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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 2.7.2008  
COM(2008) 419 final

2008/0141 (COD)

CORRIGENDUM : date d'adoption - Concerne la version EN

Proposal for a

**EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE**

**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**

**(Recast)**

{SEC(2008) 2154}

{SEC(2008) 2155}

{SEC(2008) 2166}

{SEC(2008) 2167}

(presented by the Commission)

## **EXPLANATORY MEMORANDUM**

### **CONTEXT OF THE PROPOSAL**

#### **Grounds for and objectives of the proposal**

1. This proposal for recasting is intended to amend 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<sup>1</sup>, as extended to the United Kingdom by Council Directive 97/74/EC of 15 December 1997<sup>2</sup> and adapted by Council Directive 2006/109/EC of 20 November 2006 by reason of the accession of Bulgaria and Romania<sup>3</sup>.
2. Article 15 of Directive 94/45/EC provides that, not later than 22 September 1999, the Commission, in consultation with the Member States and with management and labour at European level, is to review its operation and, in particular examine whether the workforce size thresholds are appropriate with a view to proposing suitable amendments to the Council where necessary. In the Report from the Commission to the European Parliament and the Council on the application of Directive 94/45/EC<sup>4</sup>, the Commission stated that it would take a decision on a possible review of the Directive on the basis of the required further assessments and the evolution of the other legislative proposals on the involvement of employees.

#### **General context**

3. Fourteen years on from the adoption of Directive 94/45/EC, approximately 820 European Works Councils are active, representing 14.5 million employees with a view to providing them with information and consultation at transnational level. They are vital to the development of transnational industrial relations and help to reconcile economic and social objectives within the Single Market, particularly through the decisive role they play in anticipating and managing change responsibly.
4. However, there are some problems with the practical application of Directive 94/45/EC. The right to transnational information and consultation lacks effectiveness, as the European Works Council is not sufficiently informed and consulted in the case of restructuring. European Works Councils have been set up in only 36% of undertakings falling within the scope of the Directive. There are legal uncertainties, particularly with regard to the relationship between the national and transnational levels of consultation, and in cases of mergers and acquisitions. In three cases referred to it for preliminary rulings<sup>5</sup>, the Court of Justice of the European Communities also interpreted the provisions of the Directive with regard to the communication of the information required to set up a European Works Council. Lastly, the consistency and linkage of the various directives on the information and consultation of employees are insufficient.

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<sup>1</sup> OJ L 254, 30.9.1994, p. 64.

<sup>2</sup> Council Directive 97/74/EC of 15 December 1997 extending to the United Kingdom Directive 94/45/EC (...), OJ L 10, 16.1.1998, p. 22.

<sup>3</sup> 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, p. 416.

<sup>4</sup> COM(2000) 188.

<sup>5</sup> C-62/99 Bofrost; C-440/00 Kühne & Nagel. C-349/01 ADS Anker GmbH.

5. European Works Councils need to be up to the task of playing their full role in anticipating and managing change and building up a genuine transnational dialogue between management and labour. The objective of this proposal is thus, in conjunction with non-regulatory action, to ensure that employees' transnational information and consultation rights are effective, increase the proportion of European Works Councils established, increase legal certainty and ensure that the directives on information and consultation of employees are better linked.

#### **Existing provisions in the area of the proposal**

6. This proposal takes account of the fact that there are other directives in the area of the information and consultation of employees. 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<sup>6</sup> lays down the general principles to be applied at national level. Directive 98/59/EC<sup>7</sup> and Directive 2001/23/EC<sup>8</sup> are applicable where redundancies or transfers are specifically envisaged. Directives 2001/86/EC<sup>9</sup> and 2003/72/EC<sup>10</sup> govern the involvement of employees in European Companies ('SE') and the European Cooperative Societies ('SCE').

#### **Consistency with other policies and objectives of the Union**

7. Against the background of the Renewed Social Agenda<sup>11</sup>, this initiative is intended to contribute to the European Union's efforts to have all its citizens benefit from globalisation in a balanced way. In conjunction with the reports on restructurings and transnational company-level collective agreements, it aims to encourage undertakings and employees to anticipate and adapt to the changes they must deal with. Through the appropriate involvement of employees, it contributes to improving the dialogue between management and labour within transnational undertakings and to construct a climate which fosters the search for approaches which combine flexibility and security.
8. This initiative is part of the renewed Lisbon strategy, the aim of which is, in particular, to create more higher-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 aid, in support of the social partners, particularly with regard to the inclusion of issues surrounding the skills and mobility of workers, health and safety at work, and the environment in the European Works Councils' activities. It is also part of the Commission's 'better regulation' programme, in that it emphasises the need to adapt the legislation to take account of the new economic and

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<sup>6</sup> OJ L 80, 23.3.2002, p. .

<sup>7</sup> Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies – OJ L 225, 12.8.1998, p. 16.

<sup>8</sup> Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses – OJ L 82, 22.3.2001, p. 16.

<sup>9</sup> 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, p. 22.

<sup>10</sup> 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, p. 25.

<sup>11</sup> Commission Communication *A Renewed Social Agenda: Opportunities, access and solidarity in 21st century Europe*, COM(2008)xxx, 2008

social requirements, particularly those concerning the increase in the number and scale of transnational restructuring operations.

9. This initiative intends to respect the fundamental rights and observe the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this initiative seeks to ensure full respect for the right of employees or their representatives to be guaranteed information and consultation in good time at the appropriate levels in the cases and under the conditions provided for by Community law and national laws and practices, described in Article 27 of the said Charter.

## **2. CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT**

### **Consultation of interested parties**

10. Under the terms of Article 138 of the Treaty, the Commission consulted management and labour at Community level on the possible direction of Community action in this area<sup>12</sup>. Trade union organisations came out in favour of a rapid revision of the Directive, while employers' organisations were against such a revision. Management and labour then jointly defined best practices regarding European Works Councils and the Commission then again consulted with them with regard to the promotion and implementation of those practices<sup>13</sup>. Following these consultations, the Commission considered that Community action was advisable and consulted management and labour at Community level on the content of the planned proposal, pursuant to Article 138(3) of the Treaty<sup>14</sup>.
11. In response to the latter consultation, the employers' organisations BusinessEurope, CEEP and UEAPME have declared that they are ready to open negotiations within the context of the European Social Dialogue. The European Trade Union Confederation felt that such negotiations were unrealistic. Following a fresh appeal to European management and labour, the Commission has noted that no negotiations have been held under Article 138(4) of the Treaty and has decided to submit this proposal, given the established need to review the legislation in force.
12. BusinessEurope and UEAPME, having prepared themselves to negotiate, submitted no opinion on the content of the initiative planned. The CEEP and the organisations consulted which represent employers in the fields of hotels/restaurants (HOTREC), banking (EBF) and trade (EUROCOMMERCE) have stated their opinions on the changes envisaged, as have the *Association française des entreprises privées* (AFEP), the American Chamber of Commerce to the European Union (AmCham EU) and an individual undertaking.
13. The European Trade Union Confederation (ETUC) and the European Managers' Network (CEC) have proposed some adaptations to the proposals submitted for consultation, as well as some amendments to the Directive. The Confederation of Nordic Bank, Finance and Insurance Unions (NFU Finance) Finansförbundet and the

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<sup>12</sup> European Works Councils: Fully realising their potential for employee involvement for the benefit of enterprises and their staff - First phase of consultation of the Community cross-industry and sectoral social partners in the framework of the review of the Directive on European Works Councils, 20 April 2004.

<sup>13</sup> At the same time as those for restructuring, as part of the Communication *Restructuring and employment* COM(2005)120, 31.3.2005.

<sup>14</sup> C(2008) 660, 20.2.2008.

employees' representatives from six undertakings also took the opportunity to give their opinion.

14. The responses of the organisations consulted and the contributions received have been examined in detail and taken account of in the impact assessment process, the report on which is included with the proposal. The examination carried out has led the Commission to modify certain proposals envisaged in the consultation document, for example in relation to the provisions aimed at effective decision-making in undertakings, limiting the transnational scope, introducing a threshold for representation, seeking balanced representation of employees, reinforcing the select committee and making pre-Directive agreements more secure without applying the adaptation clause.

