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POSITION PAPER

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The European Commission proposal to revise the European Works Councils Directive

KEY MESSAGES

1. The revision of the European works councils (EWCs) directive has been proposed by the European Commission, whereas the overwhelming feedback by companies operating EWCs is that their European works council operates well.

2. This revision needs to be conducted based on the real companies' evidence to support improvements in the operation of EWCs that are conducive to the development of a trust-based social dialogue culture in the concerned companies, a culture that underpins economic and social progress in each of the concerned companies.

3. The Commission's proposal to include in the Directive the voluntary EWCs agreements concluded under Article 13 of the original EWCs directive 94/45/EC or concluded or revised during the transition period following adoption of the recast directive 2009/38/EC from June 2009 to June 2011 will damage many well-functioning European Works Councils and existing social dialogue practices at company level.

4. EWCs are the only legally enabled transnational employee representative body in the world. The Commission's proposal introduces a set of amendments that, holistically considered, would significantly overcomplicate EWC's functioning, undermining European companies' competitiveness. Passing the EWC Directive as it is now proposed could further deteriorate the attraction of investments from MNCs within the EU in favour of other regions globally.

5. In particular, the new dimension of the meaning of "Consultation" in conjunction with "Transnational" and "Confidential Information" and the provision of almost unlimited resources to act against the company, including legal costs, would evolve EWCs from valuable social dialogue forums between employees and management to highly confrontational bodies for legalistic contestation.

6. The proposed presumption of transnationality in cases that only involve one Member State creates the risk of overlaps in national and European information and consultation processes and would lead to legal uncertainty.

BUSINESSEUROPE a.i.s.b.l.
AVENUE DE CORTENBERGH 168 – BE 1000 BRUSSELS – BELGIUM
TEL +32 (0)2 237 65 11 – FAX +32 (0)2 231 14 45 – E-MAIL main@businesseurope.eu
WWW.BUSINESSEUROPE.EU – Follow us on Twitter @BUSINESSEUROPE
EU Transparency register 3978240953-79

7. The ability of management to keep information confidential without delays to the decision-making process is essential and should be therefore protected. Commission's proposal to allow Member States to impose prior administrative or judicial authorisation of non-disclosure of confidential information by companies would harm business competitiveness and delay companies' decision-making.

8. The proposed change for the consultation requirements which would enable employees' representatives to express an opinion prior to the adoption of the decision and that such an opinion must receive a reasoned written response from central management before the latter adopts its decision on the proposed measure is likely to cause significant delays in the decision-making processes without improving the EWCs consultations. In practice, the timelines around consultation should be defined within each EWC agreement, respecting that an opinion should be delivered within a reasonable time.

9. The proposed wording related to experts must be clarified, and legal costs left at the discretion of Member States per their internal frameworks and practice. The possibility for EWCs to be assisted by an expert is already acknowledged in the existing Directive and no changes are therefore required. However, if additional experts should be available to the EWC at management cost, we believe that management should decide on the expert's mandate and the level of costs incurred. For this reason, it is not enough for management to be informed of the costs in advance, as an approval procedure is necessary. Moreover, it is important to clarify that the scope of the mandate of the external experts involved is to support social dialogue solutions.

10. We welcome that the proposal of the Commission respects, in line with Article 153 TFEU, Member States competence to decide the precise level of penalties to be applied. Financial penalties should be restricted to cases where the abuse of the information and consultation process has been intentional.

Specific comments

Pre-directive agreements

11. The are currently around 350 voluntary agreements concluded in the two existing categories under Article 14 of the recast EWCs directive 2009/38/EC. These agreements, which for the large majority proved to work satisfactorily for both sides over 30 years have a clear contractual framework of functioning, often using the key definitions of the existing Directive, and being based on well-established social dialogue practices at company level. The Commission impact assessment did not conclude whether and to what extent exemptions under pre-existing agreements create legal uncertainties or prevent effective information and consultation in these undertakings.

