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European Works Councils - 1

Who needs an EWC and what is the Special Negotiating Process?

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Some History

- From the early 1970s onwards trade unions argued that European Works Councils were needed to counterbalance the growing “Europeanisation” of major companies.
- Companies were becoming “European”. Labour relations were still “national”
- Needles to say, given union density at that time, the unions believed that they would be the dominant force within such EWCs.
- Several proposals were tabled during the 1970s and 1980s but ran into employer and political opposition. During the 1980s, all these initiatives were systematically vetoed by Thatcher’s UK government.
- The Maastricht Treaty, in the early 1990s, which allowed for qualified majority voting on social policy issues, made it possible to pass legislation providing for EWCs.

Timeline

- The Maastricht Treaty came into force in 1994 and the first piece of legislation to be adopted under it was the 1994 EWC Directive.
- It became law at national level in September 1996.
- It was subsequently revised, or "recast" in 2009, with the updated Directive coming into force in 2011.
- Trade unions and members of the European Parliament are currently pushing for a further revisions to give EWCs a greater say, particularly when to comes to "exceptional circumstances" involving restructuring and potential job losses.
- Companies that had arrangements in place for transnational information and consultation before September 1996 are exempt from the terms of the Directive. These are known as Article 13 agreements.

The Basics

- The EWC Directive applies to any transnational company with more than 1,000 employees in the European Economic Area (EEA = EU27 + Norway, Iceland and Lichtenstein) and more than 150 employees in at least 2 countries.
- It is estimated that there are around 2,200 companies with the scope of the Directive, with somewhere between 50% and 60% having EWCs.
- The law does not apply automatically. It has to be triggered. It can be triggered in one of 2 ways:
  - *Management can take the initiative, or*
  - *It can be triggered by a letter or letters from at least 100 employees, or their representatives, from at least 2 EEA countries. In other words, just 2 employees' representatives can trigger the process.*
- Once management has received a valid, written request it needs to begin the process of establishing a Special Negotiating Body which is mandated to discuss the terms of an EWC agreement with management.

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The SNB 1

- An SNB is made up of employees representative from each EEA in which a company has operations. They are elected/selected in accordance with national laws and/or practices.
- Each country is entitled to at least 1 representative on the SNB, even if the company only has 1 representative in a country. But if employees decline to be represented, that is their decision.
- Countries which have between 10% and 20% of the total European workforce get a second seat, those with between 20% and 30% a third seat, and so on.

The SNB 2

- It is generally accepted that management and the SNB should meet within six months of management receiving the initial request, to show that management is not refusing to open negotiations.
- From the time management receives a valid request to establish an EWC, management and the SNB have three years in which to come to an EWC agreement.
- A failure to do so results in the imposition of the Subsidiary Requirements.
- An SNB is entitled to be assisted by an expert of its choice, who can attend meetings with management in an advisory capacity.
- Members of the SNB are also entitled to appropriate training.
- If requested, management is obliged to provide translations and interpretation for SNB members.

Outcomes

Once the SNB is established there are three possible outcomes to the process:

1. *The SNB can decide by a two-thirds majority not to proceed and not to negotiate an EWC agreement. This never happens.*
2. *Over the course of the three years, management and the SNB can arrive at an agreement on the text of an EWC agreement.*
3. *Management and the EWC fail to agree on the text of an EWC agreement and the Subsidiary Requirements apply.*

But first, the critical question of which law applies to the process needs to be looked at.

The relevant law

- The SNB/EWC process is subject to the law of the country in which the central management of the company is situated. So, a German company is subject to German law, an Italian company to Italian law, and so on.
- By German law etc. we mean the law that transposes the EWC Directive into national law.
- Central management is the ultimate management in a company or group of companies.
- However, where the central management is situated outside the EU, such as with an American company, then central management has the choice of which EU country in which to situate a “representative agent” for EWC purposes.

The representative agent

- A non-EU central management is free to choose in which EU country to locate their representative agent. In the absence of such a choice, then the "representative agent" defaults to the country in which the facility with the greatest number of employees is situated.
- The only criteria guiding the decision on the location of the representative agent is that the company has a legal entity to act as the agent in the country chosen.
- Suggestions from SNB members or their expert advisors that the country with the greatest number of employees must be the legal location of the SNB/EWC are simply not the case.

Where to go?

- At any other time, maybe only 2 or 3 companies a year might be faced with this decision, where to locate our representative agent?
- Today, however, it is of pressing importance as there are maybe 150 - 200 EWCs legally located in the UK which will be obliged to move to an EU country after the UK leaves the EU's legal framework on December 31 next.

  After that date it will no longer be legally possible to base EWCs in the UK.

Where to go? Ireland is the country of choice for many.

Why? For reasons of language, common law legal framework, business culture and a supportive political environment.

Key criteria

- It is always best, where legal obligations are involved, such as with SNBs and EWCs, to work in your first language.
- Keep in mind that should a dispute involving an EWC end up before a tribunal then proceedings will be conducted in the language of the country. That can be difficult for an English-speaking company, plus there are potential interpretation and translation costs. Not to mention misunderstandings with the nuances of language.
- Further, in some jurisdictions, courts/tribunals are willing to “suspend” management decisions if they believe EWC obligations have not be complied with, France and Spain, for example.
- In others, such as Germany, management has to cover unlimited legal costs incurred by the EWC.

Some questions

Do we have to provide interpretation?

- This issue has never been tested in the courts. However, our view is that this is something that is required, if requested.

Who decides on the training?

- It depends on which law you work under. *E.G.* Irish law says the obligation to organise training falls on management.

Who picks the expert?

- SNB members are entitled to an expert of their choice. They alone decide. External trade unions cannot make the decision, but can make recommendations. However, we believe that the expert should be an EU citizen, fully subject to EU law.

Can the "expert" represent the SNB in discussions with management

- In our view, no. They can only assist at meetings in an advisory capacity. They do not automatically have speaking rights, unless management agrees.

The negotiations

In our next session we will looks at the dynamics of the negotiation process between the SNB and management, what the legislation requires by way of minimum standards, and how management can best approach these discussions.