

# **European Works Councils - 4**

## *Training, confidentiality etc*

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## In this session we will cover:

- *The annual meeting*
- *The select committee*
- *The “means required”*
- *Training*
- *Communications*
- *Structural change*
- *Confidentiality*
- *Disputes*

## The annual meeting

- The Subsidiary Requirements (SRs) provide

*The European Works Council shall have the right to meet with the central management once a year, to be informed and consulted, on the basis of a report drawn up by the central management, on the progress of the business of the Community-scale undertaking or Community-scale group of undertakings and its prospects. The local managements shall be informed accordingly.*

- The obligation is on management to arrange the meeting and provide a “report”. There is no suggestion that the EWC itself has any input into organising the meeting or can put items on the agenda.
- The only right given to the EWC is to be able to meet beforehand without management being present. This is understood to mean immediately beforehand when the management/EWC meetings is in person. Virtual meetings provide for more flexibility.

## The meeting agenda/report

- A distinction is drawn between issues about which information to be provided to the EWC and issues about which the EWC is to be informed and consulted.
  - *The information of the European Works Council shall relate in particular to the structure, economic and financial situation, probable development and production and sales of the Community-scale undertaking or group of undertakings.*
  - *The information and consultation of the European Works Council shall relate in particular to the situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies.*
- There is no guidance to the extent of the information to be provided under any of the above headings.
- Management should prepare a report beforehand covering these issues.

## Consultation 1:

- Consultation is described in the following way:  
*The consultation shall be conducted in such a way that the employees' representatives can meet with the central management and obtain a response, and the reasons for that response, to any opinion they might express;*
- As we have previously seen, there is no suggestion that consultation requires agreement. All that is required of management is that it responds to any opinion from the EWC, giving the reasons for its response.
- There is no requirement that management's response must be to the EWCs satisfaction. They can register this dissatisfaction in their opinion.

## Consultation 2

- Which brings us to the structure of the management/EWC meeting. Again, the legislation offers no guidance, other than that the meeting takes place on the basis of a report drawn up by management.
- Is management obliged to “present” to the EWC? Or just open the meeting by referring to the report and asking for comments from the EWC? After all, if they have had the report beforehand and have undertaken an “in-depth” assessment, they should have something to say.
- Can there be a break-out session during the meeting to allow the EWC to consult with its expert or to discuss matters among themselves?
- There is no entitlement to a “post-meeting” but should time be made available within the structure of the meeting to allow the EWC to formulate an opinion?
- And remember, virtual meetings offer more flexibility than in-person meetings.

## The select committee

- The SRs provide that:
  - *To ensure that it can coordinate its activities, the European Works Council shall elect a select committee from among its members, comprising at most five members, which must benefit from conditions enabling it to exercise its activities on a regular basis.*
  - *It shall adopt its own rules of procedure.*
- The question that arises from this is what “activities” can the select committee exercise on a “regular basis”?
- The only activity mentioned in the SRs is for the select committee to meet with management in exceptional circumstances.
- It is given no other role by the legislation.
- But... in a virtual world...?

## The “means required” 1

- Article 10:1 says:

*Without prejudice to the competence of other bodies or organisations in this respect, the members of the European Works Council shall have the means required to apply the rights arising from this Directive, to represent collectively the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings.*

- Without doubt, the means required covers matters such as meeting expenses, travel costs, interpretation, when necessary, and whatever else is necessary (phone, computer) to allow the EWC to meet effectively in pre-meetings and in meetings with management.



## The “means required” 2

- But do the “means required” stretch beyond straightforward operating costs?
- Could they be said to include consultancy or legal costs? Do the “means required” give the EWC the ability to break out from the “one paid” expert article in the SRs?
- Not in our opinion. The SRs are explicit. The EWC is entitled to be assisted by one paid expert. Who or what that expert is, is a matter for the EWC to decide.
- As we see it, EWC representation before courts or tribunals should be a matter for public policy to decide. Companies should not have to fund EWC to take them to court. It creates perverse incentives.
- But, these are contested views.

## Training

- Article 10:4 reads:

*In so far as this is necessary for the exercise of their representative duties in an international environment, the members of the special negotiating body and of the European Works Council shall be provided with training without loss of wages.*
- So, the right to training is not absolute, only “*In so far as it is necessary...*”
- Who decides on the training content and the training providers?
- That depends on national legislation. For instance, the Irish legislation says that it is management’s responsibility to provide appropriate training. Elsewhere, it is different.

