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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

(Text with EEA relevance)

{SEC(2024) 35 final} - {SWD(2024) 9 final} - {SWD(2024) 10 final} -
{SWD(2024) 11 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

In the ongoing transformation of the world of work driven by the pursuit of environmental, economic, and social sustainability and the deployment of new technologies, a meaningful involvement of employees and their representatives at all levels can help anticipate and manage change, diminish job losses, maintain employability, and ease effects on social welfare systems and related adjustment costs. In multinational undertakings or groups, the information and consultation of employees at transnational level can make an important contribution to such involvement. For that purpose, Directive 2009/38/EC of the European Parliament and of the Council[1] ('the Directive' or 'Directive 2009/38/EC') lays down minimum requirements for the setting-up and operation of employee representation bodies in certain multinational undertakings, so-called European Works Councils ('EWCs'). EWCs and transnational information and consultation procedures complement the information and consultation of employees at national level.

This proposal aims to tackle shortcomings of the Directive, and thereby to improve the effectiveness of the framework for the information and consultation of employees at transnational level. It does not affect the EU and national rules and practices concerning the involvement of employees at national level.

The 2018 evaluation of the Directive[2] confirmed its added value and the improvements it had brought to the quality and scope of information to employees. It also identified several challenges, principally the low rate of creation of new EWCs, the consultation of EWCs being sometimes ineffective, obstacles to access of EWCs to courts and a lack of effective remedies and effective and dissuasive sanctions in some Member States.

In its legislative own-initiative resolution 'with recommendations to the Commission on revision of the European Works Councils Directive'[3], the European Parliament has called to strengthen the role and capacity of EWCs as information and consultation bodies in Community-scale undertakings. This amending act follows the political commitment expressed in the President vor den Leyen's Political Guidelines to respond to the resolutions based on Article 225 TFEU with a legislative proposal, in full respect of proportionality, subsidiarity and better law-making principles.

With regard to the results of the evaluation and to the subsequent evidence gathering, this proposal aims to address the following main shortcomings:

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

2 COM(2018) 292 final. In response to the findings of the evaluation, the Commission acted through non-legislative actions, including financial support to social partners' projects, proposing a handbook for EWC practitioners, and engaging in a structured dialogue with Member States on enforcement.

3 European Parliament resolution of 2 February 2023 with recommendations to the Commission on Revision of European Works Councils Directive (2019/2183(INL)).

– Due to exemptions from its scope, the Directive does not apply to ca. 350 Community-scale undertakings[4] in which agreements on transnational information and consultation exist.[5] This makes the regulatory framework complex and fragmented, creating different levels of protection for employees in Community-scale undertakings. The proposal aims to avoid unjustified differences in employees' minimum information and consultation rights at transnational level.

– There can be uncertainty regarding the process for setting up EWCs and the coverage of expenses of special negotiating bodies ('SNBs') representing employees. Moreover, in most cases, the setting-up process does not necessarily result in gender-balanced EWCs. The proposal aims to ensure a more efficient and effective setting-up of better gender-balanced EWCs.

– In some cases, there is a lack of a genuine, timely, and meaningful dialogue between management and EWCs. This is notably the case where management fails to provide a reasoned response to EWCs' opinions before adopting a decision on transnational matters. Some EWCs also face legal uncertainty about the coverage of their resources and about the conditions under which management can require confidential treatment of information or refuse to disclose certain information to EWCs. The proposal aims to ensure a more effective process for the information and consultation of EWCs and their appropriate resourcing.

– Rightsholders under the Directive do not always have effective remedies and access to justice to enforce their rights. Moreover, non-compliance with transnational information and consultation requirements is often not penalised by sufficiently effective, proportionate, and dissuasive sanctions. The proposal aims to promote a more effective enforcement of the Directive to improve compliance.

• **Consistency with existing policy provisions in the policy area**

Workers' right to information and consultation within the undertaking is laid down in the EU Charter of Fundamental Rights (Article 27). The Treaty on the Functioning of the European Union (TFEU) provides that EU shall support and complement the activities of Member States in the field of information and consultation of workers (Article 153), promotes social dialogue between management and labour (Article 151) and recognises the role of social partners (Article 152). Principle 8 of the European Pillar of Social Rights states that "workers or their representatives have the right to be informed and consulted in good time on matters relevant to them".

The EU's legal framework governing information and consultation at national level has developed over several decades. Several EU directives set out rules on information and consultation of workers' representatives. The Directive contains provisions on the interplay between the information and consultation frameworks at different levels, with a view to ensuring consistency, complementarity, and synergies with the different existing legal instruments. These principles are preserved by this proposal. In particular:

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4 The term 'Community-scale undertaking' continues to be used for the purposes of this proposal, because it is a defined term in Directive 2009/38/EC and no substantive changes to that definition are required.

5 According to recital 41 of Directive 2009/38/EC, the exemptions were based on the consideration that agreements in force should be allowed to continue to avoid their obligatory renegotiation when this would be unnecessary.

– The framework for EWCs is without prejudice to the information and consultation procedures established in Directives 2002/14/EC[6], 98/59/EC[7], and 2001/23/EC[8] and the requirements for the information and consultation of worker representatives in the context of corporate restructuring under Directive 2004/25/EC[9], Directive (EU) 2017/1132[10] and Directive (EU) 2019/1023[11].

– Information and consultation of employees must occur at the relevant level of management and representation, according to the subject under discussion. To achieve that, the competence of EWCs and the requirements of Directive 2009/38/EC are limited to transnational matters. That delineation is important to prevent conflicts of competences, which differ depending on the instrument: while Directives 98/59/EC, 2001/23/EC and 2002/14/EC oblige management to inform and consult the national workers' representatives 'with a view to reaching agreement' on a matter in the context of national industrial relations, transnational consultation of EWCs under Directive 2009/38/EC is 'without prejudice to the responsibilities of the management'.

– Directives 2001/86/EC[12] and 2003/72/EC[13] provide for the establishment of representative bodies for information and consultation on transnational issues in European Companies ('SE') and European Cooperative Societies ('SCE'). The application of Directive 2009/38/EC to companies of those types is excluded, to avoid overlaps. That approach is not altered by this initiative.

• **Consistency with other Union policies**

The proposal provides for measures to ensure that employees' representatives have access to justice in relation to transnational information and consultation rights. It can thus promote the right to an effective remedy before a tribunal (Article 47 EU Charter of Fundamental Rights).

The proposal is also consistent with the right of collective bargaining (Article 28 of the EU Charter of Fundamental Rights), as it leaves broad discretion to social partners at company level to negotiate appropriate solutions for effective transnational information and consultation. Furthermore, it fully preserves management's ability to take decisions

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6 Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (OJ L 80, 23.3.2002, p. 29).

7 Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ L 225, 12.8.1998, p. 16).

8 Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ L 82, 22.3.2001, p. 16).

9 Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (OJ L 142, 30.4.2004, p. 12).

10 Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification) (OJ L 169, 30.6.2017, p. 46).

11 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) (OJ L 172, 26.6.2019, p. 18).

12 Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (OJ L 294, 10.11.2001, p. 22).

13 Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees (OJ L 207, 18.8.2003, p. 25).

effectively, in accordance with the freedom to conduct a business (Article 16 of the EU Charter of Fundamental Rights).

