmark rules -Possible support by trade unions/employers	-/+++ - Increased added value perceived by employees - Information available to employees to take first steps -Clarified relationship between national bodies and EWCs -Support by trade unions -Increased concerns of employers about efficiency of decision-making	+++ Legal uncertainties resolved	+++ Coherence and interplay ensured

The first option does not meet any of the objectives. Both the second and the third option meet the objective of enhancing the effectiveness of information and consultation rights in existing EWCs, by different means. While the non-regulatory approach will use additional promotion of best practices, the legislative option will strengthen the role of EWCs through clarified rules, notably on the links between information and consultation levels. As to the objective of increasing the take-up rate, the non-regulatory option is expected to contribute through increased awareness of the importance of EWCs among stakeholders, while the legislative option will encourage employees to set up EWCs in addition to national representation structures, as they will perceive more clearly their value added. However, this

option may also increase the opposition by employers to the extent that they may perceive risks (e.g. delays) in the decision process as a result of their strengthened role. Finally, the legislative option is clearly superior in meeting the objectives of legal certainty, coherence and interplay between directives.

The ability of every sub-option under the third (legislative) option to achieve the specific objectives is detailed in Annex 4. Overall, all the ten sub-options are expected to bring about positive outcomes as regards the four objectives considered. One exception is the first sub-option (lower thresholds) , which will reduce the take-up rate measured over the entire new hypothetical scope of application of the Directive (transnational companies with more than 500 employees) . It is also debatable the extent to which some of the sub-options may or may not contribute to the objective of increasing the take-up rate, as they will be perceived differently by employees and employers.

## 2.b Likely impact on costs for companies and on EU budget

Options	Set-up costs	Operational costs	Dispute-related costs	Non-financial costs	EU Budget
<b>2.Non regulatory approach</b>	- - Funding of projects limits need for costly legal expertise	+ - Benchmark for more costly best practices	- - Clarifications and guidance	-/+ -Better preparation and anticipation -Raised employee expectations	++ -Immediate impact: communication costs (1 mil. €/year) - increase funding for EWC projects (indicative €1.2 million for 10 new annual projects)
<b>3.Review of legislation</b>	- - Support by trade unions/employers limits need for costly expertise	-/+ - Direct cost of training for 20% of EWCs - Benchmark for more costly fall-back provisions, save for select committee instead of plenary - Saves costs of lack of interplay between levels and lack of anticipation	--- -Saves high costs linked to social unrest (strikes, level of redundancy payments, etc.) -Saves costs of additional meetings and legal fees in the event of disputes	---/+ -Saves high costs linked to the absence of anticipation and to social unrest (acceptance of change, corporate culture, image of company) -Raised employee expectations and coordination -Different impacts on decision-making (need to take employees' opinion into account but fewer delays due to disputes and interplay)	+ - Indirect impact on commitments through increased interest in EWCs and monitoring by social partners

The second and the third option diminish set-up costs as they bring the expertise needed by companies at a lower cost than what is available on the market<sup>62</sup>. They both lead to a limited increase in operational costs, mainly through higher benchmark. They both diminish dispute-related costs, the third (legislative) option having a higher impact through saving important costs linked to social unrest and legal proceedings. The third option is superior in diminishing non-financial costs, mainly through its impact on better anticipation, acceptance of change and social climate and legal certainty. While the non-regulatory approach will have a direct effect on the EU budget, which will have to be increased in order to cope, first, with communication costs and, in a second stage, with an increase in the number of funded projects<sup>63</sup>, the legislative approach will have only an indirect impact, to the extent that the interest produced by the revision of the Directive and the increase in take-up rate are expected to generate more and better projects in the future.

The detailed impact of every sub-option of the third (legislative) option on the different costs is detailed in Annex 4. The first sub-option (lower thresholds) leads to a significant increase in all company costs. As the extension of EWCs to companies in the range 500-1000 employees will affect SMEs, and costs tend to be invariant with size, it can be claimed that this sub-option will increase compliance costs for SMEs more than proportionally, and is therefore contrary to the objective of the Small Business Act. The second sub-option (registration) leads to more set-up and non-financial costs while diminishing dispute-related costs. The information of social partners at the start of negotiation to establish new EWCs (included in sub-option 3) could help meet the same objectives while being more cost-effective. All other sub-options contribute to diminishing all or most categories of costs, particularly the seventh (adaptation clause) and the tenth sub-option (linking levels) as they have an important impact in lowering dispute-related and non-financial costs. The third (SNB and negotiation), fifth (role of trade unions) and sixth (subsidiary requirements) sub-options lead however to limited increase in operational costs, mainly through the benchmark for more costly practices, while diminishing set-up or dispute-related costs.

As a result, the non-regulatory approach and sub-options 3 to 10 under the legislative approach globally diminish costs, whereas the first (lower thresholds) and second sub-option (registering agreements) globally increase them.

**2.c Likely economic and social impact**

Options	Economic impact	Social impact	Environmental impact
<b>2.Non-regulatory approach</b>	<p style="text-align: center;">+</p> <p>Improved anticipation and acceptance of change</p>	<p style="text-align: center;">++</p> <p>Benchmark for well-functioning dialogue, anticipation and management of restructuring</p>	<p style="text-align: center;">+</p> <p>Invitation to address environmental policies in EWCs</p>

<sup>62</sup> See table on operational costs in II.1 – for example, assistance by trade unions cost on annual average € 3 500 while other expertise cost €143 700.

<sup>63</sup> The increase in the number of projects will have mainly an impact upon the EU budget as the projects are supported up to the level of 80% of eligible costs.

	<b>-/+++</b>	<b>+++</b>	<b>+</b>
<b>3.Review of legislation</b>	<p>Improved anticipation and acceptance of change at company and territorial level</p> <p>Saves high costs related to social unrest and unaccompanied restructuring</p> <p>Some additional costs for companies</p>	<p>Effective information</p> <p>Improved capacity to adapt through anticipation</p> <p>Involvement of employees in strategic corporate decisions and preparation of restructuring measures,</p> <p>Quality of social dialogue</p>	<p>Environmental policies part of topics for EWC information and consultation</p>

Both the second and the third options have limited positive economic impact, mainly through improved anticipation and acceptance of change and environmental impact through the inclusion of environmental policies in the topics dealt with by the EWCs. The most positive impact of both options lies in the social area: improved capacity to adapt to change and improved social dialogue.

### **VI. 3 Added value of EU action**

The three options identified do not go beyond what is necessary to ensure more effective transnational information and consultation rights for workers and more coherent Community legislation, which Member States cannot achieve on their own. In particular, adaptation to the particular needs of each situation is possible through the priority given to negotiated solutions, and the proposed legislative review will focus on resolving actual identified problems and reinforcing effectiveness, while avoiding unnecessary burdens on business and providing flexible solutions.

Within option 3, however, sub-option 1 (lowering thresholds) would not meet the objectives and not be a proportionate solution.

### **VI. 4 Ranking the options**

The options are ranked as follows:

- (1) The third option *Review of existing legislation* is the most able generally to achieve the four stated objectives and yield the most significant economic and social benefits. Additional operational costs for companies are limited and seem generally more than compensated by savings. Within this legislative approach, however, sub-options 1 and 2 (respectively lowering the threshold and registering EWCs) do not demonstrate sufficient cost-effectiveness, as benefits seem to be outweighed by costs especially for SMEs. The objectives of Sub-option 2 (registering agreements) could be achieved by a voluntary mechanism (of the responsibility of the social partners) not entailing administrative compliance costs. . None of the remaining sub-options 3 to 10 shows globally a negative impact on costs. Asnone would bring a radical change to the present rules governing EWCs nor be sufficient by itself to achieve the desired objectives they should therefore be implemented together. The content of some of

these sub-options has been adapted to take into account the results of the consultation exercise, as well as the interest of the various stakeholders. Particularly the content of the subsidiary requirements, the protection clauses (including sanctions) and the definition of the transnational scope have been reviewed in order to minimize the concerns that employers may have about the effects of the new rules on the length and complexity of the decision-making procedures inside the companies. In any case, the revised Directive should allow for regular monitoring of the effects of the new rules particularly on these grounds.

