



Online consultation: Act implementing the revised EU Directive on European Works Councils

Date: 29 July 2026

Response from EWC-Service SBI Formaat

Summary

SBI Formaat EWC-Service endorses the aim of the revised EU Directive to make employee participation more effective. The implementation proposal generally does justice to this, but in our view requires clarification on a number of points. The legislator is requested to explicitly stipulate that the Special Negotiation Body (SNB) is entitled to training and advice even before negotiations commence. Furthermore, the minimum requirements for the legal representation of the EWC must be brought into line with those of the SNB. In addition, it is important to maintain an objective framework for confidentiality, additional safeguards regarding gender balance are required, and provision must be made for more severe financial penalties.

Introduction

In this response, the EWC-Service of SBI Formaat, drawing on our many years' experience in training and providing substantive advice to employee representatives and directors at national and European level, comments on the implementation proposal.

The new directive on European Works Councils brings significant improvements to the effectiveness of employee participation at European level. Furthermore, in our view, desirable that differences between Member States on key aspects of the Directive be minimised as far as possible. To ensure effective employee participation at European level, it is essential to avoid a situation arising in which the choice of the country of establishment for a European Works Council is influenced by differences in the implementation of the directive.

The implementation proposal generally does justice to these objectives by opting for a strict implementation of the Directive whilst at the same time seeking to align with the Dutch tradition of employee participation. Where there is scope for national interpretation, the objectives of the Directive should be kept in mind as far as possible, taking precedence over specific interests or circumstances. The straightforward implementation allows scope for employee participation practice to fill in these details in a transparent manner, in line with the Directive's objectives, whether or not through case law.

The Netherlands is the first country to have published a concrete proposal for the implementation of the Directive. This deserves praise, whilst at the same time placing a greater responsibility on the legislator. The implementation proposal is being viewed with great interest abroad, and it is not inconceivable that other Member States will adopt elements of it. For this reason, too, it is not desirable to deviate from the guiding principles and objectives of the Directive.

Below, we discuss those aspects of the proposal which, in our view, require further refinement.

Training for the Special Negotiating Body

The implementation proposal strengthens the position of the Special Negotiating Body (SNB). For instance, the legal requirement to reach an agreement is no longer limited to a single meeting. The implementation proposal also makes good provision for the legal representation of the SNB. However, in practice we often observe that, specifically in the context of the SNB, there is debate regarding the point at which the SNB can exercise its right to training and advice. It sometimes happens that the start of negotiations on an agreement is delayed for as long as possible. Precisely because no concrete arrangements regarding training and advice have yet been made in the agreement, this often also delays the training or the opportunity for the SNB to seek support.

The SNB must therefore be given the opportunity to undertake training before negotiations on an agreement commence, precisely so that it can prepare for them. In order to promote a level playing field between the director and the SNB from the outset of the negotiations on the agreement, we ask the legislator to explicitly state in the bill or the explanatory memorandum that the SNB's right to training and advice is not restricted by whether or not a meeting takes place as referred to in the proposed Article 11(1) of the EWCA.

Legal representation of the EWC

The new Directive obliges Member States to provide for the EWC's legal representation, thereby offering the EWC greater scope to take legal action. In the Netherlands, legal proceedings by an EWC are already possible, although it has not been specified who represents the EWC in court, as is the case for the Works Council under Article 7 of the WOR. The current implementation proposal deals with the legal representation of the SNB and the EWC through two separate provisions. The representation of the SNB is directly regulated by Article 13 of the EWCA, whilst the legal representation of the EWC, in accordance with Article 11(3)(c) of the EWCA, must be provided for in the EWC agreement. The implementation proposal imposes no additional requirements on this arrangement and leaves the details entirely to the negotiating parties. This implies that any agreed arrangement for the legal representation of an EWC is valid, even if it does not comply with the basic principles of democratic election from among their own members as set out in Article 13 of the EWCA and Article 7 of the WOR.

The legal representation of the EOR thus potentially becomes a point of negotiation in the EWC agreement. This poses a substantial risk both to the legitimacy of the EWC chairmanship and the EWC's access to legal procedures. Bearing in mind practical experience of such negotiations, it is not inconceivable that malicious companies might deliberately attempt to include misleading clauses concerning the EWC chairmanship in the agreement, thereby permanently blocking the EWC's ability to take legal action. Examples include clauses that assign legal representation to the director themselves, another individual within the company but outside the EWC – such as HR or Legal – or a completely external party employed by the company. Clauses that assign the chairmanship to a specific member of the EWC, without an alternative provision should that person not take their seat on the EWC, are also conceivable.

We therefore request that the minimum requirements for the EWC's legal representation in the bill be brought into line with those of the SNB. This will ensure that the legal representation of the EWC is carried out by a chairperson who is themselves a member of the EWC and is elected from among

its members. This does not preclude any additional arrangements regarding the chairmanship or deputy chairmanship in the agreement.

Confidentiality

The inclusion of objective criteria for the application of confidentiality in the form of the Trade Secrets Protection Act represents a significant improvement to the EWC's access to information. On the one hand, this concerns the provision of information subject to confidentiality, for which the Trade Secrets Protection Act provides a framework, but where additional arrangements under the agreement are also possible. As companies operate in different contexts with regard to employee representation, it is desirable for companies to be able to. Further statutory clarification as to what kind of information may be provided to the EWC under conditions of confidentiality is therefore also undesirable.