### **Collection and use of expertise**

15. In addition to the assessments on European Works Councils carried out by social operators or by academia, the Commission has asked external consultants to carry out a study to measure the potential impact of various possible options, particularly with regard to costs. This study was carried out in 2008 and included a survey of a random sample of approximately 10% of active European Works Councils. Both the management and the employees' representatives of these managements were questioned.
16. The results of this study were incorporated in the impact assessment and will be made available to the public on the Commission's website.

### **Impact assessment**

17. An impact assessment was carried out. It made it possible to precisely identify the problem which action by the European Union should address and to formulate the four objectives, i.e., ensuring rights are effective, increasing the proportion of European Works Councils established, legal certainty, and the linkage of Community legislative instruments on information and consultation of employees, as well as the operational objectives of such action, and to examine three options for achieving them.
18. The first option is for the European Union to take no new action. This would not enable the objectives described to be reached,
19. The second option is a non-regulatory approach and additional promotion of best practice. This includes increased action on communication, followed if necessary by a proposal to boost the financial support for the promotion of best practice and a recommendation on setting up and operating a European Works Council. This has several social and economic advantages, without creating additional expenses for undertakings. However, it can only address the objectives of legal certainty and linkage of Community law to a limited extent.
20. Reviewing the legislation in force is the third option. It includes amendments to Directive 94/45/EC, mainly concerning the definitions of information and consultation, the transnational scope of European Works Councils, adaptations to the subsidiary requirements, the training of employees' representatives and the role of unions. Except for two sub-options concerning lowering the staff threshold to 500 employees and setting up a mechanism to record the agreements, this option is the most suited to achieving the stated objectives, although it places additional costs on undertakings. However, it has only a limited capacity to focus the attention of operators on improving the transnational information and consultation of employees.

21. The impact assessment concludes that launching a review of the legislation in force in conjunction with non-regulatory action on communication and promotion is the most appropriate.

### **3. LEGAL ELEMENTS OF THE PROPOSAL**

#### **Summary of the proposed action**

22. The proposal for recasting comprises the following substantive changes to Directive 94/45/EC:
- the introduction of general principles regarding the arrangements for transnational information and consultation of employees, the introduction of a definition of information, and making the definition of consultation more precise;
  - the limitation of the competence of European Works Councils to issues of a transnational nature and the introduction of a link, defined as a priority by agreement within the undertaking, between the national and transnational levels of information and consultation of employees;
  - clarification of the role of employees' representatives and of the opportunity to benefit from training, as well as recognition of the role of trade union organisations in relation to employees' representatives;
  - clarification of the responsibilities regarding the provision of information enabling the commencement of negotiations and rules on negotiating agreements to set up new European Works Councils;
  - adaptation of the subsidiary requirements applicable in the absence of an agreement to developing needs;
  - introduction of an adaptation clause applicable to agreements governing European Works Councils if the structure of the undertaking or group of undertakings changes and, unless the adaptation clause is applied, continuation of the agreements in force.

#### **Legal basis**

23. The basis for this legislative proposal is Article 137 of the Treaty which stipulates that the Community is to support and complement the action taken by Member States in the field of information and consultation of employees.

## **Subsidiarity principle**

24. The objectives of the action envisaged cannot be achieved adequately by the Member States, in so far as this involves amending a Community legal act in force governing provisions of a transnational nature. The European Union is more up to the task of amending such an act and providing for its links with other Community and national provisions in this field. In particular, only Community action can introduce changes to the setting up and operation of European Works Councils: such changes require consistent and coordinated amendments to the legislation of the Member States, since the application of the law of one Member State affects the rights and obligations of undertakings and employees in other Member States. However, the proposal leaves to the Member States the role of adapting the provisions to the national industrial relations systems and legal systems, particularly with regard to determining the arrangements for designating or electing employees' representatives, their protection and determining appropriate penalties.

## **Proportionality principle**

25. Through the priority it gives to negotiation at the level of undertakings, without minimum rules, the Directive is extremely flexible as concerns adapting the operation of the European Works Council to the specific conditions in which it takes action, and in its choice of concrete arrangements and the related duties. The proposal preserves this flexibility while clarifying the framework in which it operates. By keeping the application threshold at 1 000 employees, the proposal avoids imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized enterprises.

## **Choice of instruments**

26. The review of the legislation in force, which can only be carried out via a directive, is complementary to the non-regulatory approach and the promotion of best practice carried out in support of management and labour.

## **4. BUDGETARY IMPLICATIONS**

27. The proposal has no implications for the Community budget.

## **5. ADDITIONAL INFORMATION**

### **Simplification and reduction of administrative costs**

28. A number of substantial changes are to be made to Directive 94/45/EC<sup>15</sup>. In the interests of clarity, the proposal recasts that Directive.
29. The proposal contributes towards linking Directive 94/45/EC with other directives concerning the information and consultation of employees, in particular by aligning the definitions, determining the scope of the European Works Councils and incorporating the arrangements for the links between the levels of information and consultation. It thus contributes to a simplification of the legislative framework.

### **Review/revision/sunset clause**

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<sup>15</sup> OJ L 254, 30.9.1994, p. 64. Directive as last amended by Directive 2006/109/EC (OJ L 363, 20.12.2006, p. 416).

30. The proposal includes a review clause under which review is due five years after the time-limit for transposition.

### **Correlation table**

31. The Member States are required to communicate to the Commission the text of national provisions transposing the Directive, as well as a correlation table between those provisions and the Directive.

### **European Economic Area**

32. The proposed text is relevant to the EEA and should therefore extend to the EEA.

### **Detailed explanation of the proposal**

33. The following substantive changes have been made to Articles 1, 2, 4, 5, 6, 10, 11, 12, 13 and 14 of Directive 94/45/EC and to its Annex. Articles 3 and 9 of Directive 94/45/EC are slightly adapted while Articles 7 and 8 are unchanged.
34. *General principles and concepts of information and consultation.* Article 1 of Directive 94/45/EC stipulates that the arrangements for informing and consulting employees must follow the general principle of effectiveness. Article 2 adds a definition of information and brings the definition of consultation into line with that of more recent directives, including the concepts of time, fashion and content appropriate to the information and consultation.
35. *Transnational competence of the European Works Council.* Article 1 establishes the principle of the relevant level according to the subject under discussion. To achieve this, the competence of the European Works Council is limited to transnational issues, and the determination of whether an issue is transnational is transferred from the current subsidiary requirements to Article 1, so that it can be applied to the European Works Councils established by agreement. It is specified as relating in particular to the potential effects of an issue in at least two Member States.
36. *Links between the levels of information and consultation of employees.* Article 12 introduces the principle of a link between the national and transnational levels of information and consultation of the employees with due regard for the competences and areas of action of the representative bodies. The arrangements for this link are defined by the agreement concluded pursuant to Article 6, which now covers this matter. Where there are no such arrangements and where decisions likely to lead to substantial changes in work organisation or contractual relations are envisaged, the process would have to start in parallel at national and European level. Since certain national legislation may have to be adapted to ensure that the European Works Council can, where applicable, receive information earlier or at the same time as the national bodies, a clause has been added to stipulate that there must be no reduction in the general level of protection of employees. The titles of the directives relating to collective redundancies and to transfers of undertakings have been updated and a reference to the framework Directive 2002/14/EC has been incorporated.
37. *Role and capacity of employees' representatives.* The obligation on the employees' representatives to report to the employees that they represent has been moved from the subsidiary requirements of the Directive to Article 10, which thus deals with the role of the employees' representatives and their protection. The competence of the members representing the employees on the European Works Council to represent the employees of the undertaking or group of undertakings is established. The

possibility for employees' representatives' to benefit from training without loss of salary is clarified.