- (2) The second option *Non-regulatory approach — additional promotion of best practice* presents some economic and social benefits, without entailing compulsory additional costs for companies. It entails a direct increasing effect on EU budget, but of a very limited relative scale. However, by nature, the option can address only to a limited extent the objectives of legal certainty and coherence in Community legislation and is therefore inferior to the legislative approach. Also, given the extent of activities already undertaken in this area, under the budget heading 04.030303, additional non-regulatory measures cannot be expected to bring about immediate, spectacular results. Priority in planning should be given to communication actions in order to raise interest for EWCs and their potential, and then reinforce budget credits for supporting a larger number of projects.
- (3) The first option *No new EU action* does not present any ability to meet the specific objectives.

## **VI. 5 Preferred option**

The preferred option is the third option *Review of Existing legislation*, excluding sub-options 1 (lower thresholds) and 2 (registering of agreements), combined with awareness-raising actions from the second option *Non-regulatory approach — additional promotion of best practice*, starting with communication actions.

The likely overall impact of the combination of options 2 and 3 would be to improve the quality of dialogue within companies and enable all parties to better anticipate and manage change, while imposing some additional direct costs. However, it is difficult to see this entailing significant additional costs for companies already complying with the requirements and aims of the existing Directive. The initiative would also contribute to making the existing Community instruments on information and consultation more coherent (same definitions, interplay between national and transnational rules)

## **SECTION VII: MONITORING AND EVALUATION**

### **VII. 1 Core indicators of progress towards meeting the objectives**

The core indicators of progress towards meeting the objectives are as follows:

- to ensure the effectiveness of employees' transnational information and consultation rights in existing EWCs:
  - the proportion of EWCs consulted before a restructuring decision is made public
  - the proportion of trained employee representatives
- to increase the take-up rate
  - the proportion of companies falling within the scope of the Directive having established EWCs (take-up rate)
  - the number and proportion of workers represented through EWCs
- to ensure legal certainty in the setting up and operation of EWCs:
  - the number of renegotiated agreements
  - the proportion of companies challenged by employees on the levels of consultation
- to ensure better coherence and interplay between Community legislative instruments on the information and consultation of employees:
  - the number of EWC agreements on the linking of information and consultation levels.

### **VII. 2 Outline for possible monitoring and evaluation arrangements**

In order to monitor and evaluate the progress towards meeting the objectives, the following measures may be envisaged:

- Continued updating of database on EWC agreements,
- Monitoring of litigation on EWCs to be continued,
- Regular and consistent company surveys on timing of consultation in cases of restructuring, on training and on internal challenges,
- Normal monitoring of Community legislation by the Commission.

## **ANNEX 1- EUROPEAN WORKS COUNCILS — COMPLIANCE AND FIGURES**

### **Compliance with the Directive**

Council Directive 94/45/EC concerning European Works Councils, extended to the United Kingdom by Council Directive 97/74/EC, and adapted by Directive 2006/109/EC by reason of the accession of Bulgaria and Romania to the EU, provides for the information and consultation of employees in Community-scale undertakings and groups of undertakings, i.e. undertakings and groups of undertakings having at least 1000 employees within the Member States and at least 150 employees in each of at least two Member States.

The European Works Councils Directive has been implemented in all 30 states of the European Economic Area (27 EU Member States, Norway, Iceland and Liechtenstein). All have adopted national implementing measures that are quite similar and close to the text of the Directive.

Negotiations for the establishment of a European Works Council or an information and consultation procedure in any Community-scale undertaking or group of undertakings may be initiated on the initiative of central management or at the written request of at least 100 workers or their representatives in at least two undertakings or establishments in at least two different Member States. Until such an initiative or request is forthcoming, there is no obligation to set up a European Works Council.

### **Companies affected by the Directive and established European Works Councils**

As there is no registration mechanism, there are no official data on European Works Councils or on the companies covered. Data are collected by the trade unions and the databases are monitored at European level by the ETUI-REHS and the SDA.

According to the most recent data<sup>64</sup>, EWCs were present and active in 829 companies in early March 2008 and negotiations on the setting up of EWCs were ongoing in 30 additional companies. EWCs that were dissolved or merged with another were reported in 33 companies. The EWCs had been set up or renewed through a total of 1265 agreements.

In 2007<sup>65</sup>, 2257 companies employing 24 million workers fell within the scope of the Directive. European Works Councils were operating in 816 companies (36% of companies covered) with some 14.5 million employees (62% of employees covered).

The most comprehensive and detailed data<sup>66</sup> go back to 2005 (see table for detailed data). Out of the 2204 relevant companies employing 23.6 million employees in 2005, 20% were headquartered in Germany, 16% in the USA, 12% in the UK and 10% in France.

Of these companies, 772, employing 14.45 million workers, had established European Works Councils, i.e. 35%, covering 61% of the workforce. The proportion of companies with an EWC compared to the companies covered by the Directive per country of ownership — in

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<sup>64</sup> ETUI-REHS EWC database, <http://www.ewcdb.eu/>. Consulted on 7.3.2008.

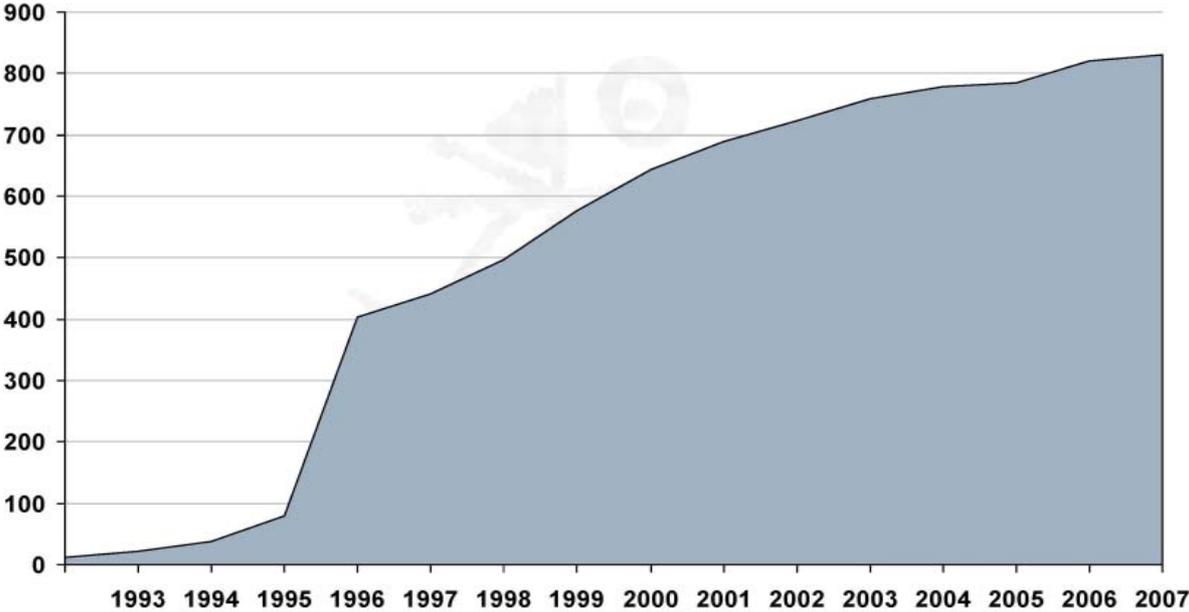
<sup>65</sup> ETUI-REHS Benchmarking working Europe 2007.

