Taking Europe in the Wrong Direction

A BEERG commentary and analysis on the Radtke Report on the Revision of the EWC Directive

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EWCs exist "to improve the right to information and to consultation of employees in Community-scale undertakings". (2009 Directive Objective). As the only statutorily mandated transnational employee representative bodies in the world, they are unique in their purpose. Accordingly, the obligations of the parties are unique.

EWCs are designed to allow employees' representatives from across Europe to engage with their multinational employers on matters of significance to all the employees in that multinational, whether they are members of unions or not. Increasingly, they are not.

They engage through information and consultation. They influence through an exchange of views and opinion. The Directive does not give EWCs authority to engage in negotiation or co-determination. Indeed, meetings "shall not affect the prerogatives of the central management." (2009 Directive Subsidiary Requirements).

As we argue in this paper, the proposals set out in the Radtke Report, as adopted by the Employment and Social Affairs Committee of the European Parliament, would change the nature of EWCs fundamentally in an unhelpful direction.

The key demand in the Radtke Report on the revision of the European Works Council Directive is the introduction of injunctive relief when EWC representatives believe they have not been properly informed and consulted in respect of proposed transnational decisions. Central management would bear the EWC's costs in any judicial proceedings. There are no limits on this management liability.

Injunctive relief in labour disputes is not a widespread practice in EU Member States. Nor is the funding by management of judicial proceeding against itself by its own employees widespread, established practice.

Indeed, funding another party to take a case against you in any branch of law is almost non-existent, especially where conflicting collective interests are an inherent part of the process. No one should be forced to pay to have themselves hurt, especially where there would be no limitations on the need to provide funding to the other party.

Giving EWCs this legal power is likely to upend the relationship between EWCs and national representative bodies who do not have similar power. It offends against the principle of subsidiary at the very least. Local works councils and/or unions would ask EWCs to seek injunctions on their behalf, arguing that the issue in play was transnational or had the potential to be transnational.

The weaponization of EWCs through litigation and injunction would add significant uncertainty and potential costs for companies who seek to compete and invest on a global basis. These proposals would make Europe less competitive as an attractive place for jobs and investment when faced with challenges from emerging economies, China's continuing economic evolution, and U.S. industrial policy that favours domestic investment, as evidenced in the Inflation Reduction Act of 2022.

The quasi-automatic involvement of union officials in EWCs runs the risk of changing them from internal bodies which foster dialogue between management and their own employees' representatives, to bodies driven by external agendas. This would especially be the case where unions have sparce or no membership in a company. Across Europe, union membership in the private sector is 15% at best. This is reflected in the increasing number of non-union members on EWCs. It would be perverse if employees choose non-union employees to represent them on EWCs, to then have a union official imposed on them whether they want such an official or not.

Labour Relations

In social market economies, the interests of management and workers often diverge. Management sees labour as a cost to be minimised. Workers see their labour as a source of income to be maximised. This inherent conflict is simply the nature of the system, and the conflict plays out in multiple ways.

For its part, labour demands higher rates of pay through regular negotiations, with recourse to the threat of strikes if necessary. On the other side, employers introduce new, more productive work systems that require fewer workers and/or workers with different skill sets. Economic or strategic pressures may lead to the transfer of production to more efficient locations.

Employer-driven changes may not be welcomed by workers in the first instance, even when such changes result in better paid jobs in the longer term. Change is seldom easy. While there will be winners, so too will there be losers. But it may be essential to the competitiveness and indeed the very survival of the company concerned that the changes are made.

As they stand, EWCs provide a forum for dialogue in transnational circumstances. Because they are not mandated to negotiate agreements, they complement rather than replace national systems of industrial relations. Discussions in EWCs can provide context and explanations for why certain decisions need to be made. They are forums for an informed exchange of views.

The opportunity to understand and influence community-scale activity comes through dialog. The transposition and implementation of transnational decisions then take place within individual countries and at individual sites, with the local parties taking time to consider their effects in greater depth that is possible at European level.

Transposition and implementation may involve conflict with employee representative bodies like works councils or unions, where they exist. How change is implemented and how the effects of that change on the workforce are mitigated and managed are dealt with as close to the employees as possible.

