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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE
COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE**

**Report on the implementation by Member States of Directive 2009/38/EC on the
establishment of a European Works Council or a procedure in Community-scale
undertakings and Community-scale groups of undertakings for the purposes of
informing and consulting employees (Recast)**

{SWD(2018) 187 final}

I. Introduction

This report reviews the implementation by Member States of Recast Directive 2009/38/EC on the establishment of a European Works Council¹ ('the Recast Directive'), as required by Article 15 of the Directive. It sets out the follow-up action the Commission intends to take. Annexed to the report is a staff working document in which the Commission sets out in greater detail the results of its evaluation².

Council Directive 94/45/EC³ was subject to a recast after consultation with social partners, which entered into force on 6 June 2009. The end of transposition period was two years later.

The evaluation underpinning this report focuses on the changes brought by the Recast Directive. The purpose of the evaluation is to assess the transposition and implementation of the Recast Directive in Member States, and the effects of these on:

- the creation of European Works Councils;
- the effectiveness of employees' transnational information and consultation rights; and
- improvements to the legal framework.

The evaluation also assesses the relevance, coherence, efficiency and EU added value of the Recast Directive, in compliance with the Better Regulation Guidelines⁴.

This report sets out the Recast Directive's objectives, the Commission's main evaluation findings and the corresponding policy responses.

II. European Works Councils and transnational social dialogue

Social dialogue is an essential element of the European social model. Where social dialogue is strong, economies are more competitive and socially resilient. The involvement of social partners in the design and implementation of policies is crucial to strengthen competitiveness and fairness, and is a prerequisite for the functioning of Europe's social market economy. The

1 Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast) (OJ L 122, 16.5.2009, pp. 28-44).

2 SWD (2018) 187 final Evaluation of Directive 2009/38/EC on the establishment of a European Works Council.

3 Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings, for the purposes of informing and consulting employees, OJ L 254, 30.9.1994, pp. 64-72.

4 http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_empl_011_evaluation_european_works_council_en.pdf

Commission is committed to strengthening social dialogue, at all levels. This is why it initiated the 'New Start for Social Dialogue' in 2015.⁵

Principle 8 of the European Pillar of Social Rights⁶ establishes that the social partners shall be consulted on the design and implementation of economic, employment and social policies according to national practices. They shall be encouraged to negotiate and conclude collective agreements in matters relevant to them, while respecting their autonomy and the right to collective action.

Social dialogue at all levels must be a core part of Europe's response to processes that deeply affect the world of work such as digitalisation, globalisation and demographic change. The involvement of social partners in labour market reforms and sector or company restructuring has shown to yield positive results as their involvement ensures ownership of reform processes and promotes trust and partnership. In addition, permanent channels for social dialogue can help anticipate and address the needs and expectations arising from the challenges associated with an ageing workforce and occupational health and safety or with regard to skills and work-life balance.

Principle 8 of the European Pillar of Social Rights also establishes that workers or their representatives have the right to be informed and consulted in good time on matters relevant to them, in particular on the transfer, restructuring and merger of companies and on collective redundancies. It sets out not only the right to receive information but also the right to be consulted about any such corporate action, which implies an exchange of views and the establishment of a consistent dialogue with the employer.

The EU's legal framework in the field of information and consultation at national level has developed over several decades. Directive 98/59/EC⁷ sets out rules on the information and consultation of workers' representatives before collective redundancies are made. Directive 2002/14/EC⁸ establishes a general framework for information and consultation of workers at national level. Directive 2001/23/EC⁹ contains provisions ensuring workers employed in businesses that are transferred to a new owner are informed and consulted.¹⁰

Through the European quality framework for anticipation of change and restructuring,¹¹ the Commission has set out principles and good practices to follow within companies and by

5 <http://ec.europa.eu/social/main.jsp?catId=88&langId=en&eventsId=1028>

6 Proclamation of the European Pillar of Social Rights of 17 November 2017

7 Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.

8 Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.

9 Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

10 For an overview of employee involvement legislation, see:
<http://ec.europa.eu/social/main.jsp?catId=707&langId=en>

11 <http://ec.europa.eu/social/BlobServlet?docId=11270&langId=en>

public authorities, in advance of changes and when managing restructuring activities. The European Globalisation Adjustment Fund was set up 10 years ago with the objective of providing support to workers who have been made redundant as a result of major structural changes in world trade patterns due to globalisation or due the global financial and economic crisis.

