

Understanding the European Works Council deficit in German multinationals

Michael Whittall*, Stefan Lücking* and Rainer Trinczek*

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Summary

This article examines the problem of setting up European Works Councils in German multinationals. Based on the findings of a Hans-Böckler-Stiftung funded project, the article argues that a key problem is the legal status of many German companies covered by the European Works Councils Directive: specifically, that companies in private hands are not legally required to reveal the number of their employees and their company structure. This lack of transparency makes it very difficult for employee representatives to determine whether their undertaking is covered by the Directive. The article also considers some issues brought to light by a German EWC database recently compiled at the Technische Universität München to support the university's research into the non-compliance with the European Works Council Directive by German multinationals.



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Sommaire

Cet article aborde la question de la mise en place de comités d'entreprise européens dans les multinationales allemandes. Basé sur les résultats d'un projet financé par la fondation Hans-Böckler, l'article constate qu'un problème-clé est le statut juridique de bon nombre d'entreprises allemandes couvertes par la directive sur les comités d'entreprise européens et plus particulièrement que des entreprises privées ne sont pas légalement contraintes de révéler leur nombre d'effectifs ni leur structure d'entreprise. Cette absence de transparence complique beaucoup la tâche des représentants des travailleurs de déterminer si leur entreprise est couverte ou non par la directive. L'article examine également quelques-uns des problèmes mis en lumière par une base de données allemande sur les comités d'entreprise européens récemment compilée par l'université technique de Munich pour soutenir la recherche de cette université sur la non-conformité de multinationales allemandes avec la directive sur les comités d'entreprise européens.



* Technische Universität München - Lehrstuhl für Soziologie - Lothstr. 17 - 80992 Munich - Germany - E-mail: michael.whittall@wi.tum.de; stefan.luecking@wi.tum.de; rainer.trinczek@wi.tum.de.



Zusammenfassung

Dieser Beitrag untersucht die Probleme, die sich bei der Einrichtung europäischer Betriebsräte (EBR) in deutschen multinationalen Unternehmen stellen. Er basiert auf den Ergebnissen eines Projektes, das von der Hans-Böckler-Stiftung gefördert wurde. Die Autoren argumentieren, dass eines der Schlüsselprobleme in der Rechtsstellung vieler unter die EBR-Richtlinie fallender deutscher Unternehmen besteht, und insbesondere in der Tatsache, dass privatwirtschaftliche Unternehmen nicht gesetzlich verpflichtet sind, die Zahl ihrer Angestellten und ihre Gesellschaftsstruktur offenzulegen. Aufgrund dieser mangelnden Transparenz ist es für Arbeitnehmervertreter sehr schwierig festzustellen, ob ihr Unternehmen in den Geltungsbereich der Richtlinie fällt. Ferner befasst sich der Beitrag mit einer Reihe von Aspekten, die sich aus einer deutschen EBR-Datenbank ableiten lassen. Diese Datenbank wurde kürzlich von der Technischen Universität München geschaffen, um Forschungsarbeiten zu Verstößen deutscher multinationaler Unternehmen gegen die EBR-Richtlinie zu unterstützen.



Keywords: European Works Council, revision of European Works Council Directive, German multinationals, restructuring, transparency, mergers and acquisitions, European Works Councils in Germany

Introduction

This article considers problems associated with establishing European Works Councils (EWCs) in German multinationals. Although German industrial relations have a long association with works councils, the majority of German undertakings covered by the European Works Council Directive (EWC Directive), 71.7% to be exact, do not possess an EWC (Lücking *et al.* 2008). This represents one of the lowest compliance rates within the European Economic Area (EEA), with most rates falling between 35 and 40% (Kerckhofs 2006: 32).

