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EU transparency register
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POSITION PAPER – 15/02/2024

Ceemet's views on the Commission proposal regarding the revision of the EWC Directive

The present paper aims to express Ceemet views on the Commission's legislative proposal for a Directive amending Directive 2009/38/EC as regards the establishment and functioning of European Works Councils and the effective enforcement of transnational information and consultation which was proposed on 24 January 2024. Many of the EWCs in the EU are established in companies of the MET industry, thus the matter of the revision of this Directive is highly important for Ceemet.

Key messages

- Employee influence through EWC concerns the core of entrepreneurship, economic freedom, and corporate governance. Shareholders, through general meetings, boards, and CEOs, direct the company's strategic direction and day-to-day operations. This constitutes a cornerstone of free enterprise, also enshrined in Article 16 of the Charter of Fundamental Rights on freedom to conduct business. When investors and companies from outside the EU choose where to invest their resources or establish their operations, the ability to control operations without hindrance in the decision-making process is a crucial parameter. Another important factor is the cost of regulatory burden. The European Commission's proposal for a revised EWC Directive may in this context result in existing operations and headquarters in Europe being established in countries outside the EU, and future investors and companies choosing countries other than EU Member States for their investments.
- Ceemet is a strong advocate for social dialogue and sees the importance and the added value of properly functioning European Works Councils.
- For Ceemet, it is extremely important that the revision of the Directive on EWC is based on a balanced, proportionate and realistic approach. Such an approach should aim at improving the functioning of EWCs, supporting the competitiveness of the companies, ensuring a level playing field, protecting existing company agreements on EWC and providing for legal certainty. Contrary to this, Ceemet believes that the proposed text creates to a great extent significant administrative, regulatory and financial burden for the companies.
- We are very concerned by the suggestion of the European Commission's proposal to delete Article 14 on "Pre-existing Agreements" from the current text of the Directive. The suggestion that the undertakings with the agreements concluded before 1996 or between 2009-2011 will be subject to the obligations arising from the Directive will negatively affect many well-functioning European

About Ceemet

Ceemet represents the **metal, engineering and technology**-based **industry employers** in Europe, covering sectors such as metal goods, mechanical engineering, electronics, ICT, vehicle and transport manufacturing.

Member organisations represent **200,000 companies** in Europe, providing over **17 million direct** and **35 million indirect jobs.**

Ceemet is a recognised European **social partner** at the industrial sector level, promoting global competitiveness for European industry through consultation and social dialogue.

Works Councils. The renewal procedures in these agreements, allowing for mutually beneficial adaptations, should be respected.

- When it comes to the concept of transnationality, we believe that the proposed extension of the definition goes too far and leads to legal uncertainty, while the proposed definition of "consultation" will delay the adoption of important decisions by management.
- Ceemet is of the opinion that it is important to have solid confidentiality rules. Therefore, we do not support the amendments to the Directive which weaken confidentiality provisions. The new text includes vague and unnecessary rules of providing the reasons justifying the confidentiality of the information shared and imposes time-restricted obligation.

Views regarding the Commission's legislative proposal

Exemptions from the scope of the recast Directive

We strongly believe that it is essential to protect the EWCs that are functioning well through ensuring that possible changes for these bodies are not automatically mandatory for the existing agreements. It should be possible that agreements can remain unchanged as long as they are valid. Further, regarding the voluntary EWCs agreements concluded under Article 13 of the original EWCs directive 94/45/EC or concluded or revised during the transition period following the adoption of the recast directive 2009/38/EC from June 2009 to June 2011, their specific nature needs to be valued and protected.

The current EWC agreements are individually and specifically tailored to the companies concerned. Employees' representatives and management have, for the most part, arrived at a consensus on what works for them. Several companies also use the EWC to exchange views with employee representatives on topics beyond those provided by law. Numerous models have been found in the negotiated agreements, which must be protected.

Therefore, Ceemet objects to the deletion of Article 14 and to the removal of the exemptions from the scope of the Directive 2009/38/EC.