European Works Councils are an important instrument for organising transnational social dialogue in multinational companies of a certain size. They are bodies that represent European employees within transnational companies. European Works Councils provide for a common platform for exchanges on transnational issues between employees and employers' representatives across EU Member States and EEA countries. Through them, workers are informed and consulted by management on the progress of the business and on any significant decision at European level that could affect their employment or working conditions.

European Works Councils have proven vital to the development of transnational industrial relations. Within multinational companies, decisions affecting employees in one Member State are often taken by central management located outside that Member State. European Works Councils contribute to creating solidarity and synergies between workers in different Member States, to sharing best practices and to the shaping, understanding and implementing of decisions on transnational issues facing the multinational company.

European Works Councils allow improving the communication between the employees and the central management. The benefit for employers can lie in increased trust and engagement from workers, bringing in their knowledge and experience. A shared understanding of the transnational challenges facing the company and the involvement of employees in the decision-making on possible solutions can also facilitate the introduction and increase the impact of strategic choices made by central management within a multinational company.

Through the decisive role they play in anticipating and managing change, European Works Councils allow for the prevention or mitigation of the negative effects of restructuring on employment and working conditions. More broadly, European Works Councils will have an increasingly relevant role to play in formulating fair and sustainable responses at company level to the transnational impact of challenges linked to digitalisation, globalisation and demographic change. They can address a wide variety of issues, such as the introduction of new technologies and the related training needs, the strategic development of the company in a changing market environment, or best practices in accommodating an ageing workforce. Some European Works Councils have initiated and supported the negotiation and conclusion of transnational company agreements on various topics such as training, employment, or sustainable development.

As with other fora of social dialogue at company level, the proper legal framework conditions do not guarantee successful results. The motivation, commitment and capacities of both

employee and employer representatives are an important determinant of the outcomes and the quality of the exchanges in European Works Councils.

III. The objectives of the Recast Directive

The Recast Directive allows for European Works Councils to be set up to inform and provide opinion on transnational matters in multinational companies that have at least 1 000 employees in the EEA and at least 150 employees in each of at least two Member States.

The process of creating a European Works Council is triggered either by a request by 100 employees from two Member States, or by a decision by the employer. The composition and functioning of each European Works Councils is tailored to the company's specific situation through a signed agreement between management and workers' representatives from the different Member States involved.

In transnational undertakings, the central management shall inform and consult European employees on progress and significant decisions via their European Works Councils representatives.

The Recast Directive aims to pursue in particular the following objectives¹²:

- ensuring employees' transnational information and consultation rights are effectively respected;
- encouraging the creation of new European Works Councils;
- resolving the problems encountered in the practical application of Directive 94/45/EC;
- remedying the lack of legal certainty resulting from defects in some provisions (such as definitions of information and consultation) and the absence of others (e.g. definition of transnationality);
- ensuring better links with other EU legislation on informing and consulting employees.

The Directive made the following significant changes to the enacting provisions:

- introducing general principles regarding the arrangements for transnational information and consultation of employees and precise definitions of information and consultation;
- limiting the competence of European Works Councils to issues of a transnational nature and introducing a link between national and transnational levels of information and consultation of employees;

¹² Recital 7 of Recast Directive 2009/38/EC.

- clarifying the role of the employees' representatives and the opportunity to benefit from training without loss of wages;
- clarifying responsibilities regarding the provision of information enabling the commencement of negotiations and rules on negotiating agreements to set up new European Works Councils;
- making changes to the subsidiary requirements that apply in the absence of an agreement;
- introducing an adaptation clause that applies to agreements governing European Works Councils if the structure of the undertaking or group of undertakings changes.

IV. Findings of the evaluation

The Commission examined the implementation of the Recast Directive in all Member States and EEA countries and conducted an assessment on the basis of data and information collected from various sources, such as an external study¹³, EU and national social partners, European Works Councils' practitioners, research institutes and labour law experts. In line with the requirements of the Commission's Better Regulation strategy, this report sets out conclusions in respect of the effectiveness, efficiency, coherence, relevance and the EU added value of the new provisions introduced by the Directive. More details on those findings are provided in Sections IV and V of the accompanying staff working document¹⁴.