What then explains the poor EWC compliance rate in Germany? A closer look at the companies covered by the EWC Directive would suggest that the legal status of the company is an obstacle in establishing EWCs in German multinationals. Of the 463 German companies covered by the EWC Directive according to the German EWC database compiled at the Technische Universität München (TUM), 269 are privately owned companies. Among these companies, which represent 58% of all German companies covered by the EWC Directive, the compliance rate is less than 20%. But what is it about such companies' legal status that explains the poor compliance rate? We argue that a key factor is the lack of transparency concerning employee threshold levels and company structure.

Although we acknowledge that the internationalisation and the size of a company have a bearing on compliance rates (Kerckhofs 2006), in that the larger the workforce and the higher the number of countries an undertaking has an establishment in the greater the likelihood an EWC will exist, the question of transparency appears to have been strangely overlooked. As the article argues, addressing this issue is of great importance. This is because the possession of information about both the number of workers within an undertaking as well as where these are employed is essential if employee representatives are to determine whether they have a right to an EWC and with whom they can collaborate in submitting a joint application to set up an EWC. As this article shows, it is virtually impossible to establish an EWC without this information.

In addition, the article considers some interesting issues arising from the TUM database of German EWCs. The TUM data set brings to light some interesting differences when compared to the ETUI database. Despite similarities between the two databases in terms of density rates and the number of companies, a closer look at the TUM database reveals a large turnover in the companies covered by the Directive. The result of incessant mergers and acquisitions closely associated with European economic integration, the differences in the two data sets show how difficult it is to keep such a database up-to-date and the problems faced by EWCs when involved in either a merger or acquisition. In this section we also consider what we refer to as fragmented EWC structures. Fragmented EWC structures are used to describe Community-scale groups of undertakings where an EWC (or even several EWCs) exists for only a part of the group while the workforce of other parts of the same group is excluded from the EWC. This contradicts the Directive's objective that an EWC should represent all employees of a group.

This article is divided into two parts. In the first part we consider issues arising from our database, particularly the difficulties faced by EWCs in a merger-acquisition situation and the problems associated with fragmented EWCs. The second part discusses and analyses the non-implementation of the EWC Directive in German multinationals. Drawing specifically on the findings of three case studies, the article demonstrates that a key obstacle to establishing EWCs involves what we refer to as the transparency deficit. Finally, throughout the article we consider ways in which our research findings can inform the European Commission's commitment to revising the EWC Directive: in particular, we offer suggestions that the revision of the Directive should consider to overcome the problems we identify in both sections.

Issues associated with the TUM EWC database

Created in 2007, the TUM database drew information from three sources, the EWC data set provided by the ETUI, the Hoppenstedt German company database and additional research (consultation of websites and business reports as well as phone calls). As shown below, the continual economic fluctuation associated with European economic integration not only makes it virtually impossible to maintain an up-to-date EWC database but

also poses some severe challenges for existing EWCs. In the three sections that follow we consider the issues of German EWC coverage, the problems associated with mergers and acquisitions and the issue of fragmented EWCs. In the final section we consider solutions to the problems brought to light by the TUM database.

German companies covered by the EWC Directive

Compared to the ETUI database, the initial results of our work reveal very few statistical surprises. Of the companies covered by the EWC Directive, that is to say where information exists, our database indicates that 131 firms have set up an EWC. In the ETUI database, the figure is 123. Based on the data we have available the TUM and ETUI databases record density rates for German companies of 28.3 and 27.3% respectively, so the difference in headline figures was 1 percentage point.

Table 1: Comparison of ETUI-REHS and TUM Database

	With EWC	Negotiations	Had EWC	No EWC
TUM	131	9	4	319
ETUI	123	2	7	318

The similarities between the two sets of data stop here. A closer look at the two data sets indicates major changes in the EWC landscape. Of those German companies recorded in the ETUI database as covered by the EWC Directive in 2005, but not necessarily in possession of an EWC, 57 companies are shown to have either been acquired or merged with another company. According to our calculations a further seven companies have become insolvent and another 53 companies no longer fulfil the coverage criteria. In contrast, the TUM database records 152 new cases of firms falling within the scope of the Directive. In addition, 23 undertakings not covered by the EWC Directive according to the ETUI database now fulfil the EWC Directive criteria.

