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From: General Secretariat of the Council
To: Delegations

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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 - MS comments

Delegations will find attached the comments received to the text of the proposal contained in document 8320/24.

Comments by AT

General comments:

- AT welcomes the objectives of the Commission's proposal.
- However, AT notes with regret that the concerns expressed were hardly taken into account in the compromise proposal.
- AT needs clarification on some points.
- The proposal is still being analysed; AT has a scrutiny reservation.

Comments concerning specific articles:

Art 1 Para 4

- A **more specific definition of "transnational"** is required.
- The concerns of AT that suppliers could also be included persist. It should therefore be stipulated in a recital that supplier companies should not be categorised as a transnational matter.

Art 5 Para 6

- In order to keep the costs at a reasonable level, MS should continue to be able to provide for a **limitation to one expert**. The second subparagraph should therefore not be deleted.

*"In compliance with this principle, Member States may lay down budgetary rules regarding the operation of the special negotiating body. **They may in particular limit the funding to cover one expert only.**"*

Art 6 Para 2

lit. f)

- AT already has an extensive implementation and is sceptical about overly detailed provisions regarding costs. **AT prefers the wording of the original directive:**

(f) the financial and material resources to be allocated to the European Works Council;

Para 2a

- The provision can only be understood as a target definition. Especially as the central management has no influence on the composition of the negotiating body.

Art. 8a

Art. 8a Para 1

- The now deleted provision (previously in Art. 8 para. 2), according to which a **central management does not have to pass on information in special cases** if this could cause damage to the company, should be **reinstated**.

"2. Each Member State shall provide, in specific cases and under the conditions and limits laid down by national legislation, that the central management situated in its territory is not obliged to transmit information when its nature is such that, according to objective criteria, it would seriously harm the functioning of the undertakings concerned or would be prejudicial to them."

Art. 8a Para 2

- The obligation to **explain the reasons for the non-transmission** of information should be **deleted**, as it contradicts the objective of not transmitting the information.

~~"2. — When central management does not transmit information on the grounds referred to in paragraph 1, it shall inform the members of the special negotiating bodies or the European Works Councils, or the employees' representatives in the framework of an information and consultation procedure of the reasons justifying the non-transmission of information."~~

Art 8a Para 3

- Who decides "*in agreement with the central management*" whether the reasons for non-transmission still exist? This decision should lie solely with the central management, as no information was forwarded to the EWC. The wording "*in agreement with central management*" is unclear because it is not clear who should be the addressee of this provision.

Art. 9 Para 3

- In particular, the **right to a written response** to the EWC's comments before the company has even made a decision appears **problematic**.

Art. 11

- The **current penalty provision** should be maintained **unchanged**. The determination of the level of penalties should be left to the Member States.

Art 11 Para 3a

- The new provision repeats the regulations in Art. 11 para. 3 and Art. 6.
Why is this additional para. 3a necessary?

Art. 14b

- AT **rejects** the tightening of the regulation by introducing the **two-year period**.
- The three-year period should remain in place.

Annex

Number 2

- The requirement that **at least one meeting per year** must take place is sufficient.

Number 5

- EWC members already have the right to consult experts and thus also representatives of European trade unions, should they wish to do so.
- It is therefore **not necessary to explicitly grant representatives of European trade unions the right to be consulted as experts** at EWC meetings.

Comments by CZ

Recital 18a

The Czech Republic considers the argument of Article 47 to be misleading.

The CJEU interprets that provision on legal aid in Article 47 of the EU Charter as meaning that the court must examine in each individual case whether there are grounds for exemption from the payment of certain costs, in particular court fees or legal advice from a lawyer. We refer to the judgment in C-279/09, where CJEU also stipulated criteria for application of legal aid within the meaning of Art. 47 (e.g. the subject-matter of the dispute, how reasonable the applicant's prospects of success are, the seriousness of the interests involved in the dispute for the applicant, the complexity of the applicable law and procedure, as well as the applicant's ability to defend his case effectively) and it further concluded that the legal aid pursuant to Article 47 of the EU Charter also applies to legal persons. Given the special nature of the EWC or the negotiating body as collective bodies, CJEU thereby provided for a guidance to deal with these situations.

In our view, it does not follow from that article that any party to the proceedings (here, the European Works Council and its members) is automatically **entitled to legal aid and exemption from court fees**. On the contrary, we consider that, even in the light of the settled case-law of the Court, the right to legal aid is guaranteed, depending on the particular circumstances of the case, to those who do not have sufficient funds to pay any court fees or to pay a lawyer. In this respect, whether this right will be granted to all claimants without distinction in their property and financial situation, as in the case of the proposed Directive, is a **political decision which is not based directly on Article 47 of the Charter**.

In this context, the Czech Republic expresses doubts as to whether such privileged treatment, where the right to reimbursement of the costs of legal proceedings and legal representation always arises, is appropriate, since there will be discrimination against possible employee councils and employees in companies that do not meet the criteria under the Directive.

The Czech Republic therefore supports that **this right to legal aid should be, as in other cases, dependent on the specific circumstances and property conditions of the employees/European Works Councils**.

As regards the proposed possibility to pass on the costs of judicial proceedings to the State, should the application take the route that the right to reimbursement of the costs of enforcing the right of access to a court, including legal aid, is reserved only to those who are unable to afford it themselves, then we can agree to this. However, we cannot in any way support the option whereby the State would be obliged to pay these costs on a flat-rate basis. Should the costs of legal proceedings always be covered, it will be a sui generis claim, which is not inherently part of the right to legal aid, but rather an **employment-law claim against the employer**.