The scope of information and consultation of EWCs under the Directive is limited to 'transnational matters'. Transnational matters are not defined by reference to specific topics or issues, but rather their ability to affect employees in several Member States. EWCs thus have the potential to enhance the implementation of various EU policies in multinational companies, by providing a forum for dialogue between central management and employee representatives. Synergies can thus occur between this initiative and any EU policy field that stands to benefit from the effective involvement of EWCs, in particular in the context of the twin transitions.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

The Directive was adopted under Article 137 of the Treaty establishing the European Community. In the current Treaty, the appropriate legal basis for a revision of the Directive is Article 153(1)(e) in conjunction with Article 153(2)(b) of the Treaty on the Functioning of the European Union (TFEU). Article 153(1)(e) TFEU provides the legal basis for the Union to support and complement the activities of the Member States to improve the information and consultation of workers. In this field, Article 153(2)(b) TFEU empowers the European Parliament and the Council to adopt – in accordance with the ordinary legislative procedure – directives setting minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States.

• Subsidiarity (for non-exclusive competence)

Only an EU initiative can set common rules on information and consultation of workers at transnational level within the EU. The challenges which reduce the effectiveness of workers' right to transnational information and consultation are closely linked to the coverage and content of the obligations under the Directive, and create effects on companies and their workers across the EU. Given the cross-border nature of the undertakings and groups within the scope of the Directive and the transnational nature of the matters subject to transnational information and consultation requirements, individual Member States cannot address the shortcomings of the current framework in a coherent and effective manner. The identified challenges must therefore be tackled at EU level.

• Proportionality

This proposal amends and sets minimum standard requirements, thus ensuring that the degree of intervention will be kept to the minimum necessary in order to reach the objectives of the proposal. Member States which already have more favourable provisions in place than those put forward in this proposal will not have to change or lower them. Member States may also decide to go beyond the minimum standards set out here.

The principle of proportionality is respected considering the size and nature of the identified problems. The impact assessment accompanying this initiative compared the policy options as to their proportionality relative to the baseline.[14] The preferred option strikes a balance between the need to take sufficiently robust measures to achieve the policy objectives,

[14] SWD(2024)10 final, section 7.4.

reinforcing the framework for social dialogue in companies, while leaving unchanged the nature of the instrument and not altering provisions of the Directive that have proven effective in the past.

- **Choice of the instrument**

The relevant legal basis allows for the adoption of binding minimum requirements solely in the form of Directives. Non-binding instruments were also considered, such as a Commission communication providing interpretative guidance or Commission recommendations on enforcement by Member States. However, such alternatives were assessed to be less effective and efficient than a targeted revision of the Directive.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

The Commission published an evaluation of the Directive in 2018. The evaluation confirmed the EU added value of the Directive and the improvements it had brought to the quality and scope of information to employees. The Directive was considered relevant by all stakeholders, and the need for transnational dialogue was acknowledged by social partners. The evaluation concluded that the Directive does not impose administrative, financial and legal obligations which would constitute an unreasonable burden for companies.

Nevertheless, the evaluation also found that the consultation of EWCs is sometimes ineffective, EWCs face obstacles in access to courts in some Member States, and there is a lack of effective remedies and effective and dissuasive sanctions in some Member States.[15] In response, the Commission acted through non-legislative actions: continued financial support to social partners' projects, proposing a handbook for EWC practitioners,[16] and engaging in a structured dialogue with Member States on enforcement.[17] These actions did not resolve the identified challenges.

- **Stakeholder consultations**

In line with Article 154 TFEU, the Commission carried out the first and second phase consultations of European social partners to seek their views, firstly, on the need for and possible direction of EU action to address the challenges related to the operation of EWCs, and subsequently, on the content of the envisaged proposal. Four trade union organisations and eight employer organisations replied to the first and second stage consultations. In the context of the second stage consultation, the employers' organisations expressed their readiness to participate in negotiations towards an agreement under Article 155 TFEU; the employees' organisations, with the exception of CEC European Managers, did not.

Generally, trade unions see a need for a legally binding revision of the Directive, whereas employer organisations mostly argue against a revision, considering the Directive fit for purpose and cautioning against additional regulatory burden on companies. Specifically:

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15 SWD(2018)187, p. 15.

16 The work on the handbook was suspended in April 2019, following a refusal of the EU level trade union organisations to participate in a group of experts, which would contribute to it.

17 The Commission services held a meeting with Member States' experts with a focus on enforcement and sanctions in 2019, while an infringement procedure concerning the Irish enforcement system was launched in 2022 and is ongoing.

– Trade unions consider that the exemptions from the scope of the Directive lead to an uneven playing field, create legal complexity and should be abolished. Employer organisations argue that it is appropriate to maintain the exemptions, stressing the autonomy of the parties and the need to preserve well-functioning existing information and consultation arrangements.

– Concerning the process of setting up new EWCs, trade unions state that it is not uncommon for the central management to delay the start of negotiations. Trade unions also underline the need to ensure appropriate resources and support by recognised trade union organisations' experts in the process. Employer organisations submit that the setting-up of EWCs works satisfactorily.

– Stakeholders from both sides of industrial relations acknowledge the issue of imbalanced gender composition of EWCs, in particular in male-dominated industries such as manufacturing and construction, where most EWCs have been set up. However, they raise concerns about the practical feasibility of implementing a binding quota to ensure gender balance.

– As regards the practical functioning of the transnational information and consultation framework, trade unions consider that the Directive does not ensure sufficient legal clarity on essential consultation requirements, such as the scope of transnational matters and the need to ensure a proper follow-up to EWC opinions. Accordingly, they support binding measures to clarify and expand those requirements. Furthermore, they state that the confidentiality obligation is often excessively applied by management, and submit that EWCs are not assured sufficient resources (covering e.g. expert advice, training or legal costs). In contrast, employer organisations consider that the current concept of transnational matters is fit for purpose and does not cause disputes in practice beyond what can reasonably be expected in a corporate setting. They state that many EWC agreements already provide for specific timeframes for information and consultation and a formal response by management to EWC opinions. Employers emphasise the need to avoid additional costs, calling for the alleviation of administrative and financial burdens on undertakings by promoting online EWC meetings.

– Concerning sanctions and remedies, trade unions consider that EWCs have insufficient access to justice in some Member States and that the Directive fails to ensure effective enforcement. They request more stringent provisions including specific thresholds for pecuniary sanctions of up to 4% of global turnover as well as injunctions to suspend management decisions. In contrast, employers submit that the existing rules are sufficient, and argue that the limited number of court cases is not due to a lack of access to justice but due to most EWCs working satisfactorily. They caution against disproportionate sanctions and the risk of delaying companies' decision-making.

In parallel with the Treaty-based formal consultation of the social partners, extensive consultation activities were conducted in the context of the supporting study,[18] gathering insights from a diverse pool of stakeholders including also policy makers, EWC representatives, management of Community-scale undertakings, and legal and academic experts. These activities consisted of:

[18] ICF(2023) Study exploring issues and possible solutions in relation to the Recast Directive 2009/38/EC on European Works Council.

- a targeted online survey of management and employee representatives in companies with EWCs;
- semi-structured stakeholder interviews;
- evidence gathering workshops with management and employee representatives.

These activities largely confirmed the input received during the social partner consultation and yielded further detailed information that fed into the problem definition and the assessment of policy options.

No public consultation was conducted on this initiative. Given the specific and technical nature of the relevant issues and options, the initiative does not lend itself to gathering the views of the general public. The initiative is directly relevant only for the stakeholders targeted by the consultation activities described above, whereas indirect impacts on other stakeholders or the general public are too tenuous to be covered by a general public consultation in a meaningful manner.