12. Enabling one side of the social partners, in this case the workers' representatives in the European Works Councils, to unilaterally challenge the nature of the existing voluntary agreements is a biased incentive that goes against existing practices. This is likely to damage the trust between the two sides and therefore

affect the quality of the consultations in the EWCs, as well as shifting for a significant period of time the focus of the EWCs members from the consultation and information purpose to the lengthy process of creating a new agreement.

13. Furthermore, imposing mandatory changes in the existing agreements concluded during the transition period of the recast directive 2009/38/EC from June 2009 to June 2011 infringes social partners' autonomy to re-negotiate these agreements.

14. It is therefore essential to allow these well-functioning EWCs agreements to continue to exist in their current form as long as they are valid through respecting their specific legal nature and without compulsorily bringing them under the Directive regime.

Transnational matters

15. The proposed presumption of transnationality in cases that only involve one Member State creates the risk of overlaps in national and European information and consultation processes and would lead to legal uncertainty.

16. Incorporating the recital 16 of the recast EWCs Directive into the definition of transnational matters ignores the importance of local and national consultations and will create the space for the EWCs members to contend that any decision of the company could have a transnational impact and should therefore be discussed in the EWC, irrespective of the number of Member States affected. This legal uncertainty creates a major risk of dysfunctional and overlapping information and consultation procedures at EU and national level in companies operating a European works council. This would make EWCs operations very complicated for global companies with headquarters or regional offices in Europe and, in turn, delay companies decision making processes and their ability to adapt. Consequently, it may lead to increased administrative burdens and cost escalations in managing the processes related to EWCs.

17. Therefore, the co-legislators should reject this proposal that would blur the difference between national and European information and consultation processes which is based on a clear distinction regarding the level (local, national, European) where a certain problem must be addressed. An appropriate approach for achieving this would be to state in the directive that transnational matters can only qualify as transnational if they significantly and directly affect workers' interests across national boundaries and with full respect of national information and consultation procedures while avoiding overlapping responsibilities.

Confidentiality

18. The ability of management to keep information confidential without delays to the decision-making process is essential and should be therefore protected. Commission's proposal to allow Member States to impose prior administrative or judicial authorisation of non-disclosure of confidential information by companies would harm business competitiveness and delay companies' decision-making.

19. While management could decide to explain to the EWCs members the reasons for which certain information is considered confidential or for withholding information, it must remain the exclusive attribution of the management to decide which information is confidential regardless of the level of harm it could cause if it were disclosed.

20. That the company would need to justify a decision not to disclose certain information could itself pose a risk of outsiders becoming aware of the type of sensitive information involved. Such categorisation may lead outsiders, along with other publicly available information, to become aware of the content of the sensitive information. This could have far-reaching consequences for the company's compliance with regulations in many other areas, such as regulations regarding market-influencing information for listed companies, along with other rules related to mergers, acquisitions, and outsourcing. Easing confidentiality rules will make it harder for companies to comply with these requirements, create legal uncertainty, and risk legal actions and claims for damages due to alleged violations of such rules. However, this not only entails legal and economic risks but may also pose a risk of lost business opportunities or investments, as negotiations with third parties typically rely on strict confidentiality.

EWCs consultations' necessary focus on measures affecting employees

21. Proposed changes on "Transnationality" and "Confidentiality" above, together with the new definition of "Consultation" (article 2) and EWC operation (article 9.3), which pivot over the idea of "decisions" instead of "measures", creates greater uncertainty and practical difficulties. It could be understood as EWCs being consulted on business decisions even before there is a proposed measure affecting employees generally, as a consequence of a business decision. EWCs consultations should remain focused on how best to deal with the impact of business decisions on employees across Europe, and not on the business decisions themselves. Otherwise, the gap between required "Consultation" for companies operating in Europe vs. any other region in the world would widen significantly, undermining competitiveness of EU businesses.