38. *Opening and process of negotiations.* In accordance with the interpretation principles of the European Court of Justice<sup>16</sup>, Article 5 clarifies the responsibility of the local managements to provide the information allowing negotiations to be opened with a view to setting up new European Works Councils. In order to resolve legal uncertainty and simplify the composition of the special negotiating body, it is modified to one representative per 10% portion of the employees in a Member State in which at least 50 employees are employed. The right of employees' representatives to meet without the employer being present is clarified.
39. *Role of trade union and employers' organisations* Article 5 introduces the obligation to inform the trade union and employers' organisations of the start of negotiations on setting up a European Works Council and explicitly mentions the trade union organisations among the experts on whom employees' representatives may call for assistance in the negotiations.
40. *Content of the subsidiary requirements (which apply in the absence of an agreement).* The Annex draws a distinction between fields where information is required and those where consultation is required, and introduces the possibility of obtaining a response, and the reasons for that response, to any opinions expressed. With a view to anticipating such eventualities, the exceptional circumstances requiring information and opening the possibility of a select committee meeting are extended to include circumstances in which decisions are envisaged that are likely to affect the employees' interests to a considerable extent. In order to enable the select committee to perform this more important function, its maximum number of members is set at five and a provision is added stipulating that the conditions enabling it to exercise its activities on a regular basis must be met.
41. *Adaptation clause and agreements in force.* The agreements pursuant to Article 6 must include provisions for amendments and renegotiation. Where the structure of the undertaking or group of undertakings changes significantly, Article 13 provides for the agreements in force to be adapted in accordance with the provisions of the applicable agreement or, by default and where a request is made, in accordance with the negotiation procedure for a new agreement in which the members of the existing European Works Council(s) are to be associated. These European Works Councils will continue to operate, possibly with adaptations, until a new agreement is reached. They will then be dissolved and the agreements terminated. Except where this adaptation clause applies, the agreements in force concluded in anticipation will still not fall under the provisions of the Directive and there will be no general obligation to renegotiate those concluded pursuant to Article 6.
42. *Other provisions.* In Article 6, the establishment and the operation of a select committee are, where applicable, part of the content of the agreement. Article 15 provides for a review clause under which review is due five years after the time-limit for transposition. In the Annex, the composition of the European Works Council set up in the absence of an agreement is aligned with the new composition of the special negotiating body.

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<sup>16</sup> See point 5 above.

Proposal for a

**⊗ DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE ⊗ COUNCIL**

**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**

**⊗ (Text with EEA relevance) ⊗**

⊗ THE EUROPEAN PARLIAMENT AND ⊗ THE COUNCIL OF THE EUROPEAN UNION,

~~Having regard to the Agreement on social policy annexed to Protocol 14 on social policy annexed to the Treaty establishing the European Community, and in particular Article 2 (2) thereof,~~

⊗ Having regard to the Treaty establishing the European Community, and in particular Article 137 thereof, ⊗

Having regard to the proposal from the Commission ⊗<sup>17</sup>, ⊗

Having regard to the opinion of the European Economic and Social Committee ⊗<sup>18</sup> ⊗ ,

⊗ Having regard to the opinion of the Committee of the Regions<sup>19</sup>, ⊗

Acting in accordance with the procedure referred to in Article ~~189e~~ ⊗ 251 of the Treaty ⊗⊗<sup>20</sup> ⊗ ,

⊗ Whereas: ⊗

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↓ new

(1) A number of substantial changes<sup>21</sup> should be made to 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<sup>22</sup>. In the interests of clarity, that Directive should be recast.

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<sup>17</sup> OJ C [...], [...], p. [...].

<sup>18</sup> OJ C [...], [...], p. [...].

<sup>19</sup> OJ C [...], [...], p. [...].

<sup>20</sup> OJ C [...], [...], p. [...].

<sup>21</sup> See Annex II, part A.

<sup>22</sup> OJ L 254, 30.9.1994, p. 64. Directive as last amended by Directive 2006/109/EC (OJ L 363, 20.12.2006, p. 416).

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↓ 94/45/EC recital 1 (new)

~~On the basis of the Protocol on Social Policy annexed to the Treaty establishing the European Community, the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Portuguese Republic (hereinafter referred to as ‘the Member States’), desirous of implementing the Social Charter of 1989, have adopted an Agreement on Social Policy;~~

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↓ 94/45/EC recital 2 (adapted)

~~Article 2 (2) of the said Agreement authorizes the Council to adopt minimum requirements by means of directives;~~

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↓ new

- (2) Pursuant to Article 15 of Directive 94/45/EC, the Commission has, in consultation with the Member States and with management and labour at European level, reviewed the operation of the said Directive and, in particular, examined whether the workforce size thresholds were appropriate, with a view to proposing suitable amendments where necessary.
- (3) Having consulted the Member States and management and labour at European level, the Commission submitted a report<sup>23</sup> on the application of Directive 94/45/EC to the European Parliament and the Council.
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↓ 94/45/EC recital 4 (adapted)

~~Point 17 of the Community Charter of Fundamental Social Rights of Workers provides, inter alia, that information, consultation and participation for workers must be developed along appropriate lines, taking account of the practices in force in different Member States; and that ‘this shall apply especially in companies or groups of companies having establishments or companies in two or more Member States’;~~

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↓ 94/45/EC recital 5 (adapted)

~~The Council, despite the existence of a broad consensus among the majority of Member States, was unable to act on the proposal for a Council Directive on the establishment of a European Works Council in Community scale undertakings or groups of undertakings for the purposes of informing and consulting employees<sup>24</sup>, as amended on 3 December 1991<sup>25</sup>;~~

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↓ 94/45/EC recital 6 (adapted)

~~The Commission, pursuant to Article 3 (2) of the Agreement on Social Policy, has consulted management and labour at Community level on the possible direction of Community action~~

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<sup>23</sup> COM(2000) 188, 4.4.2000.

<sup>24</sup> OJ No L 39, 15. 2. 1991, p. 10.

<sup>25</sup> OJ No L 336, 31. 12. 1991, p. 11.

~~on the information and consultation of workers in Community scale undertakings and Community scale groups of undertakings.~~

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↓ 94/45/EC recital 7 (adapted)

~~The Commission, considering after this consultation that Community action was advisable, has again consulted management and labour on the content of the planned proposal, pursuant to Article 3 (3) of the said Agreement, and management and labour have presented their opinions to the Commission.~~

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↓ 94/45/EC recital 8 (adapted)

~~Following this second phase of consultation, management and labour have not informed the Commission of their wish to initiate the process which might lead to the conclusion of an agreement, as provided for in Article 4 of the Agreement.~~

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↓ new

- (4) Pursuant to Article 138(2) of the Treaty, the Commission consulted management and labour at Community level on the possible direction of Community action in this area.
  - (5) Following this consultation, the Commission considered that Community action was advisable and again consulted management and labour at Community level on the content of the planned proposal, pursuant to Article 138(3) of the Treaty.
  - (6) Following this second phase of consultation, management and labour have not informed the Commission of their shared wish to initiate the process which might lead to the conclusion of an agreement, as provided for in Article 138(4) of the Agreement.
  - (7) It is necessary to modernise Community legislation on transnational information and consultation of employees with a view to ensuring the effectiveness of employees' transnational information and consultation rights, increasing the proportion of European Works Councils established, resolving the problems encountered in the practical application of Directive 94/45/EC and remedying the lack of legal certainty resulting from some of its provisions or the absence of certain provisions, and ensuring that Community legislative instruments on information and consultation of employees are better linked.
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↓ 94/45/EC recital 3 (adapted)

- (8) Pursuant to Article ~~1~~ of the Agreement  136 of the Treaty , one particular objective of the Community and the Member States is to promote dialogue between management and labour.
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↓ new

- (9) This Directive is part of the Community framework intended to support and complement the action taken by Member States in the field of information and consultation of employees. This framework should keep to a minimum the burden on undertakings or establishments while ensuring the effective exercise of the rights granted.

