



Summary note  
on consultation requirements concerning  
“Second phase of the consultation of the social partners  
on corporate restructuring and European works councils  
under Article 138 (3) of the Treaty”

On 31/03/2005 the Commission has adopted a Communication on „Restructuring and employment - Anticipating and accompanying restructuring in order to develop employment: the role of the European Union“<sup>1</sup> (hereinafter: COM 120). On 05/04/2005 the DG EMPL has sent a letter to the social partners<sup>2</sup> on the subject of „Second phase of the consultation of the social partners on corporate restructuring and European works councils under Article 138 (3) of the Treaty“<sup>3</sup> (hereinafter: the letter). The letter refers to COM 120 final and more particularly to paragraph 2.4. thereof.

The letter of 5 April 2005 might be clarified by separating the issue of *incompetence* from that of *illegality*.

### Incompetence

The second paragraph of the letter asserts that there was a *first* consultation of the social partners as regards

- restructuring (15 January 2002) and
- European Works Councils (hereinafter: EWC) (19 April 2004).

The *second* consultation for *both* is claimed to be the Communication of 31 March 2005 (COM 120). This bringing together for a second stage consultation two subjects very different in substance as regards levels, intensity and procedures is justifiably criticised. The letter demonstrates the Commission's *incompetence*, and/or attempts a deliberate distortion of the social dialogue process. But this might not constitute in itself a legal violation of Article 138 EC. Perhaps it could be argued that the Commission, by forcing together two such potentially different social dialogues, is violating the autonomy of the social partners.

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<sup>1</sup> COM(2005) 120 final

<sup>2</sup> „For the attention of the Social partners' organisations consulted under Article 138 of the Treaty“

<sup>3</sup> 004992 – Empl D1/FZ/lcd D(2005) 7951

## Illegality

The arguments for **legal violations** of Article 138 EC are different.

The distinction in the structure of Article 138 EC between the legislative framework (Commission consultation: paragraphs 2 and 3) and the social dialogue framework (the social partners initiate: paragraph 4) is clear. Arguments are suggested that the Commission has violated this structure.

Article 138(3) EC only applies **if two conditions are fulfilled**: “the Commission considers **Community action** advisable”, and the Commission produces “the envisaged **proposal**”. Neither is fulfilled by COM 120. Even if they were fulfilled, the Commission does not “consult” in COM 120.

The “**Community action**” which the Commission considers advisable in COM 120 is “encouraging the European social partners to intensify ongoing work and to start negotiations with a view to reaching an agreement among themselves”. It is questionable whether **any** of these constitute “Community action” within the meaning of Article 138(3) EC, which requires much more concrete and specific “Community action”, specifically, by the Commission.

The Commission must produce “the envisaged **proposal**”. This failure is even more evident as between the two subjects of the second consultation: (a) EWCs, and (b) restructuring. Only one point refers to EWCs: “promoting best practice”. Two points at the end of paragraph 2.4 of COM 120 refer to restructuring, including “encouraging adoption of the best practices” and a “discussion on the way forward”. The final point appears to address both: “devising a common approach”. Can any of these be characterised as “proposals” for “Community action”?

In sum: the “**Community action**” in COM 120 is so weak as not to satisfy the requirement of Article 138(3). The requirement of a “**proposal**” in Article 138(3) EC is not satisfied.

The claim that this implements Article 138(3) EC is not consistent with the structure of the procedures in Article 138 EC. If the Commission is “promoting the consultation of management and labour”, or proposing a “measure to facilitate their dialogue”, then it falls within Article 138(1) EC. If the Commission is “encouraging the European social partners... to start negotiations with a view to reaching an agreement among themselves”, it is the autonomous decision of the social partners under Article 138(4) EC.

As there is neither Community action nor an envisaged proposal, there is nothing for the Commission to consult about.

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