

Adapting the EWC when the structure of the company changes

Guidelines to industriAll Europe coordinators to EWC and EWC members

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This document provides guidance to industriAll Europe coordinators assisting European Works Councils (EWCs) and to EWC members themselves about how to adapt their EWC when the structure of their multinational company changes. The 2009/38/EC Recast European Works Council Directive makes it clear that all EWCs¹ must be adapted when their company carries out a merger, an acquisition, a spin-off, a sale, or when there is a significant change in the workforce headcount, for instance.

Adapting the EWC when the structure of the company changes proves too often challenging. The EWC agreement may contain an adaptation clause which is not up to industriAll Europe's nor to the 2009/38/EC European works council Directive's standards, and could therefore misguide the adaptation process. The adaptation clause in the EWC agreement could for instance foresee that adaptation is limited to changing the composition of the EWC following an acquisition, which would not be enough of an adaptation to fully respect the existing rights of all concerned workers, especially if workers from the acquired company had a fully operational EWC before. Structural changes like a sale or a spin-off may also imply a temporary loss of workers' rights should management wait for the conclusions of the negotiation for setting up an EWC in the new (spun-off or sold) company to resume transnational information and consultation, including on potential restructuring resulting from the sale or the spin-off. Lack of clarity concerning the adaptation process, including whether an entire re-negotiation is needed and by who, may also lead to tensions both between trade union representatives and management, as well as amongst trade union representatives themselves. All in all, adaptation of the EWC could be an unfortunate opportunity for the weakening, if not the loss, of workers' right to transnational information and consultation, or for internal competition which could severely damages cross-border trade union cooperation and solidarity.

IndustriAll Europe instead believes that a change in the company structure can be seized as an opportunity to improve EWC rights. The Recast European Works Council Directive (2009/38/EC) sets rules on how to handle such an adaptation (see in appendix). Those rules serve as a fallback position: whatever happens, management is legally compelled to, at least, abide by those rules. Therefore, nothing prevents for working out alternative ways to handle adaptation in the best interest of workers. Should those alternative ways fail, or should management disagree with them, then Directive's rules would apply in any case, as a last resort option. Hereby document is intended at providing guidance for alternative ways.

¹ This obligation also applies to EWCs which are governed by a pre-directive agreement (i.e. an agreement concluded before the EWC Directive entered into force in September 1996).

Guiding principles

To ensure that all EWC members and their trade unions speak with one voice about how to adapt the EWC when the structure of the company changes, industriAll Europe recommends the following guiding principles.

Anticipate, do not wait

Be proactive and do not wait for the management to tell how they want to handle the process. Submit a proposal on how you (i.e. all the EWCs/parties involved on workers' side) want to proceed as soon as the structural change is confirmed (e.g. merger approved by the antitrust authorities; takeover approved by the shareholders...).

Agree on a fair and fast-track procedure

Reach an agreement with management on the above proposal which you would first have agreed amongst all EWC members and trade unions concerned in all the companies involved in the structural change (e.g. the acquiring and acquired companies). Consider the possibility to engage into lighter procedures as the negotiation would not start from scratch but aims at adapting an existing EWC agreement. Management is likely to be keen on avoiding costly and long-lasting negotiations. In any case, make sure that all the concerned EWC members and trade union organisations receive regular reports and are updated at each of the different steps in the adaptation process.

Do not give up your rights

Whatever structural change is taking place, fight against any attempt at weakening or getting rid of your rights. Your right is to be informed and consulted about the structural change itself and its likely consequences on workers and, simultaneously, to discuss the adaptation of the EWC. The adaptation process cannot be used as an excuse to suspend the right to information and consultation until the new EWC(s) is(are) in place. Moreover, the adapted EWC agreement which will come out of the adaptation process cannot go below the standards of the pre-existing EWC agreement(s).

Ask for the best

Use structural change as an opportunity to upgrade the rights and operation of the EWC. Pre-directive EWC agreements (i.e. EWC agreements signed before 22 September 1996) must be repealed and brought into the scope of the Recast EWC Directive (2009/38/EC). This would in any case happen should the rules on adaptation foreseen in the article 13 of the EWC 2009/38/EC Directive apply. Also, use the good provisions of existing EWC agreement(s), or all of a good EWC agreement, as a minimum standard to be followed in the adaptation process.

