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NOTE

From:	Presidency
To:	Permanent Representatives Committee
Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2009/38/EC as regards the establishment and functioning of European Works Councils and the effective enforcement of transnational information and consultation rights *- Analysis of the final compromise text with a view to an agreement*

I. INTRODUCTION

Directive 2009/38/EC of the European Parliament and of the Council[1] lays down minimum requirements for the setting-up and operation of employee representation bodies in certain multinational undertakings, so-called European Works Councils ('EWCs'). EWCs and transnational information and consultation procedures complement the information and consultation of employees at national level. The Commission presented on 24 January 2024 a

[1] Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast) (OJ L 122, 16.5.2009, p. 28).

proposal for a revision of that Directive[2]. The Council adopted its negotiation position on 20 June 2024[3] and the European Parliament adopted its mandate on 19 December 2014.

II. STATE OF PLAY

The inter-institutional negotiations consisted of three trilogues, the first having taken place on 6 February 2025, the second on 19 March 2025 and the last on 20 May 2025. At the last trilogue, the co-legislators provisionally agreed on the text in addendum to this note. The Presidency reported on the first two trilogues to Coreper and debriefed the Social Questions Working Party. The Social Question Working Party will be debriefed on the results of the third trilogue on 27 May 2025[4].

III. MAIN ISSUES PROVISIONALLY AGREED ON 20 MAY 2025

The text of the provisional agreement is laid down in Addendum 1 to this Note. Changes compared to the Commission proposal are marked in ***bold italics*** and deletions by ▌. The following explanations are structured by reference to sections of the text of the provisional agreement[5].

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2 5837/24 + ADD1
3 10750/24
4 The final four column table has been published as document 9246/25.
5 The text in annexe to this note deviates in some details from the text in the draft agreement column of the four column table as it has been subject to some adjustment by the lawyer-linguists of Parliament and Council.

SECTION I: GENERAL

Article 1 - Material Scope: Transnational Matters

EWCs are to be informed and consulted on *transnational matters*. The Commission proposal sought to clarify this term, as diverging interpretations have led to frequent disputes in the past. Based on amendments in their respective mandates, the Council and the Parliament agreed to clarify that i) the scope of the potential effects of transnational matters on the workforce and ii) the level of management involved, should be taken into account to determine whether a matter falls within the competence of an EWC. This means that the concept of transnational matters covers those measures which could affect employees in a substantial way, thus excluding those which affect them in a trivial manner or only concern individual employees or are ordinary operational decisions[6].

The legal presumption on the question of transnationality in Article 1 (4), proposed by the Commission, was not extended to situations in which decisions are taken in one Member States which affect workers only in another Member State, although this had been requested by the Parliament.

Article 2 – Definition of employees' representatives

It was agreed to leave the definition unchanged, but to acknowledge in recital 6 that employees' representatives may be trade union representatives, where the national law and practice of a Member States provide for it.

Article 3 – Personal scope

The Parliament's request that the legal presumption of a controlling and controlled undertaking in Article 3 (2) should also be triggered by franchise and licencing agreements was not upheld, after it has been clarified in recital 3 that franchisors or licensors can fulfil the definition of a controlling undertaking, provided they can exercise a dominant influence over another undertaking in accordance with Article 3 (1).

[6] Recital 5

SECTION II: ESTABLISHMENT OF A EUROPEAN WORKS COUNCIL OR AN EMPLOYEE INFORMATION AND CONSULTATION PROCEDURE

Article 6 - Content of the agreement

A number of changes have been made to Article 6. Article 6 (1) and (2) set out the framework for the negotiation of the EWC agreement between the Special Negotiating Body (SNB) and the central management, while underlining the autonomy of the parties to that agreement.

In reply to requests of the Parliament for a minimum right to experts regardless of the content of the EWC agreement, including their right to attend meetings, and an automatic triggering of the subsidiary requirements after the expiration of an EWC agreement, the Presidency defended the autonomy of the negotiating parties, which includes their right to freely decide on the content of the EWC agreement. As a compromise, the Presidency agreed to add to the list of items to be determined by the parties in the negotiations:

- in letter (f) a reference to trade union experts and the question of participation of experts in meetings; and
- in letter (g) a reference to the possible extension of EWC agreements.

In relation to the objective to improve gender balance in the composition of EWCs, the text of Article 6 (2a) was considerably strengthened compared to the Commission proposal. Despite the Parliament's repeated requests for a binding gender quota, the Presidency strongly defended the Council's mandate and explained that binding quotas are incompatible with EU case-law and can also not be applied in this Directive due to the decentralised decisions on the composition of the EWC by the national employees' representatives. The final compromise maintains the objective of 40% representation of the underrepresented sex and adds, for the cases where the objective is not reached, the requirement for the SNB and the EWC to explain the reasons in writing to the workers.

