

BERR

Department for Business
Enterprise & Regulatory Reform

**RECAST OF THE EUROPEAN
WORKS COUNCIL DIRECTIVE**

Government Response to
Public Consultation

DECEMBER 2008

**RECAST OF THE EUROPEAN WORKS COUNCIL DIRECTIVE
GOVERNMENT RESPONSE TO THE PUBLIC CONSULTATION**

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EXECUTIVE SUMMARY

The Government is grateful to all 29 respondents for their contribution to this consultation. Whilst the consultation demonstrated a significant divergence of views as to how the Directive should be amended, many respondents viewed the joint position as established by the European Social Partners to be the best compromise acceptable to both the business community and unions. In particular, the TUC stated its “support for the joint advice as agreed by the ETUC, BusinessEurope and other employers’ association as the basis for amending the Directive on the restricted number of issues which have been agreed upon by the European Social Partners.” The CBI agreed and highlighted that the agreement “strikes a delicate balance not to be substantially amended”.

In general, employers considered that the Directive was working as intended and required minimal change. In contrast, trade unions were concerned about the operation of the current Directive and proposed changes which went well beyond those suggested by the Commission.

On points of detail, respondents focused most on the following aspects of the Commission's proposals:

- the overall aims of EWCs in achieving effective decision-making within transnational organisations (Article 1);
- the definition of those transnational issues on which EWCs should be informed and consulted (Article 1);
- the definitions for "information" and "consultation" (Article 2);
- the role of trade unions and trade union experts (Article 5);
- the allocation of seats by member state on Special Negotiating Bodies and EWCs (and the proposals that member states with fewer than 50 employees would not be guaranteed any places) (Articles 5 and Annex I);
- the linking of national and European levels for informing and consulting employees (Article 12); and
- the status of voluntary agreements as recognised under Article 13 of the current Directive (Article 13).

In the light of the responses received and its own analysis of the proposals, the UK Government can support a revision of the EWC Directive provided that this is based on the Commission's text as amended by the European Social Partners. The Social Partners' suggestions constitute an acceptable compromise. Their amendments significantly improve the text, particularly with regard to Articles 12 and 13 where the Government had concerns about the Commission's initial proposals.

That said, the Government considers that the text, as amended by the Social Partners' first opinion, contains some passages and expressions which are potentially ambiguous or unclear, and the Government believes those parts of the text could be improved in technical terms to make it easier for companies, employees, their representatives and the courts to interpret in practice. In particular, the precise meaning of Article 13, which deals with a complex set of issues about the status of existing EWCs, appeared at points to be insufficiently

clear. The Government is therefore pleased to note that the European Social Partners' have held further discussions which have resulted in a further letter, dated 2 October, which clarifies and re-expresses their proposed amendments to Article 13 of the Directive. This second letter presents a helpful clarification and its suggested new wording should be incorporated into the final text of the recast Directive. A copy of the letter is enclosed at Annex B for information.

Next Steps

In December this year, the French Presidency is seeking to obtain the agreement of the Council and the European Parliament to adopt the recast Directive. The Government believes such an agreement is within reach, provided the European Parliament does not insist on further amendments which go beyond the carefully-crafted compromise suggested by the European Social Partners. Should agreement be achieved, the UK Government would expect to hold a further public consultation on regulations to transpose the recast Directive in the UK during the course of 2009. This work will be informed by the responses received to this consultation.

However, should the text not be adopted next month, then negotiations within the Council will continue into 2009 and possibly beyond. In that event, the Government will draw on the detailed views of respondents during this consultation in formulating its views on any further suggestions to refine the text.

CHAPTER 1 – INTRODUCTION

The Department for Business, Enterprise and Regulatory Reform (BERR) issued a consultation paper in September 2008 on the European Commission's proposals to recast Directive 94/95/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. This is generally referred to as the European Works Council Directive.

The closing date was 6 October 2008. 29 responses were received in total.

A list of all respondents who responded publicly is attached at Annex A. Copies of the original responses are available on request. Please contact Karen Goulding on karen.goulding@berr.gsi.gov.uk for further information.

The breakdown of the 29 responses received is as follows:

Trade Unions	8
Employers	2
Employers' organisations	6
Individuals ¹	5
Lawyers	4
Other	4

BERR is grateful to respondents for their time and comments.

Understanding this document

The consultation document presented six specific questions for consultees to address. The structure of the response document follows a similar lay-out. A summary of the views expressed by respondents to each of the questions is presented. Not every respondent is cited in each case, not least because some submissions repeated views already expressed by others. Each section dealing with a question is followed by the Government's response to those views.

¹ The individual respondents are all representatives on European Works Councils.

CHAPTER 2 – BACKGROUND TO THE RECAST DIRECTIVE

The European Works Council (EWC) Directive, which sets out requirements for informing and consulting employees at the European level, was adopted in September 1994 and implemented in September 1996. These laws were extended to the UK in June 1997 and came into force in January 2000 by the Transnational Information and Consultation of Employees (TICE) Regulations 1999.

Following a review, the European Commission issued a legislative proposal to recast the EWC Directive in order to address a number of problems which it had identified in the practical application of the Directive.