Of the 123 German companies classified in the ETUI database as having an EWC, the TUM data set indicates that two companies are now insolvent and a further 17 companies have been acquired by another firm. Consequently, the latter no longer appear as independent companies in the TUM database. To an important extent, therefore, there appears to be a high degree of similarity between the two sets of data, but major changes have taken place below the surface.

Mergers and acquisitions involving EWCs

The TUM database indicates that a large number of companies – either because they have merged or been acquired by another undertaking – are no longer independent entities. Of these we have recorded 42 companies with an EWC, which represents 32% of all existing EWCs. Such a high figure suggests that a considerable number of EWC

delegates have had to revisit existing EWC agreements in an attempt to bring European level employee representation in line with the new company structure.

On the surface the high number of mergers and acquisition cases involving EWCs should not prove a problem. After all, a central task of EWCs concerns the very issue of company restructuring (Carley and Hall 2006; Telljohann 2007; Whittall 2000; Whittall *et al.* 2009). It is thus quite surprising that the current EWC Directive does not outline what procedure should be followed when either an existing EWC is placed in question as a consequence of restructuring or when two companies, both with an EWC, merge. Irrespective of the various constellations, the EWC Directive should theoretically provide for various procedures to simplify the process of setting up a new EWC. Certainly, such a measure is needed to ensure that the EWC is not incapacitated at the very time when its expertise is most required.

Despite the limited empirical information available on what occurs in cases of mergers and acquisitions involving an EWC, we have been able to uncover a number of findings relevant to the revision of the Directive. Ideally, a post-merger agreement should be renegotiated. The new agreement should set down new rules for the EWC structure, in particular the allocation of delegate seats and the chairing of EWC meetings. With numerous studies demonstrating that trust and legitimacy are integral elements of well-functioning EWCs (Whittall 2009; Knudsen *et al.* 2007; Haipeter 2006), the importance of managing EWC relations in a post-merger/acquisition period cannot be stressed enough.

There are examples, however, where a post-merger/acquisition agreement goes beyond a mere re-composition of the existing EWC. For example, following the takeover of Felten & Guillaume by the Danish NKT Group, a post-merger EWC agreement was signed on 20 February 2007. The agreement concluded that the existing Article 13 (see below) EWC at Felten & Guillaume should not only be retained but extended to include the NKT cables branch. In addition, it was agreed that a joint EWC be put in place at the Group level, and that a second branch of the Group, Nilfisk Advance Group, be allowed to have its own independent EWC. In another case, the acquisition of the Reinhold & Mahla GmbH by Bilfinger Berger did not result in the newly acquired company being incorporated into the existing Bilfinger Berger EWC. Instead, following restructuring Reinhold & Mahla became part of the newly formed Bilfinger Berger Industrial Services, which, in turn, established its own EWC.

In terms of restructuring, where a situation exists in which a company with an EWC is acquired by a firm without an EWC, the natural response should be to set up an EWC at the level of central management. When negotiations prove difficult, however, the solution appears to be one of retaining the existing EWC until the negotiations over a new EWC are successfully completed. An example of where this problem occurred can be found in the case of FAG Kugelfischer AG. Although it became part of Schaeffler Group in 2002, negotiations for a group-wide EWC only started in 2007. Other examples exist where no attempt has been made to extend existing EWC structures to other

parts of the group. In the case of the Franz Haniel Group, EWC agreements exist for two parts of the group, Celesio and Hebbel, while neither the group nor all parts of the group have an EWC.

