170563/EU XXVII.GP
Eingelangt am 25/01/24

Brussels, 24.1.2024
SWD(2024) 9 final

COMMISSION STAFF WORKING DOCUMENT

Subsidiarity Grid

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) 10 final} - {SWD(2024) 11 final}

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Subsidiarity Grid

1. Can the Union act? What is the legal basis and competence of the Unions' intended action?
1.1 Which article(s) of the Treaty are used to support the legislative proposal or policy initiative?
Article 153(1)(e) in conjunction with Article 153(2)(b) 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.
1.2 Is the Union competence represented by this Treaty article exclusive, shared or supporting in nature?
In this field, the Union's competence is to support and complement the activities of the Member States. 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. Possible adjustments to the existing EU rules must hence be without prejudice to Member States' responsibility and discretion to integrate those requirements into their respective legal and industrial relations systems, particularly with regard to the arrangements for designating or electing employees' representatives, their protection and the appropriate sanctions. The initiative will also preserve the nature and basic purpose of European Works Councils (EWCs) as an information and consultation instrument.
Subsidiarity does not apply for policy areas where the Union has ***exclusive*** *competence as defined in Article 3 TFEU[1]. It is the specific legal basis which determines whether the proposal falls under the subsidiarity control mechanism. Article 4 TFEU[2] sets out the areas where competence is shared between the Union and the Member States. Article 6 TFEU[3] sets out the areas for which the Unions has competence only to support the actions of the Member States.*
2. Subsidiarity Principle: Why should the EU act?
2.1 Does the proposal fulfil the procedural requirements of Protocol No. 2[4]: - Has there been a wide consultation before proposing the act? - Is there a detailed statement with qualitative and, where possible, quantitative indicators allowing an appraisal of whether the action can best be achieved at Union level?
Various consultation activities were carried out to collect factual evidence and views concerning possible problems and necessary measures to improve the EU framework for information and consultation on transnational matters. In particular, the consultation aimed to: (1) gather the stakeholders' views on the initiative; (2) collect their opinions and existing evidence on the problem and various solutions (policy options) to address it; and (3) create a robust evidence-based analysis. A wide range of stakeholders operating at international, EU and national levels were consulted: **(i) those having an interest in the matter** (e.g. workers' organisations, employers' organisations at EU and national level, national authorities): **(ii) potential beneficiaries** (e.g. EWC representatives, management and employee representatives of companies); and **(iii) experts** (e.g. legal and academic experts).

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E003&from=EN
[2] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E004&from=EN
[3] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E006:EN:HTML
[4] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016E/PRO/02&from=EN

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The stakeholder consultation included: **(a)** a two-stage Treaty based consultation of the European Social Partners under Article 154 TFEU. The first stage consultation sought their views on the need for and possible direction of EU action to address the challenges related to the operation of EWCs, and the second stage consulted them on the possible content of the EU action. **(b)** semi-structured interviews (57) **(c)** targeted online survey of companies with EWCs – management and employee representatives (233 replies) and **(d)** evidence gathering workshops with management and employee representatives. Annex 2 of the impact assessment provides the outcomes of the stakeholder consultation (Synopsis report).

The majority of the consultation activities were organised by an external contractor in the context of a study supporting the preparation of the impact assessment. The Commission led the two-stage consultation of the European Social Partners.

The European Parliament called for improvements to the recast Directive in two resolutions. The 2021 resolution on Democracy at Work covers areas of worker information, consultation and participation as well as some aspects of company law and corporate governance and calls for a revision of the recast Directive. The 2023 resolution with recommendations to the Commission on the revision of the European Works Councils Directive called for a strengthened role and capacity of EWCs as information and bodies in Union-scale undertakings. It contains an annex setting out proposals for legislative amendments to the recast Directive.

The European Economic and Social Committee (EESC) has issued a number of opinions, in which it stresses the need for an enhanced role of European Works Councils in the event of large company transformations and in transnational restructuring processes in the context of the twin transitions (eg. Opinion of 17 October 2018 on the package on European company law, Opinion of 2 December 2020 'Industrial transition towards a green and digital European economy: regulatory requirements and the role of social partners and civil society', Opinion of 9 June 2021 'No Green Deal without a Social Deal'). In April 2023, the EESC adopted an exploratory opinion on Democracy at Work, which points to the need to substantially improve effectiveness and resources of EWCs.

The explanatory memorandum and the impact assessment report (Section 3) contain an adequate justification of why the proposal is in conformity with the principle of subsidiarity. More information is available in question 2.2. below.

2.2 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the conformity with the principle of subsidiarity?

Only an EU instrument 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.