A. Transposition and legal clarity

The large majority of Member States have properly transposed the EU legislation. While most provisions have been implemented verbatim in national legislation, some countries have made more detailed provisions, which go beyond the minimum requirements of the Recast Directive.

Most stakeholders and practitioners who were consulted considered that the Recast Directive has improved the clarity of the legal framework while a non-negligible share of them considered not being in the position to answer due to lack of experience with the recast provisions. Some challenges remain in practice, in particular when negotiating or applying the provisions of the European Works Councils agreement at company level. The volume of litigation at national level is low, and shows no change compared with the trend seen in relation to the original Directive. No cases have been brought at EU level.

¹³ ICF Evaluation study of Directive 2009/38 commissioned by DG EMPL- September 2016.

¹⁴ SWD (2018) 187 final Evaluation of Directive 2009/38/EC on the establishment of a European Works Council.

B. Effectiveness

The Recast Directive provided some impetus for setting up European Works Councils and renegotiating existing European Works Councils agreements while it did not stop the declining trend of creation of European Works Councils. The evaluation observed that around 20 European Works Councils have been created per year since the implementation of the Recast Directive, mainly in companies headquartered in France, Sweden and the US.

Globally, France, Germany and United Kingdom host most of the European Works Councils due to the size of the companies at stake but also the development of industrial relations in those countries. The average size of companies setting up European Works Councils since the Recast Directive's adoption is smaller than under the previous legislation.

There is room for improvement to encourage creation of such bodies, as it is estimated that half of the companies eligible to do so have not yet set up a European Works Councils. While the absolute number of European Works Councils increased following the adoption of the Recast Directive, one could still expect a higher level of net creation of such bodies. The reasons for this are complex and multiple, including: a lack of awareness of legal requirements on the part of national social partners; changing company structures due to mergers or acquisitions; the absence of an obligation to set up European Works Councils; companies being headquartered in countries with a less developed social dialogue tradition; and the length of time for social partners to negotiate the European Works Councils agreement.

While the concept of transnationality is better defined in the provisions of the Recast Directive, it often remains difficult for European Works Councils practitioners to interpret in concrete cases.

The Recast Directive improved the information for workers in terms of quality and scope but as regards consultation, it has been less effective. Despite having the right to express an opinion, European Works Councils members seem to have little influence in the decision-making process in their companies, notably in cases of restructuring.

European Works Councils are perceived by employers as useful tools, bringing benefits to all parties in many ways, including: improving the common understanding of issues among members; explaining decisions; initiating strategic discussions; and making valuable proposals for action, depending on the topics discussed. Despite not having any formal bargaining powers, European Works Councils also play a role in negotiating transnational collective agreements¹⁵ in some multinational undertakings.

In relation to enforcement, the assessment shows a variety of situations in Member States regarding the capacity of European Works Councils to act in justice. In half of the Member States, alternative dispute resolution mechanisms are in place. Overall, the evaluation noted

15 European Commission database: <http://ec.europa.eu/social/main.jsp?catId=978&langId=en>

weaknesses in the means in place allowing European Works Councils to enforce their rights and significant differences in the type and level of sanctions.

C. Efficiency

The Recast Directive did not create additional costs for employers compared to the 1994 Directive. Quantifiable costs for setting up European Works Councils even seem to have decreased compared to the 1994 Directive, but this may simply reflect the smaller size of the companies setting up European Works Councils following the recast. For a majority of employers, the benefits outweigh the related costs. The right to training without loss of wages is largely respected and constitutes a major support for European Works Councils' representatives in exercising their roles in multinational companies. The evaluation concludes that the Recast Directive does not impose administrative, financial and legal obligations in a way which would constitute an unreasonable burden for companies.

D. Relevance

The Recast Directive is considered relevant by all stakeholders, and the need to develop further transnational dialogue is acknowledged by social partners. In terms of improved employee protection, the Recast Directive was found to make a significant contribution to ensuring transnational social dialogue at company level. European Works Councils provide a mechanism for cascading information throughout the business, create leverage between EU and local levels and thereby facilitate the introduction of strategic initiatives, leading to qualitative improvements in the strategic solutions found in the company.