From the point of view of the proposed text, the Czech Republic welcomes the fact that the proposal is relatively flexible and leaves the final solution to national legislation. However, the Czech Republic considers that it would be appropriate to clarify what is considered to be '*other measures*' and to elaborate on possible alternatives that are required from the State, at least in the form of a non-exhaustive list in point 18a of the preamble.

The Czech Republic asks for clarification as to whether Article 47 of the EU Charter of Fundamental Rights applies not only to natural persons, legal persons, but also to entities without legal personality (which is the case of EWC in Czech law).

In view of the above, CZ proposes this addition:

“According to Article 47 of the Charter of Fundamental Rights everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal. In particular, the special negotiating bodies, the European Works Councils and their members on their behalf should have the necessary means to cover the costs of legal representation and participation in administrative or judicial proceedings. The Member states (...) should take (...) measures in order to ensure that European Works Councils are not de facto prevented from participating in administrative or judicial proceedings due to a lack of financial resources, **such as granting legal aid in accordance with conditions provided for in the national law.**”

Article 6(2)(f)

The Czech Republic requests to define what is meant by the term “legal assistance to the European Works Council or to its members”.

Article 6(2a) (CZ supports the FR proposal with minor textual adaptations)

“The central management and the special negotiating body, when negotiating or renegotiating a European Works Council agreement, shall agree and lay down the necessary arrangements for Attaining, as far as possible, and without prejudice to national laws on electing workers representatives, the objective of gender balance whereby women and men each involve at least 40 % of European Works Council members, and where applicable, at least 40 % of select committee members. **In highly gendered companies where this objective is neither factually nor legally achievable, the objective towards the efforts of central management and the special negotiating body should be proportionate to the percentage of women and men in the company.**”

Article 11(3)

The Czech Republic made a comment on the Czech translation of *appeal procedures*, which was not taken into account by BE PRES. During the WPSQ meeting on 26. 2. 2024, it was promised that the text would be amended so that the translations of this term would not be misleading.

Article 11(3a) (see comment on Recital 18a)

The Czech Republic supports the need to ensure effective access to judicial proceedings. The newly proposed provision only emphasizes the general requirement of the right to a fair trial under Article 47 of the EU Charter of Fundamental Rights. In this context, however, the question is whether it is necessary for this right to always include the right to legal aid (i.e. in particular the costs related to the obligation to pay and the remuneration of the lawyer). We believe that this may lead to an undesirable difference between the Works Council and its members for corporations that meet the requirements of the Directive and employees of other (smaller and local) employers.

The Czech Republic therefore supports that this right to legal aid should be, as in other cases, dependent on the specific circumstances and property conditions of the employees/European Works Councils.

‘3a. With respect to the rights conferred by this Directive, Member States shall ensure effective access to administrative and judicial proceedings for European Work Councils and special negotiating bodies, or their members on their behalf. (...) Member States shall take other measures to avoid any de facto restriction of such access for reasons of lack of financial resources. **The right to legal aid shall be provided in individual cases in accordance with national law, with a view to the particular circumstances and financial circumstances of the special negotiating bodies and the European Works Councils.**’

Comments by EE

Regarding recital 18a we give our full support to SE proposal. Linkage with article 47 of the Charter is confusing and misleading. It is important that the interpretation in recital 18a doesn't go unreasonably far. The aim of the Charter is to give everyone the right for fair trial and an effective remedy, but not to provide for bearing the costs of the representation and proceedings. Costs allocation should be determined in accordance with national law and practice because these principles in civil or other procedures differ among Member States.

Regarding article 11 (3a) we see that the best solution would be to delete the paragraph 3a altogether, because it doesn't take into consideration the different legal principles regarding the allocation of procedural costs in Member States. In addition we want to avoid creating the precedent by regulating that procedural costs should be borne a priori by the employer. A principle that legal costs of proceedings would be borne in advance by the company/employer (here central management) is unknown to the Estonian legal system. In Estonia, the judge determines the allocation of procedural costs depending on the outcome of the proceeding, its specific features and the parties. Alternatively, we are open to finding a more flexible wording that would be suitable for more Member States. We could support SE proposal regarding article 11 (3a), but in addition, in any case we believe the article 11 (3a) should refer to "administrative *or* judicial proceedings", similarly to the recital 18a.

Comments by ES

Following the meeting on April 11th, we sent the corresponding amendments to the compromise text presented by the PRE BE (document 8320/24).

1. Overall assessment

When assessing the *proposal* and any compromise text, the Member States should not lose sight of the fact that the spirit of the revision of Directive 2009/38/EC is to remedy the shortcomings identified in it, mainly the low rate of creation of new EWCs, the sometimes ineffective consultation of the EWCs, the obstacles to access to justice for the EWCs and the lack of effective remedies and effective and dissuasive sanctions in some Member States (hereinafter referred to as MS).

Considering these and other shortcomings, and in order to comply with the European Parliament's request, the Commission designed the *proposal* to advance the objective – and in turn, object – of Directive 2009/38/EC: to improve the right to information and consultation of workers in EU-scale companies and groups of companies. However, the new compromise text introduces some modifications that seem to go in the opposite direction. It is important that the revision that is agreed does not entail reversing the path that has been taken and cutting rights or hindering their exercise instead of improving them. Each provision of the Directive that is amended must therefore be a step forward on the initial situation and not a step backwards.

In addition, it should be noted that this is a directive that goes beyond the traditional logic of blocs, since it not only affects the Member States with the largest number of multinational companies with the most EECs incorporated under their national legislation, but also directly affects the workers of the workplaces located in other smaller Member States or with fewer companies domiciled in them. Therefore, it is of particular interest to countries, including Spain, with workplaces of multinational companies domiciled in other countries, that the revision of the Directive ensures that the interests of these workers can be effectively defended through the EWCs established in other countries.

