

# **European Works Councils - 2**

## *The Subsidiary Requirements*

*By Tom Hayes, BEERG*

## ATNA

- When planning for any negotiation you start off by asking yourself the question: *“What is my Alternative to a Negotiated Agreement”?*
- What happens if we cannot reach an agreement? What choices do I have?
- The EWC legislation answers that question for us. If we cannot reach an agreement with the SNB we default to the Subsidiary Requirements (SRs).
- So, we need to begin by understanding the Subsidiary Requirements.
- But, the Subsidiary Requirements are not as straightforward as they seem.

## Subsidiary Requirements: The Basics:

- The Subsidiary Requirements (SRs) provide for an EWC elected/selected on the same basis as an SNB.
- The EWC is entitled to meet with management once a year to be informed and consulted about a range of issues relating to the progress of the business.
- The EWC can elect a select committee of up to 5 members to act as liaison with management.
- The select committee, along with EWC members from impacted countries can meet with management in “exceptional circumstances”.
- “Exceptional circumstances” mean circumstances where management is considering decisions which would have a negative impact on the workforce, such as collective redundancies or the transfer of production.

## SR EWC Rights

Members of an SR EWC are entitled to:

- The “*means required*” to allow them carry out their responsibilities to represent European employees
- Protection against discriminatory actions by management
- The right to appropriate training to be able to work effectively as an EWC
- Be assisted by an expert of its choice
- Report back to national employees’ representatives or, in the absence of such representatives to all employees, on the outcome of meetings with management.
- Before any meetings with management the EWC, or the select committee, is entitled to meet on its own, without management being present.
- Appropriate translations and interpretation, if required.

## However...

- None of the matters outlined in the two previous slides are as straightforward as they seem, and how they are to work in practice can be very much contested between managements and EWC members.
- Some of these issues have been the subject of tribunal cases over recent years, the results of which have greatly helped to clarify our understanding of the rights and responsibilities of EWCs.
- *So, let's begin at the beginning....*

## What are EWCs all about?

EWCs are about the transnational information and consultation of a company's European workforce and how transnational information and consultation links with national information and consultation.

So, we need to understanding the meaning of:

- *Transnational - Information - Consultation - European/national linkages*

We will also need to look at:

- What role does the select committee play?
- How do we define “exceptional circumstances”?
- What is the role of “experts”?
- How do we handle training?
- What does “reporting back” mean in practice?

## Transnational

- EWCs are about “transnational” information and consultation. So, how do we define “transnational”?
- Article 1:4 of the Directive says:

*Matters shall be considered to be transnational where they concern the Community-scale undertaking or Community-scale group of undertakings as a whole, or at least two undertakings or establishments of the undertaking or group situated in two different Member States.*

- So, to be transnational matters must concern the company across Europe “as a whole” or, at minimum “two different Member States”.
- But the waters are muddied by Recital 16

## Recital 16

- Recitals are the prologue to a Directive that set out the *raison d'être* of the Directive. They do not have the same legal force as the Directive's main text – but - can be taken into account by tribunals where interpreting it.
- Recital 16 reads:

*The transnational character of a matter should be determined by taking account of both the scope of its potential effects, and the level of management and representation that it involves. For this purpose, matters which concern the entire undertaking or group or at least two Member States are considered to be transnational. These include matters which, regardless of the number of Member States involved, are of importance for the European workforce in terms of the scope of their potential effects or which involve transfers of activities between Member States.*



## So, what does “transnational” mean?

- As can be seen from the previous two slides, Article 1:4 is precise – the EU as a whole or at least 2 Member States – while Recital 16 seems to suggest that a matter seemingly affecting only one country could be transnational because of its ripple effect.
- So, there are always likely to be disputes between management and EWCs around this issue. Is a matter transnational or not? Does the EWC need to be informed and consulted?
- But there are further complications. Even where there is no dispute about whether a matter is transnational or not, there can be disputes about the extent of the information to which an EWC is entitled.
- Where does transnational information end and national information begin?

## An example

- A company has 20,000 employees in Europe. Because of “exceptional circumstances” it decides to make 2,000, 10% of the workforce, redundant.
- That 10% is spread over: France, Germany, Italy, Hungary, Poland and Sweden.
- Now, is the EWC entitled to just the European number of 10% or is it entitled to a country-by-country breakdown?
- For example, is the EWC entitled to know about the proposed 550 job losses in Germany before the German works councils are told?
- We will come back to this issue later in this series as we explore the issue of “information” in some detail.
- For now, we just want to make the point that **there will always be tensions between “transnational” and “national information”.**

## Mission creep

- Once you create a transnational body, attempts at “mission creep” are inevitable.
- As we will suggest throughout this programme, the actual mandate of an EWC is relatively limited.
- At best, it can offer a non-binding opinion. It has no delaying or veto powers.
- But EWCs (and their advisors) get restless about their limited mandate and will constantly try to push the boundaries.
- From the get-go, management need to have a clear-eyed view of the role of the EWC and also to be clear on the ground rules from the start.

## Information and consultation

- The real contested grounds are around the meaning of “information” and, to a lesser extent, the meaning of consultation.
- We will begin to explore these issues in our next module (#3).