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AK Position Paper

Proposal for a European Parliament and Council Directive on the establishment of a European Works Council

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About us

The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.

The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.

Organisation and Tasks of the Austrian Federal Chamber of Labour

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 - amongst others unemployed, persons on maternity (paternity) leave, community- and military service - of the 3.2 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labor.

Herbert Tumpel
President

Werner Muhm
Director

Executive Summary

The Federal Chamber of Labour (AK) would like to express its opinion on the planned recasting of the directive on the European Works Council:

We expressly welcome the fact that revision of the directive on the European Works Council, which has been planned since 1999, has been included in the Commission work programme for 2008 and that a concrete proposal is now also to hand. Unfortunately, this does not meet the expectations placed in it. There is neither a significant improvement in the information and consultation rights nor are there any concrete plans to strengthen the legal status of European Works Councils as such (opportunity to benefit from training; access to all group locations; improvement in the inclusion of external experts vis-à-vis the right to requirements of substance and exemption possibilities; right to two meetings a year). The proposal remains very half-hearted on the question as to what extent significant changes in the corporate structure may be taken into consideration, and there are hardly any attempts to improve things when it comes to enforcing rights or sanctions. There is also no provision for lowering the threshold values for the establishment of a European Works Council.

The aims of the recast, in particular strengthening the European Works Councils and resolving legal grey areas, can therefore not be achieved. Some of the planned innovations such as e.g. the definitions on the information and consultation rights and the "structure change clauses" (see below for further details) are suitable as approaches if need be.

The AK position in detail

The AK claims for precise time regulations on information and consultation rights so that the employees' representatives can prepare themselves in time.

Information and consultation

Recital (14), (21), (23), Art 1(2) to (4), Art 2(1)(f) and (1)(g) as well as Annex I referred to in Article 7(1)(a)

Experiences show that in practice the employees' representatives are for the most part provided with information when the final decisions have already been taken by management. However, this does not do justice to the meaning and purpose of the regulation on information and consultation. The employees' representatives then do not have enough time to react to the planned changes or prepare themselves. There is even less chance of consultation rights being safeguarded in a sensible way. If the final decision has already been taken, there is no longer any willingness to change this. The revised version of the directive therefore needs to make arrangements on the time of the information rights and consultation rights that are as clear and precise as possible. The information already needs to follow in the planning stage and the consultation should take place before the decision on proposed changes or before the planned change has started to be realised. The aim must be to reach a definitive conclusion via a dialogue. The relevant provisions in the Austrian Labour Constitution Act (in particular § 109 Para 1 clause 1 and § 108 Para 2a clause 2) could serve as an example here.

The revised version proposed is in any case not enough of a reaction to the problem of belated information. Whilst the wording is a little clearer ("The arrangements for informing and consulting employees shall be defined and implemented in such a way as to ensure the effectiveness of the proce dure"..."information shall be given at such time, in such fashion and with such content as are appropriate to enable employees' representatives, in particular, to conduct an appropriate study and, where necessary, prepare for consultation"), it is in no way clear enough. Furthermore, the restriction ("and enable the undertaking or the group of undertakings to take decisions effectively") enables management to withhold information unjustly on the pretext that efficient decision-making would otherwise be threatened.

In addition, effective sanctions are also needed where an infringement of the directive occurs. If there is only the possibility to take action under civil law or if only sanctions are provided for that do not have enough of a preventative effect, then infringements are bound to occur. Unfortunately, corresponding benchmarks are also missing here, e.g. the requirement for Member States during transposition to provide for sanctions for infringements that are effective, proportionate and act as a deterrent.

In addition, the AK stands for more effective sanctions where an infringement of the directive occurs.

The definition of transnational issues in Art 1(4) should be changed to the effect that decisions by the central management are also made with effects on only one place of business in another Member State. In such cases, the national works councils have scarcely any legal possibilities with regard to the central management with headquarters in another Member State. If this area were taken away from the European Works Council, a gap would arise that would not be covered sufficiently by the employee representation bodies.

Para 3 clause 1 (information and consultation must occur at the relevant level of management and representation, according to the subject under discussion) is superfluous and susceptible to misinterpretations. This clause could in fact be interpreted as meaning that the national representation bodies do not have to be informed at all about transnational issues. It should therefore be deleted.