Addressing the problem of mergers and acquisitions

The adaptation of existing EWCs in cases of significant restructuring, due to a merger, acquisition or break-up of a company, is one of the main objectives of the proposed revision of the EWC Directive. The European Commission's proposal addresses the problem of mergers and acquisitions in two places. First, in Article 6 it introduces the obligation to define an adaptation clause for new EWC agreements. Existing agreements need not be renegotiated in order to add such an adaptation clause. Secondly, Article 13 would be amended to regulate the renegotiation of an EWC in cases where no adaptation clause exists or 'in the event of conflicts between the relevant provisions': that is, all cases where more than one EWC is involved. In these cases, a special negotiating body (SNB) has to be set up according to the same rules laid down to establish an EWC. In addition, at least three members from each of the previously existing EWCs shall be members of this SNB. Furthermore, 'during the negotiations, the existing European Works Council(s) shall continue to operate.'

The problem of mergers and acquisitions is not only one of the most important issues of the revision, but probably also one of the most controversial. Commenting on the Commission's proposal Philippe de Buck, Secretary General of BusinessEurope, argues that: 'the text raises serious challenges to existing agreements under Article 13'. Such a comment completely ignores the underlying problem that EWC structures have adapted to company structures in the case of a merger and acquisition and that this should also be in the interests of employers. If BusinessEurope wants Article 13 agreements to be protected in the case of a merger, acquisition or break-up, it needs to propose how the issue of restructuring should be solved in these cases without having to renegotiate under Article 6. The ETUC, on the other hand, proposes that Article 13(2) 'should be amended so that on request all agreements can be renegotiated' (ETUC 2008: 13).

The objective of a revision should be to allow the smooth adaptation of EWC structures in cases of mergers and acquisitions. In many cases an adaptation clause may serve this aim. As soon as two EWCs are involved in a merger, however, an adaptation clause does not function. According to the European Commission's current proposal, a new special negotiation body (SNB) has to be created in order to establish a new EWC agreement (European Commission 2008: 30).

Such a renegotiation, however, can prove to be a rather lengthy and complicated process. Ideally, the revision should propose some easy-to-apply rules that make a complete renegotiation superfluous. At least in cases where two groups with an EWC merge, it should be possible that the existing EWCs negotiate a new EWC agreement.

Fragmented EWC structures

Another factor to be considered in relation to the TUM database concerns the existence of what we term fragmented EWC structures. This describes a situation in which a company has more than one EWC or where certain parts of a company are excluded from EWC representation. The decision to have a fragmented EWC structure clearly has certain benefits for both employers and sections of the workforce represented on the EWC. In part, such a structure appears to provide a higher degree of efficiency in the way EWCs function. It can help to streamline and, hence, produce a quicker response rate; it is also extremely difficult for a single EWC to accommodate the multiplicity of divergent interests and problems that are often present in large multinationals.

Evidence indicates that in some cases a conscious decision has been taken to retain separate EWC structures – this often as a result of a fragmented management structure (Lücking *et al.* 2008). This seems to have been the motivating factor in the cases of Bilfinger Berger, Lufthansa and the Danish NKT Group. Other instances exist whereby individual EWC agreements are concluded for independent parts of a group, as was the case at Gruner & Jahr and the RTL-Group, both of which belong to the Bertelsmann Group. In this case the reason for a non-unified EWC structure is the result of separate company structures. Although both Gruner & Jahr and the RTL-Group are clearly part of the Bertelsmann Group, company actors consider both parts to be independent entities with clearly defined separate managerial structures. Nevertheless, such independence does not deny Bertelsmann the right to influence the company policy of both Gruner & Jahr and the RTL-Group.

The advantages of such a diverse EWC landscape within companies, though, should not hide the fact that such a fragmented structure is not always the result of a conscious decision to heighten the efficiency of this body. Very often it is the result of restructuring, distinct organisational structures, and, moreover power struggles within a company. These factors clearly involve associated dangers. The fragmented EWC structure can lead to situations in which only certain sections of a group have access to an EWC and a company which has an EWC is controlled by an undertaking that does not have such a body. Examples for the first scenario include Arcandor and Bertelsmann (where Random House has no EWC). The second scenario is to be found in the cases of Schott AG controlled by Carl Zeiss AG and ERGO group controlled by Munich Re.