- **Collection and use of expertise**

Several studies by external experts have fed into the impact assessment: the study supporting the evaluation of the Directive, the new evidence-gathering study supporting the impact assessment, legal comparative reviews of national provisions transposing the Directive, and case studies exploring challenges and solutions regarding EWCs.For further information on the collection and use of expertise, see Annex 1 of the impact assessment. Additional scientific sources are referenced in the impact assessment.

The European Parliament's 2021resolution on Democracy at Workand 2023 legislative own-resolution on revision of European Works Councils Directive were also taken into account, in conjunction with the relevant European Added Value Assessment of the Parliament's research service.

In addition, ad-hoc data collections by Eurostat and ETUI (from the ETUI EWC Database and 2018 ETUI survey of EWC and SEWC representatives) supported the impact assessment.

- **Impact assessment**

The proposal is accompanied by an impact assessment,[19] which was discussed with the Regulatory Scrutiny Board (RSB) on 29 November 2023. The RSB issued a positive opinion with comments,[20] which have been addressed by:

– clarifying the objectives of the initiative and policy options, in particular their interplay with other national and EU rules on the information and consultation of employees;

– strengthening the proportionality assessment and the assessment of costs and benefits, including impacts on competitiveness;

– developing ranges of possible aggregate costs based on hypothetical scenarios regarding the rate of creation of EWCs in currently exempted undertakings, the need to renegotiate existing agreements to take account of the revised minimum

[19] SWD(2024)10 final. See the summary sheet SWD(2024)11 final.
[20] SEC(2024)35.

requirements, and the possible marginal increases in operating costs of EWCs due to the initiative;

– acknowledging upfront the data limitations and uncertainties having an impact on the robustness of the analysis.

To ensure a proportionate and targeted impact assessment, the analysis focused on substantive policy measures expected to have a significant impact on stakeholders. Clarifications and minor adjustments to Directive 2009/38/EC were identified as accompanying measures and were not assessed individually. Accompanying measures are generally assumed to reinforce the effects of the options without producing significant self-standing impacts.

Based on the quantitative and qualitative analysis of impacts, the preferred policy option is expected to have the following main benefits:

– The currently 678 undertakings with active EWC agreements and their ca. 11.3 million EU employees, as well as parties to future EWC agreements, stand to benefit from increased clarity of the legal requirements, which is expected to reduce the risk of disputes and associated costs.

– By removing exemptions from the scope of the Directive, the ca. 5.4 million EU/EEA employees (and their representatives) or management of the currently exempted undertakings with 'voluntary agreements' (323) would gain the right to request the establishment of an EWC to benefit from an equal application of minimum rights and obligations enforceable under EU law. Together with management, they could alternatively opt to preserve well-functioning voluntary agreements. In the context of requests to establish a new EWC, employee representatives would gain a clear entitlement to coverage of their reasonable legal costs and more legal certainty regarding management's obligation to initiate negotiations within six months. The workforce of Community-scale undertakings would also benefit from improved gender-balance in EWCs, which is expected to contribute to more equitable corporate decisions and have positive impacts on undertakings' overall performance.

– During the information and consultation process, EWCs which are not yet entitled, through a corresponding provision in their agreement with management, to a timely reasoned response from management to their opinion would gain such a right. This will help them to engage in a genuine dialogue with central management on transnational matters. This dialogue is also facilitated by clarifications of the essential concept of transnational matters, which defines the scope of the information and consultation activities of EWCs, and by the clearer conditions for application of confidentiality obligations. For EWCs, SNBs and employees' representatives who currently do not have effective remedies to enforce all their rights under the Directive, the initiative would improve access to justice.

The increased effectiveness and quality of transnational social dialogue in Community-scale undertakings could enable a better-informed strategic decision-making by companies and reinforce mutual trust between management and the workforce that could lead to potential positive effects on competitiveness. However, such effects are uncertain and cannot – in the absence of a robust evidence – be reliably estimated, given the interplay between employee involvement at national and transnational level and the non-binding nature of EWCs' opinions.

The preferred option would entail the following costs:

– In the currently exempted undertakings with 'voluntary agreements', central management could initiate negotiations of a new EWC or would have to initiate them, if requested by employees in accordance with the Directive. The average one-off costs of negotiating a new EWC agreement are estimated at ca. EUR 148 000 per negotiation. Generally, during negotiations or renegotiations involving a SNB, undertakings will be legally obliged to cover – in addition to other costs incurred in the setting-up phase – also reasonable legal costs. Where necessary to align existing EWC agreements with the revised requirements (e.g., to address the coverage of EWCs' expenses for legal or expert advice and training), central management would have to engage in renegotiations.[21] However, in a substantial number of cases, the necessary adaptations of EWC agreements may be expected to take place as part of regular renegotiations, which occur on average every five years, entailing no or only very limited additional costs compared to the baseline. Undertakings could also face a marginal increase in the recurrent annual costs of running an EWC (these being ca. EUR 300 000 on average per year per EWC under the baseline), for instance in relation to the obligation to provide a reasoned response to the EWC, the envisaged clarifications regarding the coverage of legal costs.[22] Finally, in cases of breaches of obligations, the undertakings would face a risk of higher financial penalties. The occurrence of legal disputes and application of penalties is however expected to remain low and penalties would be subject to the principle of proportionality.

– When comparing the quantifiable unit costs to the turnover of relevant undertakings and considering the projected trends, the economic costs of the preferred option are expected to be and remain negligible.[23]

As undertakings with EWCs are primarily concentrated in the metal, services, chemicals, building, food, agriculture and tourism sectors, the identified social and economic impacts across all policy areas will materialise also primarily in those sectors. Moreover, due to the geographic distribution of those undertakings' headquarters[24], most EWCs have been set up under the national laws of seven Member States, namely Germany, France, Sweden, the Netherlands, Ireland and Italy. Nevertheless, the impacts policy options would affect employees across all Member States where the undertaking operates, because they are represented by the EWCs.

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21 Average costs of renegotiations could not be reliably quantified. Evidence suggests that a re-negotiation process is shorter than the process for setting up a new EWC, while it may also require multiple meetings in complex cases. Based on the available evidence, it was possible to monetise certain costs linked to meetings between management and EWC representatives for the renegotiation of existing agreements (ca. EUR 18 400 per meeting).

22 For further explanations regarding the factors that might influence the operational costs linked to EWCs, see pp. 30 et seq. and Annex 12 of the impact assessment accompanying this initiative (SWD(2024)10 final).

23 See Annex 5 of the impact assessment.

24 EWCs represent the European employees of a multinational company, whether it is headquartered within or outside the EU. If the companies' headquarters are situated outside the EU, the EWCs must be established under a jurisdiction of an EU/EEA Member State. The largest number of EWCs are located in multinational companies headquartered in the US (170), DE (124), FR (102), UK (92), SE (69), NL (58), CH (48), IT (38), FI (37), BE (36), JP (31).

The initiative will not have any relevant or foreseeable impacts on consumers, SMEs,[25] or the environment.[26]

The effectiveness, efficiency, coherence, and proportionality of the policy options linked to the same policy objective were compared, considering their impacts, to identify the preferred option taking into account the necessary trade-offs between different approaches.