The most relevant provisions of the compromise text that raise doubts are set out below, taking into account the observations made by this unit in past reports and, in particular, the alternative wording proposal to the Commission's *proposal* of 1.3.2024.

2. Transnational issues

The compromise text has not made any changes to the definition in Article 1.4 of the *proposal*. However, there are modifications to the recital dedicated to this concept - recital 5 - and the following should be highlighted:

On the one hand, as regards the specification that the Directive covers measures that can reasonably be expected to affect employees' interests to a considerable extent, it is worth noting the absolute rejection of this phrase, which distorts and represents a step backwards with respect to Directive 2009/38/EC by adding a requirement relating to the degree of impact of the measure that reduces the cases in which information and consultation would be activated.

On the other hand, and after the sentence referred to in the preceding paragraph, the following sentence is inserted: *The standard of reasonableness should be objectively ascertained, having regard to the nature and purpose of the measures that are envisaged and the circumstances of the case*. While the introduction of this criterion of objective reasonableness that Spain defended in its alternative drafting proposal is to be welcomed, the placement of this phrase after the reference to the impact on the interests of workers to a considerable extent is negatively valued. The reasonableness standard should be used to assess whether an issue is transnational in general and not limited to this specific issue.

Finally, it is worth reiterating our proposal to delete the end of the phrase 'where such measures could lead to substantial changes in work organisation or in contractual relations' when referring to measures taken in one Member State, but the consequences of which can reasonably be expected to affect workers in another Member State. The justification is to avoid interpretations of the concept that may impose additional requirements on the impact of the consequences. Likewise, this new requirement could distort the purpose and usefulness of information and consultation as an instrument for anticipating changes and adapting companies.

With regard to Article 1.4, we reiterate the need to incorporate in it and not only in the recital the need to take into account "objective criteria" as follows:

4. *Matters shall be considered to be transnational where they can reasonably be expected, according to objective criteria, to 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.

3. Costs of representation and participation in administrative and judicial proceedings

The compromise text removes the regulation of these costs from Articles 5 and 6 and Annex I, introducing it in the new paragraph 3a of Article 11, with the following content.

3a. With respect to the rights conferred by this Directive, Member States shall ensure effective access to administrative and judicial proceedings for European Work Councils and special negotiating bodies, or their members on their behalf. In particular, Member States shall provide that the reasonable costs of legal representation and participation in such proceedings are borne by the central management. Alternatively, Member States shall take other measures to avoid any de facto restriction of such access for reasons of lack of financial resources.

We can be in favour as long as it is interpreted that the deletion of the reference to costs in Articles 5 and 6 and Annex I is due to the fact that it has been intended to be regulated in Article 11.3.a as a general obligation -applicable to both the special negotiating body and the EWC- not susceptible to negotiation *in peius*.

With regard to the addition of the sentence: *Alternatively, Member States shall take other measures to avoid any de facto restriction of such access* [effective access to administrative and judicial proceedings] *for reasons of lack of financial resources*, to the extent that it is ensured that the EWCs and the SNBs have the necessary financial resources to access administrative and judicial procedures, there can be no objection to the new addition; -the new addition consisting of the possibility for Member States to provide for other financial mechanisms-.

In any case, we reiterate that the Spanish position is to be ambitious in terms of access to justice, both in terms of legitimacy and in terms of the necessary financial support, since precisely the difficulties in access to justice is one of the deficiencies detected in recent years that should be corrected.

4. Gender parity or balanced composition

The compromise text does not accept our proposals, keeping intact the wording of Articles 5(2)(b) and 6(2a) and practically intact that of point 6(1)(dd) of the Annex (changing the location and the lead), and merely inserting the following sentence in recital 10: *Without prejudice to the national laws and the autonomy of the employees to appoint the members of the European Works Councils, the agreements should include arrangements to work towards a gender-balanced composition of the European Works Council, which can, in particular in highly gendered sectors, include a growth path to a gender-balanced composition of the European Works Council.*

With regard to the recital, the expression "*Without prejudice to national laws and the autonomy of workers to appoint members of the EWC*" is assessed negatively since, on the one hand, the reference to *national laws* exceeds its interpretation of Article 6(2)(a) as it is broader than the reference to *national laws on the election of workers'* representatives and, on the other hand, it introduces a new limitation that is not in the articles in relation to *the autonomy of workers to appoint the members of the EWC*, which must be rejected.

As regards the second part of the recital, it is considered that the legal technique and the effective application of the directive by the national courts make it advisable that any obligation intended to have a binding effect be inserted in the articles and not in the recital. On top of this, it is advisable that the aforementioned 'growth path' is required to any sector and not limited to those with overrepresentation of some sex, and should be mandatory when there is no gender-balanced composition.

With regard to Articles 5(2)(b) and 6(2a), while acknowledging that there may be material limitations that prevent the objective of balanced composition in the SNB and the EWC from being achieved, it seems appropriate to be more ambitious on this issue, reiterating our previous proposals to establish obligations of result by eliminating the expressions "as far as possible" and establishing obligations in both the SNB and the EEC. If it is necessary to establish limitations, it is important that they are based on objective reasons duly justified in writing. In addition, instead of a growth path, it would be possible to explore, where appropriate, the establishment of a real action plan that can have a real follow-up.