In order to seek the views of stakeholders, the UK Government issued a consultation document on 9 September concerning the Commission's proposals. This posed six questions for respondents to answer. The consultation document explained that, due to the speed of developments at the European level, the consultation period would be shortened to 4 weeks. Over 400 copies of the consultation document were sent to companies and interested stakeholders. Of these, 113 were sent to UK-based companies which, according to BERR's information, operated an EWC. BERR believes the majority of UK-based companies with experience of EWCs have therefore received the consultation document.

The consultation document sought to bring to respondents' attention the joint opinion on the recast of the Directive which was agreed by the European Trade Union Confederation, BusinessEurope, CEEP and UEAPME (the "European Social Partners"). Whilst this largely endorsed the Commission's proposal as acceptable by business and unions, it included a limited number of agreed amendments to the proposal. This letter was presented to the relevant EU Institutions on 29 August 2008.

The Government emphasised the significant influence this common position was likely to have on the considerations by the member states and the European Parliament. It included a copy of this letter to inform respondents of this development for information and the Government is grateful for the comments it received on the amendments as proposed by the European Social Partners.

Since then, the European Social Partners have agreed a further letter on 2 October which has brought legal clarity to the provisions set out under Article 13 of the proposed changes. This letter is attached at Annex B for information.

CHAPTER 3 – RESPONSES TO CONSULTATION QUESTIONS

Consultees were asked to consider the following questions:

Q1 – What are your views on the performance and effectiveness of EWCs, especially those covering UK employees? Where, if anywhere, do they face operational difficulties and how could their performance be improved?

Views of respondents

Thirteen respondents replied to this question.

Employers, unions, legal organisations and representatives who sit on European Works Councils (EWC) responded to this question. Most agreed that their experience of EWCs was, overall, positive.

The Confederation British Industry (CBI) considered EWCs to have made a positive contribution to the UK's information and consultation landscape, though it reported a degree of employee apathy where EWC vacancies go unfilled or representatives either fail to contribute topics for discussion or those proposed are not transnational. Rolls Royce thought that EWCs had improved employee relations, but also considered that trade union representatives influenced the EWC with a union agenda, resulting in difficulties in attaining fair representation for non-union employees. It suggested a requirement for proportionate representation to mitigate this effect.

The Chemical Industries Association (CIA) and the Newspaper Society felt that EWCs did not fit comfortably with the overall information and consultation framework in the UK.

The European Study Group (ESG) suggested that greater use of on-line meetings could significantly reduce costs without reducing the flow of information between management and the EWC.

Trade unions, including the GMB, the Union of Shop, Distributive and Allied Workers (Usdaw) and Unite, felt that the full potential of EWCs was yet to be recognised. The GMB stated that some of its members had experienced uncooperative attitudes from some employers. Several responses highlighted language and interpretation issues as reasons for the lack of effective operation of EWCs. Usdaw felt that EWCs can become a mere talking shop where the agenda is dominated by the business' concerns rather than workers' issues.

The Involvement and Participation Association (IPA) considered there to be room for improvement in the way EWCs operate and their level of take-up.

Angela Smith of the Howden Group's EWC and Evershed's considered EWCs to have made a positive contribution to the UK's information and consultation landscape.

Government Response:

The Government appreciates the insight afforded by respondents' experiences of the operation of EWCs. It supports employee engagement and agrees with respondents that EWCs have created a useful extra tier for informing and consulting employees in European companies.

As regards the suggestion that EWCs could meet on-line, the Government would note that this is not precluded by the current or recast Directive. However, on-line meetings may be difficult to co-ordinate given the number of representatives on EWCs. On-line meetings are unlikely therefore to be seen as the most effective means of organising EWC work. Also, the Government considers that it should be a matter for the parties concerned to agree whether they should conduct their meetings in that way. With regards to the representation on the EWC, the Government considers this is a matter for the employees to decide and should not be prescribed in any detail by the Directive.

Q2 – What is your overall assessment of the Commission's proposals? Should the EWC Directive be revised?

Nineteen respondents replied to this question.

Whilst the consultation document asked for specific views on the Commission's proposals for a recast Directive, fifteen respondents expressed support for the Commission's proposal as amended by the European Social Partners in their letter of 29 August. [This advice has been further clarified and an update can be found at Annex B.]

The CBI considered that the European Social Partners' Advice to be an acceptable compromise that strikes a delicate balance not to be substantially amended. The advice is also supported by Acas. The Trades Union Congress (TUC) stated its support for the joint advice as agreed by the ETUC, BusinessEurope and other employers' association as the basis for amending the Directive on the restricted number of issues which have been agreed upon by the European Social Partners. The European Social Partners' advice was also supported by Unite, Usdaw, Unison, the British Air Line Pilots Association (BALPA) and the GMB, though the latter felt that the advice should still go further to improve EWCs.