EWCs, through their interactions with Central Management, are charged with understanding the premise driving the requirement for change and seeking to influence the decisions of Central Management that have significant, transnational implications for the workforce.

As the law stands, an EWC can offer an opinion on proposed decisions which management may take into account. Local representative bodies are left to inform, consult, and in some cases negotiate over the local implications. EWCs do not inform, consult, or negotiate over local terms.

EWCs have no negotiating or codetermination rights. Nor have they any leverage to force management to change proposed decisions. The transnational nature of EWCs makes this unfeasible. Too many diverse national labour laws, labour relations cultures and traditions make it unrealistic. The internal dynamics of EWCs, with often conflicting national interests, can make arriving at any sort of positive consensus or opinion close to impossible.

Based on the Radtke report, the Recommendations from the Committee on Employment and Social Affairs to the Commission on Revision of European Works Councils Directive (hereafter "Recommendations") would fundamentally change the current balance of rights and obligations that are found within EWCs. Under the Recommendations, EWCs would be able to go to court to seek injunctions to block and delay management decisions. The costs would be paid by management.

The Recommendations propose:

"Member States shall establish procedures to enable the temporary suspension of decisions of the central management where such decisions are challenged on the basis that there has been an infringement of the information and consultation requirements under this Directive…"

Further, courts can impose fines on central management as follows:

- financial penalties "…to a maximum of €10,000,000 or 2% of the undertaking's total annual worldwide turnover in the preceding business year, whichever is higher"
- financial penalties "…to a maximum of €20,000,000 or 4% of the undertaking's total annual worldwide turnover in the preceding business year, whichever is higher", in case of intentional infringements
- orders excluding entitlement to some or all public benefits, aids, or subsidies, including EU funds managed by the relevant Member States, and public procurement opportunities for a period of up to three years

The costs of any judicial proceedings are to be borne by management:

"The central management shall bear the direct costs incurred in carrying out the procedures, including the costs of legal representation and the subsistence and travel expenses for at least one workers' representative."

Going to court would be the rational thing for EWCs to do if they are given the power to do so. Go to court and win, and you are ahead. Go to court and having lost**,** you are no worse off. There is no downside, no

financial risk. And the Recommendations would allow EWCs to go to court again and again over the same proposed decision at multiple points in the information and consultation procedure.

Further, national / local unions / works councils would also be given an incentive to encourage them to ask EWCs to do so on their behalf; all at the unfettered expense of the company.

Create perverse incentives and perverse behaviour will follow.

The risk for workers is that short-term tactical wins can put longer-term employment security at risk. If employers are prevented from making necessary changes, then future investment will flow where the prerogatives of management are respected and are not subject to constant court involvement.

The majority of national works councils and/or unions across Europe do not have recourse to the courts to ask for injunctions to block management decisions with the costs paid by management. There are some, limited, opportunities in some countries to seek injunctive relief, but it is not a common occurrence. Where it is possible, the costs are generally covered by unions.

If EWCs were given the right to seek injunctions, which local works councils do not have, then it is inevitable that local representative bodies would look to involve the EWC in their disputes. This could be done in the guise that the issue in conflict was really a transnational issue, or potentially a transnational issue.

Some EWCs would be only too happy to oblige. While the case may be without merit and could be quickly thrown out by the courts, it is the cost, time, and effort involved in defending the action that is draining, even without contemplating the consequences of delays to implementation. Management could be faced with multiple such actions at one and the same time.

National choices about how labour relations should be structured and conducted could be subverted. The Radtke proposals could have significant unintended consequences.

The likelihood of litigation is multiplied by proposed changes to the definition of "transnational" in the Recommendations. Challenges have arisen over the current language in the 2009 Directive:

> *"Matters shall be considered to be transnational where they concern, the Community-scale undertaking or Community-scale group of undertakings as a whole, or at least two undertakings or establishments of the undertaking or group situated in two different Member States."*

However, this definition is already obfuscated in the 2009 Directive by Recital 16, which reads, in part:

> *"In order to determine the transnational character of a matter, the scope of its possible effects must be taken into account. This includes matters which, irrespective of the number of Member States involved, are of concern to European workers in terms of the scope of their potential impact, as well as matters which involve the transfer of activities between Member States."*

The Recommendations propose a further expansion of the definition into areas that are, by nature, subject to wide interpretation, particularly where interests conflict.

