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NOTE

From: General Secretariat of the Council
To: Permanent Representatives Committee

Subject: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2009/148/EC on the protection of workers from the risks related to exposure to asbestos at work
- *Analysis of the final compromise text with a view to agreement*

I. INTRODUCTION

1. On 28 September 2022, the Commission published its proposal for a directive amending Directive 2009/148/EC on the protection of workers from the risks related to exposure to asbestos at work¹ and transmitted it to the Council and to the European Parliament.
2. The main element of the proposal is the reduction of the current occupational exposure limit value ('OEL') for asbestos fibres from 0.1 to 0.01 fibres/cm³. In addition, the proposal addresses aspects related to measuring methods and provides technical clarifications on the text of the amended Directive.
3. The draft Directive is based on Article 153(2)(b) in conjunction with Article 153(1)(a) of the Treaty on the Functioning of the European Union (TFEU). Ordinary legislative procedure is applicable.

¹ ST 12863/22

4. The European Economic and Social Committee delivered its opinion on the proposal on 15 December 2022². The opinion of the Committee of the Regions was delivered on 15 March 2023.
5. On 8 December 2022, the Council unanimously reached a general approach³ on the abovementioned proposal, which constituted the mandate for negotiations with the European Parliament in the context of the ordinary legislative procedure.
6. The Committee on Employment and Social Affairs (EMPL Committee) of the European Parliament adopted its report on the proposal, including a decision to enter into trilogues, on 26 April 2023. The decision to enter into trilogues was confirmed by the plenary on 8 May 2023.
7. The first trilogue took place on 11 May 2023.
8. On 7 June, Coreper approved a revised mandate in order to enable the Swedish Presidency to continue negotiations with the Parliament.
9. At the fourth trilogue, on 27 June 2023, the negotiating teams of the Council and the Parliament reached a provisional agreement, resulting in the final compromise text as set out in the addendum to this note. The main elements of the agreement are outlined below.

II. ELEMENTS OF THE PROVISIONAL AGREEMENT

1. OEL / measuring method / transitional period

On this central element of the proposal, the provisional agreement provides for a dual system which seeks to improve workers' protection while respecting the different technological approaches already taken by Member States in this regard.

² ST 16199/22

³ ST 14988/22

Namely, the OEL value of 0.01 fibres/cm³ included in the Commission proposal and the Council's General Approach will be applicable after the two-year transposition period of the Directive. Following the introduction of the electron microscopy (EM) methodology, Member States will have a choice between the following limit values:

- 0.01 fibres/cm³ when thin fibres (a breadth of less than 0.2 micrometres) are counted, or
- 0.002 fibres/cm³ when thin fibres are not counted.

The introduction of EM methodology is key for this dual system as it allows the measurement of thin asbestos fibres, which is not possible with the currently most widely used phase-contrast microscopy (PCM). The Parliament asked for a 4-year transitional period for the introduction of the EM measuring technology. As a matter of compromise, the provisional agreement reduces the transitional period foreseen in the General Approach from 7 years to 6 years.

2. Definition of asbestos and scope

The provisional agreement maintains the material scope of the Directive, while tasking the Commission with assessing the potential future enlargement of the scope to new fibrous silicates (including erionite). The issues of passive and secondary exposure, which were important for the Parliament, have been addressed in recitals highlighting the relevance of existing requirements within the OSH acquis.

3. Sporadic and low intensity exposure

The European Parliament insisted on the complete deletion of this exemption. As a matter of compromise and taking into consideration Member States' feedback, the provisional agreement removes the exemption for the requirements of medical surveillance and registration of exposure (Articles 18 and 19) but keeps it for the requirements on notification (Article 4 of the basic Directive).

4. Notification system

The provisional agreement includes some elements of the additional notification requirements requested by the Parliament in its report, e.g. on the list of workers or specific areas where work is to be carried out. However, the level of detail has been reduced to provide Member States with flexibility in the implementation. The Parliament's amendment requiring notifications to be kept for 40 years has been rejected and is not part of the provisional agreement.

5. Removal and safe disposal of asbestos-containing materials

Most of the Parliament's amendments concerning this issue were rejected in negotiations as they were deemed to fall outside the scope of occupational safety and health measures. Still, as it was of great importance for the Parliament to address the issue of asbestos removal, a reference was included in Article 3(2) of the basic Directive, stating that, when performing the risk assessment, employers should consider the total removal of asbestos as a preferred option over any other handling activity. Removal is therefore not a hard obligation in the amended text, but rather an option to be considered – and prioritised, when possible – when carrying out the risk assessment. In this regard, a recital clarifies that removal should be performed whenever it is feasible and beneficial to the workers' protection.