Alternative measures considered in the impact assessment, which were assessed to be overall less effective, efficient, coherent, and proportionate and therefore not retained as a part of the preferred option, are described in section 5 and Annex 11 of the impact assessment accompanying this initiative.

- **Regulatory fitness and simplification**

The 2018 evaluation confirmed that the minimum requirements set out in Directive 2009/38/EC do not impose any obligations that would constitute an unreasonable burden for companies. By setting a procedural framework for transnational information and consultation, the Directive allows social partners the autonomy to agree on appropriate solutions in light of their specific needs and circumstances. For example, parties to EWC agreements may make use of ICT technologies for information and consultation purposes and choose, for instance, to use online meeting software, automatic translation tools or automatic speech-to-text transcription tools to save costs and achieve efficiencies. They are also free to agree on simplified language regimes for EWC meetings to lower the costs of simultaneous interpretation. Indeed, the Directive does not impose any specific budget to cover EWCs' expenses, including for expert advice or training, but includes a general obligation on the company to ensure the means required for the EWC to apply the rights arising from the Directive.

Against this baseline, the scope for burden reduction by this initiative is limited. As mentioned above, the initiative will create only negligible costs for Community-scale undertakings, in proportion to their turnover, and generate potential – non-quantifiable – economic benefits linked to a better quality of social dialogue. Nevertheless, the need to limit costs and administrative burdens for undertakings was considered, in accordance with concerns raised by business organisations in the consultation of social partners, throughout the design and assessment of the measures, and formed part of the rationale for discarding options such as an obligation to fund any legal expenses incurred by the EWC, without limit.

The proposal does not create any compliance costs for SMEs, as the envisaged policy measures would not apply to SMEs and no indirect effects on SMEs are foreseeable.

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[25] Given the thresholds set out in the definition of 'Community-scale undertakings' in the recast Directive, the requirements under the Directive do not apply to SMEs. For explanations why there are also no foreseeable indirect impacts on SMEs see Annex 12, section 1 of the impact assessment.

[26] While the envisaged amendment of subsidiary requirements to hold two annual plenary meetings instead of one might increase carbon emissions linked to travel to in-person meetings, the potential environmental impact of this measure is expected to be insignificant, given the small number of EWCs subject to subsidiary requirements. In addition, the requirement to specify in EWC agreements the format of meetings could prompt social partners to consider online meetings more systematically, which may lead to certain emission savings. A possibility to hold meetings remotely is already available under the existing rules if parties agree to do so. For a detailed explanation of the reasons, see Annex 12, section 1 of the impact assessment.

- **Fundamental rights**

By improving the effectiveness of the framework for transnational information and consultation, the proposal would strengthen workers' fundamental right to information and consultation within the undertaking (Article 27 of the Charter of Fundamental Rights of the EU). In line with the right of collective bargaining (Article 28 of the Charter), the proposal maintains the principle of autonomy of the parties, pursuant to which it is for the representatives of employees and the management of the undertaking to determine the nature, composition, the function, mode of operation, procedures and financial resources of EWCs so as to suit their own particular circumstances. Introducing objectives for a gender-balanced composition of EWCs will promote equality between women and men (Article 23 of the Charter). The proposal would also reinforce the right to an effective remedy (Article 47 of the Charter) against infringements of rights under Directive 2009/38/EC. Indirectly, positive effects on working conditions could be achieved, in line with workers' right to working conditions respecting their health, safety and dignity (Article 31 of the Charter). The initiative is also consistent with the freedom to conduct a business (Article 16 of the Charter), as it preserves management's ability to take decisions effectively and avoids undue burden on undertakings.

4. BUDGETARY IMPLICATIONS

The proposal does not require additional resources from the European Union's budget.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

Member States are required to transpose the amendments to Directive 2009/38/EC into their national laws within one year of the entry into force of the proposed amending directive. The application of the revised requirements would be deferred by two years to provide parties to EWC agreements sufficient time to negotiate adaptations, where necessary.

Progress towards achieving the objectives of the initiative will be monitored by a series of core indicators related to the policy objectives. These indicators and the related data sources are specified in Annex 13 of the impact assessment.

- **Explanatory documents (for directives)**

As part of the transposition process, Member States will be required to notify the Commission of the means by which EWCs, SNBs, and employees' representatives can bring judicial, and where applicable, administrative proceedings in respect of each of the rights under Directive 2009/38/EC. In addition, the general rules relating to the transposition of Directives apply. In particular, Member States must provide sufficiently clear and precise information on the measures transposing the proposal.[27] In order to satisfy that obligation of legal certainty and to ensure the transposition of the provisions of the proposed amending directive in full throughout its territory, Member States are required to state, for each provision of the directive, the national provision or provisions ensuring its transposition.

[27] Cf. judgment of 8 July 2019, Commission v Belgium, C-543/17, ECLI:EU:C:2019:573, par. 59.

- **Detailed explanation of the specific provisions of the proposal**

Amendments to the concept of transnational matters (Article 1(4) of Directive 2009/38/EC)

To clarify the concept of transnational matters, a presumption of transnationality is laid down covering not only cases where measures considered by management can reasonably be expected to affect workers in more than one Member State, but also cases where such measures can reasonably be expected to affect workers in only one Member State and the consequences of those measures can reasonably be expected to affect workers in at least one other Member State, as currently set out in Recital 16 of the Directive. The targeted clarification aims to address the existing uncertainty and reduce the risk of disputes, while maintaining the distinction from national matters in order to prevent conflicts with national information and consultation procedures.

Amendments to the definitions of 'information' and 'consultation' (Article 2(1)(f) and (g) and Article 9 of Directive 2009/38/EC; point 1(a), third subparagraph of Annex 1)

The existing definitions of 'information' and 'consultation' not only specify the meaning of those terms for the purposes of Directive 2009/38/EC, but also include normative requirements. In accordance with legislative drafting rules and for the sake of coherence and legal clarity, those requirements will instead be laid down in Article 9. The substantive changes concern the consultation requirements: Article 9 will specify that consultation is to 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. The subsidiary requirements set out in Annex 1 of Directive 2009/38/EC are adapted accordingly.

Amendments concerning the setting-up, composition, and resources of SNBs (Articles 5 and 7 of Directive 2009/38/EC, and points 5 and 6, last subparagraph, of Annex 1)

In Article 5(2)(b) of Directive 2009/38/EC, a requirement is inserted to elect or appoint the members of the SNB in a manner that strives to achieve a gender-balanced representation. In the first subparagraph of Article 5(6), it is clarified that expenses relating to the negotiations, to be borne by the central management, include the SNB's reasonable costs of legal assistance, representation, and proceedings. Furthermore, the last sentence of Article 5(6), second subparagraph is deleted because it is not necessary to mention Member States' option to limit the funding to cover one expert, given that the first sentence of the same subparagraph already states their right to lay down budgetary rules regarding the operation of the SNB, in compliance with the principle that expenses relating to the appropriate conduct of the SNB's functions must be borne by the central management. Finally, Article 7(1), second indent is clarified by referring to the failure to convene the first SNB meeting instead of central management's refusal to commence negotiations.

