

COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a
COUNCIL DIRECTIVE
on the establishment of European committees or procedures in
Community-scale undertakings and Community-scale groups of undertakings
for the purposes of informing and consulting employees

(presented by the Commission)

EXPLANATORY MEMORANDUM

I. Introduction

1. On 5 December 1990, the Commission adopted a "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"⁽¹⁾.

The Economic and Social Committee gave its opinion on 18 March 1991⁽²⁾.

On 10 July 1991, the European Parliament adopted an opinion on the proposal to the Council⁽³⁾.

On 10 September 1991, the Commission adopted an amended proposal pursuant to Article 149(3) of the EEC Treaty⁽⁴⁾.

2. The Council of Ministers discussed the Commission's successive proposals at 14 meetings at the level of its Working Party on Social Questions (between 3 July 1991 and 6 September 1993) and at five meetings of the Council of Labour and Social Affairs Ministers (on 6 May 1991, 3 December 1991, 6 April 1993, 1 June 1993 and 12 October 1993).

At none of these meetings did the Council reach unanimous agreement on the Commission's proposal, as required by the legal basis for the proposal (Article 100 of the EEC Treaty). The Council did, however, establish, at its meeting on 12 October 1993, a broad consensus among the great majority of delegations on a text submitted by the Belgian Presidency. The Commission informed the Council of its intention to initiate, on entry into force of the Treaty on European Union on 1 November 1993, the procedures provided for in the Agreement on Social Policy annexed to the Protocol on Social Policy annexed in turn to the Treaty establishing the European Community, on the basis of the text submitted by the Belgian Presidency and the views expressed in the course of the Council's discussions.

3. On 17 November 1993, the Commission decided to set these procedures in motion. 18 November 1993 saw the commencement of a six-week period of consultation of the social partners at European level, in accordance with Article 3(2) of the Agreement on Social Policy, with the dispatch of a first consultative document on the possible direction of Community action in the field of information and consultation of workers in Community-scale undertakings or groups of undertakings. The employers' associations, federations and confederations and the trade unions submitted a general opinion to the Commission on the questions put to them (see Annex 1).

On 8 February 1994, in accordance with Article 3(3) of the Agreement on Social Policy, the Commission decided to consult the social partners at Community level on the content of the proposal, including the possible legal basis for such a proposal.

(1) COM(90) 581 final, OJ No C 39, 15.2.1991.

(2) OJ No C 120, 6.5.1991.

(3) OJ No C 240, 16.9.1991.

(4) COM(91) 345 final, OJ No C 336, 31.12.1991.

By the deadline for this second phase of consultation (30 March 1994), the social partners sent the Commission their views on the consultation document (see Annex 2). Despite all the efforts made, the social partners at Community level failed to reach agreement on setting in motion the procedure provided for in Article 4 of the Agreement on Social Policy.

4. On 13 April 1994, the Commission, taking the view that a Community initiative on the information and consultation of workers in Community-scale undertakings and groups of undertakings was still warranted, decided to adopt the present proposal, with a view to presenting it to the Council on the basis of Article 2(2) of the Agreement on Social Policy.

II. General justification for the initiative

A. The impact of the internal market

5. The internal market is, according to Article 8a of the EEC Treaty "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty". The dismantling of internal frontiers is already resulting in major corporate re-organizations in the Community, and will continue to do so, particularly in the form of concentrations. The accelerating pace of transfrontier economic restructuring associated with this process, involving an increase in mergers, take-overs, transfers and joint ventures, will result in more and more employees being subject to key corporate decisions taken outside the country where their establishment or undertaking is located.

As a result of changes in the structure of undertakings, the procedures for consulting and disclosing information to employees are often no longer consistent with these new structures. Whereas firms have become more complex in that they have grown or expanded their operations by setting up subsidiaries or establishments in several Member States, their employees continue to be informed and consulted in a segmented fashion, reflecting the scope of existing national laws and practices.

Existing procedures for informing and consulting employees in a national context only have effect within the legal framework of that country, only benefit the employees of that State and generally only relate to activities carried out within national boundaries.

The same applies to procedures for informing and consulting employees provided for in the Community directives setting out rules on information and consultation on collective redundancies and transfers of undertakings. Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies⁽⁵⁾ and Council Directive 77/187/EEC of 14 February 1977 on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses⁽⁶⁾ incorporate procedures for informing and consulting the representatives of those employees affected by the operations in question. However, these information and consultation requirements do not apply specifically and effectively to situations in which the decision-making centre is not situated in the Member States in which the employees affected by its decision are employed.

⁽⁵⁾ OJ No L 48, 22.2.1975.

⁽⁶⁾ OJ No L 61, 5.3.1977.

B. The current economic crisis, the competitive status of European Community undertakings and the liberalization of international trade

6. The need to set up transnational information and consultation mechanisms for workers in Community-scale undertakings and groups of undertakings has become even more urgent with the worsening economic crisis affecting all Member States of the Union.

On the one hand, the crisis is making undertakings adapt to the new - often recessive - economic context, in very many cases requiring restructuring measures which, in the case of complex undertakings and groups of undertakings with establishments or subsidiaries in various Member States, are decided on centrally by the undertaking or the group and which concern one or more of the establishments and have an effect on workers' interests.

It is essential, then, for such restructuring measures to take place in socially acceptable conditions and for the workers concerned to at least be informed and consulted in advance.

7. On the other hand, as was underlined in the White Paper on growth, competitiveness and employment, enhancing the competitiveness of European businesses, which has become a vital factor in finding a positive response to current problems, requires higher productivity and greater commitment on the part of workers in the day-to-day life of their firms. Creating and developing appropriate information and consultation mechanisms for workers at the level of Community-scale undertakings or groups of undertakings constitutes a prior condition for this enhanced level of commitment, particularly in the current difficult social climate.
8. Finally, the liberalization of world trade and the globalization of the economy are creating conditions which are more favourable to the restructuring of undertakings and groups of undertakings, which are thus acquiring more and more room for manoeuvre, especially in terms of the transfer of production units from one Member State to another and even to non-Community countries. Here too, the prior information and consultation of workers is a minimum condition if decisions are to be adopted and implemented in an acceptable social context.

III. The historical context

A. Earlier initiatives by the Commission

9. Procedures for informing and consulting employees of European-scale undertakings have been the subject of various Community proposals. The original Commission proposals of 1970⁽⁷⁾ and 1975⁽⁸⁾ for a European Company Statute provided for both worker participation in a Supervisory Board and the representation of the interests of workers in a European Works Council or Group Works Council.

⁽⁷⁾ OJ No C-124, 10.10.1970.

⁽⁸⁾ COM(75) 150 final.

However, the 1985 White Paper, "Completing the Internal Market", provided for the preparation of a new European Company Statute, discussion of the amended 1975 proposal having been suspended by the Council in 1982. Accordingly, proposals for a Council regulation on the Statute for a European Company⁽⁹⁾ and for a Council directive complementing the Statute with regard to the involvement of employees in the European Company⁽¹⁰⁾ were presented by the Commission to the Council on 25 August 1989. The draft directive sets out measures to enable employees "to participate in the supervision and strategic development" of companies which are voluntarily formed throughout the Community in the form of a European public limited company (Societas Europea, "SE"). Undertakings operating in more than one Member State, other than companies formed as European Companies, are not affected by its provisions, European Company status being optional for the undertakings concerned. These proposals have not yet been adopted by the Council.

By the same token, it is worth stressing the importance of the revised proposal known as the "Fifth Directive" (19 August 1983), which is still on the table at the Council, providing for employee participation in undertakings employing at least 1 000 people (but not in groups of undertakings) on a management or administrative board, a body representing the employees or systems adopted by collective agreement.

10. In contrast, the proposal for a Council directive on procedures for informing and consulting the employees of undertakings with complex structures, in particular transnational undertakings⁽¹¹⁾, submitted to the Council on 24 October 1980 and amended on 13 July 1983⁽¹²⁾, covered all undertakings or groups of undertakings having one or more establishments or subsidiaries in the Community and employing as a whole at least 1 000 employees in the Community. The proposal provided that EC or non-EC undertakings or parent undertakings, having establishments or subsidiaries in the EC, must regularly inform and consult via the local management the employees' representatives provided by the law or practice of the Member States. No single body for employee representation was set up and the information and consultation procedures envisaged were channelled throughout the existing national representation structures. After lengthy discussion, the amended proposal for a Council directive on procedures for informing and consulting the employees of undertakings with complex structures, in particular transnational undertakings, did not find enough support among the Member States.