Thresholds

Art 2

The current threshold for establishing a European Works Council is 1,000 employees and at least 150 employees in at least two Member States. It is therefore only possible to set up a European Works Council in very large undertakings or groups of undertakings. However, many large and medium-sized (groups of) undertakings in fact operate on a transnational level and topics likewise naturally arise for the employees working there that affect the employees' representatives in several Member States. The threshold for establishing a European Works Council should therefore be reduced to 500 employees in total and 100 employees in at least two Member States.

Information concerning the structure of the undertaking or the group and its workforce

Recital (25) and Art 4(4)

Previous ECJ proceedings on the European Works Council have shown that management can make it impossible to establish a European Works Council or at least delay it for years by denying basic information about the undertaking. In this respect, we welcome the planned clarification on the responsibility of the undertaking in the transmission of the information required. However, this is not enough. Particularly in connection with this, it shows how important effective sanctions are. Without these, undertakings can continue to prevent European Works Councils from being established for years without any great risk by means of legal pretexts. Statutory requirements on the Member States with regard to sanctions (see above) are therefore strictly necessary.

Special negotiating body

Recital (27) and Art 5

We very much welcome the fact that the European trade union and employers' organisations should be notified about the negotiations. We also wel-

The AK welcomes that the European trade union and employers' organisations should be notified about the negotiations and their representatives may be sent as experts to the negotiation meetings.

come the clarifications made in connection with experts that assistance may be requested from a representative of the trade union organisations as an expert and that the experts may be present at negotiation meetings in an advisory capacity. However, the restrictions "...at Community level" and "....where appropriate to promote coherence at Community level" are superfluous and should be deleted without substitution.

A corresponding reference to the trade union organisations should also follow in point 6 of the annex.

Making membership of a special negotiating body dependent on a minimum number of employees (Para 2 lit b) makes perfect sense for very small businesses, i.e. those with fewer than 5 employees. However, setting the limit for this at 50 is too high.

We need to ensure at any rate that these employees – not represented in the special negotiating body and as a rule also not in the European Works Council – also have access to information on events connected to the European Works Council (Has a special negotiating body been set up? What decisions have been taken in the special negotiating body? What are the contents of the agreement? What is on the agenda of the meetings in the European Works Council? What decisions were taken there?).

Furthermore, these employees' representatives – like the regulation in Annex 3. Para 2 – should be informed about decisions that they are directly concerned by and may participate in a meeting organised with the select committee or the European Works Council.

We expressly welcome the new provision in which the special negotiating body shall be entitled before and after any meeting with the central management, using the necessary means for communication, to meet without representatives of the central management being present.

Content of the agreement

Recital (28), (29),(30) and Art 6(2)

We welcome the more detailed guidelines on the content of the agreement in principle. Laying down in particular the arrangements on renegotiations where the structure of the undertaking or the group of undertakings is modified and more detailed guidelines for the select committee are extremely sensible.

Arrangements for linking the national and transnational levels are also sensible. In connection with this, it is unclear what the last half sentence in recital (29) ("...in particular with regard to anticipating and managing change") aims to express.

Balanced representation (lit b) is desirable. However, it is questionable to what extent legislation is conducive here especially since these provisions cannot be sanctioned de facto. Legis

imperfectae often contribute to undermining legal provisions.

Role of employees' representatives

Recital (33) and Art 10

The employees' representatives need the necessary means so that they can exercise their representative duty. That they are provided with these means is also apparently the aim of the last part of the sentence in Para 1 of Art 10. However, the legal implementation of this goal is insufficient. No rule of law is formulated, just a fact ("...and have the means required..."). For reasons of legal clarity, we should specify clearly who is responsible for this. A corresponding regulation like in Art 4 (the central management in principle) would be natural here. We should also list – at least in the recitals – for example which specific means are involved (rooms, office material, technical communication means, translations, specialist literature, travel possibilities).

Because of the demands on his or her time the AK recommends that the chairperson should be fully exempted from performing his/her job in the undertaking.

So that the employees' representatives can also play their role accordingly, they should be granted access to all group locations. It would not be compatible with the purpose of the directive if in this respect the employees' representatives were dependent on the discretion of the respective business owner.