Respondents' opinions on the Commission's proposals were split. The CBI, the Engineering Employers Federation (EEF), the British Retail Consortium (BRC) and Rolls Royce felt that it was important that the proposals must not slow the business decision-making process. The EEF highlighted the expense of EWCs and stated that there was no appetite amongst its members to amend the Directive and Rolls Royce felt that the proposal offered a good balance, in most instances, between cost-effectiveness and the ability to adapt to change. Ladbroke's supported the Commission's attempts to gain legal clarity whilst the CIA thought the proposals could result in a loss of flexibility for employers and employees to decide on the most appropriate method of information and consultation.

Usdaw considered that the proposals, as amended by the Social Partner Advice, would improve EWCs but thought the Directive should be revised further to ensure consistency with the Information and Consultation of Employees Directive. It was in favour of the recast as this represented a step forward and was needed due to the changing face of the European Union and the overall Industrial Relations landscape. The GMB felt that a full revision would be preferable to a recast. Unite welcomed the Commission's proposal but thought that it fell short of some long-standing demands of European Trade Unions. Unite's views on this and the more specific aspects of the proposal are supported by representatives from GKN's EWC, the Chair of the GlaxoSmithKline European Consultation Forum and a representative from Covidien's EWC.

Acas endorsed the proposal and felt that it would lead to more transnational information and consultation.

Freshfields Bruckhauser Deringer felt that the proposed amendments would have little impact on the establishment and operation of EWCs, whereas Evershed's believed that the effects of the proposals would be significant.

Government response

The Directive is 14 years old. It is the Government's view that the Directive should be re-examined to ensure that it remains a relevant tool to those wishing to use it and that it adequately reflects changing workplace practices and broader legislative developments. Though the Government had some concerns regarding the effect of a number of the Commission's proposals, it was overall supportive of efforts to improve the functioning of the Directive and to encourage the establishment of more EWCs.

The Government notes that many respondents expressly supported the joint opinion adopted by the European Social Partners, and only a few respondents directed any criticism towards it. The Government therefore considers that the Social Partners' position represents the fair compromise, and should be broadly acceptable to UK employers and trade unions.

Q.3 – Do you have any comments about particular proposals? If so, please specify, indicating clearly the Article you are commenting upon.

Overall twenty-two respondents replied to this question, though their answers touched on different proposals. Some commented on how these have been amended by the European Social Partners. Points are presented on an Article by Article basis, followed by the Government response.

Article 1 - Objective

Fourteen respondents commented on Article 1.

Article 1(2)

The CBI, the CIA and the ESG, felt that the requirement that the procedure for information and consultation of employees is 'effective' is difficult to define and open to interpretation. The CIA considered that this should be a statement of good practice rather than a legal requirement.

The ELA suggested that this provision should be replaced with a requirement in Article 6 to explain with clarity the procedure for information and consultation.

Article 1(3)

Rolls Royce thought that the effect of Articles 1(3), 1(4) and 12(2), when taken together, should allow for parallel consultation at transnational and national level, and considered it important to draw a clear distinction between national and transnational issues. The Newspaper Society felt that the use of 'concern' could be widely interpreted.

Peter Reid Consulting welcomed the strengthening of this provision. It added that the amendment of Article 1(3) could result in employers experiencing practical difficulties when refusing to discuss non-transnational issues.

Article 1(4)

Respondents had conflicting views on the proposed definition for 'transnational'. The CBI felt that using 'establishments' in two member states as the measure for transnationality could result in businesses being required to consult over issues that affect very few employees in practice.

Unite felt that the objective of the Directive as stated in the proposal did not go far enough in order to prevent employers avoiding the requirement to consult on transnational issues by implementing changes in one member state at a time whilst the CWU welcomed the new definition for transnational.

The ELA suggested the deletion of 'or at least two undertakings' as a matter may affect establishments in two member states but only impact upon employees in one member state.

Peter Reid Consulting welcomed the strengthening of this provision. It noted that as at Article 1(3) it could cause practical problems for employers.

Article 2 - Definitions

Sixteen respondents commented on this Article.

Unite thought that the new definitions, particularly as amended by the European Social Partners, would help EWCs to contribute to strategic decision-making without having an adverse effect on the efficacy of business decision-making.

In addition to commenting on the definitions proposed by the Commission, some respondents proposed additional definitions to be included, for instance definitions for 'employers' association' and 'European Workers Organisation'.

Article 2(1)(f)

Three respondents, including the CBI, believed that the inclusion of the right for representatives to carry out an appropriate examination and to prepare for consultation could delay the decision-making process. ESG believed that the deletion of the phrase 'in-depth assessment' from the proposed definition would align it more closely with that in the Information and Consultation of Employees (ICE) Directive.

The new definition for 'information' was welcomed by the CWU and Usdaw which felt it would ensure the timely provision of information to employees' representatives. Usdaw supported the inclusion of the phrase 'in-depth assessment'.

Freshfields Bruckhauser Deringer thought the definition sensible and preferable to that put forward by the European Social Partners which it argued could result in legal uncertainty. The ELA thought that the Commission's proposed definition would misalign this Directive with the ICE Directive and that the definition should include the word 'appropriate' as applied to 'study' in order to provide context.

Peter Reid Consulting suggested that the insertion of the word 'timely' into the existing definition of 'information' would help to provide legal clarity without hindering the business decision-making process.

