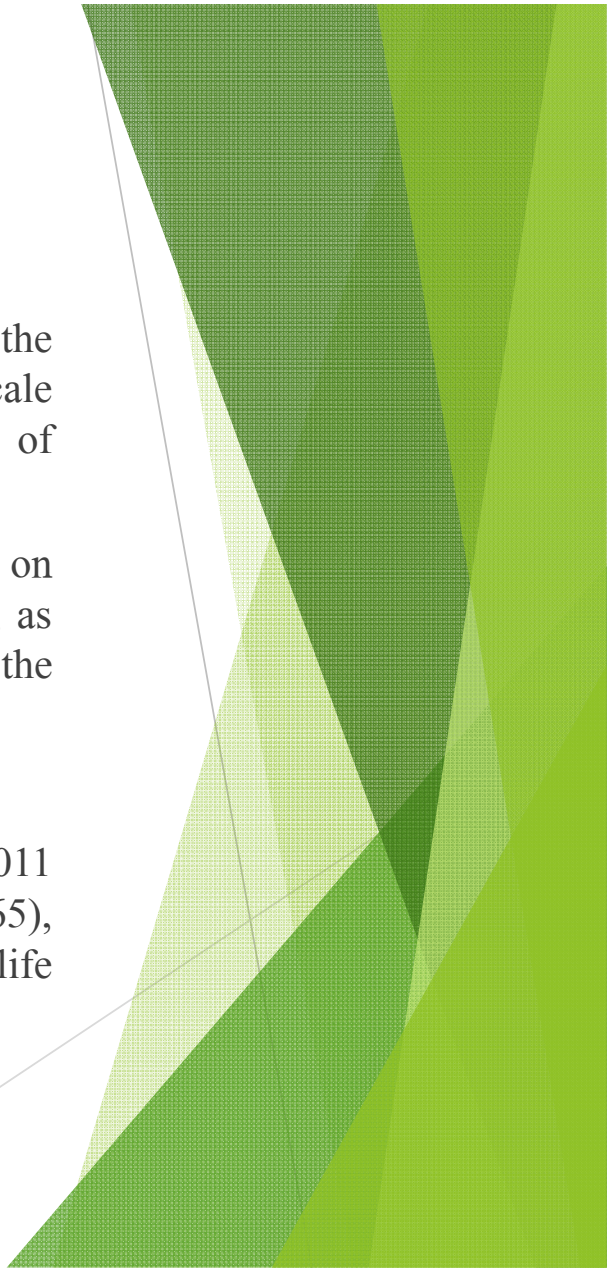



The 3rd meeting of the Steering Group



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- ▶ Directive 2009/38/ of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community – scale groups of undertakings for the purposes of informing and consulting employees (recast)
 - ▶ Implemented to the Polish legal order by the provisions of the Act of 5 May 2002 on European Works Councils (consolidated text: Journal of Laws of 2012, item 1146, as amended), which entered into force on May 1, 2004. (upon Poland's accession to the European Union).
 - ▶ The Act has been amended several times.
 - ▶ The most important amendment took place in 2011 due to the Act of 31 August 2011 amending the Act on European Works Councils (Journal of Laws No. 213, item 1265), which implemented the provisions of Directive 2009/38 / EC and entered into life October 22, 2011

Objective of recast directive

- ▶ Art. 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.
- ▶ Recital 33 of the directive
- ▶ In order to perform their representative role fully and to ensure that the European Works Council is useful, employees' representatives must report to the employees whom they represent and must be able to receive the training they require.

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- ▶ *Article 8*
 - ▶ **Confidential information**

 - ▶ *Article 10*
 - ▶ **Role of employees' representatives** (informing the representatives of the employees of the content and outcome of the information and consultation procedure).

 - ▶ *Article 11*
 - ▶ **Compliance with this Directive** (measures in the event of failure to comply with this Directive; and procedures to enforce the obligations deriving from this Directive).

Art. 8 Directive

- ▶ *Article 8*
- ▶ **Confidential information**
- ▶ 1. Member States shall provide that **members of special negotiating bodies** or of **European Works Councils** and any **experts** who assist them are not authorised to reveal any information which has expressly been provided to them in confidence. The same shall apply to **employees' representatives** in the framework of an information and consultation procedure. That **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**.

Art. 8 par. 2 Directive

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

when its nature is such that, according to objective criteria, it **would seriously harm the functioning of the undertakings** concerned or **would be prejudicial** to them.