The Council subsequently adopted a Resolution⁽¹³⁾ relating to the Commission's amended proposal, which acknowledged the political and economic importance of the problem and emphasized the importance of a social area in the context of the completion of the Community internal market and the need for greater convergence between the rights of employees in the Member States to be informed and consulted regarding major decisions in the undertakings concerned. The Resolution also called on the Commission to continue its work on this subject and, where appropriate, to present another proposal, drawing the attention of the social partners in the Community to the importance of arriving at agreements at the appropriate level which

⁽⁹⁾ OJ No C 263, 16.10.1989.

⁽¹⁰⁾ OJ No C 263, 16.10.1989.

⁽¹¹⁾ OJ No L 297, 15.11.1990. Supplement 3/80, EC Bulletin.

⁽¹²⁾ OJ No C 217, 12.8.1983. Supplement 2/83, EC Bulletin.

⁽¹³⁾ OJ No C 203, 12.8.1986.

provide for information and consultation of employees with regard to the provisions of Article 118b of the Treaty.

B. The views of the other Community instances

11. With this Council Resolution in mind, the Commission has examined the opinions of the two sides of industry reached at Community level within the framework of the social dialogue, the opinion of the Economic and Social Committee on the social consequences of cross-frontier mergers⁽¹⁴⁾ and the views and resolutions of the European Parliament.

12. At European level, within the framework of the Val Duchesse social dialogue, in spite of the complexity of the issue and notwithstanding their different approaches, the two sides of industry have been able to identify some common ground as to the desirability of information and consultation in connection with the introduction of new technology. In particular, the joint opinion adopted by ETUC, UNICE and CEEP states:

"The participants stress the need to motivate the staff at all levels of responsibility in firms and to develop their aptitude to change, amongst other ways by means of good information and consultation practices.

They consider that such motivation will be all the higher if all the staff are in a position to understand the economic and social need for structural and technological change and the potential which such change offers to firms and to the workforce.

Both sides take the view that, when technological changes which imply major consequences for the workforce are introduced in the firm, workers and/or their representatives should be informed and consulted in accordance with the laws, agreements and practices in force in the Community countries. This information and consultation must be timely".

13. The Economic and Social Committee, in its opinion of 18 October 1989 on the social consequences of cross-frontier concentrations between undertakings⁽¹⁵⁾, stated: "Since, independently of [the European Company Statute], there is a need for information and participation rights for employees' representatives in connection with cross-frontier concentrations between undertakings, a Community framework should be devised for this. This framework ought to be based on national arrangements for employee representation, and provide for regular information and consultation of employees' representatives at European level". The Economic and Social Committee's opinion went on to propose that in cross-frontier undertakings and groups, "a European advisory committee of employee representatives [should] be set up alongside the group/undertaking management", and that Community legislation should cover issues such as the composition of such a committee, the need for clearly defined information and consultation rights, the frequency of meetings, and the responsibility of the undertaking or group for meeting the operating costs of the committee.

⁽¹⁴⁾ OJ No C 329, 30.12.1989.

⁽¹⁵⁾ OJ No C 329, 30.12.1989.

14. The Commission has taken due consideration of various resolutions of the European Parliament, particularly its resolution of 16 March 1989⁽¹⁶⁾ on the Commission's Memorandum on the European Company Statute, in which the European Parliament called for the inclusion of provisions requiring the establishment of European Works Councils (as originally provided by the 1970 and 1975 proposals), and the Resolution of 15 February 1990 on the most important legislative proposals in the social field to be included in the Commission's programme for 1990⁽¹⁷⁾ which recommends, inter alia, "the setting up of European consultative committees in multinational undertakings".

C. The legal situation at national and international level

15. The Commission has taken into account a range of other factors, more particularly the aims pursued by certain non-binding international instruments such as the OECD guiding principles and the ILO tripartite declaration, and the role of legislation in promoting employee involvement.
16. As regards national legal systems, a clear distinction can be drawn between representative or indirect forms of employee involvement (e.g. works councils, employee board-level representation) and individual or direct forms (e.g. communications groups, profit sharing, employee share ownership).

A recent study⁽¹⁸⁾ shows that not only do these two distinct types of employee involvement fulfil different functions, but they also rely on statutory provision to very different degrees. The study concludes that legal requirements have played a limited role in the development of direct forms of involvement, but that legislation has been a necessary precondition for the widespread establishment of works councils and employee board-level representation in virtually every Member State where they exist (the exception being the cooperation committees in Denmark which operate without statutory backing).

17. The aim of the Commission is to stimulate a process of information and consultation at European level without creating an unduly heavy burden on undertakings. The Commission wants to introduce these procedures only in large enterprises. Although large enterprises are in official statistics classified as undertakings with more than 500 employees, the Commission wants to limit its proposal to enterprises or groups of enterprises with at least 1 000 employees within the Community having establishments or undertakings with at least 100 employees in at least two Member States.

According to statistics for 1986, large businesses (i.e. those with more than 500 employees) accounted for less than 1% of the total number of firms, but provided 28% of employment⁽¹⁹⁾.

⁽¹⁶⁾ OJ No C 96, 17.4.89.

⁽¹⁷⁾ OJ No C 68, 19.3.1990.

⁽¹⁸⁾ Mr Gold and Mr Hall, "Legal Regulation and the Practice of Employee Participation in the European Community", European Foundation for the Improvement of Living and Working Conditions, Dublin, (1990).

⁽¹⁹⁾ Enterprises in the European Community. Luxembourg, 1990, p. 37.

As the objective of the proposal is to overcome the territorial limitations of national laws on information and consultation procedures by the setting up of a European Works Council, multiplant national undertakings and national groups or undertakings are not covered. On the other hand, via national laws implementing Council Directives 75/129 and 77/187 concerning respectively procedures for informing and consulting employees in the case of collective redundancies and transfers of undertakings, multiplant national undertakings are subject to the same or similar obligations as are single national undertakings and, in the majority of Member States, they are also subject to procedures for information and consultation equivalent to those envisaged by the present proposal.

With respect to national groups of undertakings, it should be added that there is legislation concerning national group-level works councils in four Member States (France, the Federal Republic of Germany, the Netherlands and Portugal) and well developed case-law in many Member States concerning the determination of the real employer behind a group structure.

D. Practical experience of transnational information and consultation of workers

18. The Commission has also taken note of the development of European-level information and consultation bodies and procedures in a number (just less than 30) of large transnational undertakings or groups of undertakings operating in Europe, and indeed in drawing up its proposals has sought the views of management and employee representatives party to certain of these arrangements. Similar arrangements operate informally in certain other companies or groups. The Commission is also aware that discussions on the establishment of European-level information and consultation committees are taking place in a number of other major European transnational groups of enterprises which employ a substantial number of employees across the Community.

IV. The elements of the proposal

A. General remarks

19. The first thing to note is that this proposal is, in addition to the factors, initiatives and positions mentioned above, the outcome of discussions held within the Community institutions and elsewhere since the beginning of 1991 (see point 1), more particularly:
- the Commission's initial proposal of 15 December 1990;
 - the opinions on the above proposal delivered by the European Parliament and the Economic and Social Committee;
 - the Commission's amended proposal for 10 September 1991;
 - the result of discussions in the Council, more particularly the outcome of the Council of Ministers of Employment and Social Affairs of 12 October 1993;
 - the views expressed by the social partners at European level during the two phases of consultation which have just terminated.