2.3 Based on the answers to the questions below, can the objectives of the proposed action be achieved sufficiently by the Member States acting alone (necessity for EU action)?

The objectives of the proposed initiative cannot be sufficiently achieved by the Member States acting alone. Given the cross-border nature of the undertakings/groups within the scope of the Directive and the transnational nature of the matters subject to the information and consultation, individual Member States cannot enact the basic regulatory requirements to define a coherent framework for such information and consultation. All EWCs operate at transnational level. Their composition must be representative of – and ensure the dissemination of information to – employees in all Member

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States in which the respective multinational undertaking or group is active. They are consulted on topics having potential effects on employees in several Member States. There is therefore a need for the EU initiative to clarify and further develop the minimum standards that apply to all multinational undertakings of a certain size operating in the EU. Actions of individual Member States could address the identified issues only to a limited extent (eg. by revising their laws on enforcement and sanctions).
(a) Are there significant/appreciable transnational/cross-border aspects to the problems being tackled? Have these been quantified?
The initiative is transnational by nature (see above), as it concerns information and consultation on transnational matters of employees in Union-scale undertakings operating in at least two Member States. The evidence-gathering has confirmed that certain key shortcomings of the minimum requirements in Directive 2009/38/EC reduce the effectiveness of transnational information and consultation. Among the main issues encountered by EWCs is the timing of the consultation and the lack of a genuine and meaningful dialogue on transnational matters. EWCs that experienced such problems report for instance that their questions or opinions are not properly responded to by management. Conflicts also exist between EWCs and the central management on whether a matter is transnational, i.e., whether the EWC is to be informed and consulted. Moreover, there is evidence of uncertainty regarding the process for setting up EWCs, the coverage of their expenses, access to justice and effective remedies when rights under the Directive are infringed. The scale of the problem cannot be easily ascertained in objective terms, as the functioning of transnational information and consultation depends on uncertain – often behavioural – variables specific to each undertaking. As a general trend, the views of key stakeholders on the problem are polarised. Trade unions and employees' representatives underline perceived obstacles, while employer organisations do not acknowledge that adaptations to the existing framework are needed. The current framework does not guarantee that EWCs are involved prior to the adoption of management's decision on transnational matters, which is an obvious condition for their effective consultation; it also does not explicitly require management to respond to EWCs' opinions, nor does it require that the coverage of certain key expenses be specified in EWC agreements. With regard to enforcement, the Commission's 2018 evaluation found that sanctions set by Member States for non-compliance are often not dissuasive, and EWCs do not have access to justice in some Member States for some of their rights under the Directive. In response to the findings of the evaluation, the Commission launched non-legislative actions, which have not resulted in changes.
(b) Would national action or the absence of the EU level action conflict with core objectives of the Treaty[5] or significantly damage the interests of other Member States?
While the absence of EU level action might not significantly damage the interests of other Member States, national action will not be sufficient to ensure the effectiveness of transnational information and consultation nor to address the transnational dimension of the Treaty objective to promote dialogue between management and labour (Article 151, first paragraph, TFEU).
(c) To what extent do Member States have the ability or possibility to enact appropriate measures?
In accordance with the Treaty legal base of this initiative, Member States have broad discretion in implementing transnational information and consultation requirements into their respective rules

[5] https://europa.eu/european-union/about-eu/eu-in-brief_en

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and industrial relations systems and traditions, and where appropriate to complement them. However, given the inherently transnational nature of the subject-matter (see above), coherent and effective minimum requirements at EU level are needed to ensure the effectiveness of transnational information and consultation. The necessary changes to the existing EU level minimum requirements cannot be made by Member States.
(d) How does the problem and its causes (e.g. negative externalities, spill-over effects) vary across the national, regional and local levels of the EU?
About half of Member States have a low number or no EWCs established under their jurisdiction. While some of the challenges are more relevant in certain national legal systems than in others, their effects nevertheless propagate across borders due to the inherently transnational nature of EWCs. Transnational restructuring and accompanying measures can have high local impacts regardless of the location of company’s headquarters, especially where the territory specialises in a particular sector, is facing high unemployment or where the undertaking is locally a major employer.
(e) Is the problem widespread across the EU or limited to a few Member States?
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. Most EWCs were established under the legislation of DE, FR, BE, IE, SE, NL, IT, but – as transnational information and consultation bodies – they represent employees of the undertakings concerned in all Member States. Indirectly, the consequences of the problem could also affect companies linked to Union-scale undertakings in the value chain (located in the EU or outside), as well as the regional economic systems depending on those undertakings more broadly. Subcontractors and networks of businesses, with which the directly affected companies coexist and which they support, can be affected along with their workers, for instance through loss of business due to major restructuring of the multinational undertaking, especially where this is sudden or unannounced. Such effects are however difficult to estimate, considering that the EWCs remain consultation bodies without having a co-determination role in management decisions.
(f) Are Member States overstretched in achieving the objectives of the planned measure?
The proposed measures are proportionate, as they impose limited obligations on the Member States. All Member States would have to amend their legislation implementing the Directive. They would need as part of their transposition obligation to 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 negligible administrative costs since it could be discharged as a part of the standard process of notifying transposition measures via the available IT systems. While evidence remains inconclusive as to whether the preferred option would lead to a higher incidence of legal procedures, and thereby possible higher adjudication costs for Member States, costs are expected to be negligible even if a small increase should materialise, given the very low baseline. In assessing the policy options, due consideration was given to the need to afford sufficient discretion to Member States in implementing any revised minimum requirements on transnational information and consultation, allowing them to complement those requirements as appropriate and to integrate them into their respective rules, industrial relations traditions and practices, in accordance with the principle of subsidiarity and the Treaty legal base for social policy measures.
(g) How do the views/preferred courses of action of national, regional and local authorities differ across the EU?
In preparation of this initiative, national authorities of 10 Member States were interviewed,