Article 2(1)(g)

Opinions differed on the amendment to this definition. Ladbroke's thought there was no need to further define 'consultation'. Rolls Royce agreed and added that this definition must ensure that there can be parallel consultation at national and transnational levels. The ESG thought that the European Social Partners' proposal for a new right for EWC representatives to provide an opinion after consultation could have a negative effect on business decision-making.

Usdaw preferred the definition as suggested by the European Social Partners, particularly in relation to the right for the EWC to express an opinion after consultation. BALPA considered that the Commission's definition of 'consultation' should be strengthened.

The CIPD welcomed the new definition of 'consultation'.

Freshfields Bruckhauser Deringer thought that the new definition will improve legal certainty. The ELA believed that there should be a purpose to an opinion given by the EWC and that an opinion would not necessarily be required in all circumstances.

Article 4 – Responsibility for the establishment of a European Works Council or an employee information and consultation procedure.

Five respondents commented on this Article.

Article 4(4)

Unite felt that the new paragraph as proposed by the Commission was required following recent European Court of Justice (ECJ) rulings on this issue. The CWU similarly welcomed its inclusion. The GMB thought that this paragraph should give specific details of the information obligations on management and that such information should also be supplied to trade unions, employees and employees' representatives.

Peter Reid Consulting believed that, whilst the new paragraph is required, the language used is confusing and it could lead to a diversity of approaches to the level and type of information required in order to begin negotiations being taken in different member states.

Article 5 – Special Negotiating Body

Fourteen respondents commented on Article 5.

Article 5(2)(b)

The CWU supported the new calculation for the proportion of Special Negotiating Body (SNB) representatives. Unite felt that the threshold of 50 employees was too high and questioned how employees in Member States that fell below the threshold would be represented on the EWC.

The Newspaper Society thought this Article would be clearer if it gave a better illustration of the calculation of the number of SNB members.

Peter Reid Consulting, ESG and the ELA thought that the threshold is too high and could result in the exclusion of employees in member states with a small number of employees.

Article 5(2)(c)

The Newspaper Society was unclear about the purpose of the requirement to notify European employers' and employees' associations. In contrast, the CWU welcomed this provision.

The ELA questioned the meaning of the term 'competent European Workers' organisation' whilst Peter Reid Consulting believed that the requirement to inform European employers' or employees' associations should not jeopardise the right of employee representatives freely to choose an expert to advise them.

Article 5(4) Second Paragraph

The CBI thought that this provision would increase the cost to business and the Newspaper Society felt that the right for SNB representatives to meet without a management representative being present before and after each SNB meeting suggested an inherent lack of trust between the representatives and their employer.

The CWU, the GMB and Usdaw welcomed the new right for pre- and post-meetings without a management presence.

The ELA felt that there is a need for a reference to proportionality in order to minimise the cost to business.

Article 5(4) Third Paragraph

The CBI questioned the appropriateness of allowing trade union experts to sit on SNBs, and felt that the presence of a trade union expert advising employees in other organisations could compromise business-sensitive information. The BRC felt that employers had already factored in unionisation into EWC agreements and that a new right was not needed.

Most unions expressed support for the reference to unions' role in SNBs. Unite cited experience of management trying to exclude trade union experts from SNBs and thought this change would help to develop the effectiveness of EWCs. BALPA thought this measure should be extended to include national level trade unions. The GMB added that this measure should be extended to cover the EWC as well.

Evershed's felt that the new would mean that the SNB would become led, rather than advised, by experts from community-level trade unions. Peter Reid Consulting and the ELA thought that the selection of an expert should be left to the SNB representatives. Freshfield Bruckhauser Deringer felt that, as trade unions were already involved in negotiations, these changes would have little impact.

Article 6 – Content of the Agreement

Nine respondents commented on this Article.

Article 6(2)(b)

The CBI felt that the requirement to achieve a balance of representatives by category and gender may be unworkable in practice. The Newspaper Society and Rolls Royce felt that there was no need for specific criteria when defining the make-up of the EWC. They felt that it was more important that the membership is representative and was flexible enough to allow for fair discussions.

The CWU, the GMB and Unite welcomed the requirement to ensure a gender balance on the EWC. The GMB felt that the requirement should go further and

require balanced representation based on other factors including race and sexual orientation.

Article 6(2)(c)

Usdaw, Unite and the CWU welcomed the requirement to link EWCs with national level information and consultation procedures. Usdaw added that transnational information and consultation should be linked with agreements with trade unions at national level in order to be effective. Unite believed that providing clarity over the relationship between national and transnational information and consultation would assist in avoiding delays in consultation that currently occur where employers felt that they were legally bound to consult at national level first.

Peter Reid Consulting thought that the requirement to set out the link between national and transnational information and consultation could lead to heightened conflict between the two I&C levels, believing that national level consultation should always occur first.

The ELA thought that the proposal should also consider how to link transnational information and consultation with regional information and consultation arrangements.

Article 6(2)(e)

The Newspaper Society sought clarification on the extent of the function of the select committee that is referred to in this Article. Unite felt that, as the arrangements for select committees are often dealt with by EWC representatives, this new provision was unlikely to have a significant impact.

