

EN

EN

EN



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels,
xxx

European Works Councils:

Consultation of the European social partners on the revision of 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

INTRODUCTION

European works councils operate in 820 undertakings with some 14.5 million employees¹. They are vital to the development of transnational industrial relations and help to reconcile economic and social objectives within the Single Market. After 11 years of activity, all the European stakeholders emphasise the positive impact of these bodies established by Directive 94/45/EC and the decisive role they have to play in the anticipation and responsible management of change.

However, the expectations of them have grown and are far from being satisfied. All too often, their potential remains unexploited, as already pointed out by the Commission in 2004, particularly in the event of international restructuring².

The Commission feels that European works councils must be in a position to play their full part with regard to developments in undertakings, anticipating and accompanying change, and fostering genuine transnational social dialogue in a rapidly changing economic and social context. Sustainable competitiveness for large transnational undertakings and also for the network of small and medium-sized businesses with which they co-exist and which they support depends on this.

The aim of the present document, in accordance with Article 138(3) of the Treaty establishing the European Community, is therefore to collect the opinions of the European social partners on the content of a possible Community initiative to revise 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 employees³, subsequently referred to as “the Directive”.

In April 2004 the Commission launched the first phase of consultation of the social partners on a review of the Directive. Concerning the approach of Community action, employees’ organisations came out in favour of a rapid revision, especially with regard to the definition and fundamental nature of information and consultation, the role of the trade unions and what happens to agreements in the event of restructuring. The employers’ organisations were against such a revision, preferring Community action to focus on implementing the Directive in the new Member States and on the exchange of best practice.

The European social partners then examined specific cases in order to assess the functioning of European works councils. They agreed on a number of conclusions, particularly on the usefulness of European works councils, the benefits of clear procedures, training for members and assistance from experts, and the positive role that European sectoral federations may play. They noted that it is difficult to organise useful information and consultation without delays and uncertainties and that getting all workers to accept a European works council constitutes a challenge.

¹ ETUI-REHS 2007 & P. Kerkhofs, ETUI-REHS 2006.

² A survey carried out in 2005 by Professor J. Waddington (University of Manchester) covering 385 European works councils found that 20% of them are consulted only after the public announcement of a decision and 30% are not consulted at all.

³ OJ L 254, 30.9.1994. Council Directive 97/74/EC of 15 December 1997 extending Directive 94/45/EC to the United Kingdom, OJ L 10, 16.1.1998; Council Directive 2006/109/EC of 20 November 2006 adapting Directive 94/45/EC (...) by reason of the accession of Bulgaria and Romania, OJ L 363, 20.12.2006.

In March 2005, through its Communication entitled *Restructuring and employment*⁴, the Commission again consulted the European social partners simultaneously on the restructuring of undertakings and on the “best-practice” aspect of European works councils, encouraging them to negotiate with a view to reaching agreement on the requisite ways and means for promoting best practice⁵. The social partners remain divided on the revision of the Directive, but have included promotion and evaluation of their joint conclusions on European works councils in their 2006-2008 work programme.

Parliament has given its views on European works councils on several occasions. In its Resolution of 10 May 2007 on *Strengthening European legislation in the field of information and consultation of workers*⁶, it calls on the Commission to update this legislation in order to ensure a coherent and efficient framework of law, guarantee legal certainty and improve the linking of the social dialogue at the national and the European levels, and to present to it a timetable, in particular for the “long-awaited revision of the Directive on European works councils”.

The Economic and Social Committee has also delivered opinions on European works councils, the most recent of which, in 2006, recommended “rapid updating” in respect of three points of the Directive⁷.

The present initiative is part of the renewed Lisbon strategy, the aim of which is to create more growth and jobs in Europe, and in particular to create more better-quality jobs in a more dynamic and competitive Europe. It adds to the promotion of best practice, for which the European Union continues to provide substantial aid⁸, in support of the social partners.

It is also part of the Commission’s “better regulation” programme, in that it emphasises the need to adapt legislation on European works councils to take account of the new economic and social necessities, particularly in the light of the increase in the number and scale of transnational restructuring operations. Furthermore, a revision should address the problems encountered in the practical application of the Directive, which prevent European works councils from functioning properly and cannot be resolved just by promoting best practice rectifying gaps in legal certainty without creating new ones and by fostering coherence in Community legislation in the field of information and consultation of workers.

⁴ COM(2005) 120.

⁵ This general consultation did not cover a review of the legal framework and did not constitute a consultation on the revision of the Directive under Article 138(3) of the Treaty.