E. Coherence with other EU instruments

The new rules are generally found to be internally consistent and coherent with other EU legislation on workers' rights to information and consultation, including the Charter of Fundamental Rights of the EU. Discrepancies are justified by the specific objectives in the relevant legislative instruments, such as those addressing collective redundancies or the transfer of ownership of companies.

While European Works Councils' rights to information and consultation apply to all transnational topics affecting workers' employment conditions, European Works Councils are not a negotiating body and so have a different objective than informing and consulting at local level, a process which aims to reach agreement between workers' representatives and the employer.

F. EU added value

In terms of subsidiarity, European Works Councils have a genuine EU transnational dimension. Only an EU legal act, transposed into national legislation, can regulate the issue of information and consultation procedures for workers in transnational companies.

With regard to proportionality, the Recast Directive allows Member States flexibility to adapt the Recast Directive's provisions to suit national industrial relations and legal systems, particularly in determining the arrangements for designating or electing employees' representatives, their legal protection and determining appropriate penalties in case of breach in the application of the legislation.

The Recast Directive provides a legal framework at EU level for fostering the organisation of transnational information and consultation within companies, which would otherwise have a purely voluntary character and take place in a legal vacuum.

V. Policy responses at EU level

The analysis set out above identified the following challenges that require action at EU level:

- the limited number of new European Works Councils;
- the effectiveness of the consultation procedure
- the need to share and exchange existing good practices; and
- shortcomings in implementing and enforcing some of the Directive's provisions.

Therefore, the Commission proposes to pursue the following measures:

- creating and sharing a practical handbook for European Works Councils' practitioners;
- providing funding to social partners to support the implementation and effectiveness of European Works Councils; and
- ensuring the full transposition of key provisions of the Recast Directive in Member States.

A. Improving the establishment and functioning of European Works Councils by means of a practical handbook

To facilitate the implementation of the Recast Directive, the Commission envisages the publication of a handbook that would aim to:

- increase the take-up of European Works Councils, particularly in Member States and sectors that have so far set up few;
- further improve the effectiveness of European Works Councils, particularly as a tool for supporting the raising of social standards across the EU;
- spread good practice by codifying and sharing concrete examples of approaches that have worked well in practice.

This handbook would provide concrete advice and guidance for employers, European Works Councils' members, trade union representatives, workers, and other stakeholders. It should also help employers and company representatives to fulfil their duties as set out in the Recast

Directive and help people in the process of setting up and operating European Works Councils.

The Commission will develop this guidance document in 2018, in cooperation with the social partners and with the support of experts and practitioners. Working closely with social partners will help the Commission to collect examples of good practice and specific examples of agreements made in multinational companies that could be shared across the EU.

In order to share the handbook as widely as possible and to raise awareness among practitioners and social partners at all levels, a range of communication measures are envisaged. These will include publicity via a dedicated website, the organisation of activities with social partners and events supported by the Commission. The handbook will be published in all official EU languages.

B. Mobilising EU funding instruments to support European Works Councils

Each year, the Commission launches a call for proposals¹⁶ to fund activities to develop employee involvement in companies, i.e. any activity (including information, consultation and participation) through which employees' representatives may influence decisions to be taken within the company. A specific priority relating to European Works Councils will be included in the first call for proposals issued following publication of the handbook. It will offer financial support¹⁷ to social partners for setting up projects to publicise and support the use of this practical guide among stakeholders. It may also finance initiatives that support the implementation of the existing legal requirements, raise awareness of the potential benefits of European Works Councils for companies and employee representatives, and improve the establishment and functioning of European Works Councils.

C. Ensuring the implementation of the Recast Directive in the Member States

This summary report and the associated staff working document identify the key areas for future cooperation with Member States and for enforcement activity.

The Commission will continue to support Member States' work to improve implementation of the Directive's provisions, and will facilitate exchanges between Member States, notably on the design of 'effective, proportionate and dissuasive' sanctions¹⁸ in the event of infringement of the Directive's provisions.

16 European Commission call for proposals – 'Information, consultation and representation of representatives of undertakings' DG EMPL Prerogative and Specific competencies — Commission Decision C (2016)6596/F1 for call for proposals 2017.

<http://ec.europa.eu/social/main.jsp?catId=629&langId=en&callId=511&furtherCalls=yes>

17 This initiative will not require additional resources from the EU budget.

18 Article 10.1 and Recitals 35 and 36 of Directive 2009/38/EC.