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OBES positions on the Directive 2009/38 regarding EWCs

INTRODUCTION

In response your e-mail dated 19/9/2019 asking our opinions concerning the implementation of Directive 2009/38 / EC, we would like to stress the following:

We consider that the European Commission's initiative is very positive for the following two reasons: First, better informed employees will exercise their rights better and thus it is expected that there will be an increased number of EWCs. Secondly, highlighting the problems met during the implementation of Directive 2009/38 / EC can be a catalyst for the revision of Directive 2009/38 / EC, which can be further improved to better protect employees' rights. In addition, Directive 2009/38 already significantly improved the previous EWC Directive 94/95.

The problems with the implementation of Directive 2009/38 become more complex by the simultaneous application of Directive 2002/14, the differences between the respective national laws on information and consultation and, finally, the differences between the different national perceptions and practices regarding information and consultation procedures.

The experience gained by employee representatives from the implementation of Directive 2009/38 / EC is important and relates to the operation of EWCs in a variety of contexts. From this experience, the following suggestions emerge (we have to make the additional clarification that they include experiences regarding the EWC since its establishment as well as the SNB prior to the establishment of the EWC).

We clarify that many of these suggestions may be implemented by the European Commission through the promotion of specific guidelines or good practices. Others, however, require an improvement in the Directive itself.

ESTABLISHMENT OF A EWC.

There is a difficulty in establishing a EWC and there are draw-backs caused by the central management, even if the establishment of the EWC falls under the subsidiary requirements of the Directive 2009/38. Employees' representatives are required to persist. An improvement could be that the central management is also responsible for creating the conditions and providing to employees' representatives and their trade unions the tools necessary to set up the EWC (Article 4).

We consider the three-year period previewed to elapse from the date of submission of the request to the central management till the establishment of the EWC is particularly long and we propose it to be shortened to 12 months (Article 7).

The definition of a controlling undertaking should be broadened (Article 3) to include other forms of business activities such as franchisees, joint ventures, etc. It should also specify the controlling undertaking in cases of acquisitions by private equity funds or assigning the management to another business.

OPERATION OF THE EWC

Information must be given by the central management in writing at least 3 weeks prior to the EWC meeting. This time is necessary for employees' representatives to collect necessary data and to form a documented opinion. Answers to questions asked by EWC members to clarify things should also be given in writing before the EWC meeting to avoid misunderstandings and set-backs as well as to speed up procedures (Article 2).

The definition of consultation needs to be broadened so that employees' opinions 'are taken into account' in management decisions and not 'may be taken into account' (Article 2).

The definition of a transnational issue should include introductory considerations 12 and 16 (Article 1).

The means at the disposal of the EWC (Article 10) should be specified and include the legal costs the EWC has in the case it undertakes legal action in the event the central management fails to fulfil its obligations. Therefore, it must be clearly stated that the EWC must have the legal status of an independent entity having the right to bring subjects to justice itself, or through its designated representatives.

The time for training of the EWC members and their deputies as well as their days of paid absence should be specified in the Directive possibly by introducing thresholds in accordance with existing relevant national legislation (Article 10).

Where confidential information is provided, the central management must explicitly state the reasons for the confidentiality and the length of time binding employees' representatives. This will allow them, if they wish so, to dispute these reasons to Court. It should also be explicitly stated that information regarding eventual collective redundancies etc. is not covered by confidentiality and the members of the EWC should inform national representatives at once (Articles 10.11).

Finally, in the event of mergers or acquisitions by multinational companies/ groups the Directive provides that the individual EWCs will continue to operate. The time of merger and operation of the EWC or EWCs could be shortened to 12 months (Article 13).

SANCTIONS

Concerning sanctions in the event of breaching the terms of the Directive, as is the case today, they are not effective, proportionate and dissuasive, as previewed by the Directive 2009/38 and EWCs have to recourse to the Courts. We propose that decisions, which fall within the scope of the Directive and are taken by the central management without prior effective consultation, be void. Existing Court decisions may be circulated by the European Commission to make them more understandable.

SUBSIDIARY REQUIREMENTS

Subsidiary requirements are the 'safety belt' for employees' rights. They obviously need to be expanded for the following two reasons: Firstly, they constitute a guideline for the

establishment of new EWCs and secondly, the fact they are implemented in a certain case is a proof that the central management had not a positive attitude towards the establishment and operation of the EWC. In addition, any strengthening of the subsidiary requirements will act as an incentive for a larger number of employees' representatives to seek the establishment of their EWC and thus the number of EWCs will increase.

In particular the auxiliary provisions can be improved regarding the following points:

Subjects within the scope of information and consultation at the EWC level should be broadened to include issues of digitization, environmental, safeguarding the rights contained in the European Charter of Rights, etc., since even if they concern in a single country, they are decisions that are taken centrally and will eventually cover the rest of the countries (Article 1a).

The reasoned response of the central management should be in writing (Article 1a).

Given the pace of evolutions in most multinational companies / groups we consider that 2 regular meetings per year are a must and that there is a requirement for training of EWC members and their deputies and the presence of experts (which may vary depending on the subject), paid by the central management. In this way, employees' representatives will be able to formulate views on issues that require technical knowledge (Article 2).

EWC extraordinary meetings do not affect the management prerogative provided that the central management has taken into account in its decision proposals of the employees, in accordance with previewed consultation procedure. Furthermore, in the event of disagreement, employees' representatives may be able to convene the EWC again, after having contacted the national workers' representatives, with a view to reaching an agreement (Article 3).

Finally, the resources available by the EWC should be specified and include the use of individual (corporate) employee mails to be informed on the results of the common meetings between EWC and the central management.

EPILOGUE

We consider the above suggestions to facilitate social dialogue at the company level that they serve the spirit and letter of Directive 2009/38 and that both employees and companies will benefit from them if adopted.

OBES along with trade union organisations from several EU member states has developed a Trade unionists Guide along with a self -evaluation tool, tips, case studies and other useful material in the multilingual site:

www.informationandconsultation.com

The material of the site will be enriched and translated into French as well (the material is being developed in the framework of Information and consultation-new challenges project, co-financed by DG Employment).

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