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

Act of 5 April 2002 on European works councils


Article 8 paragraph 1 of the directive is implemented by art. 36 paragraph 1 and 6 of the Act on European Works Councils, which reads as follows:


Members of the special negotiating team, members of the European Works Council, representatives representing employees in accordance with the agreement concluded pursuant to Article 18, and experts and translators are obliged not to disclose information (1) obtained in connection with their function (2) which is the secret of enterprises (trade secret) (3) for which the central management has reserved the obligation to maintain their confidentiality. The obligation not to disclose the information obtained also continues after the termination of the function, unless the central management has otherwise specified the period of secrecy.

Sett. 6. The provisions of para. 1-5 do not violate the provisions on secrecy protection set out in separate provisions

Comments

- ▶ In comparison with Directive 2009/38 / EC, the Polish legislator has extended the scope of persons who may be covered by the confidentiality clause (persons obliged to not disclose obtained in connection with the function of information) - to translators.
- ▶ In addition, the Polish legislator provided that the confidentiality clause may only cover information that has been obtained in connection with the function performed. *A contrario*, the clause will not cover information obtained in any other way than in relation to the function performed.
- ▶ The Polish legislator referred this information (confidential) to information constituting trade secrets. This means that the confidentiality clause cannot include information that is not a business secret.
- ▶ As a consequence, the central management's reservation of confidentiality information not constituting business secrets will not be effective, unless it concerns information which, pursuant to para. 6 other provisions include secrecy: For example stock exchange secret

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- ▶ When defining the subject scope of information that may be covered by the central management confidentiality clause, it is worth pointing out that in this respect the manner in which the Polish legislator implements Art. 8 clause 1 of the Directive results from the Polish version of the directive.
 - ▶ Directive 2009/38 / EC in art. 8 clause 1 mentions a prohibition on disclosing information of confidential nature (character).
 - ▶ For example, in the English version, the confidentiality clause applies to information 'that has been clearly marked confidential', which does not mean that the very nature of the information must be confidential.
 - ▶ The French version: art. 8 par. 1 *in fine*: „les informations qui leur ont été expressément communiquées à titre confidentiel”.

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- ▶ The EWC Act does not contain a definition of a trade secret, therefore, following the system interpretation directives, one should refer to the definition of a trade secret regulated in art. 11 paragraph 2 of the Act of 16 April 1993 on combating unfair competition (Journal of Laws 2019, item 1010).
 - ▶ This act implements the DIRECTIVE (EU) 2016/943 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.
 - ▶ Trade secret definition based on art. 2 par. 1 of Directive:
 - ▶ "A trade secret is understood as technical, technological, organizational enterprise information or other information of economic value, which as a whole or in a particular combination and collection of their elements are not commonly known to persons usually dealing with this type of information or are not easily accessible to such persons, provided that the person authorized to use or dispose of the information has taken, with due diligence, to keep it confidential. „

Article 3

Lawful acquisition, use and disclosure of trade secrets

- ▶ 1. The acquisition of a trade secret shall be considered lawful when the trade secret is obtained by any of the following means:
 - ▶ (a) independent discovery or creation;
 - ▶ (b) observation, study, disassembly or testing of a product or object that has been made available to the public or that is lawfully in the possession of the acquirer of the information who is free from any legally valid duty to limit the acquisition of the trade secret;
 - ▶ **(c) exercise of the right of workers or workers' representatives to information and consultation in accordance with Union law and national laws and practices;**
 - ▶ (d) any other practice which, under the circumstances, is in conformity with honest commercial practices.
- ▶ 2. The acquisition, use or disclosure of a trade secret shall be considered lawful to the extent that such acquisition, use or disclosure is required or allowed by Union or national law.

Act of 5 April 2002 on European works councils

Article 8 paragraph 2 of the directive is implemented by art. 36 paragraph 2 and 3 of the Act on European Works Councils, which reads as follows:

2. Central management in particularly justified cases may not provide employees' representatives with information the disclosure of which could, according to objective criteria, seriously disrupt the activities of the enterprises concerned or cause them to be seriously injured.

Art. 11 par. 3 Directive 2009/38

- ▶ 3. If it is considered that the reservation of confidentiality of information or its failure to disclose is inconsistent with the provisions of para. 1 or 2, a special negotiating team, the European Works Council and representatives representing employees in accordance with the agreement concluded pursuant to Art. 18 may apply to the district court - commercial court for an exemption from the obligation to keep information confidential or to order disclosure of information.
- ▶ The above art 36 paragraph 3 of the Act on European work councils also implements Art. 11 paragraph 2 of Directive which imposes an obligation on Member States to establish provision for administrative or judicial appeal procedures which the employees' representatives may initiate when the central management requires confidentiality or does not give information in accordance with that Article.