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representing different geographical regions and legal systems. The results suggest that Member States tend to agree on the problem and its drivers and the need to tackle it. The national administrations interviewed tend to support the removal of the exemptions from the scope of Directive 2009/38/EC. They also generally agree on a clearer timeframe for the establishment of the EWCs, as well as on the importance of access to resources, training and legal support in the process of establishment and functioning of EWCs. For the most part, they also support the clarification of the notion 'transnational matters'.

There was only limited support among the national authorities interviewed for amending the provisions on confidentiality and non-disclosure of information, as they consider the existing national rules to be sufficient. Some interviewed members of Member State administrations opposed the introduction of preliminary injunctions or (disproportionate) financial sanctions for specific infringements.

2.4 Based on the answer to the questions below, can the objectives of the proposed action be better achieved at Union level by reason of scale or effects of that action (EU added value)?

The objectives of the proposed action can be better achieved at the EU level because the initiative has a clear cross-border dimension. The specific EU added value of the initiative lies in the development of these minimum standards, below which Member States cannot compete on the single market. 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 clearer and more coherent legal framework across the entire EU.

(a) Are there clear benefits from EU level action?

EU level action can enhance the effectiveness of information and consultation of employees at transnational level which is expected to bring clear benefits from improved social dialogue in Union-scale undertakings.

(b) Are there economies of scale? Can the objectives be met more efficiently at EU level (larger benefits per unit cost)? Will the functioning of the internal market be improved?

The objectives can be met more efficiently at EU level because the initiative has clear cross-border dimension and concerns multinational undertakings active in more than on Member State. The specific EU added value of the initiative lies in the development of these minimum standards, below which Member States cannot compete on the single market. 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 clearer and more coherent legal framework across the entire EU.

(c) What are the benefits in replacing different national policies and rules with a more homogenous policy approach?

In accordance with the relevant Treaty legal base, only minimum requirements for gradual implementation are laid down at EU level. National rules and practices are hence not replaced but required to converge only as regards the results to be achieved by those minimum requirements. Member States can choose the way in which those requirements are implemented into their legal systems. The initiative does not affect the national industrial relations systems or rules on the involvement of employees at national or local level. Those rules are complemented by this initiative at EU level addressing social dialogue on transnational matters in Union-scale undertakings operating in at least two Member States.

(d) Do the benefits of EU-level action outweigh the loss of competence of the Member States

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and the local and regional authorities (beyond the costs and benefits of acting at national, regional and local levels)?

This initiative will not lead to loss of competence of the Member States, as the EU had already previously exercised its shared competence to lay down minimum requirements on transnational information and consultation of employees. The initiative merely amends the existing EU level rules without broadening their scope.

(e) Will there be improved legal clarity for those having to implement the legislation?

Yes. The clarifications to the legal framework regarding the concept of transnational matters, conditions for imposing confidentiality, coverage of legal and training costs, access to experts, format of meetings will improve the legal clarity, facilitate implementation and reduce the risk of disputes.

3. Proportionality: How the EU should act

3.1 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the proportionality of the proposal and a statement allowing appraisal of the compliance of the proposal with the principle of proportionality?

The impact assessment accompanying this initiative compared the policy options as to their proportionality relative to the baseline. The preferred option strikes the best balance between the need to take sufficiently robust measures to achieve the policy objectives and reinforce the framework for social dialogue in companies, and the need to minimise burden and costs for undertakings and avoid negative impacts on competitiveness.