Fight for all

Ensure a fair and democratic representation of all workers, sites and countries both in the negotiation process intended to adapt the EWC agreement, as well as in the adapted EWC agreement which will result from the negotiation.

A case-by-case approach

Every situation is likely to be very specific, depending on the structural change at stake (a full or only partial takeover of a new company, a cross-border merger, a spin-off, the setting up of a new joint venture...) and the possible existing arrangements for transnational information and consultation. A case-by-case approach is therefore recommended which could be summed-up in three main steps:

#1 Contact you trade union

As soon as a structural change in a multinational company is looming and announcement is made by management, EWC members should immediately liaise with their own trade union organisations as well as with the industriAll Europe coordinator assisting their EWC. The earlier the connection is made between the trade unions and the members of all involved EWCs, the greater is the chance to work hand-in-hand in unity vis-à-vis management. Acting from the “outside”, trade union organisations can facilitate the connection between two EWCs at a time the concerned companies are still seen as competitors, and merger and acquisition due diligence processes are going on.

#2 Collect facts

Once the network of EWC members and trade unions is established, information must be collected in order to develop a shared assessment of the situation:

- How many employees are to join the company/EWC (in the event of a takeover or merger) or how many are to be carved out (in the event of a spin-off or sale)?
- Is there one, two or none EWC already in place?
- If one or two EWC(s) are in place: what does the EWC agreement(s) say? Do EWC agreement(s) contain an adaption clause? Are the adaptation clauses of each EWC agreement conflicting?

#3 Agree on a joint strategy

The shared assessment should serve as a basis for the network of EWC members and trade unions to discuss a joint strategy concerning both:

1. The negotiations on the future EWC

- Is only the composition of the EWC to be changed, or should negotiations be launched to adapt the agreement?
- If only the composition must be adapted: according to which rules?
- If a re-negotiation of the EWC agreement must be launched: Who negotiate (the existing EWC(s), existing select committee(s), a full new SNB)? Which contents (on the basis of existing agreement(s), from scratch)?

2. How to make sure that transnational information-consultation rights continue to apply during negotiations

- Which EWC or part of EWC is to be maintained (e.g. in the case of a partial takeover or a spin-off)?
- Should a temporary body for transnational information-consultation be set up? Would it be legally recognised (which legislation would underpin such a body)?

#4 Share information with all, all along the process

The industriAll Europe coordinator(s) who usually assists the EWC(s) would also assist the adaptation process. In addition to advising the EWC members and negotiators during the process, the industriAll Europe coordinator(s) should regularly report about major steps in the process to all trade union organisations concerned, which could then feedback their respective representatives at national levels (including shop stewards and/or members of works councils).

Appendix

EWC (Recast) Directive 2009/38

Recital (40)

Where the structure of the undertaking or group of undertakings changes significantly, for example, due to a merger, acquisition or division, the existing European Works Council(s) must be adapted. This adaptation must be carried out as a priority pursuant to the clauses of the applicable agreement, if such clauses permit the required adaptation to be carried out. If this is not the case and a request establishing the need is made, negotiations, in which the members of the existing European Works Council(s) must be involved, will commence on a new agreement. In order to permit the information and consultation of employees during the often-decisive period when the structure is changed, the existing European Works Council(s) must be able to continue to operate, possibly with adaptations, until a new agreement is concluded. Once a new agreement is signed, the previously established councils must be dissolved, and the agreements instituting them must be terminated, regardless of their provisions on validity or termination.

Article 13 - Adaptation

Where the structure of the Community-scale undertaking or Community-scale group of undertakings changes significantly, and either in the absence of provisions established by the agreements in force or in the event of conflicts between the relevant provisions of two or more applicable agreements, the central management shall initiate the negotiations referred to in Article 5 on its own initiative or at the written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States.

At least three members of the existing European Works Council or of each of the existing European Works Councils shall be members of the special negotiating body, in addition to the members elected or appointed pursuant to Article 5(2).

During the negotiations, the existing European Works Council(s) shall continue to operate in accordance with any arrangements adapted by agreement between the members of the European Works Council(s) and the central management.