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**COMMUNICATION FROM THE COMMISSION TO THE COUNCIL,
THE EUROPEAN PARLIAMENT, THE EUROPEAN ECONOMIC AND SOCIAL
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

on the review of the application of Directive 2002/14/EC in the EU

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1 INTRODUCTION

Directive 2002/14/EC¹ (hereinafter: "the Directive") establishes a general framework for informing and consulting employees in the European Community. The Directive consolidates the principle of information and consultation of workers, by complementing other Community directives in this field² and by filling a number of gaps in national laws and practices. It therefore plays a key role for promoting social dialogue and relations of trust at the level of undertakings and establishments, which is vital to ensure a favourable workplace environment for innovation, anticipation and adaptation, in the interests of both employers and employees.

To this end, the Directive provides for minimum requirements regarding the principles, definitions and arrangements for information and consultation of employees at undertaking level. Given the variety of national situations and practices in the field of industrial relations within the Union, Member States enjoy a large measure of flexibility as regards implementation of the Directive's key concepts (such as "employees' representatives", "employer", "employees", etc.) and the arrangements for information and consultation. The important role of management and labour in this regard is fully recognised by the Directive.

In order to avoid placing administrative, financial or legal constraints on the creation and development of small and medium-sized undertakings, the provisions of the Directive apply only to undertakings employing at least 50 employees, or to establishments employing at least 20 employees, according to the choice made by the Member State.

As required by Article 12 of the Directive, the Commission, in the present communication, is reviewing the application of the Directive, in consultation with the Member States and the social partners at Community level, with a view to proposing any necessary amendments.

In preparation for this review, the Commission addressed a questionnaire to the Member States and to the European social partners³. It also commissioned a study by independent experts⁴ and gathered information throughout its ongoing monitoring activity.

A staff report accompanying this communication deals in detail with the various aspects of the transposition of the Directive in all Member States, drawing also on the replies received to the aforementioned questionnaire.

¹ OJ L 80 of 23.3.2002, p. 29.

² Directive 94/45/EC, OJ L 254 of 30.9.1994, p. 64; Directive 98/59/EC, OJ L 225 of 12.8.1998, p. 16; and Directive 2001/23/EC, OJ L 82 of 22.03.2001, p. 16.

³ Annex 2 to the Commission Staff Working Document accompanying the present communication gives an overview of the stakeholders' replies to the questions focusing on the review of the Directive.

⁴ Study on the implementation of Directive 2002/14/EC in the enlarged EU, Synthesis Report (to be published soon on DG EMPL's website).

2 TRANSPOSITION OF THE DIRECTIVE

2.1 Only a few Member States adopted measures to transpose the Directive within the required deadline (FR, HU, NL, PT, SK, FI, UK). Two Member States (DE, AT) notified the Commission that their existing legislation already conforms to the Directive's requirements. BG and RO transposed the Directive, as required, before the date of their accession to the EU.

Thus, the majority of the Member States failed to transpose the Directive on time. Following infringement proceedings launched by the Commission, the European Court of Justice issued judgments against IT, BE, LU, ES and EL. IT, ES and EL have meanwhile adopted implementing legislation. BE and LU have transposed the Directive only partially.

The longer than anticipated time taken in some Member States for transposing the Directive may be related to difficulties in generating the necessary consensus on key issues for the reform of national industrial relations.

2.2 Most of the Member States transposed the Directive by way of legislation. BE and DK transposed it, in accordance with their traditions, by way of both legislation and collective agreements. In some Member States transposition entailed the adoption of a comprehensive law (e.g. DK, EE, EL, IT, CY, PL); in others, only some, more or less minor, changes to the existing legislation were made (e.g. CZ, LV, LT, HU, NL, SI, SK, FI, SE).

In almost all Member States the transposition was preceded by consultation of the social partners, albeit in different forms and through procedures reflecting the particular tradition of each country.