5. Confidentiality and non-transmission of information for specific reasons

Article 8.1 (confidentiality)

The mention of "justified reasons" for requiring confidentiality, as we proposed in the comments of 1.3.2024, is welcomed. However, we do not agree with the proposed placement in the compromise text. For this reason, we propose to put this mention before in the text so that its link with the requirement of confidentiality is clear:

1. *Member States shall provide that members of special negotiating bodies, members of European Works Councils or employees' representatives in the framework of an information and consultation procedure, and any experts who assist them, are not authorised to reveal information which **for justified reasons** has expressly been provided to them in confidence by central management. In addition, central management may set up [...] **appropriate** information transmission and storage arrangements to help safeguard the confidentiality of information provided in confidence.*

Article 8.2

Our previous proposal and its justification must be reiterated, as it follows:

*When central management provides information in confidence in accordance with paragraph 1, it shall inform the members of the special negotiating bodies or the European Works Councils, or the employees' representatives in the framework of an information and consultation procedure of the reasons justifying the provision of information in confidence **including an estimated duration for the reasons thereof where known.***

Justification: *In order to prevent abuses in case a duration for the reasons for confidentiality is known, this information should be provided along with the justifying reasons. This should facilitate determining whether the justification has become obsolete according to the following paragraph.*

Article 8.3

Our previous proposal and its justification must be reiterated, as it follows:

3. *The obligation referred in paragraph 1 shall continue to apply, wherever the persons referred to in paragraph 1 are, even after the expiry of their terms of office, until [...] the justification provided [...] becomes obsolete, according to objective criteria.*”;

Justification: *The obsolescence or outdatedness of the justification for confidentiality is an objective fact. Therefore, this outdatedness should be linked to objective criteria.*

Article 8(a) (non-transmission of information)

First of all, our previous proposal is reiterated for the same reasons as those indicated with respect to Article 8.2:

2. *When central management does not transmit information on the grounds referred to in paragraph 1, it shall inform the members of the special negotiating bodies or the European Works Councils, or the employees’ representatives in the framework of an information and consultation procedure of the reasons justifying the non-transmission of information including an estimated duration for the reasons thereof where known.*”;

Secondly, the compromise text proposes a new paragraph 3 (*The dispensation according to paragraph 1 from transmitting information shall continue to apply until, in agreement with central management, the justification provided is considered to have become obsolete*) which partially reflects our previous proposal by establishing the lapse of the obligation when the justification becomes obsolete, which is positively assessed. However, the introduction of the requirement similar to that contained in Article 8.3 - confidentiality of information - that the agreement of the central management with the EWC must be met with respect to the decay is negatively assessed.

6. Right to consultation in good time

Article 9.3 has not been amended. Therefore, our proposal to indicate that the time to express their opinion should be sufficient to ensure the effective exercise of the rights to information and consultation has not been accepted. However, the compromise text proposes to amend the recital 15 to introduce a similar reference (*It is therefore important, taking into account of the urgency of the matter, that information and consultation take*

place in good time and that the European Works Council and the employees' representatives are given sufficient time to express their views in order to ensure the effective exercise of the rights provided for in this Directive.)

Although this reference is positively valued in the recital, it is still considered necessary to incorporate a reference to the effective exercise of consultation in Article 9.3 since in the current wording the determination of the reasonable time for replying is conditioned solely on the urgency of the matter.

7. Sanctions

We do not agree with the elimination of the graduation criteria from Article 11(2)(b). Instead, recital 18 sets out these criteria, but no longer as an obligation but as an example of factors to be taken into account in order to ensure that sanctions are effective, dissuasive and proportionate. The need to resume the wording of the initial proposal should be defended, reincorporating these criteria into the articles, in a mandatory provision. To do otherwise would be to go against the necessary practical effect of the regulation, to unbalance competition between undertakings by means of unequal rules between Member States and, in short, not to take advantage of the revision of the Directive to remedy one of the deficiencies detected: the lack of effective compliance with the rights and obligations arising from it.

8. Transitional provisions and pre-existing agreements

In the first place, it is not clear why the compromise text has deleted the paragraph of Article 6.2 *in fine* of the *proposal* which required the adaptation of the EWC agreements, irrespective of their date, to the new minimum content set out in this provision.

Secondly, the reduction of the period of applicability of the subsidiary requirements from three to two years in the event that no agreement is reached from the start of negotiations on the 'voluntary agreements' referred to in Article 14b is welcomed.

Thirdly, after receiving an explanatory chart of the transitional provisions from the Commission dated 11.4.2024 (but received on 15.4.2024), it appears that the Commission's intention with this provision is clearer. Therefore, the following observations should be made at this stage:

- There is nothing against the fact that voluntary agreements are not covered by the Directive but, since the exemptions have been eliminated, workers will be allowed to apply for the establishment of an EWC in accordance with the Directive.
- With regard to pre-existing agreements, it appears from the interpretation given in the Commission's flowchart (page 3 of 4) that Article 14a makes the application of the Directive conditional on the request for the initiation of negotiations by 100 workers from at least two workplaces/undertakings in at least two Member States or on the own initiative of central management. While the flowchart goes on to set out certain minimum standards applicable by virtue of national law, it appears that such application would also be conditional on the request for adaptation of the agreement. If this is the intention of the transitional provision, we do not agree on the fact that these requirements should be required for adaptation, as it means that this provision, instead of being merely transitory in nature, actually behaves as a new exemption in the case of companies in which there is no such request to start negotiations. Therefore, in view of the large number of pre-existing agreements, and in order to ensure the effectiveness of the revision of the Directive and to avoid a situation of comparative grievance between the preexisting and subsequent agreements, it is necessary to remove the requirement of the request for the initiation of negotiations and to provide that in the event that negotiations are not started after the end of the deadline for transposition of the Directive, the Directive shall apply in its entirety, and the provisions of pre-existing agreements which are contrary to the Directive shall cease to apply.
- On the other hand, as regards the minimum standards to be applied to pre-existing agreements by virtue of national law, only a few are mentioned (e.g. *on confidentiality (Article 8), non transmission (Article 8a), protection of employees' representatives (Article 10(3), etc.*). But others are forgotten, such as the rights to information and consultation provided for in Article 9. Additionally, we understand that the proposed article 11.3 bis by the compromise text would also be among them. It would be useful to obtain clarification on what those provisions would be that set minimum standards in order to avoid misunderstandings. In any event, the applicability of the minimum standards to existing agreements should be expressly set out in Article 14a of the proposal.

