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NOTE

From:	Permanent Representatives Committee (Part 1)
To:	Council
Subject:	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 - *General approach*

I. INTRODUCTION

Directive 2009/38/EC of the European Parliament and of the Council[1] 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

[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).

employees at national level. The Commission has presented on 24 January 2024 a proposal for a revision of that Directive[2]. 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.

The Commission reacts with this proposal to the European Parliament's own-initiative resolution with recommendations to the Commission on revision of the European Works Councils Directive[3], in line with the political commitment expressed by Commission President van der Leyen to respond to Parliament's resolutions based on Article 225 TFEU with a legislative proposal, in full respect of the proportionality, subsidiarity and better law-making principles.

The proposal intends notably to address the following shortcoming identified by the Commission:

- Lack of application of the Directive in undertakings where old agreements on transnational information and consultation exist;
- Lack of gender balance in EWCs;
- Lack of a genuine, timely, and meaningful dialogue between management and EWCs, notably where management fails to provide a reasoned response to EWCs' opinions before adopting a decision on transnational matters;
- Legal uncertainty about the coverage of EWCs' resources and about the conditions under which management can require confidential treatment of information or refuse to disclose certain information to EWCs;
- In some cases, lack of effective remedies and access to justice for rightsholders under the Directive;
- In some cases, lack of sufficiently effective, proportionate, and dissuasive sanctions in case of non-compliance with the transnational information and consultation requirements.

[2] 5837/24 + ADD1

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

Under the relevant legal basis, i.e. Article 153(2), point (b) TFEU, in conjunction with point (e) of Article 153(1) thereof, the Council is to act by qualified majority, in accordance with the ordinary legislative procedure.

The European Parliament has adopted its report on 9 April 2024[4]. It has not yet adopted a mandate.

The European Economic and Social Committee has adopted an opinion on 30 May 2024[5]. The Committee of the Regions has renounced to giving an opinion.

II. STATE OF PLAY IN THE COUNCIL

Following discussions in the Working Party on Social Questions[6], the Presidency presented a compromise text to the Committee of Permanent Representatives[7]. This Committee agreed on 5 June 2024 on the compromise text as set out in the Annex to this report and decided to submit it to the Council (EPSCO) with a view to reaching a general approach. On 5 June, broad support for this compromise text was found.

During the preparatory work the text was subject to a first lawyer-linguistic revision. The Commission impact assessment[8] has been subject to an evaluation in the Working Party on Social Questions[9].

4 758777EN
5 10596/24
6 Meetings were held on 8, 26 and 28 February, 11 and 29 April 2024.
7 10437/24
8 5837/24 ADD4
9 10437/24 ADD1

III. THE PRESIDENCY COMPROMISE TEXT

The main changes the Presidency proposes in relation to the Commission proposal are the following:

1. Scope of information and consultation (Article 1 (1) and recital 5)[10]

The Presidency has further clarified the scope of the information and consultation obligation by refining the concept of transnational matters in recital 5 by giving more detail about the matters which are to be considered as transnational.

It has been further clarified that it should be objectively ascertained whether a measure can be reasonably expected to affect workers.

2. Gender-balanced representation (Article 1 (3) (a), (4) (b) and recital 10

The obligation to strive for a gender-balanced composition of special negotiation bodies and EWCs has been kept, but it has been highlighted that this should be done without prejudice to the national laws and practices on electing and appointing employees' representatives.

3. Reasons for confidentiality and non-transmission of information (Article 1 (6) - (7), recitals 12 and 13)

It has been clarified that information can only be required to be treated as confidential or be withheld as long as the reasons justifying these limitations of the right to information persist.

[10] References in relation to the provisions of the amending Directive

4. Addition of specific provisions for seafarers (Article 1 (8))

Specific provisions regarding seafarers have been included, restoring verbatim the text added to this Directive by means of Article 2 of Directive (EU) 2015/1794 of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers.

5. Penalties (Article 1 (9) (a), recital 18)

The rules on penalties have been streamlined. In particular, the initial provisions laying out in all detail the way penalties are to be determined by Member States have been deleted, while still keeping the reference in recital 18 to factors such as the size and financial situation of the Community-scale undertaking or group (for example, based on its annual turnover), the gravity, duration, consequences, and intentional or negligent nature of the offence, which can be taken into consideration when determining the penalties.