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↓ 94/45/EC recital 9

- (10) The functioning of the internal market involves a process of concentrations of undertakings, cross-border mergers, take-overs, joint ventures and, consequently, a transnationalisation of undertakings and groups of undertakings. If economic activities are to develop in a harmonious fashion, undertakings and groups of undertakings operating in two or more Member States must inform and consult the representatives of those of their employees that are affected by their decisions.
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↓ 94/45/EC recital 10

- (11) Procedures for informing and consulting employees as embodied in legislation or practice in the Member States are often not geared to the transnational structure of the entity which takes the decisions affecting those employees. This may lead to the unequal treatment of employees affected by decisions within one and the same undertaking or group of undertakings.
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↓ 94/45/EC recital 11 (adapted)

- (12) Appropriate provisions must be adopted to ensure that the employees of Community-scale undertakings  $\boxtimes$  or Community-scale groups of undertakings  $\boxtimes$  are properly informed and consulted when decisions which affect them are taken in a Member State other than that in which they are employed.
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↓ 94/45/EC recital 12

- (13) In order to guarantee that the employees of undertakings or groups of undertakings operating in two or more Member States are properly informed and consulted, it is necessary to set up European Works Councils or to create other suitable procedures for the transnational information and consultation of employees.
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↓ new

- (14) The arrangements for informing and consulting employees need to be defined and implemented in such a way as to ensure their effectiveness with regard to the provisions of this Directive. To achieve this, information and consultation of the European Works Council should make it possible to give an opinion to the undertaking in a timely fashion, without calling into question undertakings' ability to adapt. Only dialogue at the level where directions are prepared and effective involvement of employees' representatives are capable of meeting the need to anticipate and accompany change.

- (15) Workers and their representatives must be guaranteed information and consultation at the relevant level of management and representation, according to the subject under discussion. To achieve this, the competence and scope of action of a European Works Council must be differentiated from that of national representative bodies and must be limited to transnational matters.

- (16) The transnational character of a matter should be determined by taking account of both the scope of its potential effects, and the level of management and representation that

it involves. For this purpose, matters which concern the entire undertaking or group or at least two Member States are considered to be transnational.

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↓ 94/45/EC recital 13 (adapted)

- (17) It is necessary to have a definition of the concept of controlling undertaking relating solely to this Directive and not prejudging definitions of the concepts of group or control ~~which might be adopted in texts to be drafted in the future~~ ☒ in other acts ☒.
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↓ 94/45/EC recital 14

- (18) The mechanisms for informing and consulting employees in such undertakings or groups must encompass all of the establishments or, as the case may be, the group's undertakings located within the Member States, regardless of whether the undertaking or the group's controlling undertaking has its central management inside or outside the territory of the Member States.
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↓ 94/45/EC recital 15

- (19) In accordance with the principle of autonomy of the parties, it is for the representatives of employees and the management of the undertaking or the group's controlling undertaking to determine by agreement the nature, composition, the function, mode of operation, procedures and financial resources of European Works Councils or other information and consultation procedures so as to suit their own particular circumstances.
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↓ 94/45/EC recital 16

- (20) In accordance with the principle of subsidiarity, it is for the Member States to determine who the employees' representatives are and in particular to provide, if they consider appropriate, for a balanced representation of different categories of employees.
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↓ new

- (21) It is necessary to clarify the concepts of information and consultation of employees, in line with the definitions in the most recent directives on this subject and those which apply within a national framework, with the triple objective of reinforcing the effectiveness of the dialogue at transnational level, permitting suitable linkage between the national and transnational levels of the dialogue and ensuring the legal certainty required for the application of this Directive.

- (22) The definition of 'information' needs to take account of the goal of allowing employees' representatives to carry out an appropriate examination, which implies that the information be provided at such time, in such fashion and with such content as are appropriate.

- (23) The definition of 'consultation' needs to take account of the goal of allowing for the potential expression of an opinion which will be useful to the decision-making process, which implies that the consultation must take place at such time, in such fashion and with such content as are appropriate.

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↓ 94/45/EC recital 22

- (24) The information and consultation provisions laid down in this Directive must be implemented in the case of an undertaking or a group's controlling undertaking which has its central management outside the territory of the Member States by its representative agent, to be designated if necessary, in one of the Member States or, in the absence of such an agent, by the establishment or controlled undertaking employing the greatest number of employees in the Member States.
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↓ new

- (25) The responsibility of undertakings or groups of undertakings in the transmission of the information required to commence negotiations must be specified in a way that enables employees to determine whether the undertaking or group of undertakings where they work is a Community-scale undertaking or group of undertakings and to make the necessary contacts to draw up a request to commence negotiations.
- (26) The special negotiating body must represent employees from the various Member States in a balanced fashion. Employees' representatives must be able to cooperate together to define their positions in the negotiations with the central management.
- (27) Recognition must be given to the role which trade union organisations can play in negotiating and renegotiating the constituent agreements of European Works Councils, providing support to employees' representatives who express such a need. In order to enable them to monitor the establishment of new European Works Councils and promote best practice, trade union and employers' organisations may be informed of the commencement of negotiations.
- (28) The agreements governing the establishment and operation of European Works Councils must include the methods for making modifications thereto, terminating them or renegotiating them when necessary, particularly where the make-up or structure of the undertaking or group of undertakings is modified.
- (29) Such agreements must lay down the arrangements for linking the national and transnational levels of information and consultation of employees appropriate for the particular conditions of the undertaking or group of undertakings. The arrangements must be defined in such a way that they respect the competences and areas of action of the representation bodies, in particular with regard to anticipating and managing change.
- (30) These agreements must provide for the establishment and operation of a select committee in order to permit coordination and greater effectiveness of the regular activities of the European Works Council, together with information and consultation at the earliest opportunity where exceptional circumstances arise.
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↓ 94/45/EC recital 18

- (31) Employees' representatives may decide not to seek the setting-up of a European Works Council or the parties concerned may decide on other procedures for the transnational information and consultation of employees.

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↓ 94/45/EC recital 17 (adapted)

- (32) ~~However, p~~ Provision should be made for certain subsidiary requirements to apply should the parties so decide or in the event of the central management refusing to initiate negotiations or in the absence of agreement subsequent to such negotiations.
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↓ new

- (33) In order to play their representative role to the full and ensure that the European Works Council is useful, employees' representatives must report to the employees that they represent and must be able to receive the training they require.
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↓ 94/45/EC recital 21

- (34) Provision should be made for the employees' representatives acting within the framework of the Directive to enjoy, when exercising their functions, the same protection and guarantees similar to those provided to employees' representatives by the legislation and/or practice of the country of employment. They must not be subject to any discrimination as a result of the lawful exercise of their activities and must enjoy adequate protection as regards dismissal and other sanctions.
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↓ 94/45/EC recital 24

- (35) The Member States must take appropriate measures in the event of failure to comply with the obligations laid down in this Directive.
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↓ new

- (36) For reasons of effectiveness, consistency and legal certainty, there is a need for linkage between the Directives and the levels of information and consultation of employees established by Community and national law. Priority must be given to negotiations on these procedures for linking information within each undertaking or group of undertakings. If there are no agreements on this subject and where decisions likely to lead to substantial changes in work organisation or contractual relations are envisaged, the process must start in parallel at both national and European level in such a way that it respects the competences and areas of action of the representation bodies. Opinions expressed by the European Works Council should be without prejudice to the competence of the central management to carry out the necessary consultations in accordance with the schedules provided for in national legislation. National legislation may have to be adapted to ensure that the European Works Council can, where applicable, receive information earlier or at the same time as the national bodies, but must not reduce the general level of protection of employees.
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↓ new

- (37) This Directive should be without prejudice to the information and consultation procedures referred to in Directive 2002/14/EC of the European Parliament and of

Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community<sup>26</sup> and to the specific procedures referred to in Article 2 of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies<sup>27</sup> and Article 7 of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses<sup>28</sup>.

↓ 94/45/EC recital 23 (adapted)

- (38) Special treatment should be accorded to Community-scale undertakings and groups of undertakings in which there ~~exists~~  existed , ~~at the time when this Directive is brought into effect~~  on 22 September 1996 , an agreement, covering the entire workforce, providing for the transnational information and consultation of employees.

↓ new

- (39) Where the structure of the undertaking or group of undertakings changes significantly, for example, due to a merger, acquisition or division, the existing European Works Council(s) must be adapted. This adaptation must be carried out as a priority pursuant to the clauses of the applicable agreement, if such clauses permit the required adaptation to be carried out. If this is not the case and a request establishing the need is made, negotiations, in which the members of the existing European Works Council(s) must be involved, will commence on a new agreement. In order to permit the information and consultation of employees during the often decisive period when the structure is changed, the existing European Works Council(s) must be able to continue to operate, possibly with adaptations, until a new agreement is concluded. Once a new agreement is signed, the previously established councils must be dissolved, and the agreements instituting them must be terminated, regardless of their provisions on validity or termination.