In short, with regard to the adaptation and transitional clauses applicable to the EEC agreements in force, the following should be noted:

- It must be ensured that, irrespective of whether or not the EEC agreements are adapted through the relevant negotiations, the minimum standards of the revised Directive will be fully applicable to them.
- It should be expressly specified in the revised Directive that, in the event of non-conformity and if it is not mandatory to adapt the existing agreement after a transitional period, the minimum standards will apply in the event of a discrepancy between the agreement and the minimum standards of the revised Directive.
- The period from which this application preference will be applicable must be expressly stated.

9. Meeting Format

The new compromise text introduces in the second point of the Annex - on subsidiary provisions - the requirement that at least one of the two annual meetings of the EWC with the central management be physical.

It is worth noting our preference for resuming the initial wording from the COM, eliminating this requirement, in order to prevent the Member States from interpreting it as meaning that it is sufficient for only one meeting to be physical. However, in the event that there is a need to specify the modality of the regular meetings of the CEE with the central management, the physical format must be chosen for both meetings.

Comments by FI

FI comments to the Presidency's compromise text proposal concerning article 11 (ST 8320/24).

Article 11 3a

“3a. With respect to the rights conferred by this Directive, Member States shall ensure effective access to administrative and judicial proceedings for European Work Councils and special negotiating bodies, or their members ~~on their behalf~~ in accordance with national law and practice. ~~In particular, Member States shall provide that the reasonable costs of legal representation and participation in such proceedings are borne by the central management. Alternatively, Member States shall take other measures to avoid any de facto restriction of such access for reasons of lack of financial resources.”~~

Rationale:

- FI supports the amendments made by Sweden.
- In addition, FI proposes to delete the words “on their behalf”. This is because in Finland, in order to represent someone else in court, one needs to be an attorney or a licensed lawyer.
- In Finland, EWS are not legal personalities so the right to access legal proceedings should be provided to the members of EWCs and special negotiation bodies.
- FI believes that this kind of formulation could be applicable to all member states and allow different national laws and practices.

Comments by FR

Recital 5:

(5). Evidence shows that legal uncertainty regarding the concept of transnational matters has led to differences in interpretation and disputes. In order to ensure legal certainty and reduce the risk of such disputes, it is necessary to clarify that concept. To this end, it is appropriate to clarify that this Directive should not only cover cases where measures considered by management can reasonably be expected [...] to affect employees in more than one Member State, but also cases where such measures can reasonably be expected to affect workers in only one Member State, but the consequences of those measures can reasonably be expected to **substantially** affect workers in at least one other Member State. This is necessary to cover cases where undertakings envisage measures, such as lay-offs, redundancies **or allocation of production activities and outsourcing of activities**, which do explicitly target establishments in only one Member State but nevertheless can reasonably be expected to have consequences affecting employees in another Member State, for instance due to changes in the cross-border supply chain or production activities, where such measures could lead to substantial changes in work organisation or in contractual relations. ~~This Directive covers measures that can reasonably be expected to affect employees' interests to a considerable extent.~~ **The standard of reasonableness should be objectively ascertained, having regard to the nature and purpose of the measures that are envisaged and the circumstances of the case.**

Justification: The aim of this proposal is to clarify the extent to which workers from a MS other than the one in which the decision is taken are "affected" and to remove the uniform nature of the application of the "to a considerable extent" principle.

Recital 17:

In certain Member States, rightsholders under Directive 2009/38/EC encounter difficulties in bringing legal actions to enforce their rights. It is therefore necessary to strengthen Member States' obligation to ensure effective remedies and access to justice and the supervision by the Commission of their compliance with that obligation. For that purpose, Member States should be required to notify the Commission of how and under which circumstances the rightsholders can bring judicial, and where applicable, administrative procedures, in respect of all their rights under this Directive. Moreover, it should be clarified that the relevant procedures have to enable an [...] effective enforcement, and that possible prior out-of-court settlement procedures cannot **result in a decision which** [...] prejudices rightsholders' right to bring legal proceedings.

Justification: the French authorities have requested that the wording be brought into line with the operational provisions of Article 1(9)(c) by deleting the words "result in a decision which", but this purely consistency amendment is not decisive. Thus, it does not reduce the ambition of the text but specifies the hypothesis provided for in point b) of Article 1 paragraph 4, which extends the scope of the transnational issues concerned.

Recital 18.a-new:

According to Article 47 of the Charter of Fundamental Rights everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal. In particular, the special negotiating bodies, the European Works Councils and their members on their behalf should have the necessary means to cover the costs of legal representation and participation in administrative or judicial proceedings. Without prejudice to any judicial decision on the final cost of

judicial proceedings, the Member states should stipulate that these costs are to be borne by the central management or should take other measures in order to ensure that European Works Councils are not de facto prevented from participating in administrative or judicial proceedings due to a lack of financial resources.

Justification: The French authorities are in favour of an obligation for the central management to give sufficient means to the European Works Councils, including the costs of legal representation and participation in administrative or judicial proceedings. However, as regards the latter, this provision should not interfere with the judge's prerogatives to rule on the final allocation of costs incurred in proceedings before him. The French authorities therefore wish to clarify that these prerogatives, which do not constitute an obstacle to access to the courts as they come into play at the end of the procedure, are unaffected by this provision.