It needs to be acknowledged that the key problem associated with such a fragmented EWC structure concerns the sensitive issue of power relations between different parts of a group, which are often rooted in ideological differences between trade unions, as well as competition between different parts of a group over investment. Certainly, existing research on EWCs suggests that these two factors can be the cause of parochial interest in existing EWCs (Knudsen *et al.* 2007; Stirling and Tully 2004; Whittall 2000). In short, a fragmented EWC structure can be symbolic of restrictive policy to ensure that only certain interests have access to top management.

Addressing the problem of fragmented EWC structures

Clearly, the lack of universal access to EWCs within a company contradicts the Directive's commitment to providing that all employees, irrespective of their position within a company, be informed and consulted on European-wide issues. Legislators should be encouraged to ensure that the Directive stipulates that all parts of a group be guaranteed access to an EWC structure and that the controlling company be present at EWC meetings irrespective of the so-called independence of the company in question.

Neither the Commission's proposal nor the reactions of the social partner organisations, however, address the problem of fragmented EWC structures. In the current EWC Directive, Article 1 clearly stipulates that 'a European Works Council shall be established at the level of the group' and that it shall cover 'all group undertakings located within the Member States'. However, the text contains an exception to the first principle: 'unless the agreements referred to in Article 6 provide otherwise'. In order to prevent EWC agreements being concluded only for a part of a group, a clarification should be added to Article 6 that the EWC agreement should provide a regulation whereby all undertakings of a group are covered even in cases where several EWCs or information and consultation procedures are already established.

Transparency problems

Access to information necessary to determine whether a company or a group of undertakings is covered by the EWC Directive can at times prove to be difficult if not impossible for employee representatives to obtain. What we refer to as the transparency deficit concerns employee threshold levels, specifically whether an undertaking employs at least 1 000 workers in the EEA and at least 150 employees in two countries, as well as whether the principle of a 'controlling undertaking' is applicable. We will expand on these two factors below. In the last few years, three prominent German cases concerning the problem of transparency have been referred to the European Court of Justice (ECJ). In all three cases the ECJ ruled that employee representatives at Bofrost (Case C-62/99), Kühne and Nagel (Case C-440/00) and ADS Anker (Case C-349/01) had the right to receive the required information to determine the applicability of the EWC Directive.

In what follows we consider three case studies of privately owned companies, where transparency has proved a major obstacle to establishing EWCs. As noted in the introduction, the importance of privately owned companies is apparent from our database.

Case study evidence

The three case studies involve German companies, one from the household appliance (further referred to as 'Household Ltd') and two from the chemical ('Building Ltd' and 'Packaging Ltd') sector. Household Ltd and Building Ltd are both large companies with establishments in over 20 European countries. Interviews were undertaken with actors

in the German headquarters, as well as respondents working in the companies' French and UK subsidiaries. These involved on average two-hour interviews with personnel managers, chairs of works councils and various local and national trade union officers.

Prior to meeting company respondents face-to-face, telephone conversations to arrange an interview revealed the problem of transparency. Works councils, in particular, indicated a willingness to meet us, especially because our project was funded by the Hans-Böckler-Stiftung. It was made quite clear, however, that to the best of their knowledge they were not covered by the EWC Directive and so they questioned the relevance of such a meeting. The important point to stress here is that respondents based their claim on information provided by management on the number of workers employed and the company structure. As will be demonstrated, huge question marks exist with regard to the validity of such information, the validity of which it is very difficult for employee representatives to verify.

The key issue here concerns the fact that privately owned companies are not required to publish employee figures. This often makes it impossible to discern whether the company in question has breached the employee threshold set down in the EWC Directive. Obtaining such information is down to the discretion of management. As the three case studies demonstrate management is reluctant to divulge such information for reasons we will expand upon later.