- (40) Unless this adaptation clause is applied, the agreements in force should be allowed to continue in order to avoid their obligatory renegotiation when this would be pointless. Provision should be made that as long as agreements concluded prior to 22 September 1996 under Article 13 of Directive 94/45/EC remain in force, they should continue not to be subject to this Directive, and there should be no general obligation to renegotiate agreements concluded pursuant to Article 6 of Directive 94/45/EC prior to the entry into force of this Directive.

↓ 94/45/EC recital 19

- (41) Without prejudice to the possibility of the parties deciding otherwise, the European Works Council set up in the absence of agreement between the parties must, in order to fulfil the objective of this Directive, be kept informed and consulted on the activities of the undertaking or group of undertakings so that it may assess the possible

<sup>26</sup> OJ L 80, 23.3.2002, p. 29.

<sup>27</sup> OJ L 225, 12.8.1998, p. 16.

<sup>28</sup> OJ L 82, 22.3.2001, p. 16.

impact on employees' interests in at least two different Member States. To that end, the undertaking or controlling undertaking must be required to communicate to the employees' appointed representatives general information concerning the interests of employees and information relating more specifically to those aspects of the activities of the undertaking or group of undertakings which affect employees' interests. The European Works Council must be able to deliver an opinion at the end of that meeting.

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↓ 94/45/EC recital 20

- (42) Certain decisions having a significant effect on the interests of employees must be the subject of information and consultation of the employees' appointed representatives as soon as possible.
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↓ new

- (43) The content of the subsidiary requirements which apply in the absence of an agreement and serve as a reference in the negotiations must be clarified and adapted to developments in the needs and practices related to transnational information and consultation. A distinction should be made between fields where information must be provided and fields where the European Works Council must also be consulted, which involves the possibility of obtaining a response and the reasons for that response to any opinions expressed. To enable the select committee to play the necessary coordinating role and deal effectively with exceptional circumstances, such committee must be able to have up to five members and be able to consult regularly.
- (44) Since the objectives of this Directive, namely the improvement of the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality set out in the said Article of the Treaty, this Directive does not go beyond what is necessary to achieve these objectives.
- (45) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for the right of workers or their representatives to be guaranteed information and consultation in good time at the appropriate levels in the cases and under the conditions provided for by Community law and national laws and practices (Article 27 of the Charter of Fundamental Rights of the European Union).
- (46) The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive change as compared with the earlier Directives. The obligation to transpose the provisions which are unchanged arises under the earlier Directives.
- (47) This Directive should be without prejudice to the obligations of the Member States relating to the time-limits set out in Annex II, Part B for transposition into national law and application of the Directives.

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↓ 94/45/EC (adapted)

☒ HAVE ☒ ADOPTED THIS DIRECTIVE:

## SECTION I

### GENERAL

#### *Article 1*

#### **Objective**

1. The purpose of this Directive is to improve the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings.

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↓ 94/45/EC (adapted)

⇒ new

2. To that end, a European Works Council or a procedure for informing and consulting employees shall be established in every Community-scale undertaking and every Community-scale group of undertakings, where requested in the manner laid down in Article 5(1), with the purpose of informing and consulting employees ~~under the terms, in the manner and with the effects laid down in this Directive.~~ ⇒ The arrangements for informing and consulting employees shall be defined and implemented in such a way as to ensure the effectiveness of the procedure and to enable the undertaking or group of undertakings to take decisions effectively. ⇐

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↓ new

3. Information and consultation of employees must occur at the relevant level of management and representation, according to the subject under discussion. To achieve this, the competence of the European Works Council and the scope of the information and consultation procedure for workers governed by this Directive shall be limited to transnational issues.

4. 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.

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↓ 94/45/EC

~~35.~~ Notwithstanding paragraph 2, where a Community-scale group of undertakings within the meaning of Article 2(1)(c) comprises one or more undertakings or groups of undertakings which are Community-scale undertakings or Community-scale groups of undertakings within the meaning of Article 2(1)(a) or (c), a European Works Council shall be established at the level of the group unless the agreements referred to in Article 6 provide otherwise.

~~46.~~ Unless a wider scope is provided for in the agreements referred to in Article 6, the powers and competence of European Works Councils and the scope of information and consultation procedures established to achieve the purpose specified in paragraph 1 shall, in the case of a Community-scale undertaking, cover all the establishments located within the Member States

and, in the case of a Community-scale group of undertakings, all group undertakings located within the Member States.

57. Member States may provide that this Directive shall not apply to merchant navy crews.

## Article 2

### Definitions

1. For the purposes of this Directive:

- (a) 'Community-scale undertaking' means any undertaking with at least 1000 employees within the Member States and at least 150 employees in each of at least two Member States;
- (b) 'group of undertakings' means a controlling undertaking and its controlled undertakings;
- (c) 'Community-scale group of undertakings' means a group of undertakings with the following characteristics:
  - at least 1000 employees within the Member States,
  - at least two group undertakings in different Member Statesand
  - at least one group undertaking with at least 150 employees in one Member State and at least one other group undertaking with at least 150 employees in another Member State;
- (d) 'employees' representatives' means the employees' representatives provided for by national law and/or practice;
- (e) 'central management' means the central management of the Community-scale undertaking or, in the case of a Community-scale group of undertakings, of the controlling undertaking;

↓ new

- (f) 'information' means transmission of data by the employer to the employees' representatives in order to enable them to acquaint themselves with the subject matter and to examine it; 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;

↓ 94/45/EC (adapted)  
⇒ new

- ~~(fg)~~ 'consultation' means the ~~exchange of views and~~ establishment of dialogue ☒ and exchange of views ☒ between employees' representatives and central management or any more appropriate level of management ⇒, at such time, in such fashion and with such content enables employees' representatives to express an opinion on the basis of the information provided and within a reasonable time to the competent body of the Community-scale undertaking or Community-scale group of undertakings ⇄;

- gh) 'European Works Council' means the council established in accordance with Article 1(2) or the provisions of the Annex, with the purpose of informing and consulting employees;
- hi) 'special negotiating body' means the body established in accordance with Article 5(2) to negotiate with the central management regarding the establishment of a European Works Council or a procedure for informing and consulting employees in accordance with Article 1(2).

2. For the purposes of this Directive, the prescribed thresholds for the size of the workforce shall be based on the average number of employees, including part-time employees, employed during the previous two years calculated according to national legislation and/or practice.

### Article 3

#### Definition of 'controlling undertaking'

1. For the purposes of this Directive, 'controlling undertaking' means an undertaking which can exercise a dominant influence over another undertaking ('the controlled undertaking') by virtue, for example, of ownership, financial participation or the rules which govern it.
2. The ability to exercise a dominant influence shall be presumed, without prejudice to proof to the contrary, when  an undertaking  , in relation to another undertaking directly or indirectly:
- (a) holds a majority of that undertaking's subscribed capital;  
or
  - (b) controls a majority of the votes attached to that undertaking's issued share capital;  
or
  - (c) can appoint more than half of the members of that undertaking's administrative, management or supervisory body.
3. For the purposes of paragraph 2, a controlling undertaking's rights as regards voting and appointment shall include the rights of any other controlled undertaking and those of any person or body acting in his or its own name but on behalf of the controlling undertaking or of any other controlled undertaking.

4. Notwithstanding paragraphs 1 and 2, an undertaking shall not be deemed to be a 'controlling undertaking' with respect to another undertaking in which it has holdings where the former undertaking is a company referred to in Article 3(5)(a) or (c) of Council Regulation (~~EEC~~) No ~~4064/89~~  139/2004  of ~~21 December 1989~~  20 January 2004  on the control of concentrations between undertakings<sup>29</sup>.

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<sup>29</sup> OJ No L ~~395~~ 24, ~~30.12.1989~~ 29.1.2004, p. 1.

5. A dominant influence shall not be presumed to be exercised solely by virtue of the fact that an office holder is exercising his functions, according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings.

6. The law applicable in order to determine whether an undertaking is a 'controlling undertaking' shall be the law of the Member State which governs that undertaking.

Where the law governing that undertaking is not that of a Member State, the law applicable shall be the law of the Member State within whose territory the representative of the undertaking or, in the absence of such a representative, the central management of the group undertaking which employs the greatest number of employees is situated.