Article 1(1) amending article 1 paragraph 4.b) :

(b) the measures considered by management of the Community-scale undertaking or Community-scale group of undertakings can reasonably be expected to affect workers in an undertaking or establishment in one Member State, and workers in an undertaking or establishment in another Member State can reasonably be expected to be **substantially** affected by the consequences of those measures.

Justification: amendment consistent with the proposal in recital 5.

Article 1(8) amending article 9.3 :

3. Consultation shall take place at such time, in such fashion and with such content as it enables employees' representatives to express an opinion prior to the adoption of the decision and based on the information provided in accordance with paragraph 2, without prejudice to the responsibilities of the management, and within a reasonable time taking into account the urgency of the matter. **Unless otherwise specified in the agreement referred to in Article 6,** the employees' representatives shall be entitled to a reasoned written response from the central management or any more appropriate level of management prior to the adoption of the decision on the measures in question, provided the employee representatives expressed their opinion within a reasonable time in accordance with the first sentence.

4. When negotiating the creation of an European work council, the parties may agree in the agreement that the response from the central management, referred to in point 3, may take place by any other appropriate means.

Justification: The French authorities have reservations about the wording of point 3 of Article 9, which, according to their analysis, creates an injunction to respond on the part of central management in the context of the information and consultation procedure. In their view, there is a risk of blocking negotiations conditional on consultation of the EWC. The French authorities feel that it would be more appropriate to leave central management and the Community-scale groups to decide how to respond within the framework of the agreement creating the EWC. It is proposed that the parties should be able to determine different ways of responding within the framework of the EWC agreement, particularly in relation to what is already done in the company as part of the consultation of employee representative bodies: they may agree that the response may be communicated orally during an EWC meeting or by any other means they consider appropriate, as long as it is determined jointly in the agreement.

Article 1(9)bb-new) creating a new paragraph 3a in article 11 (first sentence):

With respect to the rights conferred by this Directive, Member States shall ensure effective access to administrative and judicial proceedings for European Work Councils and special negotiating bodies, or their members on their behalf, as well as for the members of special negotiating bodies. Member States may make action of the members of European Work Councils on behalf of this entity subject to conditions on representativeness and empowerment.

Justification: The French authorities support an effective right to redress concerning the obligations of the Directive. However, granting legal standing to the special negotiating bodies or to its members on their behalf does not seem consistent with the transitory nature of this body. The French authorities therefore prefer, as regards the special negotiating bodies, to provide for the obligation of ensuring effective access to administrative and judicial proceedings to the members of special negotiating bodies, acting in their own name. On the other hand, as regards the European Work Council, while the French authorities support giving access to administrative and judicial proceedings to this entity, as it is formed on a stable basis, these actions must necessarily be subject to conditions of representativeness and empowerment by the EWC. As these rules seem most adequately determined at national level, the French authorities therefore wish to clarify the prerogative of Member States to regulate these questions.

Article 1(9)bb) creating a new para 3a in article 11 (second and third sentences):

In particular, Member States shall provide that the reasonable costs of legal representation and participation in such proceedings are borne by the central management, without prejudice to the judge's decision on the final cost of the proceedings. Alternatively, Member States shall take other measures to avoid any de facto restriction of such access for reasons of lack of financial resources.

Justification: The French authorities are in favour of an obligation for the central management to give sufficient means to the European Works Councils, including the costs of legal representation and participation in administrative or judicial proceedings. However, as regards the latter, this provision should not interfere with the judge's prerogatives to rule on the final allocation of costs incurred in proceedings before him. The French authorities therefore wish to clarify that these prerogatives, which do not constitute an obstacle to access to the courts as they come into play at the end of the procedure, are unaffected by this provision.

Annexe 1, (1) (a):

The information provided to the European Works Council relates in particular to the structure, economic and financial situation, probable development of the activities, production and sales of the Community-scale undertaking or group of undertakings. The information and consultation of the European Works Council shall cover, in particular, the situation and probable trend of employment, investments, substantial changes in organization, **anticipation of change and management of restructuring processes including those linked to the green transition** the introduction of new working methods or production processes, transfers of production, mergers, downsizing or closures of undertakings, establishments or important parts thereof, and collective redundancies.

Justification: In order to include environmental issues in the subsidiary requirements, the French authorities are proposing this amendment in line with the provisions of Council Recommendation of 16 June 2022 on ensuring a fair transition towards climate neutrality (2022/C 243/04). The wording proposed here is more precise than the one initially proposed. It takes account of the comments made at the last QGS, on the risk of extending the scope of the issues concerned.

Annexe 1, (5):

The operating expenses of the European Works Council shall include reasonable costs of legal assistance, **without prejudice, in case of judicial proceedings, to any judicial decision on the final cost of these proceedings.** Operating expenses shall be notified to central management before they are incurred.

Justification: The French authorities are in favour of an obligation for the central management to give sufficient means to the European Works Councils, including the costs of legal representation and participation in administrative or judicial proceedings. However, as regards the latter, this provision should not interfere with the judge's prerogatives to rule on the final allocation of costs incurred in proceedings before him. The French authorities therefore wish to clarify that these prerogatives, which do not constitute an obstacle to access to the courts as they come into play at the end of the procedure, are unaffected by this provision.

Comments by IE

Ireland supports the written comments of SE and CZ in relation to legal costs. Ireland cannot support legislation that lacks balance between parties, and agrees with those MS that argue that the provision as drafted creates less favourable treatment vis a vis the company; and employees in smaller enterprises.

