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A POSSIBLE A POSSIBLE REVISION OF THE EUROPEAN WORKS COUNCIL DIRECTIVE (DIRECTIVE 2009/38/EC)

CONTRIBUTION TO A SECOND-PHASE CONSULTATION OF SOCIAL PARTNERS

The European Confederation of Independent Trade Unions (CESI) is a confederation of more than 40 national and European trade union organisations from over 20 European countries, with a total of more than 5 million individual members. Founded in 1990 and a European sectoral social partner, CESI advocates improved employment conditions for workers in Europe and a strong social dimension in the EU. Most of CESI's affiliates are employed in the different fields of the European, national, regional & local public services, and in privatised services of general interest. CESI also represents private sector unions.

This consultation response should be seen in conjunction with CESI's contribution to the first phase of this consultation of May 2023¹ and CESI's position on European Works Council Directive of June 20 2023,² which both remain valid positions of CESI also during the second phase of this consultation.

1. What are your views on the objectives of possible EU action set out in Section 5.1?

CESI agrees with the objectives of a possible EU initiative set out in section 5.1 of the consultation documents, which seek to (1) to avoid unjustified differences in workers' information and consultation rights at transnational level; (2) ensure an efficient and effective setting-up of EWCs; (3) ensure an effective process for the information and consultation of EWCs and appropriate resourcing for their operation; (4) promote a more effective enforcement of the EWC Directive, including for instance through effective, dissuasive and proportionate sanctions and access to justice for employee representatives and EWCs themselves. According to CESI, the described objectives are ambitious and fair. CESI notes in this regard the following specifications:

- The setting up of an EWC should be compulsory for all company of eligible size and geographical distribution. In this set-up phase, it should be required that all trade unions represented in the company / group must be involved.

¹ <https://www.cesi.org/wp-content/uploads/2023/07/20CAB11-1.pdf>

² <https://www.cesi.org/wp-content/uploads/2023/06/2023-CESI-position-EWC-directive-revision-20230620-final.pdf>

- For existing and new EWCs, information and consultation should be effective. This means that at least two plenary sessions per year should be prescribed. Formal minute-takings should be obligatory, and minutes should be made accessible, as internal documents, to staff representatives. Moreover, minimum levels of action fields for EWCs should be prescribed and include topics such as the management of redundancies, mergers & acquisitions, wages and equal opportunities reports.
- Effective and dissuasive sanctions in the running of EWCs should be established/enforced also for management. Currently, it happens that in EWC there are sanctions for employee representatives that do not comply, e.g., with confidentiality requirements of internal information that they receive, as so declared by the company, but practically no penalty if rules on disclosure of information or involvement of EWC in its fields of competence are not respected by company management.

2. *What are your views on the possible avenues for EU action set out in Section 5.2?*

CESI generally agrees with described possible avenues for EU action to (1) set the same minimum information and consultation rights for all EWCs, (2) ensure functioning conditions for an efficient and effective negotiation and conclusion of EWC agreements, (3) ensure an appropriate resourcing of EWCs and an effective procedural framework for their information and consultation, and (4) establish an effective enforcement of the Directive through sanctions and access to justice. Regarding the latter, CESI considers it important to entitle national tribunals to enforce the global agreements or company general declarations, as if they were set in the country itself, and costs to access to justice should be more affordable. More specifically:

- CESI agrees with the issue stated in section 5.2. of the consultation document that main issues relating to malfunctioning EWCs concern means and resources as well as confidentiality practices by management and differences in rights and representation systems in the various countries that EWCs are active in.
- CESI reiterates that initiation process of EWCs should be simplified to facilitate the set-up of new EWCs. In particular, the maximum duration of negotiations of three years between workers' representatives and management representatives should be shortened. Practical experience has shown that long before the lapse periods of three years it is usually clear if management has a genuine interest to set up an EWC or not. If both workers and management are willing and engage constructively, negotiations can be concluded in a shorter timeframe and the process of the setup of new EWCs be speeded up considerably.

- CESI stresses that the scope and nature of ‘confidentiality restrictions’ should be clarified. Currently, Article 11(3) of the current directive specifies that management is not obliged to transmit information to EWCs in situations “when its nature is such that, according to objective criteria, it would seriously harm the functioning of the undertakings concerned or would be prejudicial to them.” Further details are left for regulation (or not) by the Member States. The result is a plethora of national rules, and many of them are not strong enough to prevent situations of misuse where management refuses to share information in order to pre-empt a (legitimate) involvement of EWCs. This leads to an (illicit) obstruction of the involvement, work and functioning of EWCs. A revised EWC directive should set a clear definition of what confidentiality restrictions apply and in which situations it is legitimate for management to withhold information. This will avoid companies using confidentiality restrictions in an abusive way and as a pretext to circumvent a consultation of EWCs.
- CESI notes that the definition of ‘transnational matter’ must be sharpened. Art. 1(3) of the current directive specifies that EWCs shall only be involved in transnational matters of an enterprise. Art. 1(4) further defines that “matters shall be considered to be transnational where they 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.” All national matters shall be left to local works councils following a subsidiarity-type principle. An obstacle that EWCs encounter frequently is that management abuses the vagueness of this definition and does not consider an issue as transnational matter and does not consult an EWC, even if it should. In a revised directive, Art. 1(4) should set out a clearer definition of ‘transnational matters’ so that companies can no longer circumvent a consultation of an EWC in a relevant matter because of a blurry interpretation of what constitutes a ‘transnational matter’. A definition should in particular clarify which level of scope and effects of an issue/decision on how many workers of an enterprise in different Member States are needed for an issue to be classified as being ‘transnational’.

3. *What are your views on the possible legal instruments presented in Section 5.3?*

CESI agrees with the need to adopt binding measures, in the form of a directive. Experience has shown that Recommendations are practically not enforceable by the EU and lack proper implementation by and in Member States.

4. *Are the European social partners willing to enter into negotiations with a view to concluding an agreement under Article 155 TFEU with regard to any of the elements set out in Section 5.1?*

According to CESI, the European Commission should swiftly issue a proposal for a revision of the directive unless the recognised European cross-sector social partners can come to an understanding on an ambitious agreement to address the identified challenges in a meaningful way. Any new social partner agreement should be timely transposed into a Council directive upon proposal of the European Commission.