Article 6(2)(g)

The GMB believed that the list of topics for discussions should duplicate those listed in the subsidiary requirements whereas the CWU thought the topics should be extended to include Health & Safety, equality and anti-discrimination issues. Unite welcomed the requirement to set out where terminated agreements should be renegotiated, but they would like to see a maximum negotiation period of one year for these agreements.

Peter Reid Consulting felt that there should be a requirement for all agreements to include a clause stating what will happen in the event of a merger or takeover, with a requirement on the acquiring company to integrate the information and consultation processes within a specified timescale.

The ELA suggested that the national law that governs the EWC be included as a required item in the EWC agreement, where appropriate.

Article 10 – Role and protection of employees’ representatives

Fourteen respondents commented on this Article.

Article 10(1)

The CBI and ESG felt that the proposal's wording should not allow EWCs to act as wider employees' representatives beyond the purpose of the Directive and the CBI questioned whether the 'means required to apply the rights from the Directive' included the finances necessary to take legal proceedings against the employer for non-compliance.

Unite questioned what was meant by '...means required to apply the rights...'.

Evershed's and The ELA suggested that the phrase 'appropriate and necessary' should be used to qualify the means available to the representatives to apply their rights.

Article 10(2)

The CBI welcomed the inclusion of the right for representatives to feed back to their constituencies but expressed members' concerns about the potential for representatives to misinterpret information and for business-sensitive information to be disseminated. The Newspaper Society and Rolls Royce agreed. Ladbroke's was opposed to the requirement for representatives to feedback as it was concerned about increased costs to cover travel to multiple workplaces. ESG suggested that the EWC and the employer could jointly to agree on the process for such feedback.

The GMB welcomed the inclusion of the right for representatives to feed back to their constituencies.

Article 10(4)

The CBI recognised the value of training for EWC representatives but it thought that the proposal was unclear over who was responsible for the provision of training. In contrast, Ladbroke's was opposed to the right to training.

Unite and the CWU supported the introduction of a right to training. Unite and USDAW felt that this would help to improve the effectiveness of EWCs. The CWU felt that the European Social Partner's approach would enhance the Commission's proposals.

Acas supported the introduction of a right to training as they believed that it is essential to enable representatives to make constructive and considered contributions.

The ELA felt that there was a need to ensure proportionality in the provision of training.

Article 12 - Link between this Directive and other Community and national provisions

Ten respondents commented on this Article.

The CBI expressed concern that this provision could lead to delays in decision-making should the EWC be slow to conclude consultation. The Newspaper Society felt that the Commission's proposal were unclear about what the link would involve in practice. It questioned how the recast Directive would interact with other Directives which establish information and consultation procedures. The ESG felt that it was not clear whether these provisions create new obligations to inform and consult with national information and consultation bodies.

Usdaw and the GMB welcomed the proposal, but GMB added that the remit of the EWC should be extended to include all circumstances that exceed the powers of national level information and consultation.

The CIPD and Peter Reid Consulting believed that the stricter requirements could create conflict between the two levels of information and consultation.

Freshfields Bruckhauser Deringer supported the Commission's proposal on this issue but noted that it could increase costs for business. They also felt that the Commission's approach to a fallback position should the parties be unable to agree on the link between national and transnational information and consultation, was sensible and thought that the European Social Partner amendment to this Article waters down the provision.

Article 13 – Agreements in force

Fourteen respondents commented on this Article.

Article 13(1)

The CBI felt that it important to allow agreements in force which enjoy employee support to continue according to agreed terms and the ability to extend these should be retained provided they had widespread support. The EEF supported the European Social Partner's call for a two-year window to introduce new Article 13 agreements in an attempt to try to safeguard companies' tried and trusted EWC agreements. ESG supported the new two-year window for negotiating Article 13 agreements but thought the text, as amended by the European Social Partners' advice, could lead to a lack of clarity. It felt that it was important that existing Article 13 agreements remain outside the scope of the Directive.

Unite believed that the Commission's proposal for Article 13 to be a genuine attempt to resolve outstanding issues but considered the European Social Partner amendments a better way to resolving these. The GMB did not support the European Social Partner advice on existing Article 13 agreements. Freshfields Bruckhauser Deringer supported the European Social Partner's call for a two-year window to introduce new Article 13 agreements in an attempt to try to safeguard companies' tried and trusted EWC agreements.

Article 13(3)

The CBI considered that the threshold for triggering a renegotiation where the existing agreement does not have an adaptation clause was too low. This was supported by the ESG. Ladbroke's felt that it should be clear whether or not employees could challenge the continuation of existing Article 13 agreements. The BRC was concerned that the proposal could undermine existing agreements. The Newspaper Society felt that the term 'significantly' should be defined and suggested that examples of structural change should be given.

The CWU welcomed the requirement to renegotiate EWCs agreements in the event of structural change and felt that the new Directive should allow for the renegotiation of Article 13 agreements at the request of employees.

The ELA felt that it should be for the parties to an agreement to decide whether it needed to be renegotiated.