6. Access to proceedings (Article 1 (9) (bb), recitals 17, 18a)

The idea that Member States need to ensure that effective access to judicial proceedings or, where relevant, administrative proceedings is granted to enforce the rights attributed to the European Works Councils and special negotiating bodies, without prejudice to national laws and their possible legal standing, has been strengthened. This includes the coverage of costs of legal representation and participation in such proceedings either by the central management or by other measures to be taken by Member States.

7. Transitional proceedings (Article 1(12), recital 20a)

The new Article 14a of the amended Directive was streamlined setting out that central management and at least 100 employees can make a request for the negotiation of a new EWC-agreement in case the old agreement is not in conformity with Article 6 of Directive 2009/38/EC as modified by this amending Directive. It has also been clarified that in any case the parties to EWC-agreements or to agreements on information and consultation procedures have to respect the applicable minimum requirements in Directive 2009/38/EC.

8. Scope of information and consultation in the subsidiary requirements (Annex (1) (aa)

A reference to the green and digital transitions has been added as a new amendment to Directive 2009/38/EC.

IV. CONCLUSION

The Presidency believes that the text in the Annex represents a good and balanced compromise, taking into account the various views of delegations.

The Council (EPSCO) is invited to reach a general approach on the text as set out in the Annex to this Note and to mandate the Presidency to enter into negotiations on the file with the representatives of the European Parliament.

ANNEX

2024/0006 (COD)

Proposal for a

DIRECTIVE (EU) …/2024

OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of…

amending Directive 2009/38/EC as regards the establishment
and operation 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[11],

Having regard to the opinion of the Committee of the Regions[12],

Acting in accordance with the ordinary legislative procedure,

[11] OJ C , , p. .
[12] OJ C , , p. .

Whereas:

(1) Pursuant to Article 27 of the Charter of Fundamental Rights of the European Union, workers or their representatives are, at the appropriate levels, 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 regard to transnational matters, Directive 2009/38/EC of the European Parliament and of the Council[13] 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 confirmed that **its** 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.

(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[14] and the Commission undertook a two-phase consultation with the social partners, in accordance with Article 154 TFEU, 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.

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[13] 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 (OJ L 122, 16.5.2009, p. 28, ELI: http://data.europa.eu/eli/dir/2009/38/oj).

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

(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 of an undertaking can reasonably be expected to affect its employees in more than one Member State, but also cases where such measures can reasonably be expected to affect employees of that undertaking in only one Member State, but the consequences of those measures can reasonably be expected to affect its employees in at least one other Member State. This is necessary to cover cases where undertakings envisage measures, such as lay-offs, redundancies or allocation of production activities and outsourcing of activities, which do explicitly target establishments in only one Member State but nevertheless can reasonably be expected to have consequences affecting employees of that undertaking in another Member State, for instance due to changes in the cross-border supply chain or production activities. The concept of transnational matters covers those measures which could affect employees in a substantial way, i.e. in a way which does not affect them in a trivial manner and does not only concern individual employees or ordinary operational decisions. The standard of reasonableness should be objectively ascertained, having regard to the nature and purpose of the measures that are envisaged and the circumstances of the case.

(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 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 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 bod**ies** 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. Where the precise amount of the expenses is not known in advance an estimate of the costs including information about the nature of the cost should be notified to central management.

(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, be it in-person, online or hybrid, notably to avoid 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 and efficient sharing of information and consultation at lower environmental and financial costs on the one hand, and the possibility to hold physical meetings which can offer a trustworthy and confidential environment for meetings and gives the opportunity for exchanges in person.

(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 assistance of experts – such as technical subject-matter experts or legal experts – and the coverage of experts' fees. 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 provided for in Article 10(4) of Directive 2009/38/EC.

(10) The requirement provided for 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-balanced 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[15], 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. Without prejudice to the national laws and practices on electing and appointing employees' representatives, the agreements should include arrangements to work towards a gender-balanced composition of the European Works Council. This might include a growth path to a gender-balanced composition of the European Works Council, which could comprise intermediate progressive objectives. 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.

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

(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.

(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. When sharing information in confidence, central management should be required to provide at the same time a reasonable justification. The confidentiality should only be upheld as long as the reasons for it persist. Setting up adequate arrangements to safeguard the confidentiality of sensitive information can instil trust and facilitate the sharing of such information, while protecting business and employees' 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 in a balanced manner which allows for sufficient legal scrutiny, while not revealing protected information. The dispensation from transmitting information applies as long as the reasons for it persist.