20. The Commission has taken a detailed look at the various changes made to its initial proposal of 1990 in the light of the objectives which induced it to take the initiative in the first place, and in the light of recent economic, social and institutional changes and the broad lines of Community social policy as set out in the White Paper on growth, competitiveness and employment and the Green Paper on European social policy (options for the Union).
21. In adopting this proposal, as in the recent past, the Commission has been very mindful of the fact that this is the first time that the Agreement on Social Policy annexed to the Social Protocol, annexed in turn to the Treaty establishing the European Community, is being applied in practice. This Agreement, which seeks essentially to widen and clarify Community powers in terms of social policy, assigns an enhanced role in the legislative process to the social partners, something which the Commission has endeavoured to facilitate and encourage throughout the consultation procedure preceding this proposal.

The rules which this proposal seeks to institute at European level are addressed primarily to the social partners in that it is they who are the addressees and the principal players in the practical implementation of the information and consultation mechanisms set up under this proposal.

Recognition of the important role of the social partners in the future development of European social policy and more particularly with regard to this proposal has led the Commission to deploy all the means at its disposal to facilitate the quest for, and conclusion of, an agreement between the social partners at Community level in accordance with Articles 3 and 4 in the Agreement on Social Policy.

To this end, the document which the Commission sent to the social partners as part of the second phase of consultation provided for in Article 3(3) of the Agreement sought to reconcile the two sides' positions as expressed in the course of the first phase of the consultation. This approach was motivated exclusively by a desire to encourage an agreement-based solution, and meant that the Commission had to deviate from the most recent text on the table at the Council in as much as it seemed necessary and useful to take account of the not insignificant shift in the position of the principal employers' organizations, though respecting the essential rules and principles of the text and of the initial proposal of December 1990.

The Commission's approach set in motion a dynamic process between the social partners at European level, which made them take a hard look at their respective positions on this important subject. The Commission expected them at any moment to reach agreement on initiating the procedure provided for in Article 4 of the Agreement on Social Policy. Although no such agreement was in fact forthcoming, it does not follow that everything necessary and possible should not continue to be done to derive maximum advantage from the points of consensus or possible "rapprochement" between the positions of the social partners, or to seek an appropriate balance between their respective positions on the points on which they diverge. The fact that this might reopen discussion on a number of aspects on which consensus has already been reached in the Council would probably be compensated for very largely by the Directive's enhanced potential for alignment with existing social realities and by the fact that the implementation of the procedures instituted by the Directive in major European undertakings will be that much easier, more harmonious and more

effective if the leading employers' and workers' organizations at European - and national - level can identify with the final text.

The Commission would like, then, to draw the Council's attention to the importance of discussions held by the social partners over recent months, as reflected in the significant shift in their positions; these deserve to be given due attention. To this end, the Commission has attached (Annexes 1 and 2) the results of the two phases of the consultation of the social partners.

22. The proposal which the Commission is now making to the Council takes due account of, and seeks to reconcile, all the abovementioned positions, more particularly the text presented by the Belgian Presidency to the Social Affairs Council on 12 October 1993, which remains the principal point of reference for this proposal.

The text has had to undergo a number of changes, some of them purely technical or editorial, others imposed by the fact that the proposed Directive will not be applicable in the United Kingdom (resulting in removal from the enacting terms of all references to the "European Community", and references to the "Member States" being taken to mean the eleven Member States of the European Union which actually signed the Agreement on Social Policy), while others reflect a different option on the part of the Commission vis-à-vis the Council's most recent working text, motivated by a desire to make application of the Directive more appropriate and consensual. These latter changes concern:

- the exclusion from the scope of Article 4 of the Directive of the crews of merchant ships, which the Commission cannot accept;
- the requirements relating to the commencement of the procedure for setting up a European committee or some other information and consultation procedure (Article 5(1)) (see point 30 of this explanatory memorandum);
- removal of the requirement relating to compliance with a number of provisions in the Annex in the context of the agreement provided for in Article 6(2) (see point 31 of this explanatory memorandum);
- conversion to an obligation of the facility available to Member States to adopt provisions relating to the confidentiality of information supplied to workers' representatives (Article 8(1)) and the non-communication to workers' representatives of information which might substantially damage the interests of the undertaking (Article 8(2));
- the facility for Member States to lay down particular provisions for undertakings and establishments which pursue the aim of ideological guidance (Article 8(3) of the Council text), which the Commission cannot accept;
- requirements relating to agreements in existence at the time of entry into force of the Directive (Article 13) (see point 36 of this explanatory memorandum);
- the content of information and consultation obligations provided for in paragraphs 2 and 3 of the Annex (see point 33 of this explanatory memorandum).

B. The objectives

23. The objective of the proposal is to improve the information and consultation of employees in Community-scale undertakings and groups of undertakings. The risk here is that this aim may become dissipated in a range of procedures which makes it impossible to keep track of what is going on, and to this end it is proposed to set up a European committee where requested by employees or their representatives according to a transparent procedure, and in so far as the interested parties do not decide, by common accord, to set up some other information and consultation procedure. Of course, the initiative in setting up a Council of this kind can come from the central management of the undertaking or group of undertakings, but must receive the agreement of the employees.

C. Scope

24. It is proposed that European committees be restricted to Community-scale undertakings and groups of undertakings with more than 1 000 employees and at least two establishments in different Member States each employing at least 100 people. The thinking behind this dual threshold is that:

- small business should not be burdened with additional obligations which might be detrimental to their development;
- this proposal should have no effect whatsoever on existing information and consultation procedures in Member States based on national legislation and practices. The idea here is that, under the subsidiarity principle, only Community-scale undertakings should be affected, inasmuch as Member States are, in the absence of provisions common to all, unable to make provision individually for transnational information and consultation procedures.

Of course, the mechanisms for informing and consulting employees which the proposed Directive seeks to create at the level of Community-scale undertakings or groups of undertakings are in no way intended to prevent the coexistence and the development of decentralized information and consultation practices which are in line with current business practice or the specific needs of individual businesses.

25. The Commission proposal also covers cases where Community-scale undertakings or groups of undertakings have their headquarters outside the territory of the Member States. Where this is the case, the Commission takes the view that such businesses should be treated in a similar way based on either the representative agent of the undertaking or group of undertakings or the undertaking with the highest number of employees in the territory of the Member States.
26. Community-scale undertakings and groups of undertakings with their central management in the United Kingdom will, of course, be subject to the same obligations as are imposed on undertakings and groups of undertakings from non-Community countries.

References to the "Member States" in the preamble and in the enacting terms (and in this explanatory memorandum) must of course be taken to mean the 11 Member States which have signed the Agreement on Social Policy and which are the addressees of the proposed Directive.

D. The legal concepts of "controlled undertaking", "controlling undertaking" and "representatives of the employees"

27. Articles 2 and 3 of the proposal spell out what is meant by the terms "controlled undertaking", "controlling undertaking" and "representatives of the employees" for the purposes of this Directive. The first two definitions are based on Council Directive 89/440/EEC of 18 July 1989, amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts⁽²⁰⁾.
28. The concept of "representatives of the employees" is taken from Council Directives 75/129/EEC on collective redundancies and 77/187/EEC on transfers of undertakings. However, unlike the above Directives, this proposal says that, where there is no employees' representative, the body of employees is entitled to elect representatives on the special negotiating body and on the European committee if the absence of representation is no fault of their own.

E. Proposed approach

29. As indicated above, institution of a European committee must, under the terms of this Directive, result from a request put forward either by the central management of the undertaking or group of undertakings, or by the employees or their representatives. In other words, there can be no question of imposing a committee from the outside. The approach proposed by the Commission gives employees' elected representatives the chance, in the first instance, to decline setting up a European committee.
30. The Commission feels that it would be desirable to strengthen the requirements provided for in Article 5(1) concerning the commencement of negotiations at the workers' request, given that the latest Council text allows this to be done (as indeed did the Commission's initial proposal) by two employees only. It would seem appropriate to provide for a minimum number of applicants (at least 100 employees or their representatives from at least two undertakings or establishments situated in at least two different Member States) with the power to commence negotiations with a view to setting up a European committee or some other information and consultation procedure.
31. Once negotiations have begun, the concluding agreement between the two parties will, entirely freely and without the provisions in the Annex being applicable, define the nature, functions and powers and operating procedure of a committee. If the need for a committee is apparent to all parties, the Commission takes the view that, under the principle of autonomy of the two sides of industry, it is up to workers and management to decide by agreement on the essential characteristics of the committee, including the possibility of using existing structures to this effect. In fact, the decision may be not to set up a committee at all, without the mandatory alternative procedure having to comply with the provisions of the Annex either. On this point, the Commission now accepts the legitimate points made by the social partners to the effect that the existence of minimum provisions which would be applicable even in the event of agreement being reached would constitute a totally unwarranted violation of their bargaining autonomy.