Concept of "transnational matters"

Ceemet does not support the proposed amendment of the concept "transnational matters".

In our view, the proposed definition of "transnational matters" is very vague and broad and leads to legal uncertainty. The proposed presumption of transnationality not only covers cases where measures considered by management can reasonably be expected to affect workers in more than one Member State. It even suggests that cases are also covered by the definition where the measures themselves only affect workers in one Member State, and where it can reasonably be expected that the consequences of these measures will affect workers in at least another Member State.

Such wording will inevitably result in situations when the matters will be considered transnational even though it might not be the case in practice and consequently trigger the consultation right of EWCs. This will also require companies to analyse every project set underway at national level in order to assess whether they are transnational or not, which is burdensome and costly. Many issues currently falling outside the Directive's scope may risk being covered by the new provision, even in matters solely concerning employees in one Member State and would create a risk of overlaps with

national information and consultation processes. Consequently, the suggested wording may be viewed, in some EU countries, as an intrusion into national co-determination and thus a regulation thereof, necessitating unanimity of the Council under Article 153(1)(f) of the TFEU. Moreover, it constitutes a breach of the subsidiarity principle since matters of employee influence lacking cross-border dimensions should not be regulated at the EU level but by national provisions on information and consultation procedures.

Concept of "consultation"

When it comes to the definition of "consultation", it is proposed by the Commission that Article 9 will specify that consultation is to enable employees' representatives to express an opinion prior to the adoption of the decision and that such an opinion must receive a reasoned written response from central management before the latter adopts its decision on the proposed measure. Ceemet is in disagreement with such a proposal since the proposed process creates the risk that such formalism will be delaying important decisions to be taken by the central management whereas companies often need to react and make swift decisions in a fast-changing economic world. Thus, Ceemet fears that this provision will lead to the hampering of the decision-making process in companies.

It is also an unnecessary administrative burden to introduce formal requirements on written communication regarding the management's feedback to the EWC's views regarding the planned measure. At the same time, the rule will not lead to improved information and consultation between the company's management and the EWC. We believe that it should continue to be up to the management and the EWC to determine the forms of communication between them.

SNB Gender Balance and Expenses

Ceemet understands the importance of achieving a greater gender balance on SNBs/EWCs. However, such requirements would not be realistic to fulfil in case there is only one member of either body and they do not consider the different challenges of the industries. The functioning of SNB and the EWC should reflect the characteristics of the sector and the company. As women are severely underrepresented in our industry, unrealistic requirements or an overrepresentation of certain gender due to rigid requirements should therefore be avoided. We think that the issue of the selection or the election of SNB/EWC members is to be determined based on the rules on the national level.

Furthermore, we are concerned with the proposed wording on expert and legal costs. It seems excessive to propose that SNBs need legal as well as expert advice. Additionally, according to the proposal, SNBs have the right to incur expert and legal costs without prior approval. The Directive foresees only the requirement to notify the management in advance, and that the costs considered should be "reasonable". This suggested provision is rather vague and can lead to potential conflicts.

Likewise, the proposal regarding the possibility of incurring costs for legal representation and participation in administrative or legal proceedings is unacceptable. Such a right could entail that the company must bear the legal costs of the SNB in advance in a potential dispute against the company. Instead, these costs should, as they are currently, be allocated according to national law.

Moreover, the introduced provisions could discourage companies from considering setting up a European Works Councils whereas one of the aims of the revision of the directive is to encourage their development.

Content of the agreement

Tech and industry employers very much welcome that not only the meeting modalities such as frequency can be agreed, but also the “format” of the meetings. This will help the companies to adapt to the new reality of work organisation as well as allow companies to save time and costs, especially in terms of travel and related costs. We would like to suggest that the clarification that virtual meetings should be possible is to be transferred from the recitals to the operative part of the proposal. Furthermore, it would be helpful if EWC meetings for example could be held digitally without a formal translation, but using AI-generated translation. Other remote technologies or tools, such as sharepoints for document sharing could be used to improve information density and also save time and travelling costs. These savings could be used for green or digital innovation and a better training of involved employees.