(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 an 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 employees' 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. It is therefore important, taking into account the degree of urgency of the matter, that information and consultation take place in good time and that the European Works Council and the employees' representatives are given sufficient time to express their views in order to ensure the effective exercise of the rights provided for in Directive 2009/38/EC. Without prejudice to the possibility of Member States to provide for more stringent protective measures according to Article 153 paragraph 4 TFEU, this amending Directive should not prevent undertakings from adopting decisions in case the opinion of the European Works Council has not been provided within a reasonable time.

(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 reasonable costs of training and related expenses of the members of the special negotiating body and of the European Works Council, 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 those obligations. With regard to European Works Councils and special negotiating bodies, Member States should, in line with national law on their possible legal standing or the form of representation, guarantee to access to judicial proceedings or, where relevant, administrative proceedings to enforce the rights attributed to the European Works Councils and special negotiating bodies. Moreover, it should be clarified that the relevant procedures have to enable an effective enforcement, and that possible prior out-of-court settlement procedures cannot deprive rightsholders' of their right to bring legal proceedings. For the purpose of supervision by the Commission of the compliance of Member States with the above obligation, Member States should be required to notify the Commission of how and under which circumstances the rightsholders can bring judicial and, where relevant, administrative procedures, in respect of all their rights under this amending Directive.

(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 penalties. Financial penalties 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. In order to be effective, dissuasive and proportionate, penalties could be determined taking into consideration factors such as 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.

(18a-new) The special negotiating bodies, the European Works Councils and their members on their behalf should have the necessary means to cover the costs of legal representation and participation in judicial proceedings or, where relevant, administrative proceedings . The Member states should stipulate that those costs are to be borne by the central management in as far as those costs are reasonable or should take other measures in order to ensure that European Works Councils are not de facto prevented from participating in administrative or judicial proceedings due to a lack of financial resources. This could be done for example by requiring allocation of an appropriate operational budget to the European Works Council, by setting up of solidarity funds at national level, by providing insurances covering legal costs, by granting access to legal aid in certain circumstances or through other provisions in line with national laws and practices.

(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[16], 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. The initiation and conduct of negotiations for the establishment of European Works Councils in such undertakings should follow the procedure as set out in this Directive while the period after which the subsidiary requirements come into force should be reduced to two years instead of three, in line with the period applicable to the adaptation of existing European Works Council agreements.

[16] 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).

(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.

(20a-new) The same minimum requirements should apply to all Community-scale undertakings with European Works Councils operating under Directive 2009/38/EC. Member States should notably provide transitional arrangements enabling the parties to European Works Council agreements or agreements on information and consultation procedures, concluded under Directive 94/45/EC or Directive 2009/38/EC before [OJ: insert date from which the transposing provisions are to apply, set out in the Article 2(1), 2nd subpar. of this amending Directive], which are not in conformity with the revised requirements relating to the content of such agreements to negotiate adaptations. In any case, the parties to existing European Works Council agreements or agreements on information and consultation procedures should respect the applicable minimum requirements.

(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 those European Works Councils, it is appropriate to increase the number of such annual plenary meetings in the subsidiary requirements to two, of which at least one needs to be in person.

(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.

[…]

(25) Since the objectives of this Directive, namely ensuring 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 cannot be sufficiently achieved by the Member States, but can rather, by reason of inherently transnational nature and scale of those requirements, be better achieved at Union level, 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 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 are to be interpreted in accordance with that principle, for instance in relation to 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 by central management.

(27) In accordance with Directive 2014/23/EU[17], Directive 2014/24/EU[18] and Directive 2014/25/EU of the European Parliament and of the Council[19], Member States are to take appropriate measures to ensure that in the performance of public contracts economic operators observe applicable obligations in the fields of social and labour law established by Union law. The integration, as appropriate, of social sustainability criteria in the award criteria designed by contracting entities for identifying the most economically advantageous tenders can contribute to the effective implementation of the requirements under this Directive. 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:

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17 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).

18 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).

19 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).