Sanctions

22. As previously expressed, we have deep concerns regarding the own-initiative report of the European Parliament for the revision of this directive, which did not take into account EWCs realities, and which proposes disproportionate measures. Particularly, the GDPR-sized fines, as proposed by the European Parliament, are not in line with the EU legislative practice under the social policy chapter in the EU Treaty, whereby it is up to the Member States to provide for sanctions that are effective, dissuasive and proportionate, and would seriously damage the cooperation and trust between social partners at company level.

23. In this regard, we welcome that the proposal of the Commission respects, in line with Article 153 TFEU, Member States competence to decide the precise level of penalties to be applied. Financial penalties should be restricted to cases where the abuse of the information and consultation process has been intentional.

24. Many disputes that have arisen between EWCs and management have occurred over matters of interpretation of either agreements or the legislation. Imposing financial penalties to management for misinterpretation is disproportionate.

Strengthening the role of mediation and conciliation for EWCs disputes

25. In cases of disputed interpretation, rather than promoting Court intervention, the directive would better focus on developing clearly defined tracks for interpretation of EWCs agreements in case of disputes based on the experience of the existing mediation and conciliation structures for social partners disputes that exist in the Member States. We encourage the Commission and the Council to organise a dedicated consultation of these existing dispute resolution structures as part of the Council's work towards its general approach on the proposed amending directive. As part of this, building on the existing Italian practice in the EWCs transposition law, Member States should be encouraged to consider the use of dedicated alternative dispute mechanisms tailored to EWCs disputes if they are not already provided for.

The case of Italy – a dedicated Conciliation Committee[1]

Article 18 of legislative decree 113/2012 envisages that a conciliation procedure must be established in order to deal with disputes concerning the application of the decree regarding the establishment of the special negotiating body or of the agreement establishing an EWC, including article 10.1 and article 10.2. The conciliation procedure should be completed within 40 days.

The conciliation committee is made of three members: one appointed by workers' representatives, one by the company management and one appointed jointly by workers' representatives and company management. Should the conciliation procedure fail, an administrative procedure to consider the dispute is started under the responsibility of the territorial offices of the Ministry of Labour and Social Policies.

26. We also do not support Commission's approach on the role of the alternative dispute resolutions which underlined that such mechanisms cannot prevent an issues being referred to a court or a tribunal. Rather than encouraging judicial intervention in social partners' dealings, and in line with the political priority to support social dialogue development, a revised EWCs directive should mark a clear preference for alternative dispute resolution mechanisms, including through expert facilitation, as an alternative to Court rulings. The value of alternative dispute resolution mechanisms is that they can provide an opportunity to find a negotiated solution to the issue in dispute, thereby maintaining a constructive

[1] https://www.centrostudi.cisl.it/attachments/article/460/9_Presentation_IT.pdf

climate of cooperation between the social partners at company level, rather than undermining the trust they have in each other by imposing legal solutions from outside.

27. Many EWC agreements contain standard arbitration clauses stipulating that any disputes shall be settled by an arbitrator or arbitration institute. It is crucial that the outcome of arbitration remains binding on the parties and that valid arbitration clauses prevent any party from litigation in public courts. The provision could potentially also have implications for the applicability of national social partners collectively agreed negotiation procedures, which may apply to EWC related disputes. In cases where an EWC related dispute is covered by a negotiation procedure, the procedure must be respected, and any outcome of such procedure must also be respected by courts.

EWCs are not co-decision bodies

28. We welcome that the Commission proposal acknowledges that EWCs are not co-decision bodies and that granting a right to injunctive relief in the case of an alleged violation of the information and consultation rights, as proposed by the European Parliament in its own-initiative report, would distort the purpose of the directive and represent a real danger for European companies' competitiveness and their ability to take decisions effectively.

Ensuring timely EWCs consultations

29. The proposed change for the consultation requirements which would enable employees' representatives to express an opinion prior to the adoption of the decision and that such an opinion must receive a reasoned written response from central management before the latter adopts its decision on the proposed measure is likely to cause significant delays in the decision-making processes without improving the EWCs consultations.