Some countries which lacked a general, permanent and statutory system of information and consultation or of employee representation made use of the transitional provisions laid down in Article 10 of the Directive (BG, IE, IT, CY, MT, PL, UK). These allow Member States to use higher thresholds for the application of implementing measures in a first phase until 23 March 2007 - 150 employees per undertaking or 100 employees per establishment; and in a second phase until 23 March 2008 - 100 employees per undertaking or 50 employees per establishment.

3 CONCLUSIONS DRAWN FROM THE ANALYSIS OF THE TRANSPOSING MEASURES

3.1 General remarks

The large majority of Member States adopted transposing measures that cover the main elements of Directive 2002/14/EC. However, analysis of these measures has enabled the Commission to identify a number of issues where correct and full transposition of the Directive's requirements by Member States may be at stake, necessitating further clarification or verification.

3.2 Article 3 (Scope)

As regards Article 3, the main thing is to ensure that employees can effectively exercise their right to information and consultation in all undertakings and establishments covered by the Directive. This presupposes in particular the respect of the thresholds established per undertaking or by establishment, or the transitional thresholds in the case of countries that

availed themselves of Article 10. It presupposes also the lawful calculation of such thresholds, in line with ECJ case-law.

National provisions excluding from the aforementioned calculation certain young workers or workers with fixed-term contracts of short duration seem to pose problems and deserve further examination. Also problematic is the compatibility with the Directive of the transposing measures of those Member States which made use of the options provided for in Article 3, paragraphs 2 and 3, but did not lay down particular provisions applicable in the undertakings or to the categories of workers concerned.

With regard to the scope of application of the Directive, there is a need to clarify whether the national transposing legislation in some countries covers also undertakings which do not operate for gain.

3.3 Article 4 (Practical arrangements for information and consultation)

The national provisions adopted with a view to transposing this Article vary greatly as to the level of detail and comprehensiveness. In several Member States, in particular those with long-standing systems of information and consultation, the wording of the national laws does not always coincide with that of the Directive. Whilst the transposing legislation has to be interpreted in conformity with the Directive, certain issues are worthy of further examination, not least for reasons of legal certainty and security.

In particular, in some Member States the transposing legislation provides only for information and not for consultation on issues regarding the employment situation, its probable developments and related anticipatory measures. Furthermore, in some Member States there is no explicit mention of the employer's obligation to give reasoned replies to the employees' representatives' opinions or to consult with a view to reaching agreement.

There is also a need to further verify the situation in the Member States whose legislation allows the employer to inform and consult through means other than the defined employees' representatives⁵.

3.4 Article 5 (Information and consultation deriving from an agreement)

This Article provides a good example of the Directive's flexibility, inasmuch as it gives the Member States the option of entrusting the social partners with the task of negotiating the practical arrangements for informing and consulting employees. These arrangements may even be different from those referred to in Article 4, provided that the principles set out in Article 1 of the Directive as well as any conditions and limitations laid down by the Member States are respected.

Most Member States provide for the possibility of social partner agreement on the practical arrangements. Some Member States make a distinction between pre-existing agreements and agreements adopted subsequent to the Directive. However, the requirements established by pre-existing agreements do not always fit in with the provisions laid down in the Directive. For example, pre-existing agreements may not provide for any time frame for informing and

⁵ Account is to be taken, in this regard, of Recital 16 of the Directive, which provides that the Directive is without prejudice to those systems which provide for the direct involvement of employees, as long as they are always free to exercise the right to be informed and consulted through their representatives.

consulting employees; furthermore, they may not provide for consultation but merely for seeking the views of employees and they may not be subject to enforcement provisions.

More generally, in some Member States there is no explicit mention of the Directive's requirement that the social partners respect the principles laid down in Article 1, where they agree on practical arrangements which differ from those set out in Article 4.

In this connection, it is necessary to clarify the conditions, including the thresholds, under which the employees may express reserves or challenge pre-existing agreements in order to assess whether their right to information and consultation is impaired.