⁶ P6_TA-PROV(2007)0185.

⁷ CESE1170/2006, adopted by 144 votes to 76 with 15 abstentions; definitions of information and consultation, role of trade unions and maximum number of members.

⁸ Especially through budget line 04.03.03.03, providing support for measures to promote best practice in the field of information, consultation and participation of representatives of undertakings, to which the sum of €8.1 million has been allocated for 2008.

I. OBJECTIVES OF THE PLANNED COMMUNITY INITIATIVE

Directive 94/45/EC makes provision for the establishing, by way of an agreement, of bodies for the transnational information and consultation of employees in undertakings and groups with more than 1 000 employees in the Member States, including 150 in two different countries, on the initiative of employees or management.

The aim of the Community initiative is to respond to the issues at stake in implementing this Directive, as largely covered by a Commission report published in 2000⁹:

- complexities encountered in linking the different levels of information and consultation;
- uncertainties about what happens to European works councils in the event of mergers, acquisitions and other changes in make-up;
- no role is assigned to European trade unions by the Directive, thus limiting the number of councils established since it entered into force;
- absence of a general response to employee representatives' training needs.

On the basis of its analyses, the Commission considers that the causes of these problems do not lie in any deficiencies in how the Member States have implemented the Directive, as they have all adopted national implementing measures which are similar and close to the text of the Directive. Rather, they are to be found in the difficulties encountered by companies and their European works councils, especially in the case of transnational restructuring operations.

In addition to promoting best practice, the subject of its 2005 consultation, the Commission feels that a Community initiative could meet the following objectives:

- to ensure the effectiveness of employees' transnational information and consultation rights, currently lacking in a significant proportion of situations;
- to resolve the problems identified in the practical application of the Directive and to remedy the lack of legal certainty resulting from some of its provisions or the absence of certain provisions;
- to ensure a better link between Community legislative instruments on information and consultation of employees.

Within a framework which limits the burdens imposed on undertakings to what is strictly necessary, while ensuring the effective exercising of employees' information and consultation rights, European works councils should thus be able to play their full part in anticipating and accompanying change, develop a genuine transnational social dialogue and take on new momentum.

⁹ COM(2000) 188.

II. CONTENT OF THE PLANNED COMMUNITY INITIATIVE

In the light of the objectives described, the Commission invites the European social partners to express their opinions on certain changes to the Directive which it is now considering, taking account of developments in the issues at stake, the context and the practices introduced in recent years, as likely to significantly improve the role and functions of European works councils, while also bearing in mind the key positive aspect of the Directive, namely the priority given to negotiation between an undertaking's management and employees for the purpose of establishing procedures for the introduction and operation of these bodies.

While recognising the divergence of opinions among the social partners on the subject of a possible revision of the legislation, the Commission considers that they are in the best position to express opinions on the envisaged changes to the legal framework governing the establishing of European works councils and to identify operating procedures which are more consistent with the specific needs of the undertakings and employees they represent.

1. Measures to ensure the effectiveness of employees' transnational information and consultation rights

1.1. Concepts of information and consultation

Some of the definitions found in — or absent from — the Directive lead to different interpretations which have a major impact on the clarity of the legislative framework, the effectiveness of the rights introduced by the Directive and legal certainty, even though these rights have the nature of fundamental rights¹⁰. One possibility might be to clarify the definition of “consultation” and add a definition of “information” better linking it with the definitions in more recent directives concerning information and consultation of workers, which include the concepts of appropriate time, means and content and stipulate that “information and consultation procedures shall be established and implemented (...) so as to ensure their effectiveness”¹¹.

However, it will be necessary to ensure, in particular through the better linking of levels and agreement on information and consultation procedures, that these changes do not prolong consultation procedures to the point of slowing down decision-making processes within undertakings.

¹⁰ Article 27 of the Charter of Fundamental Rights of the European Union: “Workers’ right to information and consultation within the undertaking: Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.”

¹¹ Articles 1(2), 2(f), 2(g), 4(1), 4(3) and 4(4) of Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community — OJ L 80, 23.3.2002. Articles 2(i)-2(j) of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European Company with regard to the involvement of employees, OJ L 294, 10.11.2001, and Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, OJ L 207, 18.8.2003

1.2. Content of subsidiary requirements

Subsidiary requirements have been applied only in a very limited number of cases, as nearly all European works councils are constituted on the basis of an agreement. However, they play an important benchmark role, especially in the negotiation or renegotiation of agreements.