30. For this reason, the timelines around consultation should be defined within each EWC agreement, which could also provide the possibility for the company to give a written response. These aspects do not need to be addressed in the directive as they are better addressed by the parties of the EWCs agreements.

31. We also underline the risk that the proposed change leads to demanding the conclusion of EWC opinion prior to the conclusion of national consultations, and we advise that the wording is clarified for ensuring that consultations are conducted in full respect of the autonomy of information and consultation procedures as provided for in national law and practice.

Structurally independent undertakings

32. We welcome that the Commission's proposal acknowledges that the scope of the Directive should not be extended to include structurally independent undertakings. Contractual arrangements such as franchising does not provide

real dominant influence over the governance and management of a franchisee and therefore cannot be taken into account to define ‘dominant influence’.

Experts and legal costs

33. The proposed wording related to experts and legal costs must be clarified. The possibility for EWCs to be assisted by an expert is already acknowledged in the existing Directive and no changes are therefore required. However, if additional experts should be available to the EWC at management cost, we believe that management should have a say on the expert’s selection, as well as decide the mandate and the level of costs incurred. For this reason, it is not enough for management to be informed of the costs in advance, as an approval procedure is necessary. Moreover, it is important to clarify that the scope of the mandate of the external experts involved is to support in a neutral way social dialogue solutions. In this respect, it is important to be open to different types of experts profiles, internal or external to the company.

34. We highlight that whilst the use of experts is common to most of the EWCs agreements, their use should be limited to assistance at meetings, and they should not be entitled to carry out external activities such as audit on behalf of the EWCs. Likewise, the use of legal experts should be left at each Member State discretion according to their domestic legal tradition and practice as with the current Directive. Otherwise, there would be a gap between EWCs’ rights and local / national employee representative bodies in those countries where legal advisors are not part of the tradition and practice. In addition, this measure promotes legal contestation creating uncertainty and undermining competitiveness vs. constructive social dialogue that the Directive should continue to pursue. It would also create a perverse incentive / conflict of interest as the legal experts raising legal disputes would be paid by the employers impacted by those disputes. Instead, these costs should, as they are currently, be allocated according to national law on the allocation of litigation costs. If cost liability is introduced for other legal expenses than disputes against the company, these should be subject to approval by corporate management.

EWC meetings

35. We welcome the addition of the provision of "format" when referring to meetings, as this would offer more flexibility to the social partners to implement EWCs arrangements allowing parties to use remote technologies including virtual meetings for meetings and decision-making processes. This will lead to improvements in the way EWCs actually operate. However, it should also be clarified that negotiation meetings with the SNB can be conducted virtually to alleviate companies' costs for establishing the EWC. The same applies to meetings with the EWC established under the provisions for companies that do not conclude EWC agreements - “Annex rules”. Such cost alleviations should be particularly considered when the proposal otherwise only entails increased obligations that raise companies' negotiation costs.

36. We underline that EWCs are representative of all employees and not only trade union bodies. Therefore, it is not legitimate to offer trade union representatives the right to sit on every EWC and to attend meetings with management irrespective of the number of union members in a company. The participation of trade unions in European works councils should respect diverse industrial practices across Europe.

Training

37. We agree that training is needed for the EWCs members and support the way the current Directive is formulated in this respect. However, with the new approach proposed in the Commission's proposal, EWCs can decide the training they wished. This approach does not guarantee an impartial to be provided. Should this proposal be implemented, given that the costs associated with training can be significant for employers, alongside costs related to travel, accommodation, interpretation and translation, prior management approval must be required for training costs, also considering the scope and format of such training.

Gender aspects

38. The Commission's prescriptive provision for gender balance of the EWCs and SNBs would be difficult to achieve considering that the gender balance of employee representatives is determined by the gender composition of the local consultation bodies. Central management does not have control over the national rules setting out the selection of the EWCs and SNBs members, and therefore should not be held responsible for not achieving a particular gender quota. In this context, it should also be noted that in line with Article 12 on freedom of association in the EU Charter of Fundamental Rights, employees are free to decide on the election of their representatives.

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