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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 find the annex to this note the comments received from the AT, CZ, DK, EE, FI, IT, SE delegations related to documents 9955/25 and WK 7102/24.

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Comments by AT

AT Comments, 23 May 2024

- In general, it is emphasised that before the COREPER another Council working group should take place. There are still some open questions.

Art 1 Para 4

- The formulation ‘*Can reasonably be expected to concern*’ could lead to legal uncertainty. Instead, the current definition of the Directive in force should be retained (‘...*where they concern*...’).

Art. 8a

Art. 8a Para 1

- The now deleted provision (previously in Art. 8 para. 2), according to which **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. 11

Art 11 Para 2

- The last sentence is already covered by the general provision of point (b), according to which penalties must be effective, dissuasive and proportionate.

“2. Member States shall provide for appropriate measures in the event of failure to comply with the national provisions adopted pursuant to this Directive. In particular, they shall ensure that :

- (a) adequate procedures are available to enable the rights and obligations deriving from this Directive to be enforced in an [...] effective manner;
- (b) penalties that are effective, dissuasive and proportionate are applicable in cases of infringement of the rights and obligations deriving from this Directive [...].

In the event of failure to comply with the national provisions transposing the obligations under Article 9(2) and (3), Member States shall provide for [...] financial penalties.

Art 11 Para 3a

- The first sentence is unclear. It is not clear who should have access to the procedure and in whose name.

“3a. With respect to the rights conferred by this Directive and in accordance with national law and practice, Member States shall ensure effective access to administrative proceedings, ~~where relevant,~~ and to judicial proceedings either for European Work Councils and special negotiating bodies, or ~~on their behalf~~ for their members or representatives on behalf of the European Works Councils and special negotiating bodies. 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.”

Art. 14b

- The transition period for this provision is unclear. In any case, it should be avoided that there are time gaps in the European representation of employees.

“Where negotiations pursuant to Article 5 are initiated [...] in a Community-scale undertaking or Community-scale group of undertakings [...] hitherto exempted under Article 14(1)(a) of this Directive, in the version in force on [OJ: insert date one day before the date referred to in Article 3 of this amending Directive], [...] the period referred to in Article 7(1) indent three shall be reduced to two years. The initiation of negotiations does not affect the terms of the existing agreements in force.”;

Annex

Number 2

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

“2. The European Works Council shall have the right to meet with the central management at least once per year ~~twice a year~~, to be informed and consulted, on the basis of a report drawn up by the central management, on the progress of the business of the Community-scale undertaking or Community-scale group of undertakings and its prospects. At least one meeting per year shall be held in person. The local managements shall be informed accordingly.”

Comments by CZ

Position of the Czechia to the BE PRES third compromise proposal

to the draft DIRECTIVE amending Directive 2009/38/EC as regards the establishment and operation of European Works Councils and the effective enforcement of transnational information and consultation rights

In line with current trends in the EU, the Czechia has long supported social dialogue at all levels. It has been, however, rather sceptical about the proposed revision of Directive 2009/38/EC and has believed that the revision as presented would not contribute to proclaimed objective, i. e. improving information and consultation at transnational level. The level of proposed regulation also raised questions about respect for the principle of proportionality and the principle of contractual freedom of the social partners.

Czechia appreciates BE PRES work on the proposal for the revision of the EWC Directive. It considers the 3rd compromise proposal to be a significant improvement compared to the original proposal. Czechia also welcomes the Commission's explanations, including explanation on adaptation of existing EWC agreements.

However, Czechia still maintains reservations concerning namely:

- Definition of 'transnational matter': In particular, we regret the deletion of the term "substantially" from the definition of "transnational matters". In our opinion, this change restores a high degree of legal uncertainty in the definition.
- Reimbursement of financial costs for legal assistance to EWC members: In Czechia it is not usual for the employer to pay the costs of the employee's representatives for legal assistance, representation and the costs incurred for court or administrative proceedings. The introduction of such an arrangement could unjustifiably favour the position of EWC and EWC members vis-à-vis national employee representatives. The CR therefore advocated a narrowing and clarification of the scope of legal aid paid by central management to EWC members. Our proposals to unify the terminology relating to the costs reimbursed (replacing reference to legal assistance with reference to legal experts) have been only partially taken into account. Also, Czech proposal to maintain the current wording of the Directive as regards the explicit limitation of the number of EWC experts to one person whose funding is to be covered by the central management of the undertaking has not been accepted.
- Czechia generally supports the objective of promoting a balanced representation of women and men in the EWC and special negotiating bodies and welcomes the fact that during the examination of the proposal it was assured by the Commission and BE PRES that the objective of achieving gender balance in EWCs and special negotiating bodies (40% for under-represented genders) is not a legally binding objective. However, the proposal to add a provision either to the operative part of the text or to the respective recital has not been accepted recognising that the 40% target is legally and factually unattainable (and therefore cannot be expected) in sectors or businesses where (for a number of objective reasons) one gender outweighs the other. The goal towards which the efforts of the central management and the Special Negotiating Committee should be directed in such case should be commensurate with the percentage of women and men in these companies and sectors.

In the light of the above, despite a number of positive changes introduced into the proposal, Czechia is not in a position to support the 3rd BE PRES compromise proposal.