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 employees of that undertaking or group, or its 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 employees of that undertaking or group, or its establishments in one Member State, and their employees 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 experts, insofar as necessary for that purpose. 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 relation to the discharge of its functions;

– […]

– 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;";

(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 and practices on electing and appointing employees' 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 by the central management 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 appropriate 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 it has been agreed with central management that the reasons justifying it 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.

3. The dispensation according to paragraph 1 from transmitting information shall continue to apply until the reasons justifying it have become obsolete.";

(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 employees

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 employees.

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 their 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 degree of 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 employees' 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 inform the employees' representatives of the establishments or of the undertakings of a Community-scale group of undertakings or, in the absence of employees' 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 and shall have the necessary means to do so.

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.

A member of a special negotiating body or of a European Works Council, or such a member's alternate, who is a member of the crew of a seagoing vessel, shall be entitled to participate in a meeting of the special negotiating body or of the European Works Council, or in any other meeting under any procedures established pursuant to Article 6(3), where that member or alternate is not at sea or in a port in a country other than that in which the shipping company is domiciled, when the meeting takes place.

Meetings shall, where practicable, be scheduled to facilitate the participation of members or alternates, who are members of the crews of seagoing vessels.

In cases where a member of a special negotiating body or of a European Works Council, or such a member's alternate, who is a member of the crew of a seagoing vessel, is unable to attend a meeting, the possibility of using, where possible, new information and communication technologies shall be considered.

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 reasonable costs of such training and related expenses shall be borne by the central management, provided that the central management has been informed thereof 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 an 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 financial penalties.

(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 the procedures, referred to in the first subparagraph shall be compatible with the effective exercise of the information and consultation rights under this Directive.";

(bb-new) the following paragraph 3a is added:

"3a. With respect to the rights conferred by this Directive, Member States shall ensure effective access to judicial proceedings or, where relevant, administrative proceedings for European Work Councils and special negotiating bodies, or, on their behalf, their members or representatives. Member States shall provide that the reasonable costs of legal representation and participation in such proceedings are borne by the central management or take other measures to avoid any de facto restriction of such access for reasons of lack of financial resources."

(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 not prejudice the right of the parties concerned 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, after *[OJ: insert date from which the transposing provisions are to apply, set out in the Article 2(1), 1st subparagraph of this amending Directive]*, a European Works Council agreement or agreement on an information and consultation procedure concluded before *[OJ: 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, as a consequence of the amendments entered into force on *[OJ: insert date of entry into force of this amending Directive]* with any of the elements and requirements of Article 6, central management shall, 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, initiate negotiations to adapt that agreement to those elements and requirements of Article 6. Central management may also initiate such negotiations on its own initiative. Such negotiations may be limited to the provisions of the agreement that are not in conformity with those elements and requirements of Article 6.

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. When an adaptation procedure under this Article does not lead to an agreement within two years from the date of the respective request by employees or their representatives or from the date of initiation of the negotiations by the central management on its own initiative, the subsidiary requirements set out in Annex I shall apply.

4. This Article shall not have the effect of exempting the parties to European Works Council agreements or to agreements on information and consultation procedures from respecting the applicable minimum requirements in this Directive.

(12a -new) the following Article is inserted:

Article 14b

Where negotiations pursuant to Article 5 are initiated in order to conclude an agreement under this Directive in a Community-scale undertaking or Community-scale group of undertakings in which an agreement covering the entire workforce providing for the transnational information and consultation of employees was concluded prior to the date of application of Directive 94/45/EC and is still in force, the period referred to in Article 7(1) indent three shall be reduced to two years. The initiation of negotiations does not affect the terms of the existing agreements in force.";

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

Article 2

1. Member States shall adopt and publish, by *[OJ: please insert date: two years from the entry into force of this Directive]*, the laws, regulations and administrative measures necessary to comply with this Directive *[before….]*. They shall immediately inform the Commission thereof.

   They shall apply those measures from *[OJ: please insert a date: two years from the date set out in the first subparagraph]*.

   When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The method of making such a reference shall be laid down by Member States.

2. Member States shall communicate to the Commission their laws, regulations and administrative provisions with regard to the application of this Directive.

   With regard to the amendments provided for in Article 1, point 8, of this Directive, Member States shall notify the Commission by *[OJ: please insert the date from 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), (3a) and (4) of Directive 2009/38/EC, as amended, bring judicial proceedings, and where applicable, administrative proceedings, in respect of all the rights under that 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*