> *"Matters shall be considered to be transnational where they concern,* ***directly or indirectly****, the Community-scale undertaking or Community-scale group of undertakings as a whole, or at least two undertakings or establishments of the undertaking or group situated in two different Member States."*

The result is that a decision under consideration by Central Management that only effects one Member State, but which is seen by the EWC as having the "potential" to "concern" other Member States will be

argued to be transnational and subject to information and consultation with the EWC. How is "potential" in such circumstances to be defined in any objective way? Who can see into the future?

Further, that consultation (or refusal to consult) could lead to punitive damages equivalent to 4% of a company's worldwide turnover, all subject to litigation at the company's expense. Would the workforce really want such fines to be levied which could wipe out funding available for pay rises, better work/life balance, and damage investment? Why would any company want to invest in Europe and put itself at such risk if it can do so more safely elsewhere?

> *The butterfly effect tells us that small things can have non-linear impacts on a complex system. The appointment of a new Information Systems Manager in Poland results in fresh ideas that could in time see the roll-out of previously unconsidered labour-saving technology across the EU.*
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> *As these ideas are put on the table in Poland, the EWC argues that it should be consulted because they "potentially" are of transnational importance. Management refuses. The EWC seeks an injunction. The EWC works under Irish law. The chair of the EWC is Dutch. This results in them appearing in an Irish court to ask the judge to block a development in Poland.*

Because of the imprecise wording of the Directive there are a number of stages in the information and consultation process that currently allow an EWC to cry "infringement".

This needs to change

To put it at its simplest. Unless there is precision, then whether an EWC was "informed and consulted" becomes a matter of interpretation rather than a matter of fact. In situations of labour relations conflict, all the law can reasonably do is to defines the procedures that are to be followed. It cannot dictate outcomes.

But that is what Radtke is trying to do.

By allowing EWCs to go to court to ask for injunctions, what he really wants to achieve are outcomes to restructuring that are acceptable to EWCs and unions. Keep blocking until you get what you want. The Recommendations endorse and enable this.

All too often, complaints about the inadequacy of the current EWC Directive are really complaints about the outcome of the information and consultation process. The real complaint is not that EWCs were not informed and consulted. It is that they were not "properly" informed and consulted.

Because if they had been "properly informed and consulted" then, based on the "opinion" provided by the EWC management would have seen the error of its ways and changed or cancelled the decision under consideration. The fact that management went ahead with the decision must mean that the EWC was not "properly" informed and consulted. It is not the process that is being objected to. It is the outcome. What is in play is an attempt to game the process to influence the outcome.

Danger to European Competitiveness

Technology-enabled globalization has led to constant competition for investment and the jobs that come with it. Depending on the nature of the business, investment and work tends to flow to lower cost and/or

strategically located countries that have suitably skilled labor pools. If all else is equal, companies will opt for countries with greater flexibility and greater certainty for their operations.

The proposed Recommendations decrease companies' ability to take and to implement core entrepreneurial decisions quickly and with certainty. If accepted, the changes would expose multinational companies to more litigation, more risk, and potential penalties linked to their global sales.

In the natural course of a labour-management dispute, a judge in one of 27 countries could be asked, without any objective guidelines to take into account, to decide:

- Whether a managerial decision was transnational and potentially could directly or indirectly impact, the European workforce in whole or in part.
- Whether an EWC was properly informed and consulted.
- Whether the company's action should be legally suspended.
- Whether European subsidies and/or access to public sales should be suspended; and
- Whether the company should be fined up to 4% of its global sales.

It is important to remember that these regulations do not stand alone but are layered on top of each Member State's own regulatory regime.

Even in a static environment, these are not the actions of a region seeking to be competitive. But the world is not as it was. The global free trade system is under pressure. First Covid, now the Russian war of aggression in Ukraine, and the growing US-China rivalry are entrenching trading blocs, with the emergence of new forms of protectionism.

A current example is the US's *Inflation Reduction Act 2022,* a $700 billion piece of climate change legislation. The bill contains nearly $400 billion of subsidies for green technology. Those include tax breaks of up to $7,500 for electric vehicles providing they are assembled in America. The bill also stipulates that critical minerals used in the EV batteries must be sourced either from the United States or a country with which the US has a free trade agreement.