⁽²⁰⁾ OJ No L 210, 21.7.1989, p. 1.

The flexible approach proposed by the Commission reflects the need to bear in mind the special situations of Community-scale undertakings and groups of undertakings and their employees, and is designed to ensure that such European committees are set up on the basis of agreement between the parties concerned.

F. Absence of agreement

32. It may happen that, after negotiation, the parties concerned are unable to reach agreement on the nature, functions and powers of the committee, or on its operating procedure. To meet the stated objective of ensuring information and consultation within Community-scale undertakings and groups of undertakings in this situation, the proposal provides for a number of subsidiary requirements to be applied in this case (and in cases where the central management refuses to initiate negotiations within six months of the request being made, and of course in cases where the two sides so decide). These are set out in the Annex to this Directive and form an integral part of it. They are mainly concerned with the nature and content of information and consultation, but also deal with the composition and operating procedures of the committee.

As regards these subsidiary requirements, the following points apply:

- On the question of competence, the requirements deal with matters affecting Community-scale undertakings or groups of undertakings as such located in the Community, to the exclusion of matters covered by national legislation or national practices in establishments or undertakings in the Member States, and, in the case of undertakings or groups of undertakings with headquarters outside the Community, matters relating to establishments or undertakings located outside the Community. Matters relating to information and consultation are defined in the spirit of the joint opinion adopted in March 1987 by the two sides of industry at Community level on the understanding that such consultation take place in good time. The proposal does not provide for bypass procedures, nor does it lay down a fixed period within which decisions subject to consultation cannot be put into practice in the absence of an opinion on the part of the employees' representatives on the committee. The Commission takes the view that the desire for dialogue reflected in the setting up of a committee should lead to the two parties working naturally together in an open and constructive atmosphere.
- As regards the composition and operating procedures of the committee, the frequency of meetings and its operating methods, the subsidiary requirements set out in the Annex are both modest and realistic in terms of both the number of meetings of the committee (at least one information and consultation meeting per year) and the funding (borne by the Community-scale undertaking or group of undertakings). It should be stressed that this approach reflects current practice on the part of undertakings and groups which have already set up committees of this kind. Given the substantial advantages that such committees can bring for the two parties in contributing to a better mutual flow of information and a constructive dialogue, it seems reasonable to suppose that these subsidiary requirements will not impose a significant additional burden on central management - quite the opposite!

33. The Commission has weighed up the critical remarks made by the employers' organizations, which are wary of the disrupting effect of having too many consultation meetings if they had to be held every time there was a decision in the offing which might have a significant effect on employees' interests. At the same time, though, the Commission feels that the consultation of workers is an essential element in achieving the objectives of the proposed Directive, at least in respect of particularly important and sensitive decisions on matters like relocation, closures and collective redundancies.

With a view to striking an acceptable balance, the Commission is now proposing that, in addition to the annual information and consultation meeting provided for in paragraph 2 of the Annex, which has to remain the most important means of informing and consulting employees in Community-scale undertakings and groups of undertakings, consultation meetings might also be held, in cases like those mentioned above, with a restricted delegation from the European committee, viz. the executive committee, which has to be set up where the size of the European committee warrants it - see paragraph 1(c) of the Annex). Where the European committee is not large enough to justify the creation of an executive committee, such meetings must be held with the European committee itself. This solution will make it possible to preserve the essential objectives of the proposed Directive and to avoid the excessive cost and cumbersomeness of consulting the entire committee every time a decision is envisaged.

G. Miscellaneous provisions

34. The Commission's proposal features a number of provisions designed to ensure that the European committee functions efficiently.

These are primarily concerned with confidentiality - i.e. the employees' representatives and the experts are required to respect the confidentiality of information received, and the Directive authorizes undertakings to withhold any information which, if disclosed, would substantially damage their business interests. Should anyone object that imposing confidentiality provisions of this kind runs counter to a genuine flow of information and would make the other side "hostages" to management, the Commission would point to the elements of "transparency" and mutual respect between the parties.

By the same token, however necessary the confidentiality provisions are, their aim is not to encourage a systematic desire to "conceal" information. European committees and alternative procedures for informing and consulting employees can only work efficiently and effectively for the information and consultation of employees if both sides agree to play the game. On the basis of past experience in existing committees, the Commission has every reason to believe that this will work.

35. A number of provisions (Articles 9 to 12) are proposed with a view to establishing a principle of cooperation between the central management and the European committee (or the employees' representatives under a different information and consultation procedure), affording protection to workers' representatives, ensuring that the Member States have provisions designed to see to it that the obligations arising from

the Directive are discharged, and clarifying the relationship between the Directive and other Community and national legal instruments on information and consultation of workers.

36. The provision introduced by the Council with a view to permitting the continued existence of agreements which were already in existence in Community-scale undertakings and groups of undertakings at the time of entry into force of the Directive, and making provision for transnational information and consultation procedures, is maintained. However, the Commission intends that these agreements should not be affected by the entry into force of the Directive unless the parties do not agree to renew them when they reach their expiry date. The Commission feels that there should be no time limit to this rule.

H. Legal basis

37. Article 2(1) of the Agreement on Social Policy annexed to the Protocol on Social Policy, annexed in turn to the Treaty establishing the European Community, provides that "with a view to achieving the objectives of Article 1, the Community shall support and complement the activities of the Member States in the following fields: (...) - the information and consultation of workers".

Article 2(2) provides that, to this end, "the Council may adopt, by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules applying in each of the Member States (...) in accordance with the procedure referred to in Article 189c of the Treaty after consulting the Economic and Social Committee".

This Article 2(2) constitutes the legal basis of this proposal.

V. Subsidiarity and cost

38. The main justification for this proposal lies in the fact that existing mechanisms and procedures for the information and consultation of workers at national level apply only within individual countries' legal systems, work only to the advantage of workers in that country and are generally linked only to activities exercised within the national frontiers. These national procedures are no longer compatible with the new decision-making structures of major undertakings and groups of undertakings operating across national frontiers.

The added value of this proposal lies precisely in this complement to national legal frameworks, instituting at Community level a legal system of information and consultation of workers in Community-scale undertakings and groups of undertakings which are at present outside this compartmentalized legal framework.

Given the transnational nature of the reality addressed by this proposal, such a system can only be created at Community level.

39. The impact of this proposal in terms of cost/benefit for undertakings and groups of undertakings will be largely positive, given that the additional costs per worker (maximum ECU 10 per year - see impact assessment form attached) are marginal and are certainly substantially lower than the benefits arising from higher productivity

associated with improved labour relations in the undertakings and groups of undertakings addressed by this proposal.

VI. Conclusions

40. In the light of the foregoing, the Commission considers that:

- there is a Community need to provide for procedures for informing and consulting employees affected by corporate decisions taken by a head-office or controlling undertaking located outside the Member State in which they are employed (and therefore outside the scope of the national information and consultation rights which the employees concerned may have);
- the measures required to this end can only be taken at Community level, as the dimension and effects of such measures extend beyond national boundaries;
- at the request of one or other of the parties, and on the basis of a written agreement between them, a European committee or some other appropriate procedure must be responsible for informing and consulting employees on matters likely to be of particular concern to them;
- in the event of lack of agreement, it is important that certain subsidiary provisions be applied regarding the composition, functions and powers and the operating procedures and financial resources of European committees.

41. By presenting this proposal to the Council and requesting its adoption as soon as possible, bearing in mind the opinions of the European Parliament and Economic and Social Committee, the Commission feels that a major step can be taken towards implementing the Community Charter of Fundamental Social Rights of Workers, achieving the objectives set out in the Agreement on Social Policy and pursuing the objectives set out in the White Paper on competitiveness, growth and employment.