Amendments concerning the content of EWC agreements, to be negotiated by the parties (Article 6(2) of Directive 2009/38/EC)

Parties to EWC agreements will be required to specify the financial and material resources to be allocated to EWCs at least with respect to the use of experts, legal costs, and training. Moreover, they are to also specify the format of EWC meetings, which may include virtual formats if parties so agree. To improve effectiveness of existing EWCs, the new requirements in relation to financial and material resources and the format of EWC meetings apply also with respect to pre-existing EWC agreements, which may hence need to be adapted. This is provided for in a new sub-paragraph in Article 6(2). During the transitional period, the parties to existing EWC agreements should verify whether they fulfil the revised requirements of this

Directive and, if this is not the case, renegotiate them to avoid the risk of legal disputes once the revised requirements become applicable. Should such renegotiation not be successful, the subsidiary requirements annexed to the Directive will apply.

Amendments concerning the gender-balanced composition of EWCs (Article 6(2) of Directive 2009/38/EC)

When negotiating new EWC agreements or renegotiating existing agreements, parties will be required by a new paragraph of Article 6(2) of Directive 2009/38/EC to lay down the necessary arrangements for attaining, as far as possible, a gender-balanced composition of the EWC, and where applicable, of the select committee. This objective is defined by the target of 40% of seats on the EWC – or select committee – to be allotted to members of either gender. The same objective is reflected in Annex 1 of Directive 2009/38/EC for newly established EWCs based on subsidiary requirements. In the light of relevant case-law of the Court of Justice of the EU on positive action[28], the target of 40 % applies subject to its being legally and factually feasible and is without prejudice to the national laws on election of employee representatives.

Amendments concerning the number of plenary meetings of EWCs based on subsidiary requirements (point 2 of Annex 1 of Directive 2009/38/EC)

The revised subsidiary requirements will require two – instead of one – plenary meetings between EWCs and central management per year.

Amendments concerning extraordinary meetings of EWCs based on subsidiary requirements (point 3, first and second subparagraphs of Annex 1 of Directive 2009/38/EC)

The wording of the subsidiary requirements set out in point 3 of Annex 1 of Directive 2009/38/EC is adapted to clarify, firstly, that information and consultation of EWCs based on those requirements should in principle take place at the plenary meetings, if possible, and at extraordinary meetings only if urgency so requires. Secondly, it is clarified that information is to be provided in a timely manner, and thirdly, that EWC members have a right to participate in extraordinary meetings with the select committee if they represent employees who are potentially directly concerned by the subject-matter of such meetings.

Amendments concerning the resources available to EWCs based on subsidiary requirements (points 5 and 6 of Annex 1 of Directive 2009/38/EC)

In point 5 of Annex 1, it is clarified that the experts assisting EWCs or select committees based on subsidiary requirements may include trade union representatives, and that such experts are to be allowed, upon request of the EWC or the select committee, to be present at meetings in an advisory capacity. In point 6 of Annex 1, it is clarified that the operating expenses of EWCs to be borne by the central management include reasonable legal costs, which are to be notified to central management in advance. Furthermore, in the last subparagraph of point 6 of Annex 1, the second sentence is deleted for the reasons explained above in relation to Article 5(6) of Directive 2009/38/EC.

[28] Cf. Judgment of the Court of Justice of 28 March 2000, *Badeck and Others*, C-158/97, ECLI:EU:C:2000:163.

Amendments concerning the treatment or non-transmission of confidential information (Article 8 of Directive 2009/38/EC)

The provisions on the transmission of information in confidence and on the non-transmission of certain information are laid down in separate Articles to ensure a clearer structure. Additionally, when providing information in confidence, the central management must inform SNB members, EWC members or employees' representatives in the framework of an information and consultation procedure, at the same time, about the reasons justifying the confidentiality of the information shared. The obligation not to reveal confidential information ceases when, in agreement with management, the justification provided by management has become obsolete. Furthermore, the possibility of the central management not to transmit information will be limited to cases where its transmission would seriously harm the functioning of the undertaking. In such situation, the central management must inform the EWC members, SNB members or employees' representatives of the reasons justifying the non-transmission of information.

Amendments concerning the role and protection of employees' representatives (Article 10 of Directive 2009/38/EC)

Article 10(1) of Directive 2009/38/EC is adapted to clarify that not only EWC members but employees' representatives, including SNB members and EWC members, are to have the means required to apply the rights arising from this Directive. In Article 10(2), it is clarified that EWC members are to have the right and necessary means to inform relevant employees' representatives about the transnational information and consultation procedure before and after the meetings with central management. In Article 10(3), second subparagraph, it is clarified that the requirement to afford rightsholders under Directive 2009/38/EC equivalent protection applies also with respect to protection against retaliatory measures or dismissal. Finally, it is clarified in Article 10(4) that central management must bear the costs and expenses related to training necessary for the exercise of EWC and SNB members' representative duties, of which central management is to be informed in advance.

Amendments concerning penalties and access to justice (Article 11 of Directive 2009/38/EC)

Member States' obligation to provide for effective, dissuasive, and proportionate sanctions – currently mentioned in recital 36 of Directive 2009/38/EC by reference to the general principles of Union law – will be laid down in Article 11 of Directive 2009/38/EC. To comply with that obligation, Member States will be required, when determining sanctions, to take into consideration the gravity, duration, consequences, and the intentional or negligent nature of the offence, and in case of pecuniary sanctions, in addition also the size and financial situation of the sanctioned undertaking or group (for example, its annual turnover), and other relevant criteria. A provision is inserted in the same paragraph requiring Member States to provide for at least pecuniary sanctions in relation to breaches of the information and consultation procedures set out in Article 9(2) and (3). This does not prevent them from maintaining or introducing other forms of sanctions in addition. In Article 11(3), a reference to EWC and SNB members will be inserted in the first subparagraph, as that provision is relevant for them as well as for employees' representatives. In the same paragraph, it is further clarified that the duration of the appeal procedure applicable when central management requires confidentiality or withholds information is to be compatible with the effective exercise of the information and consultation rights under Directive 2009/38/EC. Moreover, a new provision is added in Article 11 to ensure that possible mandatory prior out-of-court settlement procedures under national law are to be without prejudice to access to justice in respect of the rights under Directive 2009/38/EC.

Removal of exemptions and arrangements for the adaptation of existing agreements to the revised requirements (Article 14 of Directive 2009/38/EC)

Article 14 of Directive 2009/38/EC is deleted and exemptions from the scope of Directive 2009/38/EC are removed. Consequently, employees and employees' representatives of Community-scale undertakings or groups with transnational information and consultation agreements pre-dating the transposition of Directive 94/45/EC ('voluntary agreements') will be entitled to either maintain their existing agreements or to request, in accordance with Article 5(1) of Directive 2009/38/EC, the establishment of an EWC or an information and consultation procedure with a view to replacing previous agreements. Undertakings with agreements signed or revised between 5 June 2009 and 5 June 2011 will become subject to the revised obligations arising from Directive 2009/38/EC.

A new provision in Article 14a provides for the adaptation of existing agreements concluded under Articles 5 and 6 of Directive 94/45/EC or Articles 5 and 6 of Directive 2009/38/EC to the revised requirements of Directive 2009/38/EC. Parties to such agreements are given the opportunity to negotiate the necessary adaptations during the two-year period between the deadline for transposing the amendments to Directive 2009/38/EC and the date from which the revised requirements under national law are to apply. These transitional arrangements do not apply in respect of 'voluntary agreements' concluded and operating outside the scope of the Directive. The consequences for undertakings with such agreements are described above, in relation to the removal of the exemptions.