A situation prevailed, for example at Household Ltd and Packaging Ltd, whereby both works councils were only aware of their companies' presence in a particular country. In the case of Household Ltd the EWC unsuccessfully attempted to glean information about a newly opened factory in the Czech Republic.

As for Building Ltd, the chair of the works council owed their intricate knowledge of the employment situation in foreign subsidiaries, specifically employment numbers, to the fact that he or she had previously held a position as an IT manager responsible for introducing computer systems in many of the subsidiaries. Nevertheless, none of the German works councils had contact with employee representatives outside of Germany. In fact, none of the respondents could indicate whether employee representative structures even existed in any of the foreign subsidiaries belonging to their undertaking. Certainly, the last point is of great importance if employee representatives are to submit a written request to management to set up a SNB. Article 5(1) of the EWC Directive states that any submission has to come from a minimum of 100 employees from two countries within the European Economic Area (EEA). Where management is not willing to share such information, the works council has the difficult and potentially impossible task of determining not only whether the threshold has been breached, but equally whether partners exist who are willing to support a request that management set up a SNB.

This is only part of the puzzle that employee representatives have to solve. The second element concerns the structure of a company. The issue of company structure is

complicated by the fact that many privately owned companies are an amalgamation, at least on paper, of many independent parts. Therefore, there is a requirement to determine whether the German headquarters fulfils the role of what Article 3(2) of the Directive refers to as a 'controlling undertaking'. The Directive sets down clear criteria to help determine the applicability of Article 3(2). This involves establishing whether a headquarters directly or indirectly:

- holds a majority of that undertaking's subscribed capital; or
- controls a majority of the votes attached to that undertaking's issued shared capital; or
- can appoint more than half of the members of that undertaking's administrative, management or supervisory body.

The first two criteria are clearly not applicable to companies in private hands. Unfortunately for employee representatives the last criterion presupposes internal knowledge of legal and management structures, knowledge that they often do not possess. As all three case studies demonstrate, however, this proves extremely problematical when companies are not required by stock market regulations to open their books.

In our three case studies management simply denied a controlling function over the foreign subsidiaries running under their companies' name, arguing that foreign subsidiaries were not controlled by the headquarters. In one of the companies under study, for example, the foreign subsidiaries in question belonged to a holding company based in Switzerland and, as a consequence, was said to remain independent of the central headquarters. In another case, a different structure was chosen which had similar results. The strategy followed here involved placing the ownership of the company in the hands of different family members. In reality, however, these individuals reported to two individuals who co-own the company.

In all three case studies the controlling principle was shown to prevail. Interviews with management and employee representatives of foreign subsidiaries, as well as group personnel managers illustrated that the headquarters oversaw key functions within foreign subsidiaries. In the cases of Building Ltd and Packaging Ltd the owners visit the foreign subsidiaries at least twice a year. Moreover, employees were schooled in how to behave when the owners were on site. It was noted that a certain degree of tension prevails prior to such visits, with the local workforce conscious that visits of this kind could have a bearing on any future investment decisions. Furthermore, the German personnel director at Building Ltd disclosed that the company had recently set up a controlling department based at the headquarters. This represented a move designed to allow central management the chance better to oversee the performance of the foreign subsidiaries. It was also common practice in all three companies for central management to take responsibility for hiring and firing key personnel of the foreign subsidiaries.

How can employee representatives challenge this transparency deficit within privately owned companies? One feasible option would be for German employee representatives to seek legal clarity in relation to these open issues, but as interviews with German

trade union officials suggest, works councils are often reluctant to go down such a route. The act of going before a court of law or involving a third party, usually a trade union, is perceived as too much of a threat to the often well-established relations that have developed with management over many years. Besides, the outcome of such a step can never be guaranteed. Even if the court should rule that the company is in fact covered by the Directive, this is likely to represent only a minor first step in the setting up of an EWC. For example, despite the ECJ's Kühne & Nagel judgment in favour of the employee representatives in 2004, management have still not provided all the necessary information requested by the German works council.¹ Such examples show that employers continue to have many means of blocking attempts to set up an EWC or, at least, to delay such attempts for years or even decades.