Comments on implementation

Directive 2009/38 / EC provides for the possibility of introducing a prior authorization of central management for an exemption from the obligation to provide information, due to its special nature (possibility of serious disruption to the operation of the undertaking concerned or harm to the undertaking)

Pursuant to the directive, an independent national authority assesses the nature of the information and, depending on the findings, gives consent or refusal to agree not to provide the information.

The implementation method adopted in national regulations provides for subsequent control of the company's decision to refuse to provide information. The implementation method indicated significantly weakens the EWC's access to information, shifting the burden of proof to it in the event of legal action.

The adopted solution may encourage abuses in the form of unjustified failure to disclose data on the part of central management, which may significantly contribute to limiting access to information by EWC members and, as a consequence, impede EWC activities and hamper the achievement of the directive's objectives.

Art.. 10 par. 2 of Directive 2009/38

- ▶ 2. Without prejudice to Article 8, the members of the European Works Council shall inform the representatives of the employees of the establishments or of the undertakings of a Community-scale group of undertakings or, in the absence of representatives, the workforce as a whole, of the content and outcome of the information and consultation procedure carried out in accordance with this Directive.
- ▶ Article 10 2 of the directive is partly implemented by art. 32 of the EWC Act, which reads as follows:
- ▶ EWC members shall inform the representatives of employees employed in enterprises or groups of enterprises on a Community scale, and in their absence - the employees themselves, on the content of information and the results of consultations obtained in accordance with the provisions of this chapter.

Comments on the implementation

Due to the location in the Act, the provision of art. 32 has limited use.

It will apply only if:

- 1) the central management and special negotiating body decide so
- 2) the central management will not start negotiations within 6 months from the date of submission of the application by the employees, (...) or
- 3) no agreement will be concluded on the establishment of EWCs or the manner of informing employees and consulting employees within 3 years from the date of the initiative being taken by the central management or the submission of an application by employees (...).

The provision of art. 32 of the EWC Act will not apply when concluding an EWC agreement, unless the central management or special negotiating team decides otherwise. It results from the content of art. 19 paragraph 2 of the EWC Act, excluding the application of Chapter 4.

The open issue remains if the EWC agreement does not contain relevant provisions and the parties to the agreement do not decide to apply Chapter 4 (Article 32.) of the EWC Act.

The entitlement referred to in art. 10 paragraph 2 of the Directives, subject to the consent of the other party - central management (contractual clause or joint decision on the application of Chapter 4), was not granted in full. It cannot be ruled out that the central management does not agree to the relevant provision in the EWC agreement or to apply Chapter 4 of the Act.

Comments on the implementation - follow up

- ▶ In this case, we have grounds for claiming faulty implementation, through incomplete granting of rights and, as a consequence, failure to achieve the objective indicated in the Directive.
- ▶ The issue of providing information by board members was not indicated in the act as a required element of the EWC agreement. Therefore, if the EWC agreement is concluded and the matter is not regulated, there are no grounds to apply Art. 32 of the EWC Act by analogy.
- ▶ Bearing in mind that the agreement referred to in art. 19 of the Act is a collective labor law agreement that does not constitute a source of labor law within the meaning of Art. 9 parish 1 CCP It does not specify the rights and obligations of employees and employers. This agreement is solely of an obligatory nature and may constitute the basis for lowering the standards of cooperation with the employee representation. Given the above, the conclusion that **art. 10 paragraph 2 of the Directive has not been properly implemented in Poland** when the EWC agreement does not contain relevant provisions and does not provide for the application of Chapter 4.

ERZ na prawie polskim



ARCTIC PAPER

Arctic Paper EWC agreement



ARCTIC PAPER

6. Confidentiality of information

True dialogue implies that some information may be sensitive to Groups and must be treated responsibly. The group may in such cases, oblige its members of the Council and experts to confidentiality of information.

The principle of confidentiality applies **as long as the information remains relevant** and applies even after their functions expire, **until they are published** by the company annual report for the year in which that information was provided.

Each member of the Council must be aware of the fact that Arctic Paper SA is a public company listed on the Warsaw Stock Exchange and on the NASDAQ stock exchange in Stockholm and is obliged to comply stock exchange rules regarding the provision of information.

EWC



ARCTIC PAPER

- ▶ EWC received information about considering selling one of the enterprises in Germany. Corrective attempts were made for several years - ultimately unsuccessful. Four years passed from informing the EWC about the management board's decision to sell the enterprise. Agreement amended in 2016.
- ▶ The developed standards of operation were transferred to the provisions of the agreement.
- ▶ It is not the agreement that defines the operating standards.
- ▶ It is not the content of the agreement or national regulations that affects the state of the dialogue - cooperation in providing information - but the state of social dialogue in a given enterprise.