Transposition and entry into application (Article 2 of the proposal)

Member States are to transpose the amendments to Directive 2009/38/EC within one year from the entry into force of the proposal. The application of the transposing measures is to be deferred by two years following the transposition deadline.

Having regard to the provisions amending Article 11 of 2009/38/EC, Member States are required to notify the Commission of how rightsholders can bring judicial proceedings under their jurisdictions, and where applicable, administrative proceedings, in respect of all the rights under Directive 2009/38/EC.

2024/0006 (COD)

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

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 153(2), point (b), in conjunction with Article 153(1), point (e) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[1],

Having regard to the opinion of the Committee of the Regions[2],

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) Pursuant to Article 27 of the Charter of Fundamental Rights of the European Union, workers or their representatives are, at all appropriate levels, to be guaranteed information and consultation in good time and under the conditions provided for by Union law and national law and practices. Principle 8 of the European Pillar of Social Rights reaffirms the right of workers or their representatives to be informed and consulted on matters relevant to them.

(2) With respect to transnational matters, Directive 2009/38/EC of the European Parliament and of the Council[3] seeks to give practical effect to these basic principles by setting minimum requirements for the information and consultation of employees in Community-scale undertakings and Community-scale groups of undertakings.

(3) While an evaluation of Directive 2009/38/EC published in 2018[4] confirmed that Directive's added value and relevance in principle, it also identified shortcomings regarding, for instance, the effectiveness of the consultation process, access to justice, sanctions, and the interpretation of certain concepts.

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1 OJ C , , p. .

2 OJ C , , p. .

3 Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast) (OJ L 122, 16.5.2009, p. 28, ELI: http://data.europa.eu/eli/dir/2009/38/oj).

4 COM(2018) 292 final.

(4) In 2023, the European Parliament, in accordance with Article 225 of the Treaty on the Functioning of the European Union (TFEU), adopted a legislative own-initiative resolution with recommendations on a revision of Directive 2009/38/EC[5] and the Commission undertook a two-phase consultation with the social partners, in accordance with Article 154 of the Treaty on the Functioning of the European Union, on the need for and the content of measures to address the shortcomings of that directive. The Commission has also collected evidence through a study involving a targeted online survey, stakeholder interviews, workshops, analysis of national case-law and of relevant provisions in the national laws of Member States.

(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 affect workers in at least one other Member State. This is necessary to cover cases where undertakings envisage measures, such as lay-offs and redundancies, 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.

(6) The definitions of information and consultation in Directive 2009/38/EC include normative requirements. For the sake of coherence and legal clarity, it is appropriate to lay down those normative provisions in the articles laying down rights and obligations instead.

(7) Members of special negotiating bodies may need legal advice or representation to carry out their tasks under Directive 2009/38/EC. It is however not sufficiently clear that they are entitled to the coverage of the associated legal fees. With a view to ensuring such coverage, it should be clarified that central management is to bear costs incurred by member of special negotiation bodies, which the latter should be required to notify in advance. It is appropriate to limit that obligation to reasonable legal costs to ensure that management is not liable for manifestly disproportionate costs, costs without justifiable link to the provision of relevant legal advice or representation, or costs created by manifestly unfounded, frivolous, or vexatious claims. Moreover, Directive 2009/38/EC gives Member States discretion to lay down budgetary rules regarding the operation of special negotiating body and European Works Councils based on subsidiary requirements, having regard to the principle that expenses relating to the appropriate conduct of the special negotiating board's functions must be borne by the central management. Therefore, the provisions referring to the number of experts to be funded by central management are redundant and should be deleted.

(8) Directive 2009/38/EC requires the parties to a European Works Council agreement to determine the venue of meetings of the European Works Council. It is appropriate to specify that they are to determine also the format of such meetings, notably to avoid

[5] European Parliament resolution of 2 February 2023 with recommendations to the Commission on Revision of European Works Councils Directive (2019/2183(INL)).

any doubt about their freedom to agree that some or all of the meetings be held in a virtual environment, using online meeting tools, reducing the environmental footprint of meetings in line with Union, national and companies' emission reduction targets, while ensuring meaningful information and consultation at lower environmental and financial costs.

(9) There can be uncertainty and disputes with respect to the coverage of certain expenses and access to certain resources also during the operation of European Works Councils. In accordance with the principle of autonomy of the parties, it is appropriate to require that certain types of financial and material resources be determined specifically in the European Works Council agreements, namely the possible use of experts – such as technical subject-matter experts or legal experts – and the coverage of experts' fees, and the coverage of legal costs, including the costs of legal representation and of participation in administrative or judicial proceedings. The agreements should also address the provision of relevant training to the members of the European Works Council, and the coverage of related expenses, without prejudice to the minimum requirement in Article 10(4) of Directive 2009/38/EC.

(10) The requirement in Directive 2009/38/EC to take into account, where possible, the need for a balanced representation of employees with regard to their gender when determining the composition of European Works Councils has proven insufficient to promote gender balance. Women remain underrepresented in most European Works Councils. Therefore, it is necessary to lay down more effective and specific objectives regarding gender representation, to be implemented by management and employee representatives when negotiating or renegotiating their agreements. To attain those objectives, it may in certain cases be necessary to give priority to the underrepresented sex in composing the European Works Council or its select committee. In accordance with the case-law of the Court of Justice of the European Union[6], such positive action is possible, in accordance with the principle of equal treatment of men and women, provided that the measures taken to achieve the gender balance objective do not automatically and unconditionally give priority to persons of a certain gender but allow to take into account other criteria, such as merits and qualifications and the procedure for election established by the relevant laws. Parties to European Works Council agreements should therefore be afforded the flexibility necessary to respect the legal and factual limitations to the positive action. For similar considerations, it is appropriate, in addition, to require steps to strive for a gender-balanced composition of the special negotiating body, to promote that objective already during the negotiation phase.

(11) Evidence shows that the initiation of negotiations is sometimes delayed beyond the period of six months set out in Directive 2009/38/EC. In some cases, management neither takes steps nor expressly refuses to commence negotiations following a request to set up a European Works Council. It should therefore be specified that the subsidiary requirements laid down in Directive 2009/38/EC apply where the first meeting of the special negotiating body is not convened within six months following a request to establish a European Works Council, irrespective of whether central management expressly refuses to commence negotiations.

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6 Judgment of the Court of Justice of 28 March 2000, *Badeck and Others*, C-158/97, ECLI:EU:C:2000:163.

(12) When sharing sensitive information with members of European Works Councils, members of special negotiating bodies, or employees' representatives in the framework of an information and consultation procedure, management has the possibility to provide that such information is shared in confidence and should not be disclosed further. W. a reasonable justificationat the same time anagement should be required to provide , central mhen sharing information in confidenceSetting up adequate arrangements to safeguard the confidentiality of sensitive information can instil trust and facilitate the sharing of such information, while protecting business and workers' interests, including to avert growing risks such as industrial espionage.

(13) The possibility of central management not to transmit information to the members of special negotiating bodies or of European Works Councils, or to employees' representatives in the framework of an information and consultation procedure, should be limited to cases where such transmission would seriously harm the functioning of the undertakings concerned. For reasons of transparency and effective redress, central management should also be required to specify the reasons justifying the non-transmission of information.

(14) With a view to increasing legal clarity, it is appropriate to lay down the provisions on the transmission of information in confidence and on the non-transmission of information in two separate Articles. In addition, the existing provision allowing Member States to lay down particular rules for undertakings pursuing the aim of ideological guidance should be moved to the Article concerning the relationship with other national provisions, because it pertains to the implementation of the requirements of Directive 2009/38/EC more broadly.