6. Protection measures for workers exposed to asbestos and medical surveillance of workers and asbestos-related diseases

Certain Parliament amendments regarding protection measures for workers exposed to asbestos have been accepted, albeit only as examples of measures to be taken when designing work processes. No specific obligations have been introduced regarding work under confinement.

As regards medical surveillance, the list of occupational diseases has been amended to include only those illnesses for which the link to asbestos exposure was deemed sufficiently established, i.e. carcinoma of the larynx, carcinoma of the ovary and non-malignant pleural diseases.

7. Samplings

For this cluster of amendments, it was agreed to include a modified version of the EP amendment on sampling, stating that it should take place at regular intervals during specific work process. The EP proposal to state that sampling should reflect the real personal exposure of the workers was not accepted.

8. Protection measures in case of exceeded OEL and protection measures in case of likely exceeded OEL value

The provisional agreement reinforces the existing obligation in Article 10, by specifying that if there is reason to believe that asbestos-containing materials which are not identified prior to the work have been disturbed so as to generate dust, work shall stop immediately. Furthermore, the existing obligation in Article 13 to ascertain the absence of asbestos exposure risk after completing demolition or removal works has been clarified.

9. Asbestos screening and information for emergency services

The majority of the EP's proposed amendments regarding screening were deemed by Council to fall outside the scope of occupational health and safety and were therefore not accepted. As part of the final package, a reference was included stating that the employer has an obligation prior to beginning demolition, renovation or maintenance work on premises built before the entry into force of the national asbestos ban, to commission an examination on the occurrence of asbestos, performed by a qualified operator according to national law or practice.

On the issue of firefighters, which was very important for the Parliament, a recital was included to, i.a. stress the importance of the Commission developing guidelines addressing the specificities of these workers' activities and the information relating to the risks of their exposure.

10. Training of workers and work plan

In line with positive feedback received from Member States on the Parliament's amendments regarding this issue, the provisional agreement maintains the spirit of the EP's proposals while giving Member States more flexibility, for instance regarding the length of the training courses, their intervals and the certification of instructors. The amendments regarding the content of the training have been adjusted to remain closer to the existing obligations and in line with the OSH legal basis. The EP proposals regarding the work plan are not part of the provisional agreement.

11. Asbestos removal companies

The provisional agreement reinforces the existing obligations for asbestos removal companies, specifying that they must obtain a permit from the competent authority by providing, at least, proof of safe working conditions in accordance with Article 6 of the Directive and training certificates of the workers. In order to ensure transparency while providing Member States with the necessary flexibility regarding implementation, the list of companies having received such permits is to be made public in accordance with national law and practice. No obligation is introduced as regards the renewal of such permits.

12. Personal protective equipment

In line with the broadly positive assessment of the Parliament's amendments by Member States, elements of the EP proposals on this topic were included in the provisional agreement. Specifically, the agreement includes an obligation to ensure that personal protective equipment is individually adjusted, including through fitting checks, notably with regards to respiratory equipment, in line with the Directive 89/656/EEC on Personal Protective Equipment. A specification of "regular" was added with regards to the existing obligation on breaks for workers. Furthermore, the provisional agreement includes an explicit reference to the appropriate decontamination of workers handling asbestos.

13. Guidelines

Both co-legislators welcomed the intention of the Commission to present guidelines in order to facilitate the implementation of the Directive. The provisional agreement includes recitals which highlight the importance of these guidelines covering notably the transition to from PCM to EM, the specific situation of and information to firefighters and the emergency services, as well as indications to employer's on how to give preference to the removal of asbestos over other forms of handling of asbestos or asbestos containing material.

III. CONCLUSION

1. The Permanent Representatives Committee is therefore invited to:
 - (a) confirm agreement on the final compromise text as set out in the addendum to this note with a view to reaching an agreement at first reading with the European Parliament;
 - (b) authorise the Chair of the Permanent Representatives Committee to send a letter to inform the Chair of the European Parliament's EMPL Committee that, should the European Parliament adopt its position at first reading on the text of the proposal in the exact form as set out in the addendum to this note, and subject to revision of that text by the lawyer-linguists of both institutions, the Council will approve the European Parliament's position and the act will be adopted in the wording which corresponds to the European Parliament's position.