Article 14 – Review by the Commission

Two respondents commented on this Article

The CWU welcomed the requirement for a review five years after the transposition. Peter Reid Consulting felt that there should be a 10 year moratorium on further review to allow EWCs to bed into the employee relations cultures of all member states.

Annex 1 – Subsidiary Requirements

Six respondents commented on this Article.

Annex 1(1)(a)

The Newspaper Society felt that the person responsible for responding to the EWC's opinion, and the expectation behind that opinion, should be more clearly defined.

The CWU welcomed the requirement for a reasoned response and an explanation of the response to be given to opinions expressed by the EWC.

The ELA felt that there should be finality introduced into the process as the proposal could allow representatives to delay the business decision by expressing a large number of opinions.

Annex 1(1)(c)

ESG and the ELA felt that the new formula for determining the composition of the EWC would disenfranchise those countries with fewer employees. The Newspaper Society believed that it was more important that the EWC membership is balanced.

Annex 1(1)(d)

The Newspaper Society felt that it should be left to the EWC to decide whether a select committee is required.

Peter Reid Consulting felt that the expansion of the number of members of the select committee should be linked to the overall number of EWC representatives.

The ELA added that the phrase “on measures significantly affecting employees’ interests” should be retained from the current Directive.

Government response to Question 3

Respondents expressed a wide range of views on the changes proposed by the Commission. However, it is notable that more than half of the respondents expressed support for the European Social Partners’ common position as a compromise.

The Government’s response to the main views to Question 3 is as follows:

Article 1

The provision of information and consultation with employees should be conducted in a timely manner to ensure that such processes are meaningful. But this should not be to the detriment of the decision-making abilities of the company. Delayed decision-making in globally competitive markets could result in a loss of business and eventually lead to a loss of jobs. The Government therefore welcomes the added emphasis at Article 1 which stipulates that the arrangements for informing and consulting employees must also enable the company to take decisions effectively.

The current EWC Directive does not describe the meaning of ‘transnational’. This has led to a lack of clarity about which types of issues should be dealt with by the EWC or by its national level equivalents. With regard to the definition of transnational, the Government welcomes this proposal so that the competence of the EWC is clearly differentiated from those issues dealt with by national-level representative bodies. It therefore supports the definition that has been proposed by the European Commission. It also notes that the European Social Partners, who discussed this issue in some detail, did not themselves suggest any agreed changes to the Commission's wording.

Article 2

Respondents expressed different opinions to the changes to the definitions for ‘information’ and ‘consultation’ as proposed by the Commission. However, it is worth noting that the European Social Partners’ letter of 29 August saw a number of additional changes to both of the definitions. In addition, their letter of 2 October (at Annex B) suggested that a relevant Recital should be amended to emphasise the importance of timely decision-making by companies.

Though the Government supports consistency with the definitions for information and consultation established by other Directives, it recognises that the Commission's proposal as amended by the European Social Partners represents an important element of the latter's joint advice. These changes should not be viewed in isolation, but considered in conjunction with the developments agreed elsewhere in the text. The Government considers the proposed definitions for information and consultation as amended by the Social Partners to present an acceptable compromise.

Article 5

The Government supports the simplified method to determine the composition of the Special Negotiating Body (SNB), including the introduction of a threshold. Some concerns have been expressed about the exclusion of employees in member states with fewer than 50 employees. However, the threshold has been proposed for practical reasons to ensure that the size of the SNB does not become unwieldy and affect the efficiency of the negotiation process. Furthermore, there is an issue of proportionality. For example, one employee representative's vote, representing only a handful of employees, would have the same weight as another employee representative which may be representing hundreds or even thousands of colleagues. The Government considers that a threshold remains desirable. However, the Government also recognises that this issue raises concerns for smaller member states, and it will therefore keep its position on this issue under review.

The ability of the SNB to meet before and after negotiating meetings will allow employee representatives from different member states to determine common priorities for the negotiations. An SNB with clear priorities will result in more effective negotiations with the management and the Government therefore can support the principle of this proposal.

In response to a number of concerns, the Government would like to clarify that the current measure which sets out that the SNB is entitled to request the assistance of an expert of their choice remains unaffected. All parties involved in the negotiations remain bound by the confidentiality requirements set out at Article 8.

Article 6

Since the adoption of the EWC Directive, other Directives involving information and consultation have been introduced. In particular, Directive 2002/14/EC creates a general framework for employees to be informed in consulted at member state level. It is therefore important to ensure that, whilst respective competences do not overlap, arrangements are put in place so that the different systems can be effectively linked. The Government considers that the detail of such arrangements is rightly a matter for the negotiating parties to determine to ensure that these are compatible and work with the structure of the company.

To ensure the effective representation of the employees, the Government supports the proposal that, where this is possible, efforts should be made to

ensure that the diversity of an organisation is reflected in the make-up of its EWC members.

Article 10

The Commission has introduced a new entitlement for the EWC to the 'means required to apply the rights' stemming from this Directive. The Government agrees with respondents that there is some ambiguity with regards the reference to "means" and has therefore invited the European Commission to provide further clarification of the legal effect of this phrase. It should be noted that this Article was the result of agreed changes by the European Social Partners and was therefore supported by most of the respondents.