(15) Effective transnational consultation requires a genuine dialogue between central management and European Works Councils, or employees' representatives in the framework of an information and consultation procedure. This implies that information and consultation need to be conducted in a way that enables worker's representatives to express their opinion prior to the adoption of the decision and that opinions issued by European Works Councils or employees' representatives must receive a reasoned response from central management before the latter adopts its decision on the proposed measure at issue. An explicit requirement to that effect should be laid down in Directive 2009/38/EC to ensure legal certainty.

(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 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.

(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 a timely and effective enforcement, and that possible prior out-of-court settlement procedures can neither result in a decision which is binding on the parties concerned, nor prejudice rightsholders' right to bring legal proceedings.

(18) The Commission's 2018 evaluation of Directive 2009/38/EC has shown that sanctions applicable in the case of non-compliance with transnational information and consultation requirements are often not sufficiently dissuasive. Therefore, it is appropriate to lay down the Member States' obligation to provide for effective, dissuasive and proportionate sanctions. Pecuniary sanctions should be provided for in case of failure to comply with the information and consultation procedures set out in Directive 2009/38/EC. Other forms of sanctions could also be provided for. Pecuniary sanctions should be determined taking into consideration the size and financial situation of the Community-scale undertaking or group – for example, based on its annual turnover – and any other relevant factors – such as the gravity, duration, consequences, and intentional or negligent nature of the offence –, in order to be effective, dissuasive and proportionate.

(19) Undertakings with an agreement on the transnational information and consultation of employees concluded before 23 September 1996, that is to say prior to the date of application of Council Directive 94/45/EC[7], are exempted from the application of the obligations arising from Directive 2009/38/EC. The employee information and consultation bodies established under such agreements have been concluded and continue to operate outside the scope of Union law. Directive 2009/38/EC does not provide the employees in the exempted undertakings with the possibility to request an establishment of a European Works Council under that Directive. However, for reasons of legal clarity, equal treatment and effectiveness, employees and their representatives in all Community-scale undertakings or Community-scale groups of undertakings should in principle have the right to request the establishment of a European Works Council. Almost 30 years after a legislative framework setting minimum requirements for the transnational information and consultation of employees was first established at Union level, those reasons prevail over the considerations of continuity for pre-existing agreements which initially motivated the exemption. That exemption should therefore be deleted.

(20) Moreover, for the same considerations, the same minimum requirements should apply to all Community-scale undertakings with European Works Councils operating under Directive 2009/38/EC and those in which a European Works Council agreement was signed or revised between 5 June 2009 and 5 June 2011. Therefore, the exemption of the latter undertakings from the application of Directive 2009/38/EC should also be deleted.

(21) European Works Councils operating based on the subsidiary requirements set out in Annex 1 to Directive 2009/38/EC have the right to meet with central management once a year, to be informed and consulted on the progress of the business of the relevant Community-scale undertaking or Community-scale group of undertakings and its prospects. In order to strengthen the transnational information and consultation of

[7] Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (OJ L 254, 30.9.1994, p. 64, ELI: http://data.europa.eu/eli/dir/1994/45/oj).

those European Works Councils, it is appropriate to increase the number of such annual plenary meetings in the subsidiary requirements to two.

(22) In addition, certain technical changes should be made to the subsidiary requirements set out in Annex 1 to Directive 2009/38/EC, to ensure consistency with the enacting terms.

(23) Therefore, it is appropriate to amend Directive 2009/38/EC to bring all eligible undertakings within its scope, clarify some of its key concepts, improve the transnational information and consultation process, and ensure effective redress and enforcement.

(24) In some cases, existing European Works Council agreements or agreements on information and consultation procedures, concluded under Directive 94/45/EC or Directive 2009/38/EC before the entry into force of the measures adopted by Member States to transpose this Directive, may not be in conformity with the revised requirements. It is therefore appropriate to set out transitional arrangements enabling the parties to such agreements to negotiate adaptations before the date of application of the transposition measures.

(25) The overall objective of this Directive is to ensure the effectiveness of the requirements of Directive 2009/38/EC regarding the information and consultation of employees of Community-scale undertakings and Community-scale groups of undertakings. That objective cannot be sufficiently achieved by the Member States alone, but because of the inherently transnational nature and scale of these requirements, it can better be achieved at Union level. Therefore, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(26) Pursuant to Article 27 of the United Nations Convention on the Rights of Persons with Disabilities, persons with disabilities by central management.accessibility and reasonable accommodation for members of special negotiating bodies, members of European Works Councils and employees' representatives exercising their functions, as well as the bearing of related costs accordance with that principle, for instance in relation to are to be interpreted in are to be able to exercise their labour and trade union rights on an equal basis with others. As both the Union and its Member States are parties to that Convention, Directive 2009/38/EC and relevant national legislation

(27) In accordance with Article 30(3) and Article 42(1) of Directive 2014/23/EU of the European Parliament and of the Council[8], Article 18(2) and Article 71(1) of Directive 2014/24/EU of the European Parliament and of the Council[9] and Article 36(2) and Article 88(1) of Directive 2014/25/EU of the European Parliament and of the Council[10], Member States are to take appropriate measures to ensure that in the performance of public contracts economic operators observe applicable obligations in

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8 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1).

9 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

10 Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).

the fields of social and labour law established by Union law. The effective implementation of the requirements under this Directive should be promoted through the integration, as appropriate, of social sustainability criteria in the award criteria designed by contracting entities for identifying the most economically advantageous tenders. However, this Directive does not create any additional obligation in relation to those Directives.

(28) In order to give employees' representatives and the central management in Community-scale undertakings or Community-scale groups of undertakings sufficient time to consider the revised minimum requirements and prepare for their application, it is appropriate to defer by two years the application of the provisions adopted by Member States to comply with this Directive,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 2009/38/EC is amended as follows:

(1) 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 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:

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

(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 affected by the consequences of those measures.";

(2) in Article 2(1), points (f) and (g) are replaced by the following:

"(f) 'information' means transmission of data by the employer to the employees' representatives in order to enable them to acquaint themselves with the subject matter and to examine it;

(g) 'consultation' means the establishment of dialogue and exchange of views between employees' representatives and central management or any more appropriate level of management;";

(3) Article 5 is amended as follows:

(a) in paragraph 2, point (b) is replaced by the following:

"(b) The members of the special negotiating body shall be elected or appointed in proportion to the number of employees employed in each Member State by the Community-scale undertaking or the Community-scale group of undertakings, in a manner that strives to achieve a gender-balanced

representation, by allocating in respect of each Member State one seat per portion of employees employed in that Member State, amounting to 10 %, or a fraction thereof, of the number of employees employed in all the Member States taken together;";

(b) paragraph 6 is amended as follows:

– in the first subparagraph, the following sentences are added:

"These expenses shall include reasonable costs of experts, including for legal assistance, insofar as necessary for that purpose, as well as reasonable costs of legal representation and participation in administrative or judicial proceedings. Expenses shall be notified to central management before they are incurred.";

– in the second subparagraph, the second sentence is deleted;

(4) Article 6 is amended as follows:

(a) paragraph 2 is amended as follows:

– points (c) and (d) are replaced by the following:

"(c) the functions and the procedure for information and consultation of the European Works Council and the arrangements for linking information and consultation of the European Works Council and national employee representation bodies, in accordance with the principles and requirements set out in Article 1(3) and Article 9;

(d) the format, venue, frequency and duration of meetings of the European Works Council;";

– point (f) is replaced by the following:

"(f) the financial and material resources to be allocated to the European Works Council, including at least with respect to the following aspects:

– the possible use of experts, including legal experts, to assist the European Works Council in the discharge of its functions;

– legal representation and participation of the European Works Council, or of its members on its behalf, in administrative or judicial proceedings;

– the provision of relevant training to the members of the European Works Council, without prejudice to the minimum requirement in Article 10(4), first subparagraph;";

The requirement to determine the elements listed in the first subparagraph, as amended by [*OP: insert reference to this amending Directive**], shall apply also with respect to European Works Council agreements concluded before [*OP: insert date laid down in the second subparagraph of Article 2 of this amending Directive.*].