Whether a works council is willing to challenge management's intransigence would appear to depend on what Kotthoff (2007) refers to as a 'crisis situation'. Certainly, this was found to be the situation at Household Ltd. The German works council's interest in an EWC came about after management took the decision to move production of certain products from Germany to a newly opened factory in eastern Europe. It was feared that this move would eventually lead to job losses in Germany. The relevant sectoral trade union was not only called upon to clarify whether the company in question was covered by the EWC Directive but also to organise the necessary support of foreign subsidiaries prior to requesting that management set up a SNB. The trade union had the necessary legal know-how required to submit such a request and the necessary contacts abroad: two factors where works councils are disadvantaged. On this occasion, the German trade union had the advantage that it had already been approached by its counterpart in the eastern European country in question about the possibility of establishing an EWC.

In the cases of Building Ltd and Packaging Ltd the works councils were not strictly opposed to setting up an EWC. It was rather the case that factors that help to exemplify the significance of an EWC: restructuring, investment abroad and the transfer of production, were not seen as that relevant at the time the research was being undertaken.

The foundation of an EWC, therefore, appears to depend strongly on management cooperation in privately owned companies, and their willingness to provide works council representatives with the necessary information required to submit an application to set up a SNB. Seen from this perspective, management plays the role of 'gatekeeper'. Unfortunately, management often appears to have mislaid the key required to open the gate to an eventual EWC. Such a stance should not surprise us. A recent study of family businesses in Europe demonstrates (Stiftung Familienunternehmen 2006) that co-determination remains a very controversial

1 Kühne & Nagel is a German-founded transportation and logistics company which moved its headquarters to Switzerland in 1976, probably in order to avoid the obligations of the German Co-Determination law of the same year (see Altmeyer 2004). Despite its legal form as Plc it is a family owned company with the majority share still owned by Klaus-Michael Kühne, heir of the founder August Kühne.

issue amongst family controlled companies. The research concludes that the sacred cow of co-determination needs to be reformed and that it is a relic of class struggle. Obviously, the word reform is here a synonym to argue for nothing less than the dismantling of employee representative practices.

Certainly, in two of our case studies such a position towards employee representation could be observed. Personnel directors at Building Ltd and Household Ltd referred to three factors which argued against the setting up of an EWC; first, the high costs of running an EWC; secondly, the view that it represents just another layer of bureaucracy which slows down decision-making procedures and; thirdly, a belief that an EWC can lead to too much transparency. In particular transparency appears to be a major management concern. This is due to the fact that working conditions are very different, with some countries working fewer hours per week and earning more. Holiday entitlements also vary greatly.

Undoubtedly, the considerable time and effort that the TUM research team had to invest in addressing the question of transparency is symbolic of the disadvantages faced by employee representatives in Germany and the foreign subsidiaries when trying to set up an EWC. The TUM team had both the time and mobility to undertake what amounted to diligent detective work to discern whether all three case studies breached the threshold of 1 000 employees, with 150 employees in at least two countries, and whether the controlling principle applied.

Addressing the transparency deficit

Our findings indicate that if the existing EEA EWC compliance rate of 35% is to be improved, any revision of the EWC Directive needs to address the question of transparency in relation to employee threshold levels and company structure. Interestingly, on the one hand the European Commission's revision proposal addresses the transparency deficit by recommending an amendment of Article 4 which would provide that 'the management of every undertaking belonging to the Community-scale group ... shall be responsible for obtaining and transmitting to the parties concerned by the application of this Directive the information required for commencing negotiations'. On the other hand, however, Article 11(2) that currently requires Member States to ensure 'that the information on the number of employees ... is made available by undertakings' is deleted. This deletion clearly represents a step backwards. While BusinessEurope does not comment on this aspect of the revision, the ETUC refers to this above-mentioned addition as a helpful improvement. However, the ETUC requests clarification on the term 'parties concerned'.