The Commission further introduced a measure to ensure that the employee representatives 'collectively represent the interests of the employees'. The Government agrees with respondents that there is merit to clarify that EWCs should only act within their competence as EWCs so that it cannot be obliged to take over a role currently the preserve of other national level employee representative bodies. However, the Government agrees with the principle to require employees' representatives to cascade information to the employees whom they represent. This should result in improved awareness by the employees of the issues of importance to the organisation as a whole.

Most employers already provide training for EWC representatives hence the proposal related to the training of employee representatives is widely seen as a positive step towards improving the effectiveness of EWCs. Whilst the Directive does not qualify who should be responsible for the provision of training, the Government considers this to be a matter for the parties to determine but could include employers and trade unions.

Article 12

The Commission's proposal required that in the absence of agreement of such arrangements as required at Article 6, that the European and national level information and consultation processes were 'to start in parallel'. The Government was concerned that the rigidity of such imposed arrangements could create significant scope for bureaucratic delay in the company's effective decision-making processes. The Government further considered the potential impact this could have had on the ability of UK companies to consult their employees and trade unions at an early stage in accordance with custom and practice.

The joint text presented by the European Social Partners saw the removal of the phrase 'start in parallel' and instead the introduction of a general requirement that the processes of informing and consulting are necessary at the national and transnational level. The Government's welcomes this approach which allows companies and employees the flexibility to determine such arrangements to best suit individual circumstances.

Article 13

The Government was concerned that the Commission's proposed changes would have resulted in the destabilisation of existing agreements even where these had wide-spread support amongst the workforce, and a change of status of voluntary agreements recognised under Article 13. The Government and most respondents welcomed the new text proposed by the European Social Partners which allows for existing Article 13 agreements to be revised or renewed without affecting their voluntary status where these have employee and management support. The European Social Partners' letter of 2 October has resulted in greater clarity and confirmation of this meaning.

Annex I

The subsidiary requirements come into effect only under very specific circumstances, where parties cannot reach agreement themselves on their EWC arrangements. Of necessity, the Annex must contain some detail as regards the operation of EWCs. The changes to the Annex proposed by the Commission are limited and the Government is supportive of them.

Q.4 – For those organisations which currently operate an EWC and for those individuals who are members of EWCs, how will the proposals impact on your current EWC arrangement?

Seven respondents replied to this question.

The CBI and the BRC felt that the proposals could jeopardise tried and trusted existing agreements, particularly those established under Article 13 of the original Directive. The CIA felt that the proposals would not have a significant effect on currently operating EWCs. Rolls Royce felt that the new definitions of 'information' and 'consultation' could have a significant effect and that the revisions could slow business decision-making resulting in a negative impact on global competitiveness. ESG agreed and added that the new requirements could lead to a rise in expectation about what an EWC could achieve.

Government response

The Government agrees that the original proposals put forward by the Commission would have undermined existing EWCs, especially those established via the Article 13 procedure. This issue has since been effectively addressed by the European Social Partners in their letters of August 29 and October 2. The Government therefore supports the approach to Article 13 which they have suggested.

Q.5 – Do you have any comments on the Impact Assessment at Annex B?

Eight respondents replied to this question.

Respondents to this question commented on the Impact Assessments (IA) produced by BERR and the Commission.

Rolls Royce felt that the BERR IA did not sufficiently take into account the cost to business of the new requirement to link national and transnational information and consultation. ESG thought that the Commission's IA relied too heavily on assumptions. It further stated that the Commission's IA did not take into account the modifications suggested by the European Social Partners.

CWU felt that the estimated costs were reasonable when set against the benefits to corporate governance and responsibility.

CIPD felt that the Commission's IA acted more as a description of possible approaches than a meaningful quantification of costs.

Angela Smith believed the BERR IA to be a good summary and a useful discussion of estimated costs. She thought the IA would not be much use to individual companies

Freshfields Bruckhauser Deringer believed that costs would increase due to increased litigation activity as a result of the adaptation clause in Article 13. Evershed's felt that it needed to take into account the costs of extra meetings.

Government response

The Government is grateful to those who responded to the partial IA. The Government has carefully considered these views and updated the IA accordingly but is of the opinion that the estimated costs and benefits remain broadly accurate. The IA was completed in respect of the Commission's proposals; however, matters have progressed in light of the Social Partners' changes to a number of these proposals. The effect of these remains to be assessed in detail but the Government considers that the proposed changes mostly introduce additional flexibility (most notably with the removal of the phrase 'in parallel' at Article 12) and add clarity to the proposals. The Government's initial observations are that these could potentially result in a reduction of costs or, at worst, have a neutral impact on current estimates. Should the Commission's proposal as amended by the Social Partners be adopted, the Government will undertake a new Impact Assessment accordingly as part of its public consultation exercise on the implementing regulations.

Q.6 - Are there any other comments about EWCs and the Commission's proposals? If so, please specify them.

Six respondents replied to this question.

CWU urged the UK Government to take a positive approach to the proposals by the Commission and the European Social Partners. Unite believed that EWCs can be an invaluable tool for employers and employees, but only where effective information and consultation is practiced. Angela Smith believed that EWCs were good at encouraging verbal communication and face-to-face networking and providing employees with valuable insight into the operations and practices of other subsidiary companies.

