

# Understanding the European Works Council Deficit in German Multinationals

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## *Extended Abstract*

### **Introduction**

After twenty-years of endeavour the 1994 European Works Council Directive (EWCD) finally marked a unique breakthrough in the field of European social policy (Marginson, 2000). The legislation collectively empowered employees of multinational undertakings active in Europe with information and consultation rights (Lecher and Platzer, 2003). It is perceived as an important step in complementing, rather than replacing, national representative practices under pressure from an increasing internationalisation of company structures (Keller, 2001).

Although EWCs currently exist in 784 undertakings (Kerckhofs, 2006: 28), a far cry from the mere 49 EWCs prior to the EWCD being passed, the large number of firms still failing to implement this legislation cannot be ignored. Currently 9.15 million employees in 1432 enterprises covered by the Directive do not have formal access to supranational information and consultation rights (Kerckhofs, 2006: 33). Though the ETUI database indicates that the poor implementation rate is not a distinct problem of any one country, figures relating to the former EU 15 demonstrate that the non-implementation of the EWCD is particularly high in German. This is quite a surprising fact considering Germany's traditionally close association with works councils, and hence by default a role model for European legislators and non-German employee representatives with an interest in company level employee representation (Whittall, 2003).

Although according to the ETUI database German enterprises with a EWC, 123 in total, account for the highest number of those companies affected by the directive, another picture emerges when the compliance rate by country of origin is considered. Ironically UK companies, this even given that their government originally opted-out of the EWCD, have shown a greater interest in complying with this piece of EU legislation.

A study funded by the Hans Böckler Stiftung on the *Non-implementation of European Works Council Directive in German Multinationals*, the following paper offers provisional findings into why some German companies, particularly their works councils, are failing to take advantage of the EWCD. The paper is divided into two parts. After reviewing recent compliance rate developments within Germany, this based on an up-to-date database produced by the Technische Universität München, the paper presents evidence taken from six case studies of German enterprises covered but who as of yet have not founded an EWC.

## **Non-implementation of EWCs: facts and figures**

The Technische Universität München has developed a reliable EWC database, i.e. documenting the number of German firms covered by the EWCD and those already in possession of an EWC. The data is based on two main sources: First, ETUI's EWC database. Though published in 2006 the ETUI figures were collated in 2004. Next, we have drawn data from the Hoppenstedt database, a commercial enterprise database covering all enterprises active within Germany. With the aim of locating all German companies covered by the EWC directive a set of probable cases (around 1.400) were selected. This was followed by a filtering process to exclude firms which appeared twice or were clearly not covered by the Directive due the fact that they did not have employees within the European Economic Area (EEA). This involved consulting web pages and business reports, followed up by phone calls and e-mails to the remaining 800 companies. The production of a EWC databank proved even more difficult than first assumed, namely that the activities of multinational companies are far too complex and fluid to be represented by simple figures or 'implementation rates'. Difficulties arose from two sides: the virtual impossibility of attaining all necessary data and the uncertainty associated with the judicial interpretation of the available data.

Regarding the *problem of access to data*, the main difficulty is that the EWC Directive's definition of 'community-scale groups and undertakings' is based on employee numbers in the Member states of the EEA. Currently, even stock companies normally only publish figures about world-wide and domestic employees. In some cases business reports provide also numbers of employees in 'Europe' (whatever this means) where countries outside the EEA normally are included. Even the most basic figure, the number of employees in the EEA, must be calculated from the figures for each country. Hence, the figures necessary for the defining a 'community-scale' company are not easily available. To make the situation worse, some private companies don't publish any employee numbers at all. The most prominent cases are Lidl and Aldi where employee numbers can only be guessed. While in these two cases there exists no doubt that they are covered by the Directive, in other cases guessing can be very tricky where the numbers are not far away from the threshold described in the Directive. Another problem is the fluidity of data. The field of multinational companies changes permanently via mergers, take-overs and spin-offs. So, data that are reliable for 2007 could already be outdated in 2008.