In order to take account of developments in European works councils' practices and needs, and to reinforce their role and relevance, the following changes could be envisaged. In the absence of a specific agreement within the undertaking or group, they would establish:

- the right of the European works council to obtain a response, and the reasons for that response, to any opinions they have expressed;
- a precise definition of exceptional circumstances by the social partners, in order to foster anticipation¹²;
- the possibility of a second meeting to seek an agreement in the event of exceptional circumstances,
- the possibility of adapting the number of ordinary meetings of the European works council, for example from one a year to two a year, in certain circumstances;
- the possibility of introducing new subjects for the information and consultation of the European works council, in line with practical developments (changes in responsibilities, mobility, health and safety at work, work organisation, environment).

1.3. Role of trade union organisations

As jointly acknowledged by the European social partners, European trade union federations have played an active role, directly or indirectly, in the negotiations for European works councils against a background of diverse systems of industrial relations. It would appear appropriate to recognise explicitly the special role which trade union organisations can play in negotiations and support for European works councils, recognition that is rendered effective by the inclusion, in Directives 2001/86/EC and 2003/72/EC¹³, of trade union organisations among the experts who may be present at meetings of the special negotiating body.

1.4. Role and competence of employees' representatives

In order to allow employees' representatives to perform their duties to the full, it might be appropriate to introduce:

- an obligation for European works council representatives to report to the workers they are representing;

¹² At the moment: exceptional circumstances affecting the employees' interests to a considerable extent, particularly in the event of relocation, transfers, the closure of establishments or undertakings, or collective redundancies.

¹³ Article 3(5).

- a right to training for employees' representatives¹⁴ (already provided in nearly half of European works councils), and an extension of the competence of employees' representatives, thus helping to optimise the functioning of European works councils and reduce the costs, a point made jointly by the social partners.

1.5. Protection of rights

Disputes relating to the operation of a European works council or the validity of the agreement establishing it are difficult to deal with owing to the complexity of the circumstances from the legal, linguistic, financial and industrial relations points of view.

It is vital that the rights referred to by the Directive are implemented. It might therefore be useful for the Directive to reiterate the general principle according to which, in the event of infringement of the provisions applicable, sanctions must be effective, proportionate and dissuasive, as described in the Framework Directive 2002/14/EC¹⁵.

As for their responsibilities, European works councils are called upon with increasing frequency to represent European employees' interests in dealings with authorities or other parties outside the undertaking, also in disputes relating to competition law. It might therefore be useful to explicitly recognise the European works council as the representative of the undertaking's or group's employees¹⁶.

2. Measures designed to resolve problems encountered in the practical application of the Directive and to rectify gaps in legal certainty

2.1. Adaptation clause

Many agreements do not include adaptation arrangements for when major changes take place within a group (for example as a result of mergers or acquisitions) or procedures for termination. This applies sometimes to anticipatory agreements concluded before September 1996, as referred to in Article 13 of the Directive, which account for more than half of existing European works councils and are not subject to the obligations arising from the Directive.

The introduction of an adaptation clause to stipulate what should happen to representative bodies in the event of a change in make-up could help improve legal certainty and be useful in relation to the introduction of transitional arrangements to ensure information and consultation of workers at key moments in reorganisation and in modifying operational frameworks which have become obsolete.

It might thus be useful to introduce arrangements to the effect that:

- all new agreements must include procedures for their adaptation and termination, and also for their renegotiation, especially in the event of a change in make-up¹⁷;

¹⁴ Cf. Directives 2001/86/EC and 2003/72/EC (Parts 2(g) of the Annexes).

¹⁵ Article 8(2).

¹⁶ Without prejudice to the competence of other bodies, in particular trade union organisations, in this respect.

¹⁷ As already referred to in Articles 4(h) of Directives 2001/86/EC and 2003/72/EC.

- in the absence of provisions in existing agreements or in the event of conflicts between the relevant provisions of two or more agreements, an obligation should be introduced to open negotiations on the new make-up within an appropriate timescale, together with transitional arrangements for the existing body or bodies for the duration of negotiations, at the request of employees or on the initiative of the central management;
- a request for the opening of negotiations with a view to adapting or replacing an anticipatory agreement that has become obsolete may be acceptable under certain conditions.

2.2 Central management and responsibilities of local managements

In three cases referred to it for preliminary rulings¹⁸, the Court of Justice of the European Communities has established the principle that all information which is essential to the opening of negotiations for the setting-up of a European works council must be supplied to the employees' representatives by the managements concerned in the Member States, regardless of the location of the group's headquarters or the opinion of the group's management concerning the applicability of the Directive. It would appear useful for these principles to be incorporated into the revised Directive.