Other issues raised outside the scope of the recast

Ladbroke's believed that any sanctions should stop short of stopping the business decision from being taken. The GMB and the CWU felt that the maximum time-limit for negotiating an EWC agreement should be reduced from three years to one year.

The CWU felt that the proposals should follow more closely ETUC proposals such as a lower threshold for companies to come within scope, a minimum of two EWC meetings a year and the right for EWC representatives to meet without management representatives being present after joint EWC meetings. CWU also felt that greater clarity was needed on the rules of disclosure of share-price sensitive information and suggested a clear framework when companies wish to cite this reason for non-disclosure.

The GMB believed that sanctions should include the ability to stop the business decision being taken until effective information and consultation has been conducted. The CWU felt that there should be fairer enforcement mechanisms introduced.

Government response

The Government would point out that the Commission's proposals constitute a "recast" of the Directive. This means that member states cannot propose changes to those parts of the Directive which are unaffected by the Commission's proposals. The issues raised by respondents are outside the scope of the recast of the Directive and can only be considered during a full revision of the Directive. Whilst the Government believes that the effects of the proposed changes to the Directive should be reviewed by the Commission after five years, it would be premature at this stage to consider that such a review should necessitate a full-scale revision of the Directive.

Annex A: List of organisations and individuals who responded to the consultation document

Those listed below were willing for their details to be disclosed:

Advisory, Conciliation and Arbitration Service (Acas)
Angela Smith (Secretary of the EWC, Howden Group)
British Airline Pilots Association
British Retail Consortium
Chartered Institute of Personnel and Development
Chemical Industries Association
Communication Workers Union
Confederation of British Industry
Employment Lawyers Association
Engineering Employers Federation
European Study Group
Evershed's
Federation of Managerial and Professional Staff Associations
Freshfields Bruckhauser Deringer
GMB
Herbert Smith LLP
Involvement and Partnership Association
John Clough (Chairman of the GlaxoSmithKline European Employees Consultation Forum)
John Suckling (UK Commercial EWC Representative for Covidien)
Ladbroke's
Mick Forbes (GKN Driveline Birmingham EWC member)
Newspaper Society
Peter Reid Consulting
Rolls Royce
Stefan Unterweger (EWC Representative for GKN European Forum)
Trades Union Congress
Union of Shop, Distributive and Allied Workers
UNISON
Unite



European Trade Union Confederation (ETUC)
Confédération Européenne des Syndicats (CES)



Monsieur Xavier Bertrand
President of the Employment,
Social Policy, Health and Consumer
Affairs Council (EPSSCO)
127 rue de Grenelle
F- 75007 Paris

2 October 2008

Monsieur le Président, Monsieur le Ministre,

In their joint advice dated 29 August 2008, European social partners accepted the Commission proposal for a directive on European Works Council (recast) of 2 July 2008 as the basis for a revision of the directive. They pointed to a restricted number of issues where changes to the proposal should be sought.

We appreciate the positive reception the joint advice has been given and would like to reiterate and confirm our support to the joint advice. We also support a clarification, as proposed by the Presidency, regarding the changes to article 13 suggested by the social partners. The text proposed by the Presidency however does not include all situations envisaged in the joint advice.

In order to respect the proposal of European social partners, the Presidency compromise wording for a new article 13 bis should therefore be modified as follows:

Article 13bis §1 i): an agreement or agreements covering the entire workforce providing for the transnational information and consultation of employees have been concluded pursuant to article 13(1) of Directive 94/45/EC or article 3(1) of Directive 97/74/EC[...], or where such agreements are adjusted because of changes in the structure of the undertakings or groups of undertakings;

Article 13bis §2: When the agreements referred to in paragraph 1 expire, the parties to those agreements may decide jointly to renew, or revise, them. Where this is not the case, the provisions of the Directive shall apply.

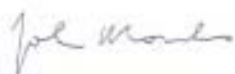
In addition, we would suggest a further point for clarification to be included in the text. The definition of "information" which was agreed by European social partners in their joint advice stipulates that the information provided to employees' representatives should enable them to undertake "an in-depth assessment". In order to clarify the notion of "in-depth assessment", which should not slow down decision-making in companies, recital 22 should read as follows:

"(22) The definition of "information" needs to take into account of the goal of allowing employees' representatives to undertake an in-depth assessment of the possible impact and where appropriate prepare consultations, which implies that the information be provided at such time, in such fashion and with such content as are appropriate without slowing down the decision-making process in companies".

We call for these points to be considered in further proceedings in both the Council and the European Parliament. We count on your continuous support in order to achieve the adoption of the proposal for a recast directive on European works councils before the end of 2008.

We are sending a copy of this letter to Commissioner Spidla and to Mr Jan Andersson, Chairman of the Committee on Employment and Social Affairs of the European Parliament.

Yours sincerely,



John Monks
General Secretary



Philippe de Buck
Secretary General

Department for Business, Enterprise and Regulatory Reform
www.berr.gov.uk
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