<sup>66</sup> Kerkhofs, P., European Works Councils facts and figures 2006, ETUI-REHS, Brussels, 2006.

decreasing order — is highest (at least 40%) for companies headquartered in Norway, Belgium, Sweden, Finland, UK, Denmark and Luxemburg and lowest (less than 30%) for companies headquartered in Germany, Canada, Greece, Spain, Ireland, Portugal, Hungary, Austria, Czech Republic and Poland.

Particularly relevant for the information and consultation of workers is also the proportion of companies with an EWC among those operating in a particular EEA Member State. For example, 777 companies falling within the scope of the Directive have operations in Sweden and, of these, 414 have established EWCs. Similarly, 819 companies covered by the Directive have operations in Poland and 425 of them have established EWCs. Over half of relevant companies with operations in the new Member States have set up EWCs (see table for details).

The number of companies with an EWC has grown over the years:



Source: EWC database, ETUI-REHS 2007

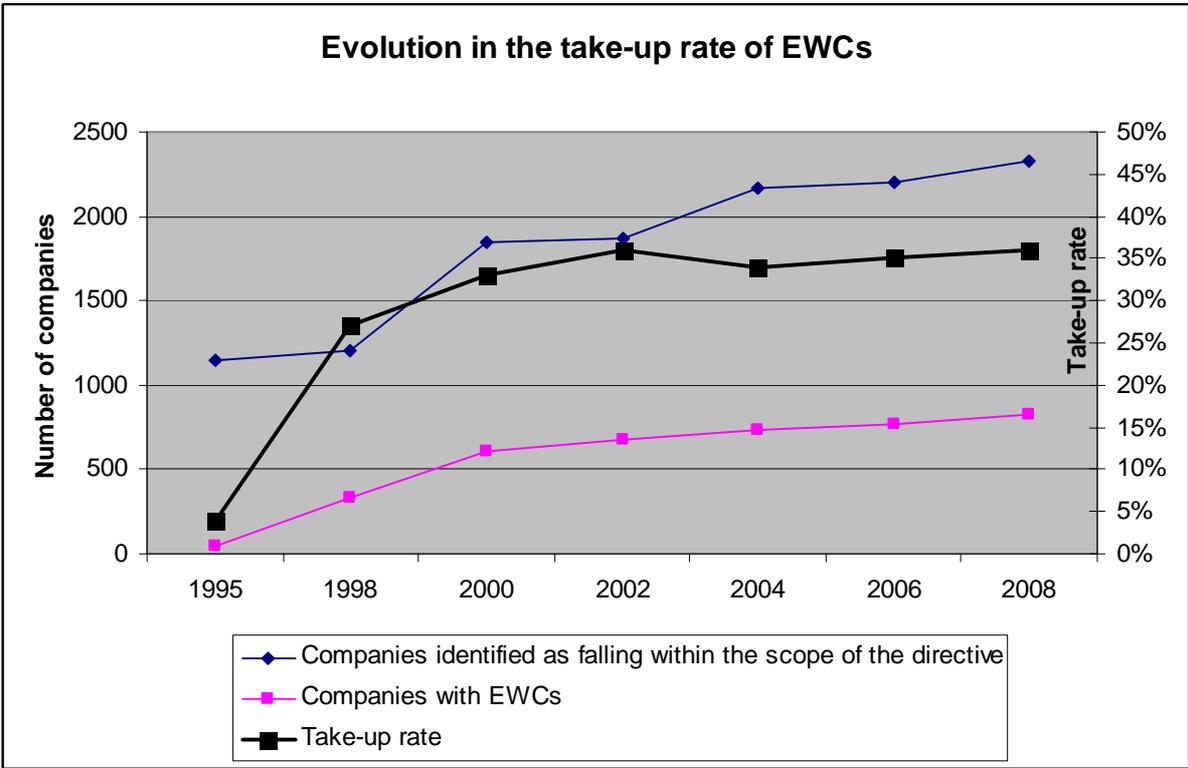
More than the country of ownership, size is a major factor in the variation in the presence of EWCs. 61.3% of relevant companies with a workforce larger than 10 000 employees have EWCs, compared with 43.3% of companies with 5000 to 10000 employees and only 23% of companies with fewer than 5000 employees.

	Companies covered by Directive and headquartered in country	Companies headquartered in country with established EWCs	Companies covered by Directive and operating in country	Companies operating in country with established EWCs
Austria	46	17	786	394
Belgium	72	39	1085	556
Cyprus	0	0	65	33
Czech Republic	8	0	636	333
Denmark	60	24	666	357
Estonia	0	0	181	101
Finland	64	28	503	283
France	210	79	1539	676
Germany	450	123	1753	697
Greece	5	1	358	221
Hungary	12	1	662	337
Iceland	0	0	50	27
Ireland	43	6	560	297
Italy	66	25	1118	546
Latvia	0	0	155	84
Liechtenstein	0	0	20	9
Lithuania	0	0	162	87
Luxembourg	5	2	274	152
Malta	0	0	56	29
Netherlands	133	51	1182	556
Norway	22	14	556	308
Poland	11	0	819	425
Portugal	9	1	617	335
Slovakia	0	0	340	199
Slovenia	0	0	185	108
Spain	41	6	1167	563
Sweden	120	57	777	414
UK	265	109	1556	660
<b>EEA Total</b>	<b>1642</b>	<b>583</b>		
Australia	8	3		
Canada	16	4		
Japan	56	21		
Russia	4	0		
South Africa	6	2		
Switzerland	104	37		
USA	344	120		
Other	24	2		
<b>Non-EEA Total</b>	<b>562</b>	<b>189</b>		
<b>TOTAL</b>	<b>2204</b>	<b>772</b>		

Source: Kerkhofs, P., European Works Councils, facts and figures 2006, ETUI-REHS, Brussels, 2006

There is also a direct relationship between the degree of internationalisation of a company and the likelihood of an EWC being established. Looking at the number of EEA countries where companies covered by the Directive are operating, it appears that 12% have operations in 15 or more countries (high internationalisation), 21% in 10 to 15 countries, 32% in 5 to 9 countries and 34% in 2 to 4 countries (limited internationalisation). The percentage of relevant companies with an EWC is 65% where internationalisation is the highest, decreases with the decrease in the number of countries of operation, and falls to less than 20% where internationalisation is lowest.

As the number of companies falling within the scope of the Directive has increased since 2000 (the increase between 1998 and 2000 is more likely to be due to improvements in the database), the slow increase in the number of companies with EWCs did not lead to an increase in the take-up rate, which has remained at around 35% of companies.