Nor is the *Inflation Reduction Act* the only way in which the global trading system is breaking down as governments seek ways to boost the resilience of their supply chains, protect critical infrastructure against emerging national security risks and manage the transition to clean technology. America's *Chips Act,* for example, includes subsidies to bring semi-conductor manufacturing onshore, while barring export of critical technologies to China.

As Georgina Wright, of the Institute Montaigne in Paris, argues in a recent paper on the challenge posed to the EU by the *Inflation Reduction Act:*

> *There is an immediate risk that the EU's 'green tech industry' relocates to the US to flee the bloc's high energy costs and low subsidies.*
>
> *…*
>
> *Realistically, if EV companies want to continue receiving (US) subsidies beyond 2025, they would need to relocate to the US - or at the very least, have US-integrated supply chains. Similarly, US consumers can buy European EVs but they would only benefit from IRA tax breaks if they buy cars that are "Made in America". This prospect, combined with low US energy prices, probably explains why Tesla announced in September that it was opening a battery plant in the US, rather than Germany.*

> *Iberdrola, the Spanish energy firm, and Safran, the French multinational company specializing in aviation, defense and space markets, have also relocated part of their activity to the US.*
>
> *…*
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> *This poses a key challenge for the EU. With the US, but also China, placing national preference at the heart of their industrial policies, and with the World Trade Organization at a deadlock, the EU needs to find new ways to support industry and ensure it remains competitive on the global stage. Unless it does, more EU businesses will move to the US.*

As the economist Adam Tooze wrote recently in the *Financial Times (24/12/2022):*

> *We are in an era of turbulent transition. New modes of industrial intervention are our best means of responding to the multiple challenges ahead.*

Blocking that transition through multiple calls for injunctions because an EWC "believes" it has not been informed and consulted is the last thing Europe needs at this time. Giving EWCs the right to seek injunctions, with unlimited financial resources to do so provided by management, is to give EWCs the right to take management hostage.

European competitiveness should not be at the mercy of the hurt feelings of EWC members who feel that they have not been "properly" informed and consulted.

"Exit" is a well-known concept in labour relations taken from Hirschman's *Exit, Voice, and Loyalty.* When conditions become intolerable, employees "exit" rather than staying to fight to change things, especially if attractive alternatives are on offer.

The same applies to employers. If proposals to change and restructure in Europe are constantly blocked and dragged through the courts, then employers will exit or, at the very least, cut back on future investment. Platitudes about a "just transition" to the green and digital economies can easily be undercut by unreconstructed self-interest. On the employee side, there is no "central control" in the world of labour relations that can ensure that local unions, works councils, or EWCs will "act responsibly."

To repeat: ***If you create perverse incentives, then do not be surprised when parties act perversely.***

The attraction of "exit" for employers will be all the more tempting in light of the subsidies available under the *Inflation Reduction Act,* as Wright notes. Welcome to America. Because of:

1. *The danger of conflating European and national systems of labour relations, and*
2. *The danger to European competitiveness*

we do not believe that injunctions have any role to play in information and consultation issues involving EWCs. As already noted, the Directive makes it clear that the information and consultation meeting "shall not affect the prerogatives of the central management." It is the job of management to make and implement decisions in the interests of the business.

The mandate of the EWC is to offer an "opinion" on proposed decisions. The right to offer an opinion cannot be turned into a right to block and delay decisions through the involvement of the courts. The Damocles Sword of constant threats of resort to the courts to influence outcomes is unacceptable and damaging to European competitiveness.

Conclusion

This paper has not looked in detail at the totality of the Radtke Recommendations.

As of now they are what they are: recommendations to the European Commission on how the EWC Directive might be revised. Certainly, the Directive could be improved. There is much in the current version that is unclear and imprecise, language that is open to conflicting interpretations. Greater clarity would be helpful to all parties.

When the European Commission responds to the Radtke Recommendations and brings forward legislative proposals we will look in them at detail.

For now, we want to advise against the "direction of travel" in Radtke, based on his core proposals of giving courts the power to hand down injunctions at the request of EWCs, who believe their rights have been informed because they have not been properly informed and consulted.

Hurt feelings and beliefs are never a good basis on which to base laws.

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