Furthermore, failing to share information with the EWC is made considerably more difficult, as it is no longer possible to agree on additional arrangements in this regard on a contract-by-contract basis. We emphasise the importance of an objective framework, verifiable in advance, with regard to the confidentiality of information. The Trade Secrets Protection Act provides such a framework and, by enabling objectification at an early stage, can prevent legal proceedings. It would not do justice to the intentions of the Directive to weaken this.

Gender balance

In addition to organising European employee participation more effectively, the Directive also aims to redress the balance between men and women in European Works Councils. The aim is for men and women each to make up at least 40 per cent of the SNB or EWC. This is an important objective, given that men are over-represented in many EWCs and SNBs.

Imposing a best-efforts obligation on the EWC does, however, raise a number of questions. The legislator has already made it clear that failure to meet the best-efforts obligation must not hinder the formation or rights of a SNB or EWC. Nevertheless, it is not yet entirely clear when an EWC or a SNB has fulfilled its best-efforts obligation. This is particularly the case for the EWC, which, under Article 11(7) of the EWCA, is obliged to lay down provisions in the EWC agreement to achieve the intended gender balance. As Member States, in principle, determine their own representation in the EWC, a careful balance must be struck between promoting balanced representation and the freedom of Member States to choose their own delegates. The subsidiary provisions (Article 16(2) of the EWCA) provide further guidance in this regard, although it remains difficult to determine when an EWC has made sufficient efforts to achieve balanced representation.

In addition, there are significant differences in the male-to-female ratio between companies. Nevertheless, the Directive has opted for a fixed percentage, which is specifically intended to promote the representation of women on the EWC in sectors where they are currently under-represented in the workforce. However, an imbalance in the gender ratio within the workforce may be included in the written statement if the 40 per cent representation target is not achieved.

To this end, it is important that the EWC and the Management Board are granted the formal right to the information and means of communication necessary to draw up this written statement and to

distribute it to all European staff. In practice, this is by no means always the case. This concerns, for example, access to the intranet or email, but also information on the gender ratio in different countries and business units, which may form part of the written explanation. If these means of communication are not available, it is questionable whether an EWC has fulfilled its obligation if the message is circulated amongst the representatives, with a request for them to pass it on to staff in their Member State. It is important to ensure that the Community-scale undertaking cannot, consciously or unconsciously, prevent the EWC from properly fulfilling its duty of best endeavours.

Under Article 5(1) of the EWCA, an individual may apply to the court to require an EWC to fulfil its duty of best endeavours where, in their view, this has not been sufficiently done. The Act thus offers individuals the possibility of seeking to enforce or prevent membership of an EWC or SNB in this way. Practical experience shows that the position of individual representatives within an EWC is often under pressure from various parties.

Although the position of the SNB and EWC as a whole is already safeguarded in this implementation proposal within the framework of gender balance, this is not yet the case for individual representatives. As this is essential for the proper functioning of the EOR as a whole, we request that the legislator introduce safeguards here to protect the position of individual representatives as well.

Fines and enforcement framework

The Directive requires Member States to establish a comprehensive system of law enforcement with effective, dissuasive and proportionate sanctions. The guiding principle must be that these sanctions have a sufficiently preventive effect.

As the present implementation seeks to align with the WOR, the path for deterrent and proportionate sanctions lies with the Enterprise Chamber, which may impose injunctions and, if these are not complied with, sanctions on the grounds of an economic offence (category 4). However, the Enterprise Chamber's focus is on rectifying policy, not on imposing sanctions.

In Dutch practice, the Enterprise Chamber is not used as a means of enforcing the establishment of a works council. Within the framework of the EWC, however, this is a primary objective of law enforcement. Furthermore, within the scope of the EWCA, one is dealing with large companies with correspondingly substantial financial interests, which mean that the maximum fine under category 4 of the Economic Offences Act (EOA) is insufficiently dissuasive. Furthermore, it is plausible that the costs associated with complying with an imposed measure will, in practice, be higher than the financial penalty if a company fails to comply with an imposed measure.

We therefore take the view that the choice to use deterrence through the possibility of a high fine, as set out in the Directive, is not correctly reflected by – even with regard to this aspect – aligning with Dutch national practice, in which the Enterprise Chamber and, where applicable, the application of the EOA. The preventive nature of the intended fine is lost in that interpretation.

The fine should be aimed at enforcement, in situations where the statutory obligation to establish an EWC is not complied with or where that process is unlawfully obstructed. That enforcement-oriented nature of the fine is better served if the penalty clause is applied through government supervision of compliance with the EWCA.

Many business regulators operating in the Netherlands (namely the AP, ACM, DNB and AFM) impose fines of a similar magnitude to those envisaged in the Directive. This is precisely because the aim is to achieve the same deterrent effect. When it comes to supervising compliance with the EWCA, we therefore advocate granting such powers to the Labour Inspectorate, which oversees labour relations. Enforcement can thus take place when a report from employees of a Community undertaking gives cause to do so, with the possibility of imposing a fine commensurate with the size of the undertaking.

Once implementation has taken effect, the question arises as to how a Community-based undertaking itself will give effect to the EWCA. These are issues that do not arise directly from the EWCA, but from the EWC agreement. As this concerns an agreement between two parties within the same undertaking, external supervision is no longer the obvious course of action. These contextual issues are better dealt with by the Enterprise Chamber, which is, after all, focused on restoring rules and policies so that the proper functioning of an organisation prevails once again.

This concludes our response to the online consultation on the implementation of the new directive through amendments to the EWCA.

On behalf of SBI Formaat EWC-Service

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