Proposal for a
COUNCIL DIRECTIVE
on the establishment of European committees or procedures in
Community-scale undertakings and Community-scale groups of undertakings
for the purposes of informing and consulting employees

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Agreement on Social Policy annexed to the Treaty establishing the European Community, and in particular Article 2(2) thereof,

Having regard to the proposal from the Commission⁽¹⁾,

In cooperation with the European Parliament⁽²⁾,

Having regard to the opinion of the Economic and Social Committee⁽³⁾,

Whereas, 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;

Whereas, pursuant to Article 1 of the said Agreement, one particular objective of the Community and the Member States is to promote social dialogue at Community level;

Whereas 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; whereas the Charter states that "this shall apply especially in companies or groups of companies having establishments or companies in two or more Member States";

Whereas the Commission's 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⁽⁴⁾, as amended⁽⁵⁾, did not achieve the unanimity required for its adoption despite the existence of a broad consensus among the majority of Member States;

(1) OJ No C

(2) OJ No C

(3) OJ No C

(4) OJ No C 39, 15.2.1991, p. 10.

(5) OJ No C 336, 31.12.1991, p. 11.

Whereas the Commission, pursuant to Article 3(2) of the Agreement on Social Policy, has consulted the social partners at Community level on the possible direction of Community action on the information and consultation of workers in Community-scale undertakings and groups of undertakings;

Whereas the Commission, considering after this consultation that Community action was desirable, has again consulted the social partners on the content of the planned proposal, pursuant to Article 3(3) of the said Agreement, and the social partners have presented their opinions to the Commission;

Whereas, following this second phase of consultation, the social partners have not informed the Commission of their desire to initiate the procedure which might lead to the conclusion of agreement, as provided for in Article 4 of the Agreement;

Whereas the completion of the internal market should generate a process of concentrations of undertakings, cross-border mergers, takeovers, joint ventures and, consequently, a transnationalization of undertakings and groups of undertakings; whereas, 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;

Whereas 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; whereas this may lead to the unequal treatment of employees affected by decisions within one and the same undertaking or group of undertakings;

Whereas appropriate provisions must be adopted to ensure that the employees of Community-scale undertakings or groups of undertakings are properly informed and consulted when decisions likely to affect them are taken in a Member State other than that in which they are employed;

Whereas, 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 committees or to create some other suitable procedure for the transnational information and consultation of employees;

Whereas it is accordingly 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;

Whereas 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;

Whereas, 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, powers, mode of operation, procedures and financial resources of European committees or other information and consultation procedures so as to suit their own particular circumstances;

Whereas, however, in the event of the central management refusing to initiate negotiations or in the absence of agreement subsequent to such negotiations, provision should be made for certain subsidiary requirements to apply should the parties so decide;

Whereas, moreover, employees' representatives may decide not to seek the setting-up of a European committee or the parties concerned may decide on an alternative procedure for informing and consulting employees;

Whereas, without prejudice to the possibility of the parties deciding otherwise, the European committee set up in the absence of agreement between the parties must be kept informed and consulted on the activities and projects of the undertaking or group of undertakings so that it may assess the possible impact on employees' interests; whereas, 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 and projects of the undertaking or group of undertakings which are liable to affect employees' interests; whereas the European committee must be able to deliver an opinion;

Whereas certain decisions having a particular effect on the interests of employees must be the subject of a special consultation of the employees' appointed representatives as soon as possible to enable them to deliver an opinion;

Whereas 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 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;

Whereas special treatment should be accorded to Community-scale undertakings and groups of undertakings in which there exists, at the time of entry into force of this Directive, an agreement providing for the transnational information and consultation of employees;

Whereas the Member States must take appropriate measures in the event of failure to comply with the obligations imposed in this Directive,

HAS 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.
2. A European committee 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 set out 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.
3. Notwithstanding paragraph 2, where a Community-scale group of undertakings within the meaning of point (c) of Article 2 comprises one or more undertakings which are Community-scale undertakings within the meaning of points (a) or (c) of that Article, a European committee shall be established at the level of the group unless the agreements referred to in Article 6 provide otherwise.
4. Unless a wider scope is provided for in the agreements referred to in Article 6, the powers and competence of European committees and the scope of information and consultation procedures provided for by this Directive 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.

Article 2

Definitions

1. For the purposes of this Directive:
 - (a) "Community-scale undertaking" means any undertaking with at least 1 000 employees within the Member States as a whole and at least 100 employees in each of at least two Member States;
 - (b) a "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 1 000 employees within the Member States as a whole,

- at least two group undertakings in different Member States, and
 - at least one group undertaking with at least 100 employees in one Member State and another group undertaking with at least 100 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, or the representative agent referred to in Article 4(2);
- (f) "consultation" means the exchange of views and establishment of dialogue between employees' representatives and central management or any other more appropriate level of management.
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.
3. In compliance with the principles and objectives of the Directive, and in so far as the need arises, the Member States may establish special provisions to apply to the crews of seagoing vessels, adapted to their particular working conditions.

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, in relation to another undertaking, an undertaking directly or indirectly:
- (a) holds a majority of that undertaking's subscribed capital,
 - (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⁽⁶⁾.
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 agent of the undertaking or, in the absence of such an agent, the central management of the group undertaking which employs the greatest number of employees in the Community 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 committee or an employee information and consultation procedure

Article 4

Responsibility for the establishment of a European committee 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 committee or an information and consultation procedure as provided for by this Directive in respect of a Community-scale undertaking or 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 carry out the responsibility referred to in paragraph 1.

⁽⁶⁾ OJ No L 395, 30.12.1989, p. 1.

In the absence of such an agent, the management of the establishment or the central management of the group undertaking employing the greatest number of employees in any one Member State shall bear the responsibility referred to in paragraph 1.

Article 5

Special negotiating body

1. The central management shall initiate negotiations for the establishment of a European committee 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. The special negotiating body shall be composed 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.

- (b) The special negotiating body shall have a minimum of three and a maximum of 17 members.

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

- first, 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.

- (d) The central management shall be informed of the composition of the special negotiating body.

3. The special negotiating body shall have the task of determining, with the central management, by written agreement, the scope, composition, powers and term of office of the European committee(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.

For the purpose of the negotiations, the special negotiating body may be assisted by experts of its choice.

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 within two years of the abovementioned decision unless the parties concerned lay down shorter periods.

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.

Article 6

Content of the agreement

1. The central management and the special negotiating body must negotiate in a spirit of cooperation with a view to reaching an agreement.
2. Without prejudice to the autonomy of the parties, the agreement drawn up in writing between the central management and the special negotiating body shall determine:
 - (a) the scope and the composition of the European committee(s), the number of members, the allocation of seats, the election procedures and the term of office;
 - (b) the functions and powers of the European committee(s);
 - (c) the procedure for informing and consulting the European committee(s);
 - (d) the venue, frequency and duration of meetings of the European committee(s);
 - (e) the financial and material resources to be allocated to the European committee(s);
 - (f) the duration of the agreement and the procedure for its renegotiation.

3. The central management and the special negotiating body may decide, in writing, to establish an information and consultation procedure instead of a European committee.

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

4. The agreements referred to in paragraphs 2 and 3 shall not, unless provision is made otherwise, 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. Where the central management and the special negotiating body so decide or if the central management refuses to commence negotiations within six months of the request referred to in Article 5(1), or if, after two 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), the subsidiary requirements laid down by the legislation of the Member State in which the central management is situated shall apply.
2. The subsidiary requirements referred to in paragraph 1 as adopted in the legislation of the Member State must at least 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 committees and the experts who assist them are not authorized 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 need not transmit information when its nature is such that it would be seriously prejudicial to any of the undertakings affected.

A Member State may make such derogation subject to prior administrative or judicial authorization.

Article 9

Operation of European committees or information and consultation procedures

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

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

Article 10

Protection of employees' representatives

Members of special negotiating bodies, members of European committees and employees' representatives exercising their functions under the procedure referred to in Article 6(3) shall, in the exercise of their functions, enjoy the same protection and guarantees provided for employees' representatives by the national legislation and/or practice in force in their country of employment, especially as regards attendance at meetings of special negotiating bodies or European committees 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.