3.5 Article 6 (Confidential information)

Most Member States transposed this provision by using general terms, broadly similar to those laid down in the Directive, without specifying them further, leaving this to case-law or to agreements between management and labour. Some Member States transposed it in a minimalist way, omitting certain terms and thus raising questions as regards the compatibility of the implementing acts with the Directive.

While effective protection of employers' legitimate interests in regard to confidentiality must be ensured, effective exercise of the right of employees to information and consultation should not be impaired by employers' unwarranted recourse to the confidentiality clause.

Some other issues deserve also closer attention:

- The lack of any explicit provisions in the transposing legislation regarding continuation of the confidentiality obligation, even after expiry of the term of office of the employees' representatives, or the limitation of such an obligation to a defined period after expiry of the term of office.
- The possibility that specific laws characterize an information as confidential, without specifying the underlying criteria, in particular whether there is any legitimate interest of the undertaking or any risk of prejudice to it, according to objective criteria.
- The conformity of national acts which provide that a piece of information is confidential by the mere fact that the employer entrusts it in confidence and loses this quality only after the competent party decides that it is not of a confidential nature.

Furthermore, with regard to the last paragraph of Article 6, on administrative or judicial review procedures, the Commission noticed that some Member States have not taken specific measures to transpose this provision.

3.6 Article 7 (Protection of employees' representatives)

All Member States seem to give adequate protection and guarantees to employees' representatives, in order to enable them to properly perform their duties. To this end, Member States provide above all for a right to paid time off as well as for protection against employers' actions disadvantaging or discriminating against the employees' representatives while carrying out their tasks, or even, in certain cases, after their term of office.

3.7 Article 8 (Protection of rights)

All Member States provide for adequate administrative or judicial procedures in order to ensure respect of the obligations imposed by the Directive. In most countries, monitoring and control is assigned to the Labour Inspectorate. Disputes may be brought before specific bodies and/or courts.

The national transposing measures provide also for administrative or, in certain cases, penal sanctions and determine, in several cases, the minimum and/or maximum amounts of such sanctions. These amounts vary considerably among Member States. They may depend on the legal form of the employer (natural or legal person), the size of the undertaking, the relative gravity of the infringement in relation to comparable ones, the dissuasive effect in practice, etc. A number of Member States provide for particularly effective sanctions in case the employer takes decisions without respecting his/her information and consultation obligations: such decisions may be suspended or even declared null and void. In a few countries, non-compliance may also be taken into account when determining the measures to be taken by the employer in order to compensate for disadvantages suffered by employees in cases of restructuring.

It is necessary to check whether the measures in place ensure that infringements of the Directive, including where employees' representatives violate their confidentiality obligation, are liable to sanctions which are effective, proportionate and dissuasive.

3.8 Article 9 (Link between this Directive and other Community and national provisions)

Most national transposing acts stipulate that they do not affect or are without prejudice to the national provisions transposing other directives in the field of information and consultation⁶. The interaction of the aforementioned directives does not seem to be a problem in countries which transposed all directives in a single act, in particular by amending their Labour Code. It may become an issue in cases where such transposition was carried out through different acts in ways that could appear to be not wholly coherent, in terms either of the beneficiaries of the information and consultation rights (possible duplication of the actors) or of the procedural modalities of such information and consultation.

4 REVIEW OF THE APPLICATION OF THE DIRECTIVE

As indicated above, in accordance with Article 12 of the Directive, the Commission consulted the Member States and the European social partners by means of a questionnaire on the review of the application of the Directive⁷.

4.1 Position of the Member States

As regards the question on the practical application of the Directive, including attainment of its objectives, several Member States highlighted the fact that their legislation has long provided for information and consultation of employees in undertakings/establishments. Several other Member States responded that it is too early to provide a definite answer, given the early stage of implementation of the Directive.

⁶ See footnote 2.

⁷ For an overview of the replies see Annex 2 of the Commission Staff Working Document cited in footnote 3 above.

All Member States find the Directive sufficiently flexible and suitable.

