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EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT REPORT

Accompanying the document

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

{COM(2024) 14 final} - {SEC(2024) 35 final} - {SWD(2024) 9 final} -
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A. Context

European Works Councils ('EWCs') are employee representation bodies for information and consultation with management of multinational undertakings of a certain size on transnational matters. In the ongoing transformation of the world of work driven by environmental, economic, and social sustainability considerations, a meaningful involvement of workers 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. To date, EWCs or other agreements on transnational information and consultations exist in around 1000 multinational undertakings, representing ca. 16.6 million EU employees. Directive 2009/38/EC ('the Directive') provides a framework with minimum requirements for the setting-up and operation of EWCs, which respects the autonomy of management and employees' representatives to tailor the information and consultation process to their specific needs and preserves management's ability to take decisions effectively. This initiative is about making sure that this framework is clear, effective, and enforceable. This initiative concerns Union-scale undertakings and their employees in the Member States.

EWCs and transnational information and consultation procedures complement the information and consultation of employees at national level pursuant, in particular, to Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community, Directive 2001/23/EC on transfers of undertakings, and Directive 98/59/EC on collective redundancies. This initiative does not affect national legislation on information and consultation of employees deriving from these EU Directives.

B. Need for EU action

What is the problem being addressed?

The Directive does not always fully achieve its objective to improve the right to transnational information and consultation of employees in multinational undertakings. In some cases, there is a lack of a genuine and meaningful dialogue between management and EWCs, and uncertainty in relation to the process for setting up EWCs, to the scope of information and consultation obligations limited in the Directive to 'transnational matters', to the coverage of expenses, to the conditions for requiring the confidential treatment of information or refusing to disclose certain information to EWCs, and to access to justice. Moreover, there is a clear lack of gender balance on many EWCs, and infringements of information and consultation rights are often not sanctioned sufficiently to ensure compliance. Finally, due to exemptions from the scope, the Directive does not apply to ca. 350 undertakings in which agreements on transnational information and consultation exist, which makes the regulatory framework complex and fragmented, creating different levels of protection for employees in Union-scale undertakings.

While these issues cannot be assumed to apply on a general scale, they together lead to shortcomings of the effectiveness of the existing EWC framework. Consequently, the potential of EWCs is not fully exploited to promote employee involvement and 'buy-in' and sustainable working conditions, also in the context of structural changes linked to the green and digital transitions.

What is this initiative expected to achieve?

The general objective of this initiative is to improve the effectiveness of the framework for the information and consultation of employees at transnational level. This objective is consistent with the aims and principles set out in the Directive. In accordance with the relevant legal basis in the Treaty on

the Functioning of the EU, the basic nature of the Directive as an information and consultation – rather than co-determination – instrument remains unchanged.

Specifically, the initiative aims (i) to avoid unjustified differences in workers' minimum information and consultation rights at transnational level, (ii) to ensure an efficient and effective setting-up of EWCs, (iii) to ensure the appropriate resourcing of EWCs and an effective process for their information and consultation, and (iv) to promote a more effective enforcement of the Directive, including through access to justice for employee representatives and effective, dissuasive and proportionate sanctions.

What is the added value of action at EU level?

The Directive sets out minimum standards for transnational information and consultation of employees in multinational undertakings. Since this is a cross-border matter, challenges must be addressed at EU level. The specific EU added value of the initiative lies in the development of these minimum standards. These standards foster upwards convergence in employment and social outcomes between Member States. The initiative will further increase the added value also for companies, by creating a simpler and more coherent regulatory framework across the entire EU. In geographic terms, all Member States can be affected by the problem, because its consequences materialise not only in the Member State where an EWC is based, but also in those where establishments belonging to the same group are based.

C. Policy options

What legislative and non-legislative policy options have been considered?

The Commission has considered various policy options, taking into account available evidence and stakeholder views, in particular its evaluation of the recast Directive, the relevant resolutions of the European Parliament and social partners' contributions to the two-phase consultation. The options were grouped in relation to the four distinct policy objectives mentioned above.

In relation to the application of different rules to undertakings depending on when they concluded their information and consultation or EWC agreement, there is, for legal reasons, a binary policy choice between maintaining and removing the exemptions from the scope of the Directive.

Concerning the setting-up of EWCs, legislative and non-legislative policy options involve clarifications regarding the resources available to employees' representatives tasked with negotiating the EWC agreement, and in particular the coverage of their reasonable legal costs. As an accompanying measure, the options include a clarification of the deadline for initiating negotiations following a request to establish an EWCs. As a more far-reaching alternative, the options also include an objective of a balanced gender-composition of EWCs, to be reflected in EWC agreements.