Article 11

Compliance with this Directive

1. Each Member State shall ensure that the management of establishments or group undertakings 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 points (a) and (c) of Article 2(1) is made available by undertakings at the request of the parties concerned by the application of this Directive.
3. Member States shall provide for appropriate measures in the event of failure to comply with this Directive and shall in particular ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced.
4. Where Member States apply Article 8, they shall make provision for administrative or judicial appeal procedures which the employees' representatives may initiate when the management requires confidentiality or does not give information in accordance with that Article.

Article 12

Link between this Directive and other provisions

1. This Directive shall apply without prejudice to measures taken pursuant to Council Directive 75/129/EEC⁽⁷⁾ and to Council Directive 77/187/EEC⁽⁸⁾.
2. This Directive shall not prejudice employees' existing rights to information and consultation under national legislation.
3. This Directive shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions which are more favourable to employees or to allow or give priority to the application of collective agreements which are more favourable to employees.

Article 13

Agreements in force

1. Without prejudice to paragraph 2, the obligations arising from this Directive shall not apply to Community-scale undertakings or groups of undertakings in which, on the date laid down in Article 14(1) for the transposition 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 already an agreement providing for the transnational information and consultation of employees.
2. When the agreements referred to in paragraph 1 expire, the parties to these agreements may decide jointly to renew them. Where this is not the case, the provisions of this Directive shall apply.

Article 14

Final provisions

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within two years of its entry into force or shall ensure by that date at the latest that employers and workers' representatives introduce the required provisions by way of agreement, the Member States being obliged to take the necessary steps enabling them at all times to guarantee the results imposed by this Directive. They shall immediately inform the Commission thereof.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

⁽⁷⁾ OJ No L 48, 22.2.1975, p. 29.

⁽⁸⁾ OJ No L 61, 5.3.1977, p. 26.

Article 15

Review by the Commission

Seven years after the adoption of this Directive, the Commission shall review its operation and, in particular, examine whether the workforce size thresholds are appropriate with a view to proposing suitable amendments, where necessary.

Article 16

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

Article 17

This Directive is addressed to the Member States.

Done at Brussels,

For the Council
The President

ANNEX TO THE DIRECTIVE
SUBSIDIARY REQUIREMENTS

1. The establishment, composition and competence of a European committee shall be governed by the following rules:

- (a) The competence of the European committee shall be limited to those 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 committee 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.

- (b) The European committee 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 committee shall be carried out in accordance with national legislation and/or practice.

- (c) The European committee shall have a minimum of 3 members and a maximum of 30. It shall elect a chairman and, where its size warrants it, an executive committee from among its members, comprising at most a chairman and four members. It shall adopt its own rules of procedure.

- (d) In the election or appointment of members of the European committee, 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.

- (e) The central management shall be informed of the composition of the European committee.

- (f) If, at the end of this procedure, the number of employees' representatives on the European committee is less than 30, those establishments or controlled undertakings which did not obtain members under subparagraph (d) shall elect or appoint a member.
- (g) Four years after the European committee is established it shall deliberate as to the renegotiation of the agreement referred to in Article 6 or the continued application of the provisions in this Annex.

Articles 6 and 7 shall apply, mutatis mutandis, if a decision has been taken to negotiate an agreement according to Article 6 and "special negotiating body" shall be replaced by "European committee".

2. The European committee shall have the right to meet with the central management at least once a year, to be informed and consulted, on the basis of a report drawn up by the central management, of the progress of the business of the Community-scale undertaking or Community-scale group of undertakings and of its prospects. The local managements shall be informed accordingly.

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

3. Where there are exceptional circumstances affecting employment, more particularly in the event of relocations, the closure of establishments or undertakings or collective redundancies, the executive committee of the European committee - or, where there is no such executive committee, the committee itself - shall have the right to meet, at its request, the central management, or any other more appropriate level of management within the Community-scale group of undertakings, with a view to being informed and consulted on any measure liable to have a considerable effect on the employees' interests.

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 the management of the Community-scale group of undertakings, on which the European committee may put forward an opinion within a reasonable time.

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

4. The European committee or its executive committee shall be entitled to meet before any meeting with the central management, without the management concerned being present.
5. The members of the European committee shall be entitled to inform the employees' representatives at establishment or at group undertaking level or, in the absence thereof, the body of employees, of the content and outcome of the information and consultation procedure carried out in accordance with this Annex.
6. The European committee may be assisted by experts of its choice, insofar as this is necessary for it to carry out its tasks.

7. The operating expenses of the European committee shall be borne by the central management.

The central management concerned shall provide the members of the European committee with such financial and material resources as enable them to meet and 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 committee and its executive committee shall be met by the central management unless otherwise agreed.

ANNEXES TO THE PROPOSAL

ANNEX I

SUMMARY OF CONTRIBUTIONS RECEIVED DURING THE FIRST CONSULTATION OF SOCIAL PARTNERS

- I. The Commission of the European Communities consulted the social partners on the basis of Article 3(2) of the Agreement on Social Policy appended to the Maastricht Social Protocol on the topic referred to.

The organizations listed in Point II of this Annex sent contributions to the Commission whose content is summarised below.

- (a) On the feasibility and advisability of Community action on worker information and consultation procedures in multinational groups and companies, all the organizations consulted agreed that there was a need for appropriate employee consultation and information machinery in transnational concerns. But there is a difference of approach between the employers' organizations and the trade union confederations: the latter implicitly endorse the principles and rules set out in the text which the Belgian Presidency submitted to the Member States at the Employment and Social Affairs Council on 12 October 1993, and which met with a broad consensus of the Eleven, whereas the employers' organizations prefer a broader voluntary approach which deviates in some respects from the proposals made in the text (see below). Of the employers' organizations consulted, HOTREC, the ACE, the UEAPME and Eurocommerce believe that Community action in this field is not appropriate.
- (b) On the possibilities for negotiating an agreement between the social partners, in accordance with Article 4 of the Agreement on Social Policy, UNICE and CEEP were willing to begin negotiations with ETUC, while other employers' organizations preferred not to state their position until the second stage of consultation. ETUC did not pronounce on this topic. The CEC said that they were open to negotiations, particularly within the scope of Article 2.2 of the social agreement (Directive). UEAPME has declared that - were the Commission to decide that Community action was necessary - an agreement between the social partners was the most appropriate solution.
- (c) On the feasibility and advisability of proposing Community legislation under Article 2(2) of the Agreement on Social Policy, ETUC's verdict was favourable, taking the view, as mentioned above, that the proposal should be based on the Belgian Presidency's text. In general, the employers' organizations expressed a preference for a Recommendation, but were prepared to accept a more binding act of Community legislation (Directive) as a last resort. The exceptions were HOTREC, the ACE and UEAPME who were opposed to any form of Community legislation, and EUROCOMMERCE, which would only accept a Recommendation.

- (d) On the subject of restricting the scope of proposals to large concerns or groups of companies operating in several Member States, the organizations consulted were generally in favour, but did not mention any size limits or other conditions, apart from UEAPME and EUROCOMMERCE, which suggested a threshold of 10 000 full-time workers over the whole group and at least 1 000 in at least two Member States. The CEC would like to clarify the proposal's field of application to small and medium transnational companies.
- (e) On the subject of channelling information and consultation procedures via appropriate machinery or by way of alternative procedures, the employers generally felt that procedures should be adapted to suit the real situation and the structure of the company or group and based on voluntary cooperation, without binding standard procedures laid down by Community legislation. Although there was broad acceptance that minimum binding requirements would have to be laid down if no agreement could be reached, it was felt that any requirements should be sufficiently flexible to safeguard the abovementioned principle.
- (f) On the advisability of concluding an agreement on the powers, area of competence and mode of functioning of the of the information and consultation machinery, or, in the absence of an agreement, laying down the minimum requirements, ETUC and the CEC implicitly endorsed the principles and rules outlined in the Belgian Presidency text; UNICE and CEEP emphasised that information and consultation arrangements should depend on voluntary cooperation, and the agreements reached should not form part of rules laid down in the statutes. Since UNICE, CEEP and the other employers' organizations listed in the Annex, apart from HOTREC and EUROCOMMERCE, accepted that minimum requirements could be laid down in the absence of an agreement, the Community legislation should be sufficiently flexible in this respect to allow companies and groups to adapt the procedures to their structure. According to UNICE, these minimum requirements should state that:
- information and consultation of workers or their representatives is carried out by the employer, especially at local level;
 - the employer is obliged to provide information at least once a year on the functioning of the company or group;
 - consultation takes place on all transnational matters liable to have serious consequences for workers' interests;
 - CEEP wishes the general information and consultation obligations to include in addition the obligation to hold a dialogue with workers' representatives on all topics of general interest liable to have consequences for the personnel of two or more establishments in different Member States of the European Union.