7. Where, in the case of a conflict of laws in the application of paragraph 2, two or more undertakings from a group satisfy one or more of the criteria laid down in that paragraph, the undertaking which satisfies the criterion laid down in point (c) thereof shall be regarded as the controlling undertaking, without prejudice to proof that another undertaking is able to exercise a dominant influence.

## SECTION II

### ESTABLISHMENT OF A EUROPEAN WORKS COUNCIL OR AN EMPLOYEE INFORMATION AND CONSULTATION PROCEDURE

#### *Article 4*

##### **Responsibility for the establishment of a European Works Council or an employee information and consultation procedure**

1. The central management shall be responsible for creating the conditions and means necessary for the setting-up of a European Works Council or an information and consultation procedure, as provided for in Article 1(2), in a Community-scale undertaking and a Community-scale group of undertakings.

2. Where the central management is not situated in a Member State, the central management's representative agent in a Member State, to be designated if necessary, shall take on the responsibility referred to in paragraph 1.

In the absence of such a representative, the management of the establishment or group undertaking employing the greatest number of employees in any one Member State shall take on the responsibility referred to in paragraph 1.

3. For the purposes of this Directive, the representative or representatives or, in the absence of any such representatives, the management referred to in the second subparagraph of paragraph 2, shall be regarded as the central management.

4. The management of every undertaking belonging to the Community-scale group of undertakings and the central management or the deemed central management of the Community-scale undertaking or group of undertakings shall be responsible for obtaining and transmitting to the parties concerned by the application of this Directive the information

required for commencing negotiations referred to in Article 5, and in particular the information concerning the structure of the undertaking or the group and its workforce. This obligation shall relate in particular to the information on the number of employees referred to in Article 2(1)(a) and (c).

↓ 94/45/EC

## Article 5

### Special negotiating body

1. In order to achieve the objective in Article 1(1), the central management shall initiate negotiations for the establishment of a European Works Council or an information and consultation procedure on its own initiative or at the written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States.

2. For this purpose, a special negotiating body shall be established in accordance with the following guidelines:

- (a) The Member States shall determine the method to be used for the election or appointment of the members of the special negotiating body who are to be elected or appointed in their territories.

Member States shall provide that employees in undertakings and/or establishments in which there are no employees' representatives through no fault of their own, have the right to elect or appoint members of the special negotiating body.

The second subparagraph shall be without prejudice to national legislation and/or practice laying down thresholds for the establishment of employee representation bodies.

↓ 2006/109/EC Art. 1 et Annexe

~~(b) The special negotiating body shall have a minimum of three members and a maximum of members equal to the number of Member States.~~

↓ new

(b) The members of the special negotiating body shall be elected or appointed in proportion to the number of employees in each Member State by the Community-scale undertaking or Community-scale group of undertakings, by allocating in respect of each Member State in which at least 50 employees are employed one seat per portion of employees employed in that Member State amounting to 10%, or a fraction thereof, of the number of employees employed in all the Member States taken together;

↓ 94/45/EC

⇒ new

~~(c) In these elections or appointments, it must be ensured:~~

~~— firstly, that each Member State in which the Community-scale undertaking has one or more establishments (SIC! establishments) or in which the~~

~~Community-scale group of undertakings has the controlling undertaking or one or more controlled undertakings is represented by one member,~~

~~secondly, that there are supplementary members in proportion to the number of employees working in the establishments, the controlling undertaking or the controlled undertakings as laid down by the legislation of the Member State within the territory of which the central management is situated.~~

(~~c~~) The central management and local management ⇨ and the competent European workers' and employers' organisations ⇐ shall be informed of the composition of the special negotiating body ⇨ and of the start of the negotiations ⇐.

3. The special negotiating body shall have the task of determining, with the central management, by written agreement, the scope, composition, functions, and term of office of the European Works Council(s) or the arrangements for implementing a procedure for the information and consultation of employees.

4. With a view to the conclusion of an agreement in accordance with Article 6, the central management shall convene a meeting with the special negotiating body. It shall inform the local managements accordingly.

↓ new

Before and after any meeting with the central management, the special negotiating body shall be entitled to meet, using the necessary means for communication, without representatives of the central management being present.

↓ 94/45/EC (adapted)  
⇨ new

For the purpose of the negotiations, the special negotiating body may ☒ request ☒ assistance ☒ with its work ☒ from experts of its choice ⇨, for example representatives of appropriate Community-level trade union organisations. Such experts may be present at negotiation meetings in an advisory capacity at the request of the special negotiating body, where appropriate to promote coherence and consistency at Community level ⇐.

↓ 94/45/EC

5. The special negotiating body may decide, by at least two-thirds of the votes, not to open negotiations in accordance with paragraph 4, or to terminate the negotiations already opened.

Such a decision shall stop the procedure to conclude the agreement referred to in Article 6. Where such a decision has been taken, the provisions in the Annex shall not apply.

A new request to convene the special negotiating body may be made at the earliest two years after the abovementioned decision unless the parties concerned lay down a shorter period.

6. Any expenses relating to the negotiations referred to in paragraphs 3 and 4 shall be borne by the central management so as to enable the special negotiating body to carry out its task in an appropriate manner.

In compliance with this principle, Member States may lay down budgetary rules regarding the operation of the special negotiating body. They may in particular limit the funding to cover one expert only.

## Article 6

### Content of the agreement

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↓ 94/45/EC

1. The central management and the special negotiating body must negotiate in a spirit of cooperation with a view to reaching an agreement on the detailed arrangements for implementing the information and consultation of employees provided for in Article 1(1).

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↓ 94/45/EC

⇒ new

2. Without prejudice to the autonomy of the parties, the agreement referred to in paragraph 1 between the central management and the special negotiating body shall determine:

- (a) the undertakings of the Community-scale group of undertakings or the establishments of the Community-scale undertaking which are covered by the agreement;
  - (b) the composition of the European Works Council, the number of members, the allocation of seats ⇒ , taking into account where possible the need for balanced representation of employees with regard to their activities, category and gender, ⇐ and the term of office;
  - (c) the functions and the procedure for information and consultation of the European Works Council ⇒ and the arrangements for linking information and consultation of the European Works Council and national employee representation bodies, in compliance with the principles set out in Article 1(3) ⇐;
  - (d) the venue, frequency and duration of meetings of the European Works Council;
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↓ new

(e) where necessary, the composition, the appointment procedure, the functions and the procedural rules of the select committee set up within the European Works Council;

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↓ 94/45/EC

~~(ef)~~ the financial and material resources to be allocated to the European Works Council;

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↓ 94/45/EC (adapted)

⇒ new

~~(fg)~~ the ⇒ date of entry into force ⇐ ☒ of the agreement and its ☒ duration ~~de l'accord~~ ⇒ , the arrangements for amending or terminating the agreement and the cases in which the agreement should be renegotiated ⇐ and the procedure for its renegotiation ⇒ , including, where necessary, when the structure of the Community-scale undertaking or Community-scale group of undertakings changes ⇐.

3. The central management and the special negotiating body may decide, in writing, to establish one or more information and consultation procedures instead of a European Works Council.

The agreement must stipulate by what method the employees' representatives shall have the right to meet to discuss the information conveyed to them.

This information shall relate in particular to transnational questions which significantly affect workers' interests.

4. The agreements referred to in paragraphs 2 and 3 shall not, unless provision is made otherwise therein, be subject to the subsidiary requirements of the Annex.

5. For the purposes of concluding the agreements referred to in paragraphs 2 and 3, the special negotiating body shall act by a majority of its members.

#### *Article 7*

#### **Subsidiary requirements**

1. In order to achieve the objective in Article 1(1), the subsidiary requirements laid down by the legislation of the Member State in which the central management is situated shall apply:

- where the central management and the special negotiating body so decide;  
or
- where the central management refuses to commence negotiations within six months of the request referred to in Article 5(1);  
or
- where, after three years from the date of this request, they are unable to conclude an agreement as laid down in Article 6 and the special negotiating body has not taken the decision provided for in Article 5(5).

2. The subsidiary requirements referred to in paragraph 1 as adopted in the legislation of the Member States must satisfy the provisions set out in the Annex.