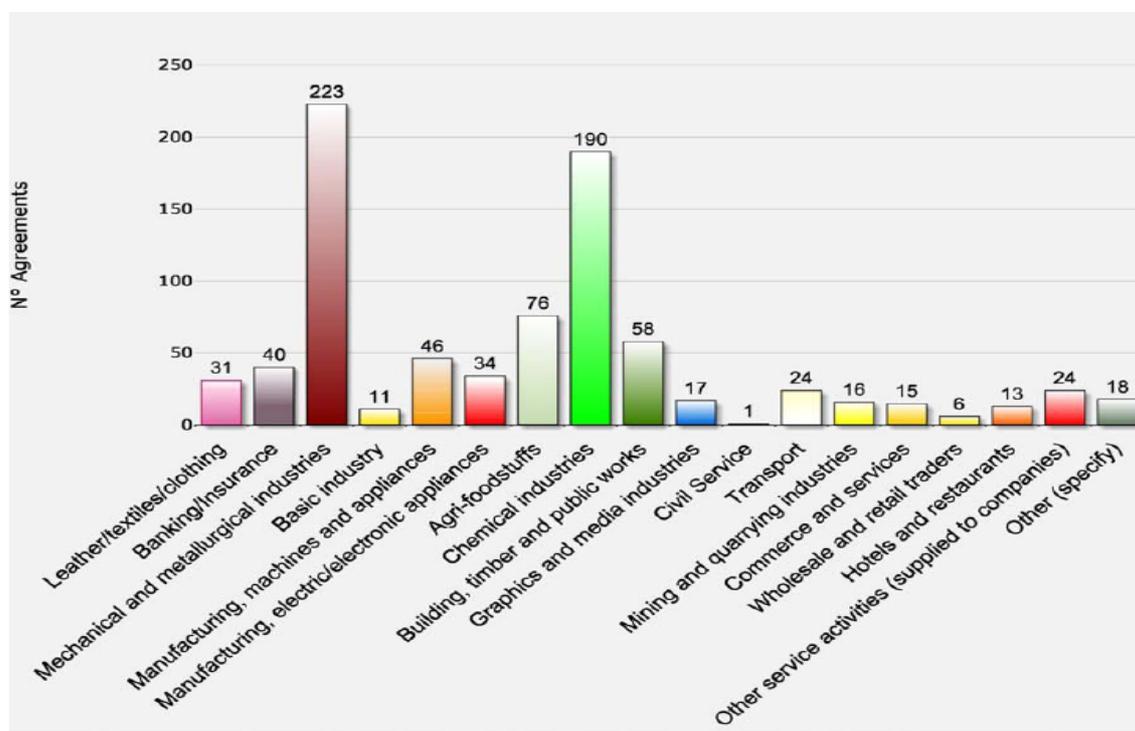
Source: ETUI-REHS Benchmarking working Europe 2008

As regards the distribution among sectors, an overview of the agreements establishing EWCs is given in the chart below. The metal, services and chemicals sectors are the most significant in terms of the number of companies falling within the scope of the Directive (see table). The first two are also the most significant as regards the workforce covered by the Directive. Over 70% of the relevant workforce is actually represented by EWCs in the metal and chemicals sectors, over 60% in the food, hotel and catering sector and in the building and wood sector, over 50% in the services sector, whereas representation is less than 40% in the textile and transport sectors. The differences may be primarily attributed to the variation in the size of the companies concerned.

	Companies covered by the Directive	Companies with established EWCs	Proportion of companies with established EWCs	Workforce in companies covered (million)	Proportion of workforce represented
Metal	735	302	41%	8.0	71%
Chemicals	437	177	41%	3.7	72%
Services	595	143	24%	8.0	55%
Food, hotel, catering	241	92	38%	2.7	65%
Building and wood	193	73	37%	2.3	63%
Textile	96	25	26%	0.3	37%
Transport	81	19	25%	1.1	29%

Source: Kerkhofs, P., European Works Councils facts and figures 2006, ETUI-REHS, Brussels, 2006

**TABLE 1: NUMBER OF AGREEMENTS BY SECTOR**



Source: SDA Infopoint Database 15 May 2006

## **ANNEX 2- LESSONS LEARNED ON EUROPEAN WORKS COUNCILS**

by European social partners UNICE, CEEP, UEAPME, ETUC, April 2005

### **Introduction**

Ten years ago, the Council adopted Directive 94/45/EC on the establishment of a European Works Council (EWC) in Community-scale undertakings and Community-scale groups of undertakings. Eight years after the deadline for transposition of the Directive at national level, companies and workers that have put in place EWCs report the positive role these bodies can play in improving the information flow between workers and management, allowing for consultation of workers on relevant cross-border issues affecting the group, developing a corporate culture in transnational groups and gaining acceptance for necessary change. Reference was also made to the cost and complexity of organising transnational information and consultation in such European structures.

Today, some 750 transnational companies or groups have established EWCs or similar bodies. This represents approximately 45% of the companies or groups of companies and about 70% of the employees potentially concerned. The majority of agreements establishing EWCs were concluded before 1996, on the basis of Article 13 of the Directive, which allowed greater flexibility to workers and management to design and operate procedures for transnational information and consultation in their company. In the meantime, a number of these agreements have been renegotiated.

Since May 2004, the EWC Directive has been applicable in the 10 new Member States. Enlargement is a major challenge for groups and companies operating in both the old and new Member States which are now enlarging their EWCs or seeking to establish transnational information and consultation bodies as they now fall under the scope of the Directive.

Building on the work programme for the European social dialogue 2003-2005, which foresaw the organisation of a seminar on the enlargement of EWCs, and after the first-stage consultation of the Social Partners by the Commission in April 2004, UNICE/UEAPME, CEEP and ETUC decided to discuss the functioning of EWCs in the enlarged European Union on the basis of practical case studies. Examples of the nine company-case studies presented during two social dialogue seminars in September and October 2004 are attached.

### **The lessons learned**

On the basis of these case studies, ETUC, CEEP and UNICE/UEAPME drew the following lessons.

#### **1. EWC: a useful tool to organise transnational information and consultation.**

Practice shows that EWCs can help management and workers to build a corporate culture and adapt to change in fast-evolving transnational companies or groups, when changes concern the group's strategy and affect sites in several countries.

In a context of globalisation and ongoing technological innovation, companies and workers in all European countries are confronted with continuous and rapid change in the organisation of work and production. The existence of a good social dialogue climate of confidence and a

constructive attitude to change are key factors which may contribute to ease the management of change in companies and to prevent or limit possible negative social consequences when more far-reaching restructuring is necessary.

## 2. Mutual trust

The establishment of a climate of mutual trust between management and workers' representatives in the EWC is important for a good functioning of this body.

Clarity in procedures is important to create the basis for this mutual trust. Some companies, in the agreement creating the EWC, have developed fairly detailed rules on the kind of and moment at which information is given to this body. Others have chosen to function with broad rules and entrusted a restricted steering committee with the task of recommending how to handle information and consultation on a particular issue.

Adopting a pragmatic approach on both sides to the operation of the EWC, developing informal relations between the management and worker representatives in the EWC or the restricted steering committee, plays a crucial role.

Openness on the side of management to releasing information at an early stage and a constructive attitude in the search for solutions on the workers' side are also important.

## 3. Understanding complex issues

The ability to understand complex issues discussed in the EWC determines the quality in communication. Investing in language as well as technical/content training helps to optimise the functioning of the EWC and to reduce overall functioning costs. Ensuring the efficiency of such training actions is essential.

Some agreements foresee the worker representatives to be assisted by experts, helping them to analyse and discuss the group's strategy, financial situation or consequences of decisions and to formulate their proposals and opinions.

## 4. Reconciling different cultures

Finding ways of reconciling different national industrial relations practices, occupational traditions and addressing an increasingly diverse workforce is a constant challenge. As part of their efforts to see the EWC play a positive role in developing a common approach in companies undergoing rapid internationalisation, some agreements have been negotiated and signed by European sectoral federations only. In some cases, they were co-signatories alongside companies' workers' representatives or their experts played an informal but important role in facilitating the synthesis of different cultures during the negotiation process. In other cases, priority was given to working exclusively with designated worker representatives within the companies.