As the European Works Council is confronted with a multitude of legal, business and other topics, special training is needed. Merely been able to take training courses on an unspecified scale without wage and salary losses falls short. Undertakings should also agree to pay the training costs themselves and a minimum volume should be specified. A period of 2 weeks for an (ordinary) member of the European Works Council and 4 weeks for the chairperson per job period would be appropriate.

The chairperson of the European Works Council faces at any rate particular challenges. Not only in terms of credentials, but also the demands made on his or her time. The chairperson should therefore as of right be fully exempted from performing his/her job in the undertaking.

In addition, the chairperson should in any case and at least be granted the right to participate in meetings involving the supervisory board or the executive board of the central management.

It is inexplicable why "the same" was deleted without substitution in Para 3. The following would make more sense: "...in the exercise of their functions [enjoy] similar protection and guarantees like...".

Compliance with this Directive, transposition

Art 11 and Art 15

As already discussed above, it has become apparent in particular because of previous ECJ proceedings in connection with the establishment

of European Works Councils that the measures provided for at present in the event of an infringement of the directive are apparently not sufficient to ensure that the provisions are complied with effectively. What we therefore need at any rate are clearer requirements for Member States with regard to effective sanctions.

We cannot understand why item 2 in Art 11 was deleted without substitution. Whilst this provision is undoubtedly insufficient, it should however not merely be deleted, but rather revised within the meaning of what has just been explained (clear requirements on the Member States for effective sanctions).

Link with other directives and procedures

Recital (36), (37) and Art 12

The AK asks for a regular and inevitable basis in the case of significant changes in undertakings.

Use of the word "competence" in connection with the central management's obligation to safeguard the consultation rights of the employees' representatives (recital 36, sentence 4) is inappropriate and should be replaced by "duty".

Art 12(1) and (2) was formulated as a fact and not as a rule of law. We should therefore replace "shall be linked" with "should be linked", "with due regard" with "due regard should be given" and "...shall be established by the agreement referred to in Article 6" with "...should be established by the agreement referred to in Article 6".

The restriction in Art 12(3) to decisions likely to lead to substantial changes in work organisation or contractual relations is inexplicable and should be deleted.

The adjective "sufficient" in Para 5 should be deleted without substitution. Implementation of this Directive shall not be grounds and not just sufficient grounds for any regression in the given context. It would be better to replace the wording with "no effective justification..." (see Art 23 of the Working Time Directive 2003/88/EC). In addition, we consider the word "co-determination" to be more apt in the given context instead of "protection of workers".

Agreements in force

Recital (38), (39) and Art 13

Large undertakings and groups of undertakings have been around for many years as a rule. In the process, significant changes occur on a regular and inevitable basis such as:

- New businesses or undertakings spring up or fall by the wayside
- The number of employees and their structure changes
- The structure of the employees' representatives or management changes
- The headquarters of the undertaking or group of undertakings changes
- The owner structure or the purpose of the undertaking changes.

The current version of the directive is barely concerned about these changes. The European legislator has clearly assumed a business world that is static, which is not the case in reality. It is therefore essential that steps are taken to correct this.

The revised version of the directive attempts this – however, it is most half-hearted in the end. It stipulates that renegotiations should take place where the structure of the undertaking or the group of undertakings changes significantly, no corresponding arrangement was made in the agreement and there is a request of at least 100 employees or their representatives.

However, it is unclear what applies if the negotiations break down. Are standard rules then applied? However, if this is not to be the case these provisions lose their effectiveness. As a rule, some of the negotiating parties (management, the employees' representatives or some of the employees' representatives) are not interested in a new agreement. The old agreement is adapted at most when it comes to insignificant points.

We therefore propose that clear and effective arrangements are made in the event of significant structural changes. This means on the one hand that requirements that are as specific as possible are needed when a significant structural change is to hand and on the other an arrangement needs to be made in the event that the negotiations break down, i.e. that standard rules apply in this case. § 228 Para 2 to 5 of the Austrian Labour Constitution Act could serve as a model or stimulus for such provisions.

For the standard rules, the AK proposes § 228 Para 2 to 5 of the Austrian Labour Constitution Act as a model.