### **SECTION III**

#### **MISCELLANEOUS PROVISIONS**

#### *Article 8*

#### **Confidential information**

1. Member States shall provide that members of special negotiating bodies or of European Works Councils and any experts who assist them are not authorised to reveal any information which has expressly been provided to them in confidence.

The same shall apply to employees' representatives in the framework of an information and consultation procedure.

This obligation shall continue to apply, wherever the persons referred to in the first and second subparagraphs are, even after the expiry of their terms of office.

2. Each Member State shall provide, in specific cases and under the conditions and limits laid down by national legislation, that the central management situated in its territory is not obliged to transmit information 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.

A Member State may make such dispensation subject to prior administrative or judicial authorisation.

3. Each Member State may lay down particular provisions for the central management of undertakings in its territory which pursue directly and essentially the aim of ideological guidance with respect to information and the expression of opinions, on condition that, at the date of adoption of this Directive such particular provisions already exist in the national legislation.

#### *Article 9*

### **Operation of the European Works Council and the information and consultation procedure for workers**

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↓ 94/45/EC

The central management and the European Works Council shall work in a spirit of cooperation with due regard to their reciprocal rights and obligations.

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↓ 94/45/EC

The same shall apply to cooperation between the central management and employees' representatives in the framework of an information and consultation procedure for workers.

#### *Article 10*

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↓ 94/45/EC (adapted)

### **⊗ Role and ⊗ Protection of employees' representatives**

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↓ new

1. Without prejudice to the competence of other bodies or organisations in this respect, the members of the European Works Council shall collectively represent the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings and shall have the means required to apply the rights stemming from this Directive.

2. Without prejudice to Article 8, the members of the European Works Council shall inform the representatives of the employees of the establishments or of the undertakings of a Community-scale group of undertakings or, in the absence of representatives, the workforce as a whole, of the content and outcome of the information and consultation procedure carried out in accordance with this Directive.

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↓ 94/45/EC (adapted)

3. Members of special negotiating bodies, members of European Works Councils and employees' representatives exercising their functions under the procedure referred to in Article 6(3) shall, in the exercise of their functions, enjoy protection and guarantees similar  to those  provided for employees' representatives by the national legislation and/or practice in force in their country of employment.

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↓ 94/45/EC

This shall apply in particular to attendance at meetings of special negotiating bodies or European Works Councils or any other meetings within the framework of the agreement referred to in Article 6(3), and the payment of wages for members who are on the staff of the Community-scale undertaking or the Community-scale group of undertakings for the period of absence necessary for the performance of their duties.

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↓ new

4. In so far as this is necessary for the exercise of their representative duties in an international environment, the members of the special negotiating body and of the European Works Council shall be have access to training without loss of wages.

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↓ 94/45/EC

## *Article 11*

### **Compliance with this Directive**

1. Each Member State shall ensure that the management of establishments of a Community-scale undertaking and the management of undertakings which form part of a Community-scale group of undertakings which are situated within its territory and their employees' representatives or, as the case may be, employees abide by the obligations laid down by this Directive, regardless of whether or not the central management is situated within its territory.

~~2. Member States shall ensure that the information on the number of employees referred to in Article 2(1)(a) and (c) is made available by undertakings at the request of the parties concerned by the application of this Directive.~~

32. Member States shall provide for appropriate measures in the event of failure to comply with this Directive; in particular, they shall ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced.

43. Where Member States apply Article 8, they shall make provision for administrative or judicial appeal procedures which the employees' representatives may initiate when the central management requires confidentiality or does not give information in accordance with that Article.

Such procedures may include procedures designed to protect the confidentiality of the information in question.

## Article 12

↓ 94/45/EC (adapted)

### Link between this Directive and other Community and national provisions

↓ 94/45/EC (new)

~~1. This Directive shall apply without prejudice to measures taken pursuant to Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies<sup>29</sup>, and to Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses<sup>21</sup>.~~

~~2. This Directive shall be without prejudice to employees' existing rights to information and consultation under national law.~~

↓ new

1. Information and consultation of the European Works Council shall be linked with that of the national representation bodies, with due regard for the competences and areas of action of each and for the principles set out in Article 1(3).

2. The arrangements for the links between the information and consultation of the European Works Council and national employee representation bodies shall be established by the agreement referred to in Article 6. Such agreement must comply with the provisions of national law on the information and consultation of employees.

3. Where no such arrangements have been defined by agreement, the Member States shall ensure that the processes of informing and consulting the European Works Council and the national bodies start in parallel in cases where decisions likely to lead to substantial changes in work organisation or contractual relations are envisaged.

4. This Directive shall be without prejudice to the information and consultation procedures referred to in Directive 2002/14/EC and to the specific procedures referred to in Article 2 of Directive 98/59/EC and Article 7 of Directive 2001/23/EC.

5. Implementation of this Directive shall not be sufficient grounds for any regression in relation to the situation which already prevails in each Member State and in relation to the general level of protection of workers in the areas to which it applies.

↓ 94/45/EC (adapted)

⇒ new

## Article 13

### Agreements in force

<sup>30</sup> OJ No L 48, 22. 2. 1975, p. 29. Regulation as last amended by Directive 92/56/EEC (OJ No L 245, 26. 8. 1992, p. 3).

<sup>31</sup> OJ No L 61, 5. 3. 1977, p. 26.

1. Without prejudice to paragraph ~~23~~, the obligations arising from this Directive shall not apply to Community-scale undertakings or Community-scale groups of undertakings in which, ~~on the date laid down in Article 14(1) for the implementation of this Directive or the date of its transposition in the Member State in question, where this is earlier than the abovementioned date,~~ there ~~is~~ ~~is~~ already an agreement ~~is~~ on 22 September 1996 ~~is~~, covering the entire workforce, providing for the transnational information and consultation of employees ~~is~~, in so far as such agreements are still in force ~~is~~. ~~22~~ When ~~the~~ ~~is~~ these ~~is~~ agreements ~~referred to in paragraph 1~~ expire, the parties to those agreements may decide jointly to renew them. Where this is not the case, the provisions of this Directive shall apply.

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↓ new

2. Without prejudice to paragraph 3, this Directive does not establish a general obligation to renegotiate the agreements concluded pursuant to Article 6 of Directive 94/45/EC between 22 September 1996 and the date provided for under Article 15 of this Directive.

3. Where the structure of the Community-scale undertaking or Community-scale group of undertakings changes significantly, and either in the absence of provisions established by the agreements in force pursuant to Article 6 or to this Article, or in the event of conflicts between the relevant provisions of two or more agreements applicable, the central management shall initiate the negotiations referred to in Article 5 on its own initiative or at the written request of at least 100 employees or their representatives.

At least three members of the existing European Works Council or of each of the existing European Works Councils shall be members of the special negotiating body, in addition to the members elected or appointed pursuant to Article 5(2).

During the negotiations, the existing European Works Council(s) shall continue to operate in accordance with any arrangements agreed between the members of the European Works Council(s) and the central management.

When the new European Works Council established following the procedure referred to in the first subparagraph takes up its activities, the previously existing European Works Council(s) shall be dissolved and the agreement(s) instituting them shall be terminated.

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↓ 94/45/EC (adapted)

#### *Article 14*

#### **Final provisions**

~~1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 22 September 1996 or shall ensure by that date at the latest that management and labour introduce the required provisions by way of agreement, the Member States being obliged to take all necessary steps enabling them at all times to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof.~~

~~2. When Member States adopt those provisions, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.~~

## Article ~~15~~ 14

### Review by the Commission

~~Not later than 22 September 1999, the Commission shall, in consultation with the Member States and with management and labour at European level, review its operation and, in particular examine whether the workforce size thresholds are appropriate with a view to proposing suitable amendments to the Council, where necessary.~~

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↓ new

Five years after the date specified in Article 15 of this Directive, the Commission shall report to the European Parliament, the Council and the European Economic and Social Committee on the implementation of this Directive, making appropriate proposals where necessary.