Comments by DK

Given that the silence procedure has been broken, we would like to convey the following:

We believe that the compromise text on recital 5 broadens the scope of the Directive. According to a strict interpretation of the provision, in the PRES amended wording, EWC's should be informed and consulted about every decision that is non-trivial, individual, and of an ordinary operational nature.

Read in this way, the remit of the EWCs and the scope of the directive risks becoming broader than the scope of the national rules on information and consultation of workers, which could create uncertainty and overlaps between EWC's and national systems.

Therefore, we would suggest to delete the proposed qualifying of "substantial" in the Presidency text, so the relevant text of the recital would read as follows:

"The concept of transnational matters covers those measures which could affect employees in a substantial way."

Alternatively, we would prefer reverting back the latest compromise text or as the third best option the Commission's original wording.

Comments by EE

Estonia reserves its position.

Bearing the costs of legal proceedings by the central management has been a concern for us from the start. Therefore, we repeat our request to bring legal clarity into Article 11 par 3a in order to give a Member State a clear choice on equal footing between alternatives. The objective is to ensure effective access to proceedings but the choice of the measures regarding the costs of legal proceedings should be left to the Member State. There is no justification to give preference or stronger focus any of the measures.

Article 11 par 3a:

3a. With respect to the rights conferred by this Directive, Member States shall ensure effective access to administrative proceedings, where relevant, and to judicial proceedings for European Work Councils and special negotiating bodies, or, on their behalf, their members or representatives. ~~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 or~~ take other measures to avoid any de facto restriction of such access for reasons of lack of financial resources.

In addition, regarding legal clarity and usage of certain terms, we noticed some inconsistencies in the text. The text refers to the following: “judicial proceedings and relevant administrative proceedings” (recital 17, art 11 par 3a), „judicial and, where applicable, administrative procedures“ (recital 17), „administrative or judicial ... procedures“ (art 11 par 3), „judicial proceedings, and where applicable, administrative proceedings“ (art 2 par 2). We ask the Presidency to take a closer look and propose to adjust the text. We understand that there is no obligation to introduce both, judicial as well as administrative proceedings.

Comments by FI

Definition of transnational matter

Finland has previously supported the addition of the word “substantially” to the Article.

In the recital 5 additional elements of explanation of the term "transnational matters" have been added. The recital says that the concept of transnational matters covers those measures which could affect employees in a substantial way, i.e. in a way which does not affect them in a trivial manner and does not only concern individual employees or ordinary operational decisions.

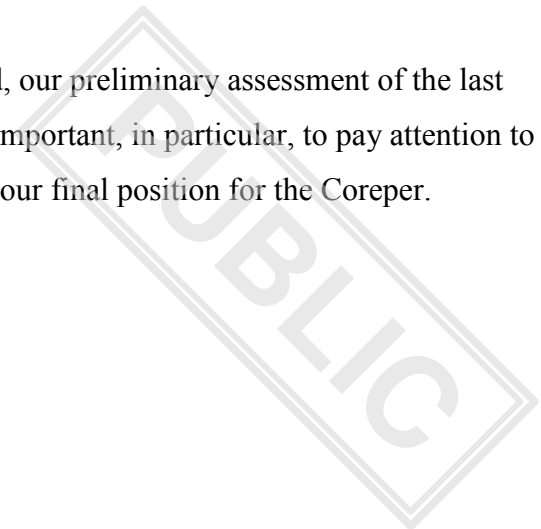
We are critical of words “ordinary operational decisions” because they can lead to confusion or misinterpretation. Operational decisions may include smaller or bigger decisions so these words may create ambiguity. According to our understanding, a decision to lay-off employees or make them redundant can be an ordinary operational decision. For that reason, we propose to delete the words “ordinary operational decisions”.

Transitional provisions

The insertion “Member States should notably provide transitional arrangements enabling the parties to” has been added to the recital 20a. We are wondering what these arrangements mean. We understand that transitional arrangements refer to the ordinary transitional provisions that Member States stipulate in their national legislation. Have we understood correctly?

Comments by IT

Italy appreciates the work you have done. As announced, our preliminary assessment of the last compromise proposal is quite positive. For us it is very important, in particular, to pay attention to the related costs of the revision. In any case, we reserve our final position for the Coreper.



Comments by SE

SE reserves its position to Coreper.

In particular, SE is concerned about the latest wording of Article 1.4 and Recital 5. This Article and Recital define the scope of the whole directive and a change of balance in this provision risks to distort the balance of the directive as a whole.

The second compromise text (st 9079/24) stroke the right balance in Article 1.4 and Recital 5, taking account of both those MS who favoured a stricter and those who favoured a broader provision. The current compromise text fails to strike this balance.

In this context we wish to highlight the fact that the Commission found the text in the previous compromise to be in line with the objectives of their original proposal. To our understanding, the current compromise text alters the balance in a way that also change the scope of the COM proposal.

Given the very limited possibility for changes due to the procedure chosen by the Presidency, SE suggests reverting back to the previous compromise text as for Article 1.4 and Recital 5. At the very least, the additions in the current compromise text in Recital 5, need to be reverted back to the Commission's original wording.