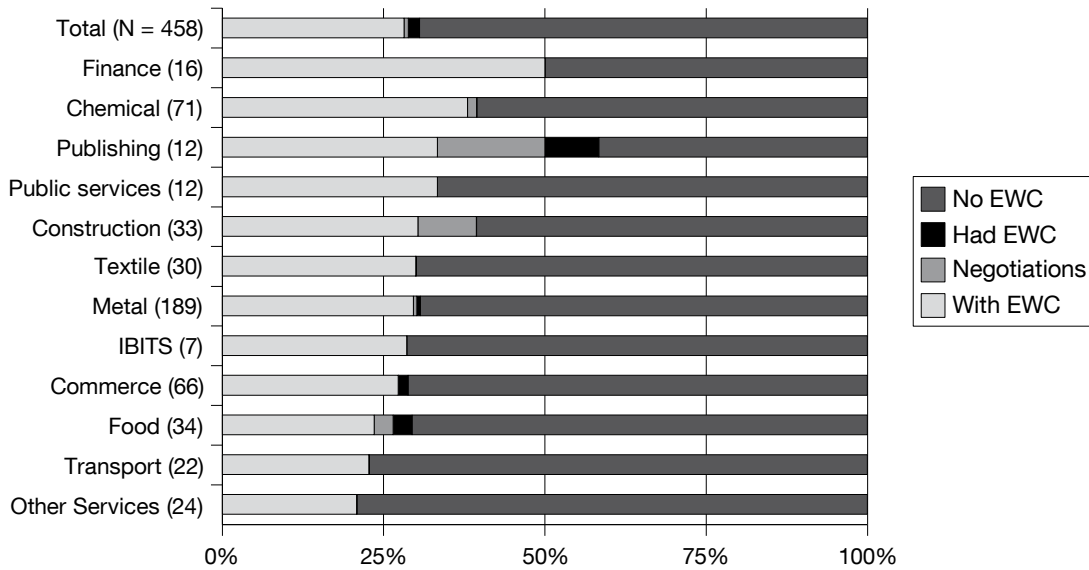
Concerning the *uncertainty of judicial interpretation*, difficulties arise from two aspects of EWC Directive 94/45/EC: the definition of a 'controlling undertaking' and the rule that an EWC should be established at group level 'unless the agreements ... provide otherwise'. The definition of 'controlling undertaking' provided by article 3 of EWC Directive 94/45/EC is quite clear. Still, some companies try to avoid being identified as 'controlling undertaking', and some groups even go to great lengths to changing the group structure to circumvent the obligation of establishing an EWC. Of the three criteria provided by article 3 the first two, holding 'a majority of that undertaking's subscribed capital' and controlling 'a

majority of the votes attached to that undertaking's issued share capital', refer to stock companies and can easily be checked in published sources. The third criterion however, the ability to 'appoint more than half of the members of that undertaking's administrative, management or supervisory body', presupposes internal knowledge about the management structures of the companies involved. In Germany, there are a considerable number of large private groups, often owned by families, where dependency between the companies belonging to the group can not be verified via capital shares. This is because each company is owned by a small number of private owners, sometimes members of the same family. In these cases the applicability of the EWC Directive can only be verified by the third criterion, control of management structures by one controlling undertaking at the top of the group. We concluded that such a private group forms a unity where it presents itself as a unity – for example, on web pages and in business reports. However, in one case the chair of the German works council told us that management would never accept that the enterprises belonging to the group form a unity.

The second issue we confronted in the production of a EWC database concerns the rule that an EWC should be based at the level of 'central management' of the group – 'unless the agreements referred to in Article 6 provide otherwise' (Directive 94/45/EC Art. 1.3). According to this rule, it should be unnecessary to collect data about each company fulfilling the criteria defined in Dir. 94/45/EC Art. 2(a) as long as this company belongs to a larger group. However, there exist many groups with more than one EWC, these set up to account for distinct branches or even on different levels within in a holding. Sometimes there are branches with and other branches without EWCs (e.g. Bertelsmann and Karstadt-Quelle). There are groups having an EWC controlled by a company without EWC (e.g. Ergo insurances and Munich Re, or in the near future VW and Porsche). If one takes into account these cases the data becomes biased due to the fact that for groups with more than one EWC there is a need to count every entity covered by its own EWC while groups that have built, in accordance with the Directive, one EWC for the whole group are only documented once.

In light of these difficulties and uncertainties the outcome of our efforts is not that astonishing. According to our data 458 German companies and groups are covered by the EWC Directive, 60 % of which have already been documented in the ETUI database 2006 as companies covered by the Directive. 168 companies or 36 % have been added to the database as completely new records. On the other side 90 German companies included in the ETUI database have lost their independence by merger or take-over – not included are those companies controlled by another company which still have their own EWC. Hence, it is possible to see that the basic population for the statistical analysis of EWC coverage in German multinationals has drastically changed within a few years.