## 5. Ensuring ownership of the EWC by the workforce

All the case studies demonstrated that ensuring a real sense of ownership of the EWC by the whole workforce was a considerable challenge. However, the practical issues to be addressed varied depending on the structure of the company, the range of its activities, its geographical coverage and possible numeric dominance of the workforce of some countries, the existence of a restricted steering committee, the dissemination of EWC activities, the possible role of European sectoral federations or other external experts, etc.

## 6. Difficulty of identifying worker representatives in new Member States

Some companies have anticipated the enlargement of their EWC and do not seem to have encountered insurmountable difficulties in identifying worker representatives from those countries. However, other companies currently seeking to enlarge their EWC report considerable difficulties in identifying worker representatives in the new Member States in which they operate.

## 7. Managing multiple layers of information and consultation

A complexity encountered by both management and worker representatives is to organise meaningful information and/or consultation without creating undue delays and uncertainties. The necessary respect of obligations arising from the legislative and contractual framework on worker information and consultation as well as confidentiality requirements influence the information and consultation process. Tensions can also arise from the fact that even if some decisions on the strategy of the group are taken at European level, managing its social consequences remains local and governed by national rules.

## 8. The good functioning of EWC is an evolving process

All case studies underlined that the good functioning of EWCs is a learning and evolving process through fine-tuning over the years. Creating a good working atmosphere and functioning in an EWC requires time, openness and efforts from both sides, notably to overcome possible misunderstandings and tensions due to differences in national situations and social dialogue traditions across Europe.

## **ANNEX 3- RESULTS OF THE 2008 SECOND-STAGE CONSULTATION OF THE EUROPEAN SOCIAL PARTNERS ON THE REVIEW OF THE EUROPEAN WORKS COUNCILS DIRECTIVE 94/45/EC**

### **Consultation process**

On 20 February 2008, the Commission adopted document C(2008) 660 launching the second-stage consultation of the social partners in accordance with Article 138(3) of the EC Treaty on the content of a possible Community initiative to revise Directive 94/45/EC on European Works Councils (EWCs) and inviting them to negotiate in accordance with Articles 138(4) and 139 of the Treaty. The consultation lasted for six weeks, ending on 3 April 2008.

### **Positions of the European social partners on the opening of negotiations**

On 20 February 2008, in a press release, the European Trade Union Confederation (ETUC) welcomed the Commission's initiative launched the same day and its Deputy General Secretary declared that 'The ETUC will be ready for a substantial and rapid negotiation. But we will not accept the employers playing for time'.

On 2 April, the European employer organisations BusinessEurope, CEEP and UEAPME, 'considering that the European social partners are best placed to address this legislative review effectively', declared they were 'looking forward to the opening of negotiations on European Works Councils' with the objective 'to agree on amendments to the EU legislative framework, which will help improve the functioning of EWCs in practice'. On the same day, the European Trade Union Confederation (ETUC), considering its objective 'to see action to revise the Directive during the lifetime of this Commission and this Parliament', declared it was 'ready to negotiate but only on a basis which includes a tight timetable and a quick conclusion of the talks'.

On 3 April, the sectoral employers' organisation European Banking Federation EBF awaited 'with interest the decision of the social partners on whether to open negotiations and would hope to make a positive contribution to the debate over the next few months'. The same day, EUROCOMMERCE declared it had 'no objections to start negotiations at EU level' but considered 'it should be made possible to benefit from an open-ended social dialogue and negotiation procedures' and felt there was a risk of not having 'fair and balanced negotiations'. On 10 April, CEC European Managers expressed its 'wish that European social partners start a negotiation procedure on the basis of the Commission's proposals and of CEC's responses' and 'to actively take part to the negotiations within the drafting group'.

On 11 April, claiming it had made 'serious efforts to allow a social dialogue solution', the ETUC concluded it was 'not ready for negotiations within the framework of the social dialogue' considering 'the time constraints and the depth of differences with the employers' and counted on the Commission to present a revised Directive. On the same day, BusinessEurope, CEEP and UEAPME regretted 'the decision made by the ETUC to reject the opening of negotiations', recalled their commitment, good will and 'motivation to find an agreement with ETUC' but that 'employers could not agree to open pre-negotiations without involving all affected employers' organisations and their respective members in a democratic process', and asked the Commission to make its 'best efforts to enable a social dialogue solution' and in the meantime not to enter into a legislative process by itself.

On 30 April, the Commission launched a last call to the social partners, inviting them to make their best efforts to negotiate on European Works Councils. A few days later, it was confirmed that there would be no such negotiations.

### **Responses from the European social partners consulted under Article 138 of the EC Treaty**

In addition to the above-mentioned responses regarding the opening of negotiations, the Commission received six contributions from the European social partners consulted under Article 138 of the Treaty.

CEEP, the European centre of enterprises with public participation and of enterprises of general economic interest, underlined that “the existence of good, constructive social dialogue can have an important role to play in managing the impact of change, including that resulting from transnational restructuring” and that “effective information and consultation, without hampering the process of company level decision making is important” to achieve this result. It commented on the proposals (see table). It broadly supported, with some suggestions, the envisaged proposals for the concepts of information and consultation, the role and competence of employee representatives, the adaptation clause and the linking of levels. It opposed any measure giving the EWC a legal personality and a negotiating role. It proposed other solutions for the role of trade unions and transnational competence. In addition, it proposed a threshold to hold a seat on the Special Negotiating Body and to shorten the period of negotiation to adapt existing agreements.

HOTREC, on behalf of the hospitality industry, stressed that ‘there is no need for a revision of the Directive’, which, ‘as it currently stands (...) provides companies and employees with a sufficient framework for efficient consultation’.

The European Banking Federation, EBF, stressed the importance of EWCs for the banking sector and ‘the need for flexibility in responding to economic and technological change’.

EUROCOMMERCE insisted ‘on the principle that social partners at company level need a maximum of flexibility to agree solutions best suited to their own circumstances’ and made detailed comments on the envisaged proposals (see table). It supported those relating to the role and competence of employee representatives and to the transnational competence of EWCs. It opposed those relating to the concepts of information and consultation, the content of subsidiary requirements, the role of trade unions and the protection of rights. It proposed another solution for the linking of consultation levels.

ETUC shared the Commission’s view that ‘substantial changes in the legislation are needed if EWCs are to play their appropriate role on the ongoing process of European integration’ and made detailed comments on the envisaged proposals (see table). It broadly supported, with some suggestions, those relating to the concepts of information and consultation, the role of trade unions, the role and competence of employee representatives, the protection of rights, the adaptation clause, and the responsibilities of management. It opposed part of the proposal regarding the composition of the Special Negotiating Body. It proposed other solutions for the content of the subsidiary requirements and transnational competence. In addition, it proposed

- Lowering the thresholds from 1000 to 500 and from 150 to 100, respectively
- Deleting the exemptions for merchant navy crews and *ideological guidance* undertakings

- Specifying more precisely the definition of *controlling undertaking* to cover, for example, joint ventures, franchise companies and monopsonies
- Making possible the opening of negotiations by trade union federations
- Reducing the negotiation period from 3 years to one, with a possible agreed extension of 6 months
- Applying the subsidiary requirements where negotiations are not resumed 4 months after the last negotiating meeting
- Establishing majority rules for an agreement to be concluded: absolute majority of members as well as of employees from at least two Member States
- Deleting the possibility to agree on a procedure instead of a body for information and consultation
- Including expertise and operating expenses within the compulsory items for an *Article 6* agreement
- Promoting equality between men and women in the composition of EWCs
- Defining a procedure for agreement on decision-making rules within the EWC and fall-back provisions
- Specifying more precisely the definition of confidential information and placing the burden of proof on the company
- Providing for a decision to be abandoned if information and consultations rights have been violated
- Defining more precisely the protection of employees, as in Directive 2001/86/EC
- Providing for the cost of legal assistance and court proceedings to be borne by management
- Making all EWC agreements accessible in a public register.