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* [*OP: insert OJ reference to this amending Directive.*]";

(b) the following paragraph 2a is inserted :

"2a. 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 comprise at least 40 % of European Works Council members, and where applicable, at least 40 % of select committee members.";

(5) in Article 7(1), the second indent is replaced by the following:

"— where the first meeting of the special negotiating body is not convened within six months following a request pursuant to Article 5(1),";

(6) Article 8 is replaced by the following:

"Article 8

Provision of information in confidence

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 has expressly been provided to them in confidence by central management. In addition, central management may set up adequate information transmission and storage arrangements to help safeguard the confidentiality of information provided in confidence.

2. 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.

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, in agreement with central management, the justification provided is considered to have become obsolete.";

(7) the following Article 8a is inserted:

"*Article 8a*

Non-transmission of information on specific grounds

1. Member States 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 to members of special negotiating bodies or European Works Councils, or employees' representatives in the framework of an information and consultation procedure, and any experts who assist them, when its nature is such that, according to objective criteria, it would seriously harm the functioning of the undertakings concerned.

A Member State may make such dispensation subject to prior administrative or judicial authorisation.

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.";

(8) Articles 9 and 10 are replaced by the following:

"*Article 9*

Operation of the European Works Council and the information and consultation procedure for workers

1. The central management and the European Works Council shall work in a spirit of cooperation with due regard to their reciprocal rights and obligations.

The same shall apply to cooperation between the central management and employees' representatives in the framework of an information and consultation procedure for workers.

2. Information on transnational matters shall be given at such time, in such fashion and with such content as are appropriate to enable employees' representatives to undertake an in-depth assessment of their possible impact and, where appropriate, prepare for consultations with the competent organ of the Community-scale undertaking or Community-scale group of undertakings.

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. 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.

Article 10

Role and protection of employees' representatives

1. Without prejudice to the competence of other bodies or organisations in this respect, the employees' representatives, including the members of the special negotiating body and the members of the European Works Council, shall have the means required to apply the rights arising from this Directive, to represent collectively the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings.

2. Without prejudice to Articles 8 and 8a, the members of the European Works Council shall have the right and necessary means to inform the representatives of the employees of the establishments or of the undertakings of a Community-scale group of undertakings or, in the absence of representatives, the workforce as a whole, of the content and outcome of the information and consultation procedure, in particular before and after the meetings with the central management.

3. Members of special negotiating bodies, members of European Works Councils and employees' representatives exercising their functions under the procedure referred to in Article 6(3) shall, in the exercise of their functions, enjoy protection and guarantees equivalent to those provided for employees' representatives by the national legislation and practice in force in their country of employment.

This shall apply in particular to attendance at meetings of special negotiating bodies or European Works Councils or any other meetings within the framework of the agreement referred to in Article 6(3), the payment of wages for members who are on the staff of the Community-scale undertaking or the Community-scale group of undertakings for the period of absence necessary for the performance of their duties, and protection against retaliatory measures or dismissal.

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 costs of such training and related expenses shall be borne by the central management, provided that the central management has been informed in advance.";

(9) Article 11 is amended as follows:

(a) paragraph 2 is replaced by the following:

"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 a timely and 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 pecuniary sanctions, to be determined considering the criteria listed in the third subparagraph of this paragraph, without prejudice to the possibility to provide for other types of sanctions in addition.

For the purposes of point (b), of the first subparagraph, Member States shall take into consideration, when determining penalties, the gravity, duration, consequences, and the intentional or negligent nature of the offence, and in respect of pecuniary sanctions, also the size and financial situation of the sanctioned undertaking or group, and any other relevant criteria.";

(b) paragraph 3 is amended as follows:

– the first subparagraph is replaced by the following:

"3. Member States shall make provision for administrative or judicial appeal procedures which the members of the special negotiating body, European Works Council members or employees' representatives may initiate when the central management provides information in confidence in accordance with Article 8 or does not transmit information on specific grounds in accordance with Article 8a.";

– the following subparagraph is added:

"The duration of such procedures shall be compatible with the effective exercise of the information and consultation rights under this Directive.";

(c) the following paragraph 4 is added:

"4. Where Member States make access to legal proceedings conditional upon the prior implementation of an alternative dispute resolution, that procedure shall neither result in a decision which is binding on the parties concerned, nor otherwise prejudice their right to bring legal proceedings.";

(10) in Article 12, the following paragraph is added:

"6. Each Member State may lay down particular provisions for the central management of undertakings in its territory which pursue directly and essentially the aim of ideological guidance with respect to information and the expression of opinions, on condition that, at the date of adoption of this Directive such particular provisions already exist in the national legislation.";

(11) Article 14 is deleted;

(12) the following Article is inserted:

"*Article 14a*
Transitional provisions

1. Where, following the transposition of [*OP: insert reference to this amending Directive*], a European Works Council agreement or agreement on an information and consultation procedure concluded before [*OP: insert date from which the transposing provisions are to apply, set out in the Article 2(1), 2nd subpar. of this amending Directive*] in accordance with Articles 5 and 6 of Directive 94/45/EC or Articles 5 and 6 of this Directive is not in conformity with any of the requirements applicable to that agreement as a consequence of the amendments provided for in [*OP: insert reference to this amending Directive*], central management shall initiate negotiations to adapt that agreement at the written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States. Central management may also initiate such negotiations on its own initiative.

2. Where the European Works Council agreement or agreement on an information and consultation procedure contains procedural arrangements for its adaptation or renegotiation, the adaptation may be negotiated pursuant to those arrangements. Otherwise, the adaptation shall follow the procedure set out in Article 5 in conjunction with Article 13, second and third paragraphs.

3. Where an adaptation procedure does not lead to an agreement within two years from the date of the respective request by employees or their representatives, the subsidiary requirements set out in Annex I shall apply.";

(13) Annex I is amended in accordance with the Annex to this Directive.

Article 2

1. Member States shall adopt and publish, by [*OP: insert date one year from the entry into force of this Directive*] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

They shall apply those provisions from [*OP: insert date two years from the date set out in the first subparagraph*].

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Regarding the amendments provided for in Article 1, point 8, of this Directive, Member States shall notify the Commission by [*OP: insert date in the first subparagraph of paragraph 1*] of the means by which the European Works Councils, the special negotiating bodies, and employees' representatives can, in accordance with Article 11(2), (3) and (4) of Directive 2009/38/EC, as amended, bring judicial proceedings, and where applicable, administrative proceedings, in respect of all the rights under this Directive

Article 3

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament *For the Council*

The President *The President*