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## Article 15

### Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles [...] and Annex I, points [...] [*The articles and annexes which have been changed as to the substance by comparison with the earlier Directive*] no later than [...] or shall ensure that management and labour introduce on that date the required provisions by way of agreement, the Member States being obliged to take all necessary steps enabling them at all times to guarantee the results imposed by this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. They shall also include a statement that references in existing laws, regulations and administrative provisions to the directive repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

## Article 16

### Repeal

Directive 94/45/EC, as amended by the Directives listed in Annex II, Part A, is repealed with effect from [...] [day after the date set out in the first subparagraph of Article 15(1) of this Directive], without prejudice to the obligations of the Member States relating to the time-limit for transposition into national law of the Directives set out in Annex II, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex III.

*Article 17*

**Entry into force**

This Directive shall enter into force on the [twentieth] day following that of its publication in the *Official Journal of the European Union*.

Articles [...] and Annex I, points [...], [*The articles and annexes which are unchanged by comparison with the earlier Directive*] shall apply from [day after the date set out in the first subparagraph of Article 15(1)].

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↓ 94/45/EC

*Article ~~16~~ 18*

This Directive is addressed to the Member States.

**ANNEX I**  
**SUBSIDIARY REQUIREMENTS**

**referred to in Article 7 of the Directive**

1. In order to achieve the objective in Article 1(1) of the Directive and in the cases provided for in Article 7(1) of the Directive, the establishment, composition and competence of a European Works Council shall be governed by the following rules:

~~(a) The competence of the European Works Council shall be limited to information and consultation on the matters which concern the Community-scale undertaking or Community-scale group of undertakings as a whole or at least two of its establishments or group undertakings situated in different Member States.~~

~~In the case of undertakings or groups of undertakings referred to in Article 4(2), the competence of the European Works Council shall be limited to those matters concerning all their establishments or group undertakings situated within the Member States or concerning at least two of their establishments or group undertakings situated in different Member States.~~

- (a) The competence of the European Works Council shall be determined in accordance with Article 1(3).

The information of the European Works Council shall relate in particular to the structure, economic and financial situation, probable development and production and sales of the Community-scale undertaking or group of undertakings. The information and consultation of the European Works Council shall relate in particular to the situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies.

The consultation shall be conducted in such a way that the employees' representatives can meet with the central management and obtain a response, and the reasons for that response, to any opinion they might express.

- (b) The European Works Council shall be composed of employees of the Community-scale undertaking or Community-scale group of undertakings elected or appointed from their number by the employees' representatives or, in the absence thereof, by the entire body of employees.

The election or appointment of members of the European Works Council shall be carried out in accordance with national legislation and/or practice.

- ~~(c) The European Works Council shall have a minimum of three members and a maximum of 30.~~

~~Where its size so warrants, it shall elect a select committee from among its members, comprising at most three members.~~

~~It shall adopt its own rules of procedure.~~

~~(d) In the election or appointment of members of the European Works Council, it must be ensured:~~

~~— firstly, that each Member State in which the Community-scale undertaking has one or more establishments or in which the Community-scale group of undertakings has the controlling undertaking or one or more controlled undertakings is represented by one member,~~

~~— secondly, that there are supplementary members in proportion to the number of employees working in the establishments, the controlling undertaking or the controlled undertakings as laid down by the legislation of the Member State within the territory of which the central management is situated.~~

↓ new

(c) The members of the European Works Council shall be elected or appointed in proportion to the number of employees in each Member State by the Community-scale undertaking or Community-scale group of undertakings, by allocating in respect of each Member State in which at least 50 employees are employed one seat per portion of employees employed in that Member State amounting to 10%, or a fraction thereof, of the number of employees employed in all the Member States taken together;

(d) To ensure that it can coordinate its activities, the European Works Council shall elect a select committee from among its members, comprising at most five members, which must have the conditions enabling it to exercise its activities on a regular basis.

↓ 94/45/EC (adapted)

⇒ new

⊗ It shall adopt its own rules of procedure; ⊗

(e) The central management and any other more appropriate level of management shall be informed of the composition of the European Works Council.

(f) Four years after the European Works Council is established it shall examine whether to open negotiations for the conclusion of the agreement referred to in Article 6 of the Directive or to continue to apply the subsidiary requirements adopted in accordance with this Annex.

Articles 6 and 7 of the Directive shall apply, mutatis mutandis, if a decision has been taken to negotiate an agreement according to Article 6 of the Directive, in which case ‘special negotiating body’ shall be replaced by ‘European Works Council’.

2. The European Works Council shall have the right to meet with the central management once a year, to be informed and consulted, on the basis of a report drawn up by the central management, on the progress of the business of the

Community-scale undertaking or Community-scale group of undertakings and its prospects. The local managements shall be informed accordingly.

~~The meeting shall relate in particular to the structure, economic and financial situation, the probable development of the business and of production and sales, the situation and probable trend of employment, investments, and substantial changes concerning organization, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies.~~

3. Where there are exceptional circumstances ⇨ or decisions ⇩ affecting the employees' interests to a considerable extent, particularly in the event of relocations, the closure of establishments or undertakings or collective redundancies, the select committee or, where no such committee exists, the European Works Council shall have the right to be informed. It shall have the right to meet, at its request, the central management, or any other more appropriate level of management within the Community-scale undertaking or group of undertakings having its own powers of decision, so as to be informed and consulted ~~on measures significantly affecting employees' interests.~~

Those members of the European Works Council who have been elected or appointed by the establishments and/or undertakings which are directly concerned by the ~~measures~~ ⇨ circumstances or decisions ⇩ in question shall also have the right to participate in the ☒ where a ☒ meeting is organised with the select committee.

This information and consultation meeting shall take place as soon as possible on the basis of a report drawn up by the central management or any other appropriate level of management of the ~~Communityscale (SIC! Community-scale)~~ undertaking or group of undertakings, on which an opinion may be delivered at the end of the meeting or within a reasonable time.

This meeting shall not affect the prerogatives of the central management.

⇨ The information and consultation procedures provided for in the above circumstances shall be carried out without prejudice to Article 1(2) and Article 8 of this Directive. ⇩

4. The Member States may lay down rules on the chairing of information and consultation meetings.

Before any meeting with the central management, the European Works Council or the select committee, where necessary enlarged in accordance with the second paragraph of point 3, shall be entitled to meet without the management concerned being present.

5. Without prejudice to Article 8 of the Directive, the members of the European Works Council shall inform the representatives of the employees of the establishments or of the undertakings of a ~~Communityscale (SIC! Community-scale)~~ group of undertakings or, in the absence of representatives, the workforce as a whole, of the content and outcome of the information and consultation procedure carried out in accordance with this Annex.
6. The European Works Council or the select committee may be assisted by experts of its choice, in so far as this is necessary for it to carry out its tasks.
7. The operating expenses of the European Works Council shall be borne by the central management.

The central management concerned shall provide the members of the European Works Council with such financial and material resources as enable them to perform their duties in an appropriate manner.

In particular, the cost of organising meetings and arranging for interpretation facilities and the accommodation and travelling expenses of members of the European Works Council and its select committee shall be met by the central management unless otherwise agreed.

In compliance with these principles, the Member States may lay down budgetary rules regarding the operation of the European Works Council. They may in particular limit funding to cover one expert only.



**ANNEX II**

**Part A**

**Repealed Directive with its successive amendments**  
(referred to in Article 16)

|                               |                                |
|-------------------------------|--------------------------------|
| Council Directive 94/45/EC    | (OJ L 254, 30.9.1994, p. 64)   |
| Council Directive 97/74/EC    | (OJ L 10, 16.1.1998, p. 22)    |
| Council Directive 2006/109/EC | (OJ L 363, 20.12.2006, p. 416) |

**Part B**

**Time-limits for transposition into national law**  
(referred to in Article 16)

| Directive   | Time-limit for transposition |
|-------------|------------------------------|
| 94/45/EC    | 22.09.1996                   |
| 97/74/EC    | 15.12.1999                   |
| 2006/109/EC | 1.1.2007                     |

### ANNEX III

#### CORRELATION TABLE

| Directive 94/45/EC | This Directive                |
|--------------------|-------------------------------|
| Article 1(1)       | Article 1(1)                  |
| Article 1(2)       | Article 1(2), first sentence  |
| -                  | Article 1(2), second sentence |
| -                  | Article 1(3) and (4)          |
| Article 1(3)       | Article 1(5)                  |
| [...]              | [...]                         |
| Annex              | Annex I                       |
| -                  | Annexes II and III            |