2.3. Composition of the special negotiating body and organisation of negotiations

The Directive states that the special negotiating body (SNB) must have a minimum of three members and a maximum number of members equal to the number of Member States. It must have an employees' representative for each Member State in which the group has at least one establishment or undertaking, plus supplementary members in proportion to the number of employees¹⁹. The original maximum number of 17 members, corresponding to the number of Member States when the Directive was adopted, was increased to 18 by Directive 97/74/EC (extension to the United Kingdom) and in 2007 to the "number of Member States", i.e. 30²⁰, by Directive 2006/109/EC.

In spite of the latter change, application of this provision causes problems:

- it creates a practical difficulty, as a group employing workers in most Member States cannot comply with both the maximum number stipulated and the other provisions;
- it may lead to imbalances in representation on the SNB.

It would therefore seem appropriate to delete the maximum number of SNB members from the Directive and replace it by a system which allows better adaptation to the number of employees.

It would also be useful if Member States with only a small number of employees could be represented through a group arrangement or indirectly.

¹⁸ C-62/99 Bofrost; C-440/00 Kühne & Nagel; C-349/01 ADS Anker GmbH.

¹⁹ Article 5(2).

²⁰ European Economic Area: Norway, Iceland and Liechtenstein included.

Concerning SNB meetings, the Directive does not explicitly lay down either the right of employees' representatives to meet without the employer being present, with the linguistic facilities necessary for communication, before and where appropriate after negotiation meetings with the employer, or the right of SNB experts to be present at such negotiations. It would appear useful to add a provision to this effect, which corresponds to normal practice.

3. Measures designed to ensure coherence of Community legislative instruments in the field of information and consultation of employees

3.1. Linking of definitions of information and consultation

An improved linking of the levels of definitions, as referred to in section 1.1, may help to establish a better interplay between the Community legislative instruments in the field of information and consultation of employees.

3.2. Transnational competence of European works councils

In order to differentiate between the area of competence of a European works council and that of national bodies and to place constituent agreements in a coherent framework, it might be useful to state that the Directive establishes a right for employees to information and consultation on transnational issues. In line with the principle of dialogue at the relevant level of management and representation depending on the subject under discussion, this transnational nature could be defined as relating to issues going beyond the powers of decision-making bodies in a single Member State²¹.

3.3. Linking of information and consultation levels

Linking the national and transnational information and consultation levels is one of the difficulties in the practical application of the Directive. In cases of restructuring, apart from the Directive on European works councils, the Framework Directive 2002/14/EC, Directive 98/59/EC on collective redundancies and Directive 2001/23/EC on transfers of undertakings also apply where such redundancies or transfers are specifically envisaged. Cases brought before the national courts concerning the relationship between legal acts and links between information and consultation levels have produced different responses in this respect.

To ensure legal certainty and the effectiveness of Community law, it would be appropriate to find the best way to set out the principles of linking information and consultation levels.

The procedure envisaged, in line with the diversity of situations and allowing both an anticipatory approach and consideration of the employees potentially most affected by a decision, could for example be based on:

- maintaining the principle of “at the relevant level of management and representation, depending on the subject under discussion”, as facilitating the agreement between the

²¹ Directives 2001/86/EC and 2003/72/EC — Articles (2)(i)-(j) and Annexes Part 2(a) (see 1.2).

social partners in order to find a time-scale ensuring the “effectiveness” of information and consultation;

- giving priority to negotiations on procedures for linking information and consultation of the European works council and national representative bodies, in compliance with the above principles;
- introducing provisions applicable in the absence of an agreement on the subject in exceptional circumstances, which could allow a parallel start to the processes of informing and consulting the European works council and the national bodies.

4. Transitional provisions

The Commission considers that European works councils which operate to the satisfaction of the parties involved should be able to continue.

III. QUESTIONS TO THE SOCIAL PARTNERS

The Commission requests the social partners:

- to forward to it an opinion or, where appropriate, a recommendation concerning the objectives and content of the envisaged proposal, in accordance with Article 138(3) of the EC Treaty;
- where appropriate, to inform it of their wish to initiate the negotiation procedure on the basis of the proposals contained in this document, in accordance with Articles 138(4) and 139 of the EC Treaty. Should the social partners answer positively to this question, the Commission would be ready to organise a conference which would involve all the companies concerned in a suitable way. This conference would take place within the period allowed for the negotiation of the social partners.

The Commission would like the social partners’ opinions or recommendations, as appropriate, to contain an assessment of the impact of the measures advocated above, and any other solution which might be advocated.