In our opinion the Commission's proposal does not solve the transparency deficit. For example, such an obligation on the part of the 'management of every undertaking belonging to the Community-scale group of undertakings' makes no sense in cases where it is not even clear whether the group fulfils the criteria of a 'Community-scale group of undertakings'. Every undertaking that is part of a multinational group should be required therefore to provide all the data necessary to determine whether the group

fulfils the criteria defined in Article 2 (thresholds) and 3 ('controlling undertaking') of the EWC Directive. Instead of deleting Article 11(2) an obligation should be added that defines appropriate sanctions if an undertaking fails to provide such information.

Generally, case study work on German multinationals failing to implement the EWC Directive demonstrates employers' lack of willingness to share information necessary to determine whether the company in question falls under the EWC Directive. With employee representatives' reluctant to challenge management's continued lack of cooperation, one solution to be considered could involve requiring companies to register the numbers of employees they employ within the EEA. Furthermore, the continued reluctance of companies to comply with such a request should not only result in the imposition of financial penalties but also measures to exclude such companies from benefiting from any financial assistance provided by the European Union.

Finally, the clear role designated to trade unions by company level representatives in facilitating the foundation of an EWC demonstrates the need for the Directive to recognise them as an important actor. National trade unions and European industry federations assist in building bridges between employees geographically dispersed across the EEA, play a key role in coordinating EWC relations and provide important training needed to reconcile the diverse and often troublesome industrial relations practices across Europe. Recognition would ensure that trade unions have access to EWC meetings, adequate resources to support their work in assisting already existing EWCs as well as help them increase the overall number of EWCs. Unfortunately, BusinessEurope is strictly opposed to such recognition.

Conclusion

Undoubtedly, the EWC Directive has had a positive impact in Germany. That 131 EWCs have been set up by actors within German multinationals is no mean feat and it represents by far the highest figure of any EU Member State. Such positive figures, however, cannot and should not detract from the fact that many workers employed by German multinationals are denied the right to be informed and consulted at an European level. As the TUM database demonstrates, 71.7% of German multinationals covered by the Directive have still not set up an EWC.

As this article has shown, the problem of compliance involves the lack of transparency in privately owned companies. On the one hand, this concerns management's unwillingness to share information on employee threshold levels and company structures. On the other hand, it involves management providing employee representatives with dubious information relating to such issues. Together, these practices make it very hard to set up an EWC. Given the current problems that most employee representatives find themselves struggling to master, we should not lose sight of the fact that they often have neither the resources nor the time to track down the relevant information required to make an application to establish an SNB.

In part, though, this is only half the story. Establishing an EWC in privately owned companies often involves challenging management's authority. This represents a step that most German employee representatives are unwilling to take. To do so would not only mean placing in question the hitherto good working relations with management, but equally be seen as an act of treason. The last point relates to the fact that employee representatives have a close association with privately owned companies. Although it would be an exaggeration to say they belong to the inner family circle, they nevertheless have the status of a 'distant relative'.

Finally, the article also considers interesting issues brought to light by the German EWC database compiled by TUM. First and foremost it exemplifies the difficulties associated with keeping such a database up-to-date in an economic environment increasingly marked by restructuring. Secondly, we have demonstrated that the explosion of mergers and acquisitions brought about by European economic integration means that EWCs are currently ill-equipped to deal with such change. Certainly, the European Commission is aware of this problem and the Commission's proposal to revise the EWC Directive lays down certain procedures to be followed. Unfortunately, the European Commission's proposals fail to simplify the process of renegotiation and to prevent the emergence of fragmented EWC structures. As a consequence, the European Commission has missed an ideal opportunity to ensure that all employees covered by the Directive should have the right to be properly informed and consulted on European-wide issues.

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