It should be borne in mind that the purpose of EWCs is to create good faith engagement, not adversarial litigation.

Comments by LV

General comment:

In general, LV calls on the text of the directive to avoid the inclusion of terms that may cause various interpretation problems in the future, for example the terms "considerable extent", "reasonably be expected" (recital 5 of the proposal, Article 1, Clause 4 of Directive 2009/38/EC and amendments to its subsections), "reasonable costs" (recital 7 of the proposal, amendments to the first paragraph of Article 5, Clause 6 of Directive 2009/38/EC), "manifestly unfounded, frivolous or vexatious claims" (recital 7 of the proposal).

On individual articles and recitals of the proposal:

Recitals 7, 9, 16 and 18a of the proposal, amendments to the first and second paragraphs of Article 5, Clause 6 of Directive 2009/38/EC (Article 1, Clause 3, subparagraph (b) of the proposal), Article 6, 2. Amendments to the second paragraph of point (f) (second paragraph of Article 1, point 4 (a) of the proposal), Article 11, point 3a (subpoint of Article 1, point 9 (bb-new) of the proposal) and Annex I, 6. amendments to paragraph (paragraph 5 of the proposal annex):

LV stands for a balanced regulation that would be proportionate in relation to all involved parties (employee representatives, employer). LV is concerned whether the obligation for central management to pay the expenses/costs of the special negotiation group and the European Works Councils for providing legal support, assistance, representation and participation in administrative or court proceedings, would be considered a proportionate solution.

In addition, in LV's view, it is not enough that the central management is only informed in advance about such costs, it would be necessary for the central management and employee representatives to mutually agree on the expenses to be paid. At the same time, LV believes that it would be important to provide for the limits and/or amounts of the expenses to be paid in cases where the parties cannot reach an agreement on the expenses to be paid.

In addition, LV draws attention to the fact that the term "*other associated costs which are necessary for the exercise of their duties*" used in recital 16 in connection with the training costs to be paid by the representatives of the special negotiation group and the European Works Councils is not formulated clearly enough and may cause unnecessary disputes between the parties about what exactly these expenses are.

Recital 10 of the proposal, amendments to Article 6, Clause 2a of Directive 2009/38/EC (Article 1, Clause 4, subparagraph (b) of the proposal) and Annex I, Clause 1, subparagraph (b) (Clause 1, Clause (c) of the Annex to the proposal) subsection)

LV positively assesses the amendments, which are intended to promote gender equality in European Works Councils, special discussion groups, as well as selected committees. However, it is still unclear in LV how it will be practically possible to meet the 40% threshold specified in the directive's norms in sectors with low representation of the same sex. Taking into account what was stated in the clarified recital 10 of the proposal, LV believes that the mentioned 40% threshold should be deleted from the text of the directive norms, or the directive norms should include an indication of where it is possible when the relevant threshold is reached, similar to "as far as possible" in the added text in paragraph 1 (b) of Annex I of the directive.

Recital 18 of the proposal, amendments to Article 11, Clauses 2 and 3 of Directive 2009/38/EC (Subparagraphs (a) and (b) of Article 1, Clause 9 of the proposal)

LV positively evaluates the clarifications made in the 18th recital of the proposal and the amendments to Article 11, Clause 2 of Directive 2009/38/EC, which give the right to member states to determine the criteria for the applicable sanctions. However, LV still expresses concern about the obligation left in the norms for member states to impose financial sanctions. LV believes that the regulation of sanctions and the mechanism of their application should be resolved at the level of the member states. In addition, the regulation proposed in the proposal may create an additional disproportionate administrative burden for Member States' supervisory authorities.

In addition, LV requests a more detailed explanation of the amendments to the second paragraph of Article 11, Clause 3 of Directive 2009/38/EC in relation to administrative and court appeal processes - "The duration of [...] the procedures in the first subparagraph shall be compatible with the effective exercise of the information and consultation rights under this Directive."

Amendments to Article 14b of Directive 2009/38/EC (clause 1 (12a new) of the proposal)

LV asks to explain the proposed provision of the directive article with practical examples.

Recital 21 of the proposal, amendments to point 2 of Annex I of Directive 2009/38/EC (point 2 of the annex to the proposal)

LV believes that the directive should not interfere with the format of organizing meetings of employee representatives and central management - determining that at least one of these meetings must be a face-to-face meeting. The parties must be given the opportunity to agree on the most appropriate form of organization of meetings themselves, as necessary.

Clause 1 of Article 2 of the proposal

LV positively evaluates the changes made in the norms of the proposal regarding the deadline for the transposition of the directive, respectively setting 2 years instead of 1 year for the implementation of the norms of the directive in the national regulatory acts.

Recital 17 of the proposal and the second paragraph of Article 2, Clause 2

In LV, it is still not clear why the member states must specifically notify the EC of the means by which European Works Councils, special negotiating bodies and employee representatives can initiate legal proceedings and administrative processes in relation to all the rights set out in this directive. LV draws attention to the fact that the duty of the member states to inform the Commission of the main provisions of the legal acts adopted by the member states is already included in the transposition duties foreseen in advance. LV believes that such an additional administrative obligation does not meet the goal of "better regulation".

Comments by NL

Amending Directive - Recital 16

In addition, provisions of Directive 2009/38/EC on the role and protection of employees' representatives should be amended to increase clarity and accuracy, in particular with regard to the protection of the members of special negotiating bodies and the members of European Works Councils against retaliatory measures or dismissals. In order to avoid disputes, it should also be specified that the central management is to cover the **reasonable** costs of training of the members of the special negotiating body and of the European Works Council and other associated costs, which is necessary for the exercise of their duties, where management has been informed of those costs in advance.