It should also be clarified that negotiation meetings with the SNB can be conducted virtually to alleviate companies' costs for establishing the EWC. Additionally, it is important to clarify that mandatory meetings taking place with the EWC under the subsidiary requirements (i.e. the rules that apply when an EWC agreement is not reached) can take place virtually. Such cost alleviations should be particularly considered when the proposal otherwise only entails increased obligations that raise companies' negotiation costs.

The enumeration of the costs and resources that the EWC agreement should cover is unnecessarily detailed and reduces the parties' ability to control the content of the EWC agreement. It also risks increasing the likelihood of renegotiating existing well-functioning EWC agreements, thereby disrupting functioning information and consultation procedures.

Confidentiality

Ceemet appreciates that both the current and proposed text of the Directive foresee that the protection of confidential information is to be determined by the Member States. Ceemet believes that it is crucial to have strong confidentiality rules in place, therefore we support that the new text provides a reference to “adequate information transmission and storage arrangements” since this gives management a greater security regarding the protection of confidential information. However, it seems the proposed Directive weakens confidentiality rules as it includes vague and unnecessary rules for the central management that must give reasons to justify the "confidentiality" or "non-transmission" of information, and doing so in a timely manner. Weakening confidentiality provisions jeopardizes the competitiveness of companies with the consequence of further weakening Europe as an innovative and forward-looking industrial and business location.

That the company would need to justify a decision not to disclose certain information could itself pose a risk of outsiders becoming aware of the type and content of sensitive information involved. This could have far-reaching consequences for the company's compliance with regulations in many other areas, such as regulations regarding market-influencing information for listed companies, along with other rules related to mergers, acquisitions, and outsourcing. Easing confidentiality rules will make it harder for companies to comply with these requirements, create legal uncertainty, and risk legal actions and claims for damages due to alleged violations of such rules. However, this not only entails legal and economic risks but may also pose a risk of lost business opportunities or investments, as negotiations with third parties typically rely on strict confidentiality.

Judicial Procedures and Penalties

We agree that the proposed text includes a reference to penalties which take into account "the intentional or negligent nature of the offence". Since among disputes that have taken place between EWCs and management many have concerned the matters of interpretation of either agreements or the legislation, it is believed inappropriate to impose fines on the management for the misinterpretation.

On the other hand, Ceemet does not find it reasonable that the proposed text suggests that Member States reinforce the penalties for the violation of obligations arising from the EWC Directive, in particular, that for the financial sanctions, the size and financial situation of the companies have to be considered. High penalties pose a concern, as they primarily target violations of flexible procedural rules. This concern is particularly pronounced in the proposal due to the ambiguity of certain rules, as seen for example in point 3 of the Annex concerning "exceptional circumstances or decisions which are likely to affect the employees' interests to a considerable extent". These rules are not clear enough to demand high penalties. Generally, we believe that the matter related to penalties should be dealt with by the Member States.

We also do not support Commission's approach on the role of alternative dispute resolutions which underlined that such mechanisms cannot prevent issues being referred to a court or a tribunal. Many EWC agreements contain standard arbitration clauses stipulating that any disputes shall be settled by an arbitrator or arbitration institute. It is crucial that the outcome of arbitration remains binding on the parties and that valid arbitration clauses prevent any party from litigation in public courts. The provision could potentially also have implications for the applicability of national social partners' collectively agreed negotiation procedures, which may apply to EWC-related disputes. In cases where an EWC-related dispute is covered by a negotiation procedure, the procedure must be respected, and any outcome of such procedure must also be respected by public courts.

Involvement of Union-level trade union representatives

Point 5 of the Annex refers to the possibility of involving union-level trade union representatives as experts. We do not endorse this proposal. EWC members have a much better knowledge of their companies than any expert. Permitting the experts to participate in management or EWC meetings in an advisory capacity might endanger the dynamics of such meetings.