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SECTION III: MISCELLANEOUS PROVISIONS

Article 8 – Confidentiality

The question of confidentiality of information shared by the undertaking was one of the most difficult issues to be solved in the last trilogues. Finally, in exchange for the introduction of the concept of 'objective criteria' based on which information is to be treated confidentially, the Parliament agreed to withdraw its amendments asking for the right to pass confidential information on to national employees' representatives. The provisionally agreed text combines the concept of the legitimate interest of the undertaking stemming from Article 6 (1) of the Information and Consultation Framework Directive (2002/14/EC) with the concept of objective criteria established by Member States, in a similar way as in Article 8a dealing with the non-transmission of information.

The duration of the confidentiality requirement is to be defined by the central management in advance, whenever possible. Confidentiality continues to apply until the reasons justifying have become obsolete.

In the framework of the discussions on confidentiality, the Presidency also succeeded in persuading the Parliament to drop its amendment related to Article 8a on the non-transmission of information, which would have obliged Member States to make the non-transmission of information conditional to a prior administrative or judicial authorisation.

Article 11 - Compliance with this Directive

The Article dealing with enforcement was the provision on which the mandates of the co-legislators were the furthest apart from each other. On penalties, the General Approach had reduced the requirements set out in the Commission proposal, while the Parliament's report had reinforced them considerably. The latter requested

- a preliminary injunction for the temporary suspension of decisions taken in violation of the rights set out in this Directive,

- financial penalties that are proportionate to the nature, gravity and duration of the undertaking's infringement and the number of affected employees,
- orders excluding undertakings from public benefits and public procurement, and
- penalties corresponding to 2% or 4% of the turnover of the concerned undertaking, depending on whether the undertaking acted with negligence or intent, respectively.

The General Approach had limited the provisions on penalties to the general rule that these shall be dissuasive, effective as well as proportionate, and that financial penalties shall apply in case of infringements of information and consultation rules.

Based on the feedback from Member States, the Presidency presented a compromise proposal stating that Member States shall take into consideration, when determining penalties, the gravity, duration, consequences, and the intentional or negligent nature of the offence. In reply to the Parliament's repeated requests to add a reference to turnover, and with the commitment to a final compromise package that was balanced, the Presidency agreed to add a sentence at the end of Article 11 (2) that requires Member States to take also *into account the annual turnover of the sanctioned undertaking or group*. However, the final compromise ensures that Member States are given sufficient flexibility to take into account the elements of their national systems by specifying that, alternatively, Member States can *ensure that the applicable sanctions have a similarly dissuasive nature*.

This offer was made under the condition that the Parliament would renounce to all its other requests on penalties and for an injunction, which it finally did.

On Access to Justice (Article 11 (4), the Parliament could be persuaded to follow the Council's approach which guarantees effective access to justice while leaving to Member States the choice of measures to achieve this.

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Article 12 - Relationship with other Community and national provisions

Given the importance the EP attaches to the relationship between the EWC and the national workers representatives, this is now reflected in recital 15a, in Article 9 (2) and reference to the objective of good cooperation was added to Article 12 (2).

SUBSIDIARY REQUIREMENTS

The changes to the subsidiary requirements in the Annex 1 to the Directive were limited:

- In point 1 (a), references to skills and training policies, to substantial changes concerning working conditions, notably to work organisation or contractual relations, and to controlled undertakings were added to the text of the Council mandate;

- In point 1 (c), the same mechanism to explain why the objective of gender balanced was not achieved as for negotiated EWCs and for SNBs, was introduced;

- In point 2 the number of in-person meetings was changes from one to two per year, with the possibility to replace them, if agreed, by digital meetings.

TRANSPOSITION AND DEFERRAL PERIODS

Amending act, Article 2 (1)

In line with the Council mandate and following the call of several Member States, the Presidency insisted on and obtained the agreement of the Parliament that the transposition deadline is extended from one to two years (Amending act, Article 2 (1), first subparagraph). In exchange, it was agreed to shorten the period of deferred application of the provisions of the amended Directive (Amending act, Article 2 (1), second subparagraph) from two to one year. The overall timeline for the full application of the amended Directive remained thus unchanged to three years from the entry into force.

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III. CONCLUSION

The Presidency considers that the provisional agreement presented in this note and set out in the Addendum to this note, represents the best possible compromise between the co-legislators and respects the spirit of the General Approach.

The Committee of Permanent Representatives is invited to:

- Analyse and agree on the text of the final compromise resulting from the final trilogue, as set out in Addendum 1 to this Note, and to
- mandate the Presidency to send a letter to the Chair of the EMPL Committee of the European Parliament confirming that, should the European Parliament adopt its position at first reading, in accordance with Article 294(3) of TFEU, in the exact same form as set out in the compromise text set out in the Addendum to this document (subject to finalisation by the lawyer-linguists of the two institutions), the Council would, in accordance with Article 294(4) of TFEU, approve the position of the European Parliament and the act shall be adopted in the wording which corresponds to that European Parliament.

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