Several Member States noted that the impact of the national transposing measures upon their industrial relations systems is expected to be minimal, given that they already had long-standing legislation in this area. Other Member States considered the impact as positive, whilst some pointed out that it is too early to make an assessment.

The majority of Member States do not see a need to revise the Directive. Still several others pointed out that it is too early for such revision. Two Member States replied in the affirmative.

As regards the question on the need to clarify any provision of the Directive, most Member States replied in the negative. Some pointed out that it is too early to assess such need. Two Member States replied in the affirmative.

Most Member States have not identified any difficulties connected to the links between the different EU directives in the field of information and consultation and therefore do not see any need to improve coherence between them. However, three Member States replied in the affirmative. Some others pointed out that it is too early to assess such need.

4.2 Position of the European Social Partners

All the social partners consulted point out that, in general, the Directive's impact on each Member State depends on the extent to which a developed national system of information and consultation is already in place. The practical significance and impact of the Directive is appreciated differently. For BusinessEurope the Directive's impact is still uncertain, as the application of the Directive might lead in some countries to an accumulation of legislation and the imposition of a one-size-fits-all approach. Furthermore, the objective of empowering the social partners through the adoption of agreements has not been achieved in several countries. UEAPME also draws attention to the risk that the Directive may impose a unified model in some Member States, and generate red tape and social unrest. CEEP notes that the national implementing measures in general meet the Directive's objective, and adds that in some countries the implementation of the Directive has favoured certain employees' representatives to the detriment of others.

ETUC considers that the Directive has a positive impact, particularly in terms of making industrial relations more participative, notwithstanding the vagueness of some provisions, the weakness of procedures and sanctions, and the absence of reference to trade unions. It also drew attention to attempts to deviate from existing procedures and representative bodies.

All the European social partners agree that the Directive is, in general, sufficiently flexible and suitable.

As regards the questions on the need to review and to clarify the Directive, BusinessEurope, UEAPME and CEEP replied in the negative. On the contrary, ETUC noted that the Directive could be improved and clarified regarding a number of issues.

BusinessEurope and UEAPME do not see the need to improve coherence between the directives in the field of information and consultation, and have instead advised the Commission to evaluate the existing EU provisions in terms of their added value under the better regulation initiative. CEEP noted that the specific directives take precedence over the general one (i.e. Directive 2002/14/EC), whilst adding that some of its members question the

need for the latter Directive. ETUC pointed out that it would be necessary to harmonise the existing directives in order to avoid “double tracks” in which different actors are required to deal with the same issue. It also urges an update of Directive 94/45 on European works councils in order to keep it consistent with the standards set in Directive 2002/14/EC, which is more advanced in certain respects.

4.3 Assessment

The implementation of the Directive represents an important step forward in the consolidation of the right to information and consultation enshrined in the EU Charter of Fundamental Rights. The Directive is expected to contribute to the approximation of the national systems across the EU through the establishment, by way of minimum requirements, of a general and flexible framework for information and consultation of employees in all Member States. A particularly significant impact is expected in the Member States which did not previously have a general, permanent and statutory system of information and consultation of employees' representatives⁸.

The implementation of the Directive necessarily takes place within the context of the industrial relations systems of the Member States. It is generally accepted that the Directive is sufficiently flexible to be adapted to the national situation of each Member State. However, whilst the Directive refers to the national definitions of key concepts, including that of "employees' representatives", its implementation has given rise in certain countries to lively and sometimes lengthy debates on how to organise the system of workers' representation, whether by single or double channel (i.e. by works councils and trade unions), or admitting mixed solutions.

While a majority of opinions suggest broadly positive prospects as to the overall impact of the Directive, clearly more time is needed to make a definite assessment, as the Directive has not yet generated its full impact. Just over two years have passed since the transposition deadline. Also, there has been a considerable delay in transposing the Directive in several Member States, and in a few it has not yet been transposed entirely. It is too early for comprehensive evidence-based research⁹ into the application of the Directive in all EU Member States¹⁰. Furthermore, the Directive's requirements do not yet apply to all the undertakings covered by it, given that some Member States took advantage of the transitional period and currently restrict its application to undertakings employing more than 100 employees.