As regards the operation of EWCs, policy alternatives to clarify the concept of 'transnational matters' range from non-binding interpretative guidance and a targeted clarification of the wording to a substantial broadening of the concept, combined with an obligation on management to justify why a certain matter is not transnational. Secondly, a requirement for management to provide a reasoned response to the EWC's opinion was assessed, as well as a clarification that management may impose the confidential treatment of information only in the legitimate interest of the undertaking. Moreover, management would be required to specify, upon request, the grounds for declaring certain information confidential or refusing to disclose it. A more far-reaching alternative option would allow management to refuse the disclosure of information on the grounds that it would seriously harm the functioning of

the undertaking only subject to prior judicial or administrative authorisation, and generally exempt information sharing between the EWC and national or local employees' representatives from confidentiality restrictions. Thirdly, concerning the coverage of EWCs' expenses, policy options include non-binding guidance facilitating the application of existing requirements, or alternatively more specific legislative requirements for parties to regulate in their agreement how certain expenses – such as experts' fees and legal and training costs – are covered. Alternatively, more far-reaching binding requirements for the coverage of costs could be laid down in the Directive.

Concerning the issues of enforcement and access to justice, the policy options pertain to sanctions applicable when the national legislation transposing the Directive is infringed, and remedies available to rightsholders in such cases. Binding options involve, at one end of the spectrum, measures to clarify and strengthen the general requirements in the Directive, including through a requirement to take undertakings' turnover into consideration when determining pecuniary sanctions, as well as an obligation on Member States to notify the Commission of how access to justice and effective remedies are ensured in respect of all the rights under the Directive. At the other end of the spectrum are more far-reaching options consisting of introducing the possibility for EWCs to request the suspension of management decisions and laying down specific ceilings for pecuniary sanctions of 2% (in the case of unintentional infringements) and 4% (in the case of intentional infringements) of undertakings' worldwide turnover.

In designing the policy measures and packaging them to form policy options, the Commission was guided by the following key considerations: (i) the need to leave discretion to Member States in implementing any revised minimum requirements on transnational information and consultation, allowing them to integrate them into their respective rules, industrial relations traditions and practices, in accordance with the principle of subsidiarity and the Treaty legal base; (ii) full respect of the autonomy of social partners in giving practical effect to the minimum requirements; (iii) the fact that business stakeholders generally favour non-binding measures whereas trade union organisations and employee representatives support legislative amendments. Therefore, while various possible alternative combinations between legislative and non-legislative measures could be envisaged in theory, stakeholder feedback did not indicate any particular such combination; (iv) non-legislative measures, such as the funding of projects to promote the awareness of the transnational information and consultation framework, and the Commission's monitoring of the implementation of the Directive by the Member States form part of the baseline scenario. A legislative initiative would therefore automatically be combined with such continuing non-binding measures.

Who supports which option?

As part of a broader campaign for democracy in workplaces, the Parliament has in its 2021 resolution on 'democracy at work' and, in particular, in its 2023 resolution with recommendations to the Commission to revise Directive 2009/38/EC, called to strengthen the role and capacity of EWCs as information and bodies in Union-scale undertakings operating in the European Union. The European Economic and Social Committee has made similar calls over the past years. European trade union organisations generally support the more far-reaching binding amendments outlined above, which take up the European Parliament's recommendations, whereas business organisations dispute the existence of shortcomings warranting EU policy action, and caution against creating additional costs and negative impacts of some options on competitiveness.

What is the preferred choice and why?

The preferred policy option combines the following measures:

(i) The exemptions of certain Union-scale undertakings will be ended, to simplify the framework for transnational information and consultation and guarantee equal access of employees to the rights under the Directive. The 'voluntary agreements' of previously exempted undertakings were concluded and operated outside the scope of EU law, so once the exemption is removed an EWC may be set up upon request of employees or on management's own initiative, or the voluntary agreements may continue if no such request is made.

(ii) The resources available to employees' representatives during the negotiation of new EWC agreements, in particular the coverage of reasonable legal costs, will be clarified, as will the wording of management's obligation to initiate negotiations within six months of a request to establish an EWC. In addition, a gender-balance objective is to be reflected in EWC agreements, as the currently unbalanced composition of EWCs would otherwise be perpetuated.

(iii) Targeted clarifications of the concept of transnational matters will be introduced in the Directive to address the existing uncertainty and reduce the risk of disputes. An obligation for management to conduct information and consultation in a way that enables worker's representatives to express their opinion prior to the adoption of the decision and to provide a reasoned response to EWCs' opinions before adopting a decision on transnational matters will be laid down, to strengthen the effectiveness of dialogue on transnational matters. With respect to the coverage of EWCs' expenses, the preferred option upholds the principle of party autonomy, requiring that potentially contentious points such as the coverage of legal costs, experts' fees and training costs be addressed in EWC agreements. For EWCs operating based on subsidiary requirements, their right to coverage of reasonable legal costs will be spelled out in those requirements. The wording of the existing requirement to provide necessary training "without loss of wages" for members of EWCs and special negotiating bodies (SNBs) will be adapted to clarify that undertakings are to cover the costs and expenses related to such training. Furthermore, to ensure that confidential treatment of information is not imposed without justification, the preferred option will limit that possibility to cases where it is in the legitimate interest of the undertaking. For reasons of transparency and effective redress, management will be required to specify, upon request, the grounds justifying confidentiality or non-disclosure.