Directive - Art. 10, paragraph 4

In so far as this is necessary for the exercise of their representative duties in an international environment, the members of the special negotiating body and of the European Works Council shall be provided with training without loss of wages. Without prejudice to agreements concluded pursuant to Article 6(2), point (f), the **reasonable** costs of such training and related expenses shall be borne by the central management, provided that the central management has been informed in advance.

Reasoning:

We suggest adding the word 'reasonable' to avoid the possibility that unreasonable costs for training may be claimed.

Annex I – Point 1, sub a:

The information of the European Works Council shall relate in particular to the structure, economic and financial situation, probable development and production and sales of the Community-scale undertaking or group of undertakings. The information and consultation of the European Works Council shall relate in particular to the situation and probable trend of employment, investments, **transnational policies and measures on corporate sustainability, a safe and healthy workplace, equal opportunities, inclusion and equal pay**, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies.

Reasoning:

- The ongoing transformation of the world of work is the underlying motivation to make the EWC directive more effective and efficient: a meaningful involvement of employees and their representatives at all levels can help anticipate and manage change.
- It is remarkable that those developments themselves are not subjects for information and consultation in the EWC in the subsidiary requirements.
- The list of topics for information and consultation of the annex, that serves as a model for EWCs, has basically been unchanged since 1994.
- Undertakings' policies and measures on topics like corporate sustainability, a safe and healthy workplace, equal opportunities, inclusion and equal pay, may be transnational in nature. In that case, the right level for information and consultation on these those topics is the EWC.

Comments by SE

Sweden welcomes clarifications made in the compromise text but there are also those that go in the wrong direction moreover there are important calls for changes that has not been catered for in the compromise text.

Please find below Swedish suggested insertions underlined and deletions ~~striked out~~.

Recital 10

“(10) The requirement in Directive 2009/38/EC (.....) ~~Without prejudice to the national laws and the autonomy of the employees to appoint the members of the European Works Councils, the agreements should include arrangements to work towards a gender-balanced composition of the European Works Council, which can, in particular in highly gendered sectors, include a growth path to a gender-balanced composition of the European Works Council.~~ For similar considerations (....).”

Rationale

- The added wording to the recital in the compromise text is too prescriptive and limits the autonomy of the social partners and should therefore be deleted.
- Of the same reason that Sweden did not approve of the defined numbers in article 6.2a as pointed out in Sweden´s last amendments.

Article 1.4

“in Article 1, paragraph 4 is replaced by the following:

“4. Matters shall be considered to be transnational where they can reasonably be expected to concern to a considerable extent, 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.

Those conditions shall be deemed to be met where:

the measures considered by management of the Community-scale undertaking or Community-scale group of undertakings can reasonably be expected to a considerable extent affect workers in undertakings or establishments in more than one Member State;

the measures considered by management of the Community-scale undertaking or Community-scale group of undertakings can reasonably be expected to a considerable extent affect workers in an undertaking or establishment in one Member State, and workers in an undertaking or establishment in another Member State can reasonably be expected to be affected to a considerable extent by the consequences of those measures.”;

Rationale

- Sweden welcomes the amendments made in the compromise text in recital 5 but these changes need to be reflected in the operative part of the text.

Article 8.1

“1. Member States shall provide (...) ~~for justified reasons.~~”

Rationale

- The addition of the compromise text amendment should be deleted, it is unclear and may increase the number of litigations.

Article 8a.3

~~“3. The dispensation according to paragraph 1 from transmitting information shall continue to apply until, in agreement with central management, the justification provided is considered to have become obsolete.”;~~

Rationale

- The addition of the compromise text amendment should be deleted as it is not clear who the parties of the referred agreement could be.

Recital 12 and 13

- (12) When sharing sensitive information (...), the reasonable justification should not be disclosed further. **The confidentiality should only be upheld as long as the reasons for it persist.**
(...).
- (13) The possibility of central management (...). The reasons justifying the non-transmission of information should not be disclosed further. (...)

Rationale

- The reasons for non-transmitting information as well as the reasonable justification to information given in confidence must stay within the EWC. A widespread transmission of this information might in practice lead to problems for the central management to keep classified information from impacting the financial market and risks leading to infringements of the Market Abuse Regulation.

Recital 18a

(18a-new) According to Article 47 of the Charter of Fundamental Rights everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal. In particular, the special negotiating bodies, the European Works Councils and their members on their behalf should have the necessary means to cover the costs of legal representation and participation in administrative or judicial proceedings in accordance with national law and practice. The Member states should stipulate that these costs are to be borne by the central management or should take other measures in order to ensure that European Works Councils are not de facto prevented from participating in administrative or judicial proceedings due to a lack of financial resources.

Article 11 3a

“3a. With respect to the rights conferred by this Directive, Member States shall ensure effective access to administrative and judicial proceedings for European Work Councils and special negotiating bodies, or their members on their behalf. ~~In particular, Member States shall provide that the reasonable costs of legal representation and participation in such proceedings are borne by the central management. Alternatively, Member States shall take other measures to avoid any de facto restriction of such access for reasons of lack of financial resources.~~”

Rationale

- Article 47 in the Charter does not in itself constitute a basis for this part of the proposal. The Charter already applies to the Member States, there is no need to insert a reference to it, especially since reference to the charter is not to be found elsewhere in EU labour law.
- The provision stating that the central management is to be responsible for the cost of legal representation is seriously distorting the balance between the parties and risks to be litigious.
- The wording above would interfere with national fundamental principles and legal framework on legal costs of proceedings, in particular the provisions governing the court’s possibility to assess how legal costs shall be set off, reduced, or allocated between the parties.