Therefore, the Commission does not currently envisage proposing amendments to Directive 2002/14/EC. Whilst its provisions could be improved and rendered more precise regarding certain specific points, the Commission considers that the national implementing measures

⁸ Cf. the quantitative data cited in PL's reply to the questionnaire (Technical Annex). As regards the UK, see "Employment Practices of MNCs in Organisational Context: A Large-Scale Survey, June 2007, <http://www2.warwick.ac.uk/fac/soc/wbs/projects/mncemployment>

⁹ Apart from the UK, where a report has recently been published (first phase of a research project: "Implementing information and consultation: early experience under the ICE Regulations", Employment Relations Research Series N° 88, September 2007), there is merely some anecdotal evidence in some Member States regarding in particular the interaction between works councils and trade unions, the effectiveness (or shortcomings) of the information and consultation procedures in practice, and the awareness (or lack thereof) of the stakeholders concerning their rights and obligations.

¹⁰ Cf., in this regard, Synthesis Report (footnote 4 above); "Impact and Assessment of EU Directives in the field of Information and Consultation", PE 385.646, European Parliament 2007.

should be given some time to bed down in the industrial relations systems of the Member States.

One aspect of the Directive may, however, require action. Article 3(3) gives Member States the possibility to exclude from the personal scope of its application crews of vessels plying the high seas. However, such exclusion is conditional upon the Member States laying down "particular provisions" covering this category of workers. On October 10th 2007, the Commission adopted a Communication on "reassessing the regulatory social framework for more and better seafaring jobs in the EU" in the context of the Blue Book on Maritime Policy adopted the same day. The Communication, which addresses the Directive under Section 3c), launched a first phase consultation of the social partners which may lead to further EU measures to ensure adequate protection of the information and consultation rights of seagoing workers¹¹.

5 CONCLUSIONS

The main challenge now is to ensure the full and effective transposition and enforcement of the Directive. This requires the active involvement not only of the Commission, in its role as guardian of the Treaty, but also of the Member States, who play a crucial role in this respect, as it is their obligation to ensure the correct implementation and application of Community law in practice.

As stipulated by the Directive¹², management and labour may assume a leading role in defining the arrangements for informing and consulting employees in a way which best suits their needs and wishes. This is the case in several Member States with strong traditions of social partnership. Certainly, the relevant requirements of the Directive should be respected in this regard¹³.

As indicated above, the Commission has identified a number of outstanding issues which raise either questions of interpretation of the Directive or doubts as regards the compliance of implementing measures with the Directive. The Commission intends to examine such issues more closely in co-operation with the national authorities of the Member States concerned. If necessary, it will, on a case-by-case basis, launch infringement proceedings under Article 226 EC.

It is encouraging that certain Member States have already introduced draft legislation¹⁴ in order to remedy shortcomings identified in connection with the transposition of the Directive.

In addition, the Commission intends to take further action aimed at facilitating correct enforcement of the Directive. Knowledge by management and labour of their respective rights and obligations in the area of information and consultation is an indispensable prerequisite for the full and effective exercise of these rights in the workplace. The Commission intends to undertake action geared to awareness-raising, as well as to promote exchange of best practices and to enhance capacity-building of all stakeholders, by way of seminars, training courses,

¹¹ COM(2007) 591 final of 10.10.2007.

¹² See in particular Recital 23, Articles 5 and 11(1) of the Directive.

¹³ See notably section 3.4 above.

¹⁴ Draft legislation in EL (maritime sector), LT and PL.

studies and financial support for projects submitted by representatives of employers and employees¹⁵.

It is not currently envisaged to propose amendments to the Directive.

¹⁵ The Commission promotes several actions with these aims, in particular under budget heading 04.030303 – Information, consultation and participation of the representatives of undertakings.