3.2 Based on the answers to the questions below and information available from any impact assessment, the explanatory memorandum or other sources, is the proposed action an appropriate way to achieve the intended objectives?

The proposed action is appropriate to achieve the objective of improving the effectiveness of the framework for the information and consultation of employees at transnational level, considering that it is limited to aspects that Member States cannot address satisfactorily on their own and that it creates only negligible adjustment costs for companies and negligible enforcement costs for Member States. Furthermore, a targeted revision of the existing Directive is considered the most effective and efficient form of EU action within the limits of the applicable legal basis, leaving space for Member States to integrate the requirements into their respective legal and industrial relations systems, and preserving the autonomy of social partners.

(a) Is the initiative limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the Union can do better?

Yes, the initiative is limited to the aspects that Member States cannot achieve satisfactorily one their own and where the Union can do better. Given the cross-border nature of the undertakings/groups within the scope of the Directive and the transnational nature of the matters subject to the information and consultation, individual Member States cannot enact the basic regulatory requirements to define a coherent framework for such transnational information and consultation. There is therefore a need for the EU initiative to clarify and further develop the minimum standards that apply to all multinational undertakings of a certain size operating in the EU. Actions of individual Member States could address the identified issues only to a limited extent (e.g. by revising their laws on enforcement and sanctions), but no such actions have been taken by any Member State in response to the findings of the 2018 evaluation and subsequent non-legislative actions by the

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Commission.

(b) Is the form of Union action (choice of instrument) justified, as simple as possible, and coherent with the satisfactory achievement of, and ensuring compliance with the objectives pursued (e.g. choice between regulation, (framework) directive, recommendation, or alternative regulatory methods such as co-legislation, etc.)?

The relevant legal basis allows for the adoption of binding (minimum) requirements only 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.
Furthermore, 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.

(c) Does the Union action leave as much scope for national decision as possible while achieving satisfactorily the objectives set? (e.g. is it possible to limit the European action to minimum standards or use a less stringent policy instrument or approach?)

The Union action leaves as much scope for national decision as well as to decisions of social partners. Possible adjustments to the existing EU rules are without prejudice to Member States' responsibility and discretion to integrate those requirements into their respective legal and industrial relations systems, particularly with regard to the arrangements for designating or electing employees' representatives, their protection and the appropriate sanctions. The initiative will also preserve the nature and basic purpose of EWCs as an information and consultation – rather than co-determination – instrument. Moreover, the social partners in Union-scale undertakings play a key role in implementing the legislation via the negotiation of EWC agreements. Their autonomy, enshrined specifically in the Directive, is maintained.

(d) Does the initiative create financial or administrative cost for the Union, national governments, regional or local authorities, economic operators or citizens? Are these costs commensurate with the objective to be achieved?

The initiative creates negligible costs for the companies when comparing the quantifiable unit costs to the turnover of relevant undertakings. The adjustment costs are limited to possible marginal increases of the baseline costs of running EWCs (costs of meetings, training, expertise, legal advice), as well as in certain cases the costs of negotiating new EWC agreements. No reporting or other administrative requirements are imposed on undertakings, and the Directive's flexible approach is maintained in the preferred option, which focuses on ensuring legal certainty and effectiveness and minimising the risk of disputes or delays. Policy options that might have negatively affected undertakings' ability to take decisions effectively were not retained, in compliance with the proportionality principle and concerns stressed by business organisations during the consultation of social partners.
In the currently exempted undertakings with 'voluntary agreements', negotiations of new EWC agreements could be initiated by either management or employees. This entails estimated average costs of ca. EUR 148 000 per negotiation for those undertakings. Generally, during negotiations or renegotiations involving a special negotiating body, 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

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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. Evidence suggests that a renegotiation process is shorter than the process for setting up a new EWC, although it may 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 made 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 their obligations under the Directive, 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. 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 although these could be minimised as a part of 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.
(e) While respecting the Union law, have special circumstances applying in individual Member States been taken into account?
The initiative respects national competencies and has the flexibility to cater for possible special circumstances in individual Member States. The preferred option limits the application of the confidentiality obligation to cases where this is in the legitimate interest of the undertaking and it is for Member States to define the criteria for applying the confidentiality obligation in their national legislation. In ensuring effective sanctions and access to justice, Member States shall take into account undertakings' annual turnover when determining the level of pecuniary sanctions, to ensure their proportionality, effectiveness and dissuasiveness, but retain their procedural autonomy for determining their enforcement procedures and remedies and sanctions for specific infringements.

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