§ 228

(2) Significant changes to the structure of the European Company (SE) are considered in particular relocation of the European Company's seat, a change in the European Company's management system, the closure, retrenchment or relocation of undertakings or businesses of the European Company, the merger of businesses or undertakings of the European Company as well as the acquisition of significant interests in other undertakings by the European Company provided these exert considerable influence over the overall structure of the European Company as well as considerable changes in the number of employees in the European Company and its subsidiaries.

(3) For the negotiations on the conclusion of an agreement in accordance with §§ 230 or 231, the special negotiating body and the SE works council should get together to discuss the changes in structure or the number of employees in the European Company, its subsidiaries and businesses (§§ 216 Para 5, 233 Para 2). For the negotiations, all duties incumbent on the companies or their competent bodies with an interest affect the European Company or its competent body when it comes to negotiations in connection with the establishment of a European Company.

(4) Provided an agreement in force in accordance with §§ 230 or 231 con-

tains a regulation on the prerequisites and the procedure for renegotiating it, one should proceed based on this as far as it fulfils the requirements of Para 1 to 3.

(5) If no agreement has been achieved within the period designated for the negotiations (§ 226), the provisions of the third chapter apply on condition that the scope of worker participation is determined by the structure of the European Company, its subsidiaries and businesses at the moment when the negotiations broke down.

Specifically, this would mean for instance that the standard rules apply if there is a change in structure and a request to commence negotiations yet management refuses to commence negotiations within 6 months or no agreement has been reached within 3 years.

In connection with sub-paragraph 3 of Para 3 ("During the negotiations, the existing European Work Council(s) shall continue to operate"), it is unclear how one should handle conflicting agreements particularly in the event of undertakings merging. As negotiations can drag out for several years, a corresponding regulation or a conflict mechanism would be desirable.

Art 13 of the current directive stipulates that "old" agreements, i.e. those concluded before 22 September 1996, remain valid and the provisions for these on the establishment of a European Works Council are not applicable. This arrangement was already questionable from the start. It provides no requirements whatsoever in terms of the quality of the agreement. However, it is unclear in particular with regard to the parties that have concluded this agreement. This leads to considerable legal uncertainty as it is very often debatable whether the employees' representatives involved in these agreements have also legitimately represented all or only some of its employees and whether there were legitimate doubts in general about the representativity of some employees' representatives. If you take a look at the agreements themselves, then this problem becomes even clearer.

It is all the more astonishing that the new proposal basically does not want to change anything here. The mere possibility of achieving negotiations in the event of significant structural changes has little value in practice (see above). Cleaning up this extremely unfortunate "restructuring arrangement" would be essential. It is unreasonable for many employees that an agreement is in force for them that was concluded many years ago by people who had no authority to represent them or the employees who worked in the undertaking or the group of undertakings at that time.

The AK criticises that the new proposal basically does not change anything.

Standard rules – composition of the European Works Council

Annex I, referred to in Article 7 item 1 lit c)

As with the special negotiating body, a threshold of 50 employees for representation is stipulated here for each

Member State. Reference can therefore be made to the above statements (50 employees too high, information needs to be guaranteed, consultation rights if directly affected).

Standard rules – meeting with the central management

Annex I, referred to in Article 7 item 2

One annual meeting is not enough for adequate information and consultation. The right to meet with the central management twice a year would be reasonable and by no means excessive.

Standard rules – select committee

Annex I, referred to in Article 7 item 3

The new part in the sentence "...or decisions..." should read "...or decisions are to be taken...". Where the decision has already been taken, then consultation makes little sense. The inhibition threshold of management to go back on a decision that was made once is very high, i.e. decisions once made are as a rule no longer reversed. However, the aim of the consultation should be reach a definitive conclusion in a dialogue with the employees' representatives.

The European Works Council should not only be informed about exceptional circumstances such as relocations or closure of undertakings, management should also be obliged to submit a "Social Business Plan". It should contain the short and medium-term effects of exceptional circumstances on employees and the employment situation in the undertaking (jobs, skill requirements, working conditions etc).

We kindly request that this opinion is taken into consideration during the negotiations at European level and that the AK is informed about the further course of negotiations.

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