CEC European Managers considered ‘a consolidation of the EWC role can only take place if executives and managers are adequately represented within it’. It proposed different solutions to ensure executives and managers are represented, informed and consulted, such as compulsory inclusion in national delegations with at least three representatives or in the national delegation of the country with the highest number of executives, the establishment of specific committees for managers, an obligation to take into account the interests of the managers within EWC discussions and the right for the negotiating body to be assisted by managers’ representatives. CEC made detailed comments on the envisaged proposals (see table). It broadly supported, with some suggestions, most of the proposals, except for the role of trade unions, the composition of the Special Negotiating Body, and transnational competence, where it proposed other solutions. In addition, it proposed

- Making possible the opening of negotiations by trade union federations
- Removing the limit of one expert on the Special Negotiating Body
- Defining more precisely the content, level and timetable for information to be communicated to the EWC

- Guaranteeing the communication of documents in several languages, for example the three main languages spoken in the group
- Specifying that confidentiality is applicable vis-à-vis third parties but not between employee representatives and authorising the EWC to create a website
- Introducing an early warning procedure for the supervisory board in the event of severe deficits in information and consultation.

### **Contributions from other stakeholders**

The Commission also received eleven other contributions in response to the consultation document: four from employers and companies and seven from trade unions and European Works Councils. The Confederación Empresarial Española de la Economía Social (CEPES) considered that the specificities of companies in the social economy should be taken into account and their organisations consulted. The other contributors shared the main orientations of the envisaged proposals and made suggestions for reviewing some of them and removing or adding others.

Employers and companies:

- The Association Française des Entreprises Privées (AFEP — French private companies) commented on the proposals (see table). It broadly supported, with some suggestions, the envisaged proposals for the concepts of information and consultation, the role and competence of employee representatives, the adaptation clause and the linking of levels. It opposed any measure in the subsidiary requirements giving the EWC a negotiating role. It proposed other solutions for the role of trade unions, transnational competence and the transitional provisions. In addition, it proposed reinforcing the role of the select committee to deal with specific circumstances and regulating the use of expertise by agreement
- The American Chamber of Commerce to the European Union (AmCham EU) expressed its interest in EWCs and the proposed revision of the Directive since a substantial number of its member companies had EWC agreements and recalled that companies of American parentage accounted for at least 130 of the total 820 EWCs. It stressed the need for flexible solutions ‘preserving the speed of decision-making processes that enable these undertakings to compete in the global economy’. It commented on the proposals (see table). It broadly supported, with some suggestions, the envisaged proposals for the role and competence of employee representatives, the responsibilities of local management, the composition of the SNB, the expression of opinions and the inclusion of new subjects in the subsidiary requirements, the adaptation clause, the linking of levels and the transitional provisions. It firmly opposed any measure that could be associated with collective bargaining or creating an obligation to reach an agreement, a predefined role for experts, as well as a definition of transnational competence for EWCs that could sanction consultation on single-country events whether or not the decision is taken outside the affected countries. In addition, it favoured company-level agreements over a definition of information and consultation going beyond the present definitions, the definition of exceptional circumstances so as to favour anticipation, the content and modalities of training, and proposed reinforcing the role of the select committee.
- The company Generali shared its experience and comments in detail on the consultation document, considering that the changes envisaged to the Directive and the amendments to

the EWC agreement go in the same direction and suggested empowering the select committee.

#### Trade unions and European Works Councils

- NFU Finance, the Confederation of Nordic Bank, Finance and Insurance Unions, emphasised how consultation was understood in the Nordic context, as mandatory with opinions taken into account before decisions are made. It proposed provisions for ensuring the legitimacy of employee representatives, organising network meetings between employees, establishing that the burden of proof regarding confidentiality and non-transnational character rests with management, and having decisions taken without proper consultation declared null and void
- Finansförbundet, the Swedish financial sector union, focused on the concept of consultation and its relationship with the concept of negotiation in the Swedish context and supported the adaptation clause
- Contributions from European Works Councils and company unions at Total, HeidelbergerCement, Handelsbanken, and EADS, together with a joint contribution from IF, Nordea and Danske Bank, provided detailed comments based on their experience, mostly supporting the measures envisaged and making additional proposals similar to those put forward by the ETUC. They especially insisted on the concepts of information and consultation, the number of meetings, access to sites, expertise and training.

#### **Contributions received ahead of the consultation**

Ahead of the consultation, it should be noted that stakeholders sent letters to the Commission at the end of 2007 and in early 2008 to share their experiences, opinions and suggestions concerning the review of the EWC Directive. The Commission received 35 letters from:

- Five organisations representing workers: the European Trade Union Confederation and four European Industry trade union federations in the metal (EMF), textile (ETUF/TCL), services (UNI Europa) and public services (EPSU) sectors, stressing the need to launch the process for revising the Directive, notably with regard to the particular situation in their sector, and proposing measures along the lines found in the ETUC's response to the consultation;
- Six national trade union organisations from Austria (OGB Vida), the Czech Republic (OS KOVO), Germany (DGB), Poland (Solidarnosc and OPZZ) and the United Kingdom (UNISON), describing the need to revise the Directive with reference to the particular situation in their country, and proposing measures along the lines found in the ETUC's response to the consultation;
- Three German employers' organisations at cross-industry level (BDA) as well as in the banking (AGV Banken) and insurance (AVB and member companies) sectors, sharing their experience of the EWCs and opposing the Commission's planned initiative to launch a review of the Directive, underlining the absence of a need to do so and that the initiative would run counter to the autonomy of the social partners;

- Four German companies (Deutsche Bank, Heimbach, Leoni, Renolit), sharing the experience with their EWCs and underlining the absence of a need for revision of the Directive;
- Seventeen European Works Councils (Alcatel-Lucent, Akzo Nobel, BNP, Caterpillar, Chemtura, Federal Mogul, GDF, GlaxoSmithkline, Italcementi, Parker Hannifin, Rheinmetall, Riva Group, Seco tools, Securitas, St Gobain, Volkswagen, Wyeth Farma), sharing their experience with EWCs and describing the need for revision of the Directive, notably as regards the definitions of information and consultation and the other proposals found in the ETUC's response to the second consultation.