II. ASSOCIATIONS, FEDERATIONS AND CONFEDERATIONS
WHICH WERE CONSULTED

- AECM (Association européenne des classes moyennes)
- BIPAR (Bureau International des producteurs d'assurances et de réassurances)
- C.E.C. (Confédération Européenne des Cadres)
- C.E.E.P. (Centre Européen des Entreprises à Participation Publique)
- C.E.S. (Confédération Européenne des Syndicats) et ses comités syndicaux
- COPA (Comités des organisations professionnelles agricoles de la CE)
- ECSA (European Shipowners Association)
- European Federation of Banks
- European Saving Banks Groups
- EUROCOMMERCE (Retail, Wholesale and International Trade Representation to the EC) et d'autres organisations patronales
- FIEC (Fédération de l'Industrie européenne de la construction)
- UEAPME (Union Européenne de l'Artisanat et des petites et Moyennes Entreprises)
- UNICE (Union des Confédérations de l'Industrie et des Employeurs d'Europe (EC) et ses organisations sectorielles
- E.R.A. (European Regional Airlines Association)
- ACCA (Association of Charter Companies Airlines)
- ACCI Europe (Airports Council International)
- A.C.E. (Abelag Aviation)
- A.E.A. (Association of European Airlines)
- IRU (International Road Transport Union)
- UNIF (Union Internationale de la Navigation Fluviale)
- Groupe des Assistants Communauté des Chemins de Fer Européennes
- HOTREC (Confédérations des Associations Nationales de l'Hôtellerie et de la restauration de la CE)
- Groupement des Banques Coopératives de la CE

LIST OF ORGANIZATIONS WHICH SENT CONTRIBUTIONS TO THE
COMMISSION ON THE CONSULTATION DOCUMENT

- Association of Cooperative Banks of the EC
- CEC (European federation of managerial staff)
- CEEP (European Centre of Enterprises with Public Participation)
- ECSA (European Community Shipowners Association)
- Employers' Group of the Committee of Agricultural Organizations in the EEC (COPA-COGECA)
- ETUC (European Trade Union Confederation)
- Eurochambres
- EUROCOMMERCE (Retail, Wholesale and International Trade Representation to the EC)
- European Federation of Banks
- FIEC (European Construction Industry Federation)
- HOTREC (Committee of the Hotel and Restaurant Industry in the EC)
- UEAPME (European Union of Crafts and Small and Medium-Sized Enterprises)

European Savings Banks Group

IRU (International Road Transport Union)

ACI Europe (Airports Council International)

Euro-Fiet (European Regional organization of the International Federation of Commercial, Clerical, Professional and Technical Employees)

Community of European Railways

ACE (The European Community's Independent Airline Association)

AEA (Association of European Airlines)

ANNEX II

The Commission consulted the social partners at Community level between 8 February and 30 March 1994, pursuant to Article 3(3) of the Agreement on Social Policy. To that end, the Commission sent them a consultation document which included a draft proposal for a Council Directive, and asked them to present whatever remarks or suggestions they found appropriate. They were also asked to inform the Commission of their intention to initiate the procedure provided for in Article 3(4) of that Agreement, aimed at negotiating and concluding an agreement between them.

The answers received by the Commission by 30 March 1994 were as follows:

ETUC (EUROPEAN TRADE UNION CONFEDERATION)

ETUC informed the Commission of its initiative to "propose to UNICE and CEEP an exploratory debate aimed at testing the possibility of initiating negotiations to reach an agreement".

ETUC considers that its efforts failed "due to the fact that UNICE and CEEP were not able to commit themselves unreservedly and unambiguously on the essential elements which would ensure the exercise of the right (to transnational information and consultation)".

ETUC thinks that the Commission should initiate the legislative procedure according to the provisions of the Agreement on Social Policy, on the basis of "the Belgian compromise, which has already achieved a political consensus".

UNICE (UNION OF INDUSTRIAL AND EMPLOYERS' CONFEDERATIONS OF EUROPE)

UNICE acknowledges that its efforts to "take this issue to the negotiating table have failed" but says that the offer to the ETUC remains open.

Regarding the consultation document of 8 February 1994, UNICE "much appreciates the greater flexibility introduced by the Commission in its text, which is a considerable improvement on previous drafts". Nevertheless, UNICE considers that this text remains unacceptable because it "requires companies to set up a special, centralised structure to negotiate mechanisms for information and consultation ... and the minimum provisions of the Annex will in most cases serve as a starting point for any negotiations, and thus will bias the outcome in favour of centralized, rigid and bureaucratic structures...".

In its detailed comments, UNICE raises, among others, the following issues:

- the subsidiary threshold in Article 2(1) should be raised to 200 employees;
- the provisions related exclusively and expressly to the UK should be deleted;
- the central management should have the possibility to delegate to a more appropriate level of management its obligations and duties under this Directive;
- part-time employees should be included pro rata temporis;
- the crews on seagoing vessels and employees of undertakings pursuing the aim of ideological guidance with respect to information and expression of opinion should be excluded from the Directive;

- the provisions which give experts the right to participate in the meetings and compel employers to pay for their activities should be deleted;
- there should be no faculty for the Member States to establish subsidiary requirements more favourable to the workers than the ones of the Annex;
- prior administrative or legal authorization should not be required to withhold prejudicial information;
- acceptance of the principle of the non-application of the provisions of the Annex to voluntary agreements and existing agreements;
- companies that do not want to negotiate should be able to refuse and thereby only be subject to the minimum requirements;
- the Annex should be entirely suppressed and replaced by a formula similar to the one which has been introduced in Article 2(4) of Directive 75/129/EEC (collective redundancies) by Directive 92/56/EEC.

CEC (EUROPEAN FEDERATION OF MANAGERIAL STAFF)

CEC supports the objectives of the directive and the specific solutions provided for in the consultation document, subject to the following remarks:

- the wording "mechanisms for informing and consulting" should be replaced by another expression more related to a definite structure;
- managerial staff should have the right to be represented in the negotiating bodies and in the structures for informing and consulting;
- the provision which provides for an obligation to invite the management and the employees of the undertakings in the UK is welcome;
- the threshold in Article 2(1) should be reduced to 50 employees;
- the requirements relating to the initial demand to initiate negotiations should not be reinforced;
- Article 7 should provide for a one-year negotiation period;
- the provisions of the Annex relating to consultation should be mentioned directly in the Directive.

EUROPEAN FEDERATION OF BANKS

The European Federation of Banks holds the view that information and consultation of staff are beneficial both for employees and for the institution itself. Nevertheless, it reaffirms its preference for a recommendation and for the setting-up of information and consultation mechanisms "as close as possible to the employee's workplace". It welcomes "the introduction of a certain amount of flexibility into the body of the Directive".

The main criticisms from the Federation regarding the consultation document are as follows:

- the Annex, which imposes a "rigid and centralized structure for information and consultation" should be deleted;
- the thresholds in Article 2(1) should be raised to 150 employees;
- Article 5(5) should provide for a majority of votes and not two thirds of votes;
- the confidentiality clause and the possibility to withhold information should be reinforced.

HOTREC (COMMITTEE OF THE HOTEL AND RESTAURANT INDUSTRY IN THE EC)

HOTREC reaffirms its previous opposition to the Commission's initiative. It emphasizes in particular now its strong opposition to the inclusion of part-time workers in the thresholds in Article 2(2).