(iv) Member States will be required as part of their transposition obligation to notify information about their enforcement framework in respect of rights guaranteed by the Directive, with a view to facilitating compliance monitoring and enforcement by the Commission, and the general obligation to ensure effective sanctions and access to justice will be reflected in the Directive. Financial penalties to sanction infringements of transnational information and consultation rights are to be determined in consideration of undertakings' turnover, to ensure their proportionality and dissuasiveness.

D. Impacts of the preferred option

What are the benefits of the preferred option?

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, all eligible undertakings (ca. 3970) would be placed on an equal footing, simplifying and reinforcing the coherence of the regulatory framework. 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 in order to benefit from an equal application of minimum rights and

obligations enforceable under EU law. Together with management, they could also opt to preserve well-functioning voluntary agreements. In the context of requests to establish a new EWC, employee representatives would have a clear entitlement to the coverage of their reasonable legal costs and more legal certainty regarding management's obligation to initiate negotiations within six months. The workforce of Union-scale undertakings would also benefit from the objective of a gender-balanced composition of EWCs, which is to be reflected in newly concluded or renegotiated EWC agreements. Improved gender-balance in EWCs would improve quality of social dialogue and may contribute to more equitable management decisions on transnational matters.

During the information and consultation process, EWCs which are not yet entitled to a timely reasoned response from management to their opinion would gain such a right. This will help them to engage in 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 application of the confidentiality obligation solely when objectively justified. 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 overall increased effectiveness and quality of transnational social dialogue in Union-scale undertakings would enable a better-informed strategic decision-making by companies and reinforce mutual trust between management and the workforce. However, the analysis of such benefits is necessarily qualitative in nature, as they tend to be long-term and indirect and depend on intangible factors such as the established culture of employee involvement in the respective undertaking.

What are the costs of the preferred option?

In the currently exempted undertakings with 'voluntary agreements', central management could initiate negotiations of a new EWC or would have to initiate them, if so requested by employees in accordance with the Directive. This will entail estimated average costs of ca. EUR 148 000 per negotiation for those undertakings. Generally, during negotiations or renegotiations involving an SNB , undertakings will be legally required to cover – in addition to other costs incurred in the setting-up phase – also reasonable legal costs, currently not explicitly required in the large majority of Member States. 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 must engage in renegotiations. Average costs of renegotiations could not be reliably quantified as they are highly variable. 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). In a substantial number of cases, the necessary adaptations of EWC agreements could be agreed 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 an incremental increase in the costs of running an EWC (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. 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.

For assessing the impacts of the policy options, available cost estimates have been presented in terms of average unit costs per option, in relation to the average turnover of the Union-scale undertakings.

When comparing the quantifiable unit costs to the turnover of relevant undertakings and taking into account the projected trends, the economic costs of the preferred option are expected to be and remain negligible. Accordingly, no impacts on competitiveness of companies could be identified as a result of the preferred option

Estimates of aggregate costs of the initiative have been developed to indicate potential costs based on hypothetical assumptions, due to the multiplicity of factors influencing the operation of social dialogue, which cannot be reliably estimated (for example, it cannot be reliably estimated in how many undertakings with voluntary agreements employees or management would initiate a process for setting up of an EWC, or how many of the existing EWC agreements would be adapted as a result of this initiative). The fact that the Directive leaves broad freedom to parties to EWC agreements to tailor the information and consultation process as well as resources, training, etc. to their specific situation and needs makes it fundamentally challenging to establish a causal link between the policy options and specific economic or social outcomes.

Will SMEs or consumers be affected?

The envisaged policy measures would not apply to SMEs and no indirect effects on SMEs are foreseeable. It is also highly unlikely that the possible marginal increases in the costs of setting-up or running of EWCs would be passed on to consumers.

Will there be significant impacts on national budgets and administrations?

All Member States would have to amend their legislation implementing the Directive. They would need to collect and notify to the Commission information on how EWCs, SNBs and employees' representatives can bring judicial proceedings in respect of all their rights under the Directive. This obligation would entail limited administrative costs, which would be minimised by discharging it through the standard process of notifying transposition measures via the available IT systems. The initiative is unlikely to entail increased enforcement/adjudication costs for national authorities.