+ support - opposition *Alternative	ETUC	CEC	CEEP	Eurocommerce	AmCham EU	AFEP
<b>1.1 Concepts of information &amp; consultation</b>	+ Use definition in Dir. 2001/86	+ Use definition in Dir. 2001/86	+ Dir.2001/86 Without involvement in decision making	- Would slow down decision-making and bring no clarification	* <i>To be defined by agreement</i>  - <i>no bargaining</i>	+ <i>See definition in Dir. 2002/14</i>
<b>1.2 Subsidiary requirements</b>	* Select committee up to 5 mb where EWC has 9 or more mb, right to min. 2 regular meetings, follow-up meeting, facilities, experts, interpretation and translation as needed, topics: disability, discrimination, gender, data protection	+ Use provisions in Dir. 2001/86  At least 1 meeting/year  Define resources for the EWC	* Response to opinion not to delay decisions  - Second ordinary meeting and new topics to remain voluntary  - no new meeting as no negotiating role of EWC	- EWC not to give opinions, maintain costs/benefits, limit topics addressed, maintain definition of extraordinary circumstances	+ <i>Express opinion, new subjects</i> * <i>anticipatory exceptional circumstances</i> by agreement  - <i>no reaching of agreement</i>	- <i>New meeting not with view to reaching an agreement, as EWC not a negotiating body</i>
<b>1.3 Role of trade unions</b>	+ Right of TU to attend SNB meetings and EWC meetings where required by members, full-time officers not to be prevented from being EWC members	* Agreements with signature of European federations	* TU involvement according to need, TUs not to be members of SNB and EWC as internal bodies	- No compulsory TU role, inadequate references to Dir. 2001/86	* <i>Per agreement, no predefined role of expert</i>	* <i>Only internal TU representatives to be present</i>
<b>1.4 Role &amp; competence of employee representatives</b>	+ Implies access to sites and link between sites, free time for training and costs covered, also economic, legal & social topics	+ Explicit topics & financing for training, access to sites	+ Training appropriate, reporting back important, to be linked with rules on confidentiality	+ Mandatory reporting to country of origin, continuing training necessary, obligation to attend for representatives	+ <i>Training needed to be discussed in EWC</i> * <i>Ways of communicating to adapt to MS</i>	+ <i>Training important, reporting back to be linked with rules on confidentiality</i>
<b>1.5 Protection of rights</b>	+ EWC to have legal personality and capacity	+ On condition EWCs also represent managerial staff	- Sanctions national, EWC not to have legal personality	- Managers to represent employees' interests vis-à-vis outside world	- <i>Sanctions already provided for</i>	

	ETUC	CEC	CEEP	Eurocommerce	AmCham EU	AFEP
<b>2.1 Adaptation clause</b>	+ Obligation to renegotiate Art. 6 or 13 upon request	+ Obligation to have single body after M&A	+ In case of significant changes in company structure & on request * Shorten renegotiating period		+Encourage adaptation but Article 13 agreements to be modified by own provisions  *guidelines on M&As	+ Only one EWC after M&A but Article 13 agreements not to be challenged
<b>2.2 Responsibility management</b>	+ European TU federations entitled to request info	+ European managers federations entitled to request info	+		+ provided no confusion or unnecessary burden	
<b>2.3 Composition of SNB, negotiation</b>	- No grouped or indirect representation but OK to remove maximum limit on SNB	* Representation for managers	+ With threshold for holding a seat at SNB		+	
<b>3.2 Transnational competence</b>	* Burden of proof on management that issue is non-transnational	* Use definition in Dir. 2001/86	* To define per agreement, or where to or more Member states are concerned	+ But requires adaptation of codetermination rules at national level	*Significant impact on employees in at least two countries, no competence over single country	* Refer to effects of decision and not to its origin
<b>3.3 Linking levels</b>		+	+ Linking of levels per agreement, information to all levels at the same time in case of transnational restructuring	* It should not be possible to consult first at national level, so as not to slow down decision-making	+ Principle of relevant level, confirmation of possible parallel or simultaneous consultation at different levels	+ Fall-back: parallel and autonomous start of process
<b>4 Transitional provisions</b>		+ As long as representation of executives & managers satisfactory	+ Revision not to require all agreements to be renegotiated		+ With revision according to own provisions of agreements	* Article 13 agreements not to be challenged

## ANNEX 4- DETAILED WEIGHING OF OPTION 3 (REVIEW OF LEGISLATION)

### Ability to achieve the specific objectives

Sub-options in option 3	Effectiveness of information and consultation rights in existing EWCs	Increase in take-up rate	Legal certainty in the setting up and operation of EWCs	Coherence and interplay between directives
<b>1.Lower thresholds</b>	<p>+</p> <p>-Easier dialogue in smaller companies</p>	<p>---</p> <p>-Will lower take-up rate in the new scope</p>	No progress	No progress
<b>2.Registering agreements</b>	<p>+</p> <p>-Benchmark text for agreements</p>	<p>+</p> <p>-Better access to information to ease first steps</p>	<p>++</p> <p>-Clarity and transparency of agreement -facilitates monitoring of implementation</p>	<p>+</p> <p>-Same provisions in SE/SCE</p>
<b>3.Composition of SNB and negotiation process</b>	<p>+</p> <p>-Helps work in starting period -Agreements using best practices</p>	<p>+</p> <p>-Supports start of negotiations</p>	<p>+</p> <p>-Resolves uncertainty on composition of SNB</p>	<p>+</p> <p>-Same mechanism as for SE and SCE</p>
<b>4.Protection of rights</b>	<p>++</p> <p>-Clarifies existence of sanctions in cases of non-compliance -Clarifies possibility for EWCs to represent workers' interests</p>	<p>-/++</p> <p>-Information necessary to take first steps available -Fear of sanctions among employers</p>	<p>+</p> <p>-Role of EWC in expressing employees' interests and legal standing of EWC clarified</p>	<p>+</p> <p>-Same provisions as Framework Directive</p>

Sub-options in option 3	Effectiveness of information and consultation rights in existing EWCs	Increase in take-up rate	Legal certainty in the setting up and operation of EWCs	Coherence and interplay between directives
<b>5.Role of trade unions</b>	<p style="text-align: center;"><b>++</b></p> <ul style="list-style-type: none"> <li>- Promotion of best practice</li> <li>-Increased added value through better coordination and relations between EWC and national bodies and workers</li> <li>-Possible support for draft agreements from trade unions/ employers</li> </ul>	<p style="text-align: center;"><b>-/+++</b></p> <ul style="list-style-type: none"> <li>-Provision of information useful to take first steps</li> <li>-Support for initiatives by workers of subsidiaries</li> <li>-Promotion of EWCs</li> <li>-Fear of trade union intervention among some employers</li> </ul>	<p style="text-align: center;"><b>+</b></p> <ul style="list-style-type: none"> <li>-Provision of expertise on EWCs</li> </ul>	<p style="text-align: center;"><b>+</b></p> <ul style="list-style-type: none"> <li>-Same provisions as for SE/SCE</li> </ul>
<b>6.Subsidiary requirements</b>	<p style="text-align: center;"><b>+++</b></p> <ul style="list-style-type: none"> <li>-Benchmark for best practices on responses to opinions, anticipation, role of select committee</li> </ul>	<p style="text-align: center;"><b>-/+++</b></p> <ul style="list-style-type: none"> <li>-Increased added value of EWCs perceived by employees</li> <li>-Fear of slower decision-making among employers</li> </ul>	<p style="text-align: center;"><b>+</b></p> <ul style="list-style-type: none"> <li>-Benchmark for consultation in exceptional circumstances</li> </ul>	<p style="text-align: center;"><b>+</b></p> <ul style="list-style-type: none"> <li>-Same provisions as for other directives</li> </ul>
<b>7.Adaptation clause and transitional provisions</b>	<p style="text-align: center;"><b>++</b></p> <ul style="list-style-type: none"> <li>-Secures information and consultation during changes in make-up</li> <li>-Allows obsolete agreements to be changed</li> </ul>	<p style="text-align: center;"><b>-/+</b></p> <ul style="list-style-type: none"> <li>-Eases agreements for newly formed groups</li> <li>-Faster termination of EWCs in the event of mergers</li> </ul>	<p style="text-align: center;"><b>+++</b></p> <ul style="list-style-type: none"> <li>-Resolves uncertainty as to changes in make-up</li> <li>-Secures existing agreements</li> </ul>	<p style="text-align: center;"><b>+</b></p> <ul style="list-style-type: none"> <li>-Similar provisions in SE/SCE</li> </ul>
<b>8.Role and competence of employee representatives</b>	<p style="text-align: center;"><b>+++</b></p> <ul style="list-style-type: none"> <li>-Increases added value</li> <li>-Increases capacity to analyse information and have meaningful consultation</li> <li>-Increases cost-effectiveness</li> </ul>	<p style="text-align: center;"><b>-/+++</b></p> <ul style="list-style-type: none"> <li>-Increased added value of EWCs perceived by employees</li> <li>-Fear of additional operating costs among employers</li> </ul>	<p style="text-align: center;"><b>+</b></p> <ul style="list-style-type: none"> <li>-Better knowledge /observance of legal framework</li> </ul>	<p style="text-align: center;"><b>+</b></p> <ul style="list-style-type: none"> <li>-Same provisions in SE/SCE</li> </ul>