EUROCOMMERCE - THE RETAIL, WHOLESALE AND INTERNATIONAL TRADE REPRESENTATION TO THE EUROPEAN UNION

EUROCOMMERCE reaffirms its previous position, emphasizing now the following issues:

- only employees should be authorized to participate in the negotiations and in the resulting structures or procedures;
- part-time workers should be considered pro rata temporis;
- the consultation requirement should be suppressed or, at least, it should be clear that the consultation should not automatically precede the adoption of decisions.

AEA (ASSOCIATION OF EUROPEAN AIRLINES)

AEA is completely against any form of Community intervention in the field of information and consultation of workers, on the basis of subsidiarity.

LIST OF ORGANIZATIONS WHICH WERE CONSULTED IN THE SECOND-STAGE CONSULTATION

- UNICE (Union of Industrial and Employers' Confederations of Europe)
- CEEP (Centre Européen des Entreprises à Participation Publique)
- ETUC (European Trade Union Confederation)
- European Association of Craft, Small and Medium-Sized Enterprises (UEAPME, EUROPMI and other associated organizations)
- CEC (Confédération Européenne des Cadres)
- Eurocadres
- EUROCHAMBRES
- BIPAR (International Association of Insurance and Reinsurance Intermediaries)
- CEA (European Insurance Committee)
- Euro-Fiet (European Regional organization of the international Federation of Commercial, Clerical, Professional and Technical Employees)
- EUROCOMMERCE (Retail, Wholesale and International Trade Representation to the EC)
- European Federation of Banks
- European Savings Banks Group
- Groupement Européen des Banques Coopératives
- FETBB (Fédération Européenne des Travailleurs du Bâtiment et du Bois)
- FIEC (Fédération de l'Industrie Européenne de la Construction)
- CEI Bois (European Confederation of Woodworking industries)
- EFA (European Federation of Agricultural Workers' Unions)

- COPA/COGECA (Groupe Employeurs des Organisations Professionnelles Agricoles de la CE)
- HOTREC (Confédération des Associations Nationales de l'Hôtellerie et de la Restauration de la CE)
- ACE (The European Community's Independent Airline Association)
- ACI Europe (Airports Council International - European Region)
- AEA (Association of European Airlines)
- Community of European Railways
- CSTCE (Comité Syndical des Transport dans la Communauté Européenne)
- ECSA (European Community Shipowners Association)
- IRU (International Road Transport Union)
- SETA-UITA (Secrétariat Européenne des Travailleurs de l'Alimentation)

ANNEX III

IMPACT ASSESSMENT FORM THE IMPACT OF THE PROPOSAL ON BUSINESS

with special reference to small and medium-sized enterprises (SMEs)

TITLE OF PROPOSAL: PROPOSAL FOR A COUNCIL DIRECTIVE ON THE ESTABLISHMENT OF EUROPEAN COMMITTEES OR PROCEDURES IN COMMUNITY-SCALE UNDERTAKINGS AND COMMUNITY-SCALE GROUPS OF UNDERTAKINGS FOR THE PURPOSES OF INFORMING AND CONSULTING EMPLOYEES

REFERENCE NO: COM(94) 134 final

THE PROPOSAL:

1. **Taking account of the principle of subsidiarity, why is Community legislation necessary in this area and what are its main aims?**

The completion of the internal market is bound to generate a process of concentrations of undertakings, cross-border mergers, takeovers, joint ventures and, consequently, a transnationalization of undertakings and groups of undertakings. If economic activities are to develop in a harmonious fashion, this situation requires that undertakings and groups of undertakings operating in more than one Member State must inform and consult the representatives of their employees affected by their decisions.

As a result of changes in the structure of undertakings, the procedures for consulting and disclosing information are often no longer consistent with these new structures. Whereas firms have become more complex, in that they have grown or expanded their operations by setting up subsidiaries or establishments in several Member States, their employees continue to be informed and consulted in a segmented fashion, reflecting the scope of existing national laws and practices.

Existing procedures for informing and consulting employees in a national context only have effect within the legal framework of that country, only benefit the employees of that State and generally only relate to activities carried out within national boundaries. Community legislation intended to overcome the territorial limitations of national law with respect to information and consultation of employees of Community-scale undertakings or groups is therefore needed.

The principal objective of the proposal is thus to create a Community legal framework with a view to improving the information and consultation of workers in transnational undertakings and groups of undertakings covered by the proposal, by way of the establishment in such undertakings and groups of European committees or other information and consultation procedures.

2. Who will be affected by the proposal?

This proposal is intended to apply to: (a) undertakings with at least 1000 employees in all the Member States and with at least two establishments in different Member States, each employing at least 100 workers; and (b) groups of undertakings with at least 1000 employees in all the Member States and with at least two group undertakings in different Member States which each employ at least 100 employees. Small and medium-sized undertakings are not covered.

The proposal applies to all sectors of business throughout the European Union.

3. What will business have to do to comply with the proposal?

Undertakings and groups of undertakings covered by this proposal must establish European committees or set up some other procedure for informing and consulting their employees.

The European committee encompasses all the establishments or group undertakings located within the Member States which employ at least 100 workers. Their composition, functions and mode of operation may be determined by a written agreement between the representatives of employees and the management concerned. If there is no agreement a standard model will apply.

The standard model lays down rules on the composition, function and powers, and mode of operation of the European committee. It will be composed of employees' representatives and feature a minimum of three members and a maximum of 30. It must meet with management once a year to be informed and consulted on the status of the Community-scale undertaking or group of undertakings. If consultation is necessary, further meetings may be called with the executive committee.

4. What economic effects is the proposal likely to have?

(a) on employment

Difficult to measure but the Commission believes that the proposed Directive will have a highly beneficial effect on workers' productivity and commitment to their firm, on the competitiveness of undertakings and hence on employment.

(b) on investment and the creation of new businesses

No direct effect.

(c) on the competitive position of businesses

The competitiveness of a company depends on a number of factors, one of them labour costs. The costs involved in setting up and maintaining a European committee can be considered as an element of labour costs. For the calculation of the costs of a meeting of the committee the following factors are essential:

1. The number of participants - the proposal in the Annex is for a maximum of 30.
2. The number of Member States covered - between two and 12.
3. Travel expenses.
4. The need for interpreters and the requisite equipment (e.g. booths and other equipment).
5. Accommodation.
6. Absence from work on the part of employees attending the meeting.
7. Costs of preparation of the meeting, including documentation in a number of languages.

A Community undertaking which is concentrated only in a number of Member States, e.g. the Benelux countries or the Iberian Peninsula, will have much lower costs and probably fewer participants than a company with a European committee with representatives from 12 Member States. Even in this latter situation, the cost picture will vary greatly. In some cases, interpretation into nine languages will be necessary; in others there may be a company culture with work being done in the "company language" or in only a few languages. It may be necessary to hire a meeting room and install all the requisite interpretation facilities. Participants might have to travel by air and spend two nights in a hotel.

The undertaking might have its own facilities, or the meeting might be combined with other meetings.

Another difficult element to calculate is the cost of preparation. In some cases special reports, paper, etc. have to be prepared and other preparatory work done. In other cases, existing material - available in a number of languages - can be used.

Taking these elements into account, a theoretical calculation based on dubious assumptions does not seem very useful. Still taking as a basis for calculation figures used for meetings organized by European institutions, a meeting of 30 experts from most of the Member States, with interpretation in a number of languages, will cost some tens of thousands of ECU. In such cases, though, a Community-scale undertaking will have at the very least several thousand workers throughout the Community, thus increasing the wage cost per worker by a maximum of ECU 10 per year. In most cases, the actual wage cost increase per worker is likely to be less.

It may be said that a small increase is necessary to complement the process of concentration of undertakings brought about by the completion of the internal market.

It should be added that labour costs themselves are not the crucial factor in terms of competitiveness, but rather unit labour costs taking into account productivity. When - as the Commission expects - industrial relations are improved by the setting up of a European committee and increased worker involvement, this might lead to an increase in productivity which will more than compensate for this marginal cost increase.

- 5. Does the proposal contain measures to take account of the specific situation of small and medium-sized firms (reduced or different requirements, etc.)?**

The proposed Directive does not apply to small and medium-sized businesses.

- 6. List the organizations which have been consulted about the proposal and outline their main views**

See Annexes 1 and 2.

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