## Communications

- Article 10:2 of the Directive reads

*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.*

- It has been argued that this implies a right for EWC members to visit the sites in the country they represent. Some go further and say that the select committee should be able to visit all European sites.
- We take a different view. We believe 10:2 should be read as meaning that the EWC as a collective body reports back, so a uniform and consistent message is conveyed.
- Tools such as intranets and emails can be used. Travel is not necessary.
- Ideally, all post-meeting communications should be jointly agreed, but this is not always possible.

## Structural change 1 (Article 13)

- Where the structure of the Community-scale undertaking or Community-scale group of undertakings changes significantly, and either in the absence of provisions established by the agreements in force or in the event of conflicts between the relevant provisions of two or more applicable agreements, the central management shall initiate the negotiations referred to in Article 5 on its own initiative or at the written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States.
- At least three members of the existing European Works Council or of each of the existing European Works Councils shall be members of the special negotiating body, in addition to the members elected or appointed pursuant to Article 5(2).
- During the negotiations, the existing European Works Council(s) shall continue to operate in accordance with any arrangements adapted by agreement between the members of the European Works Council(s) and the central management.

## Structural change 2

- Let's look at the words:

*Where the structure of the Community-scale undertaking or Community-scale group of undertakings changes significantly, and either **in the absence of provisions established by the agreements in force or in the event of conflicts between the relevant provisions of two or more applicable agreements**, the central management shall initiate the negotiations referred to in Article 5 on its own initiative or at the written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States.*

- So, it is clear that this provision is only triggered where there are two or more EWCs in existence in the event of a merger or acquisition.
- If the acquiring company has an EWC but the acquired company does not, then the employees of the acquired company simply get folded into existing EWC structures.
- What happens if there is only one EWC in existence, but that EWC is in the acquire company is legally unclear, but in practice an SNB request will be triggered.

## Structural change 3

- Where an SNB is triggered in a merger or acquisition scenario then the SNB is constructed as normal, but with the addition of three members from each existing EWC.
- The SNB has the usual three year timeline (as previously discussed).
- While the SNB is in existence, the legislation says that existing EWCs continue to work as normal.
- In practice, this is unrealistic. As the two companies become integrated, seats on EWCs disappear.
- How management should approach the situation can only be dealt with on a case by case basis.

## Confidentiality 1

Two key provisions in the Article on Confidentiality read:

- *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*
- *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.*

## Confidentiality 2

So...

- Companies do not have to reveal to EWCs information of such a nature that it could seriously damage the company.
- Information can be provided in confidence to EWC members which mean they may not pass it on. It is argued that they can pass it on to national employees' representatives who themselves are bound by conditions of confidentiality.
- What information should be marked “confidential” will always be contested terrain.
- Not all information can be confidential.
- Deciding what information is confidential will always be a judgement call.



## Disputes 1

- Let's put this in perspective. There have been EWCs in existence since 1996. Close on 25 years. Maybe 1,200 or so. Over that time, there have been more than around 100 disputes. EWCs going to law has not been common, but maybe that is changing.
- Disputes are generally referred straight to labour courts or tribunals.
- Legislation does not appear to provide for mediation, which is to be regretted. It could be helpful.

## Disputes 2

- In the EWC legislation in all countries, the penalties for breach of EWC obligations are financial. Penalties range from €150,000 in Spain to a few thousand € in some Central and eastern European countries.
- But the judges in some jurisdictions believe they have the power to freeze or reverse management decisions. France and Spain come to mind.
- But these assumed powers grow out of national law and precedent cases.
- Which underscores the need to pick your jurisdiction wisely.

## Finally...

- So that's it, our walk through the SRs of the EWC legislation.
- Once you understand the SRs, you can calibrate the terms of your agreement, knowing your ATNA, your *alternative to an agreement*.
- Of course, as we said at the outset, a set of recordings like this can never replicate the real thing: – the face-to-face discussions and interactions with colleagues, formally and informally.

There is only so much we can cover in these recordings, so you will have questions. If you have questions – please email: [tom.hayes@beerg.com](mailto:tom.hayes@beerg.com)

*But, before we go... we've one last supplementary module: Brexit + EWCs: PP5*