Sub-options in option 3	Effectiveness of information and consultation rights in existing EWCs	Increase in take-up rate	Legal certainty in the setting up and operation of EWCs	Coherence and interplay between directives
<b>9. Concepts of information and consultation</b>	<p style="text-align: center;"><b>+++</b></p> <ul style="list-style-type: none"> <li>-Strong reference to information and consultation with useful effect</li> <li>-Better anticipation</li> </ul>	<p style="text-align: center;"><b>-/+++</b></p> <ul style="list-style-type: none"> <li>-Improved perception of added value of EWC leading to new initiatives from employees</li> <li>-Fear of workers' involvement and slower decision-making among employers</li> </ul>	<p style="text-align: center;"><b>++</b></p> <ul style="list-style-type: none"> <li>-Clarification leading to less disputes</li> </ul>	<p style="text-align: center;"><b>+++</b></p> <ul style="list-style-type: none"> <li>-Coherent concepts of information and consultation across directives</li> </ul>
<b>10. Transnational competence and linking levels</b>	<p style="text-align: center;"><b>+++</b></p> <ul style="list-style-type: none"> <li>-Proper and appropriate interplay between levels, which is the key challenge during restructuring</li> <li>-Better anticipation</li> <li>-Dialogue at relevant level of management and employee representation</li> <li>-Increased added value and cost-effectiveness of EWC</li> </ul>	<p style="text-align: center;"><b>-/++++</b></p> <ul style="list-style-type: none"> <li>-Better perception of link between national bodies and EWCs may increase interest and avoid reluctance of employees, but fear of losing power at national level may increase reluctance</li> <li>-Possibility to save time in consultation processes may lead to employers' initiatives</li> </ul>	<p style="text-align: center;"><b>+++</b></p> <ul style="list-style-type: none"> <li>-Avoids disputes in 40% of companies</li> <li>-Makes it legally possible to consult first or at same time at European level</li> </ul>	<p style="text-align: center;"><b>+++</b></p> <ul style="list-style-type: none"> <li>-Organises the link between directives</li> </ul>

### Likely impact on costs

Sub options in option 3	Set-up costs	Operational costs	Dispute-related costs	Non-financial costs
<b>1.Lower thresholds</b>	++ -Higher relative costs for smaller companies	++ -Higher relative costs for smaller companies	No impact	++ More rigid employee-management relations in smaller companies
<b>2.Registering agreements</b>	+ Administrative costs of sending the agreement to register	No impact	- -Clarity and transparency of agreement	+ External control
<b>3.Composition of SNB and negotiation process</b>	- -Support by trade unions/employers	+ -Benchmark for more costly practices	-- -Clear provision of information and composition of SNB -Legitimacy of agreements	-/+ -More efficient negotiation -Involvement of external organisations
<b>4.Protection of rights</b>	No impact	No impact	--/+ -Increased observance of rights -Easier legal standing for EWCs	---/+ -Saves high costs linked to absence of consultation -Different impacts on decision-making
<b>5.Role of trade unions</b>	--/+ -Support for initiatives -Support for draft agreements -Eases working together of representatives -Cost of travel and subsistence where no expert before	-/+++ -Benchmark for more costly practices -More efficient operation	-/+ -Provision of expertise on EWCs -Negotiation instead of litigation -Experience on legal proceedings	-/+ -More efficient negotiation and operation -Involvement of external organisations -Raised employee expectations and coordination

<b>Sub-options in option 3</b>	<b>Set-up costs</b>	<b>Operational costs</b>	<b>Dispute-related costs</b>	<b>Non-financial costs</b>
<b>6.Subsidiary requirements</b>	<p><b>-/+</b></p> <p>-To be set neither too low nor too high to avoid either party playing for time and holding more meetings than necessary</p>	<p><b>-/++</b></p> <p>-Benchmark for more costly practices, save for select committee instead of additional plenaries</p>	<p><b>--</b></p> <p>-Benchmark for more timely information &amp; consultation -Benchmark for better anticipation</p>	<p><b>-/+</b></p> <p>-More efficient benchmark for operation -Benchmark for need to take employees' opinion into account</p>
<b>7.Adaptation clause and transitional provisions</b>	<p><b>-/+</b></p> <p>-Eases agreements for newly formed groups -SNB to be established where necessary -Transitional costs</p>	<p><b>--/+</b></p> <p>-Faster termination of EWCs in cases of mergers -Benchmark for pre-existing agreements</p>	<p><b>---</b></p> <p>-Lowers high costs due to social unrest -Resolves legal uncertainty as to changes in make-up and termination of agreements</p>	<p><b>---/+</b></p> <p>-Helps build new corporate culture in mergers -Lowers social unrest -Need to take into account employees' opinion</p>
<b>8.Role and competence of employee representatives</b>	<p><b>-/+</b></p> <p>-More efficient negotiation -Right to training</p>	<p><b>--/++</b></p> <p>-New training in 20% of EWCs -Increases cost-efficiency</p>	<p><b>-/+</b></p> <p>-Better knowledge /observance of legal framework</p>	<p><b>---/+</b></p> <p>-Saves costs linked to absence of feed-back and to social unrest -Raised employee expectations and coordination -Different impacts on decision-making</p>

Sub options in option 3	Set-up costs	Operational costs	Dispute-related costs	Non-financial costs
<b>9. Concepts of information and consultation</b>	No impact	<p align="center"><b>--/++</b></p> <ul style="list-style-type: none"> <li>-Saves costs of lack of anticipation</li> <li>-More meetings (either plenary either select committee)</li> </ul>	<p align="center"><b>---/+</b></p> <ul style="list-style-type: none"> <li>-Saves high costs linked to social unrest</li> <li>-Saves costs of additional meetings and legal fees in the event of disputes</li> </ul>	<p align="center"><b>---/++</b></p> <ul style="list-style-type: none"> <li>-Saves high costs linked to absence of anticipation and to social unrest</li> <li>-Raised employee expectations and coordination</li> <li>-Different impacts on decision-making</li> </ul>
<b>10. Transnational competence and linking levels</b>	No impact	<p align="center"><b>--/+</b></p> <ul style="list-style-type: none"> <li>-Better prepared and more effective information and consultation processes</li> <li>-More meetings where EWC previously not consulted</li> </ul>	<p align="center"><b>---</b></p> <ul style="list-style-type: none"> <li>-Avoids disputes in 40% of companies</li> <li>-Makes it legally possible to consult first or at same time at European level</li> </ul>	<p align="center"><b>---/+</b></p> <ul style="list-style-type: none"> <li>-Saves high costs linked to absence of anticipation and to social unrest</li> <li>-Possibility to save time in consultation processes</li> <li>-Raised employee expectations and coordination</li> <li>-European level potentially more important</li> </ul>