*EWCs in German Multinationals covered by EWC Directive (2007)*



Despite these changes the ratio of companies having implemented an EWC remains nearly the same. It oscillates around 29 % depending on the way mixed groups with more than one EWC are treated. This astonishing result is another hint that the field of ‘community-scale’ groups and undertaking with German origin is far too complex and fluid to speak of a simple implementation rate. The collected data, however, allow us to identify companies and groups that fulfil the criteria provided by the EWCD, but still have not installed an European Works Council.

### **Preliminary Findings**

Finally, the following draws on preliminary findings taken from qualitative study of six German firms covered by the EWCD but which have not taken advantage of this piece of legislation. Conscious of the need to accommodate sectoral and foreign subsidiary variables that might have a bearing on EWCD compliance rates, German enterprises (two per sector) were chosen from each of the following sectors, chemical, metal and services. The eventual choice also included firms with a tradition of works councils and trade unions (See table. 1). As a means of winning respondents long-term support and open co-operation for the project the names of the firms have been changed accordingly.

**Table 1: Company profile**

<i>Firm</i>	<b>Wein KG</b>	<b>Verpackung KG</b>	<b>Isar AG</b>	<b>Sofia AG</b>	<b>Trockner KG</b>	<b>Lackierer AG</b>
<i>Activity</i>	Construction materials	Packaging	Insurance	IT	Household products	automobile supplier
<i>Sector</i>	Chemical	Chemical	Service	Service	Metal	Metal
<i>Company size</i>	Large	Small	Large	Small	Large	Small
<i>Works Council</i>	√	√	√	√	√	√
<i>Trade union density</i>	Medium IGBCE	Medium Verdi	Low DHV/Verdi	Low IG Metall	Medium IG Metall	High IG Metall
<i>Internationalisation of firm</i>	High	Medium	Medium	Medium	High	High
<i>Cov. by coll. agreements</i>	√	√	√	–	√	√

Source: composed by the authors.

With interviews already completed with the German works councils from all the firms under study, so-called experts, European-level actors, union officers from the IG Metall, Verdi and IGBCE as well as personnel managers from three of our firms' UK subsidiaries, preliminary fieldwork has uncovered some provisional findings concerning German multinationals failure to implement the EWCD. These include the following factors:

1. Legal coverage of EWCD: this concerns clarifying whether the chosen case study companies are legally compelled to set up a EWC. In the case of two firms, Wein KG and Trockner KG, it was respectively argued that the EWCD did not apply because employees outside of Germany did not directly work for the Group as well as the fact that the necessary threshold set by the Directive had not been surpassed.
2. Missing interest in an EWC: this concerns both employees and German works councils assumption that existing structures within German industrial relations more than adequately facilitate dissemination of information and the right of consultation provided by EWCD.
3. Opposition to an EWC: both German employers and German employee representatives demonstrated to different degrees opposition towards the EWCD. In the case of the employees this was twofold, 1) a concern that the existence of an EWC could prove expensive, i.e. the cost factor, 2) a fear that an EWC could lead to solidarity amongst the group's geographically dispersed workforce. As for German works councils there existed a fear that such a structure could threaten the special relationship that they had build up with management over many years.
4. Conflict between German employee representatives: there exists evidence in two cases, Sofia AG and Trockner KG, of division amongst employee representatives over the worth of such a European body.

5. Delegated and hegemonic representation: at Isar AG and Lackierer AG there existed a willingness to use existing German co-determination channels to champion the rights of employees within foreign subsidiaries. However, the motivation behind playing such a role was quite different. In the case of Isar AG a hegemonic tendency prevailed, representation functioning as a means of controlling relations that foreign subsidiaries had with higher management. At Lackierer AG, on the other hand, there existed a sense that supporting employees outside of Germany involved demonstrating the importance of solidarity amongst employees.
6. Foreign subsidiaries interest in an EWC: evidence was also uncovered in three cases, Wein KG, Trockner KG and Isar AG, of an interest in an EWC on the part of non-German employee representatives. However, such interest was opposed by management and did not receive the necessary support from the relevant German works councils.

The paper concludes that while opposition can be observed this does not appear to be major problem. Though employers generally appear to have reservations about the relevance of an EWC, there were only two examples of outright opposition. Rather a tendency prevailed whereby employers are willing to tolerate the existence of such a body. As for German works councils the foundation of an EWC was not rejected, that is with the exception of one firm, Isar AG. On the contrary German works council respondents either indicated a strong interest in setting up an EWC or acknowledged that it could become an important agenda issue in the near future, this last position reflecting the fact that their respective firm was currently going through a period of restructuring at a European level.

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