

Understanding European Works Councils

David Hopper

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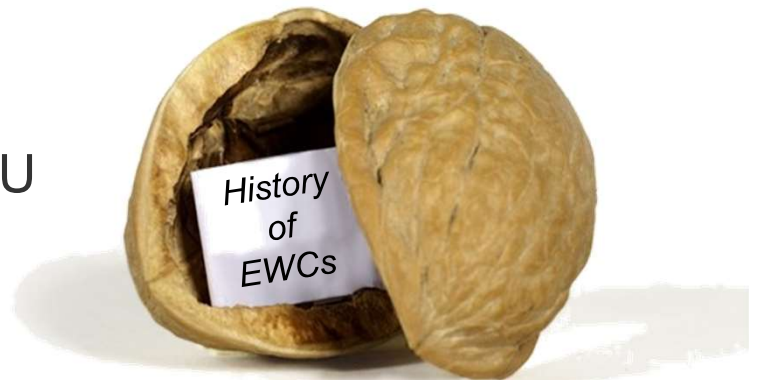
Facts and figures

- Around **2,200** businesses are covered by the European Works Council Directive
- There are currently **1,202** businesses with a European Works Councils (“**EWC**”)
- Assume annual running costs are **€100,000**



History of European Works Councils

- Counter balance to the common market
- Desire for social dialogue between businesses and their employees' representatives
- Article 13 Agreements
- Directive 94/45/EC
- UK opt-in to the social chapter and EU expansion Directives
- Directive 2009/38/EC
- Seafarers Directive
- Brexit

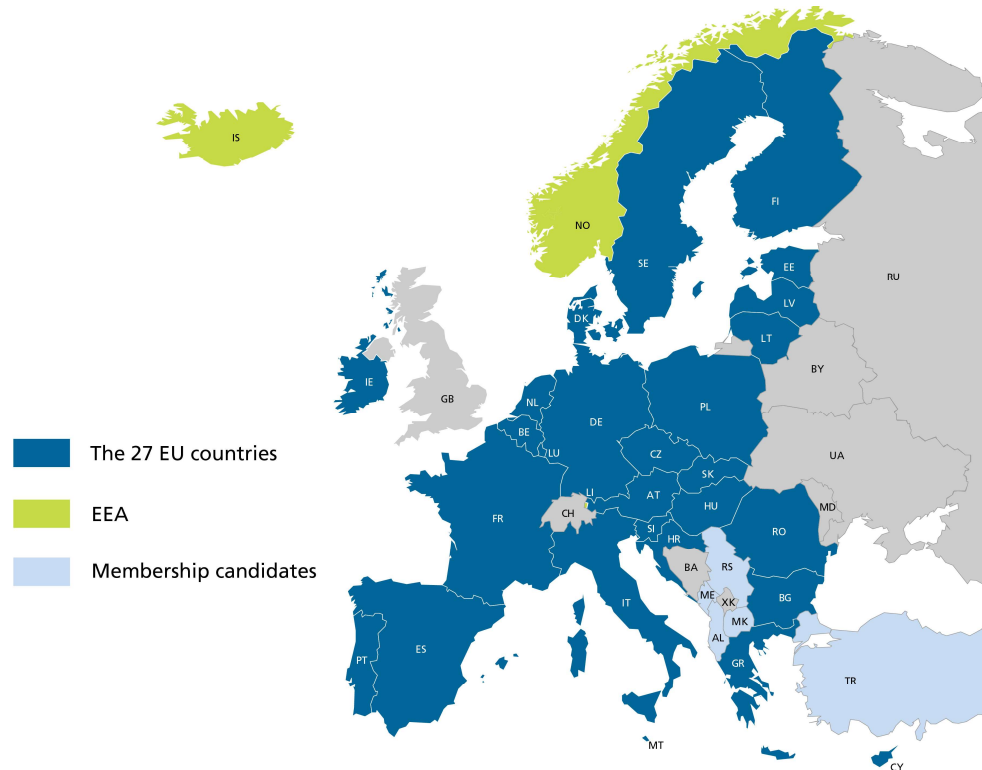




Do you live in Europe?



Do you live in the European Economic Area?



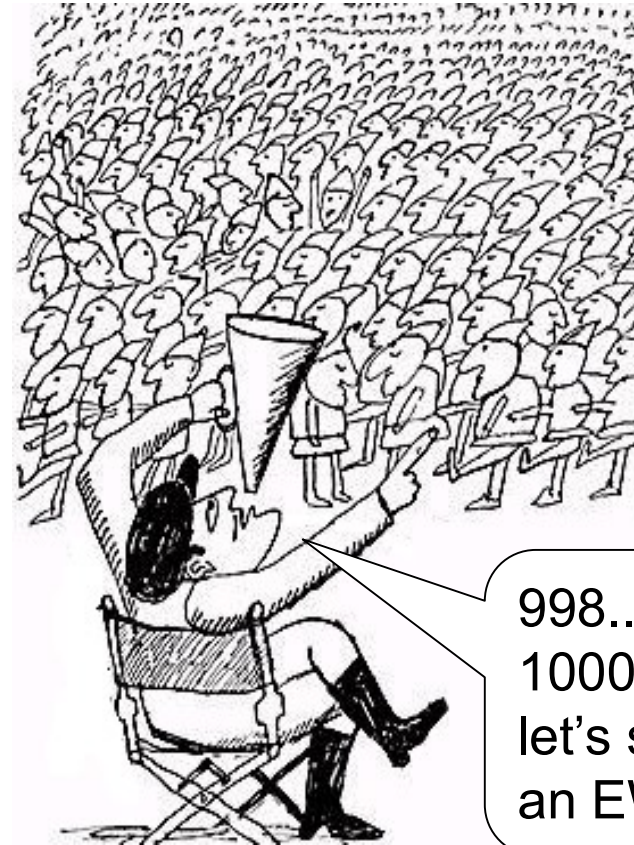
Legal background

- Framework for transnational employee information and consultation across the EEA
- Council Directive 2009/38/EC (as amended) (the “**EWC Directive**”)
- Ireland – The Transnational Information and Consultation of Employees Act 1996 (as amended)



When does the EWC Directive apply?

- The EWC Directive applies to every undertaking which has:
 - **1,000** or more employees in the EEA
 - At least **150** employees in an undertaking in one member state
 - At least **150** employees in an undertaking in another member state



Central Management (1)

- Location
- Location
- Location



Central Management (2)

- Central management is identified by determining which legal entity within a corporate group has **dominant influence**
- An entity has **dominant influence** over another entity if it
 - owns a majority of the subscribed capital
 - controls a majority of the voting rights
 - can appoint more than 50% of the board (determinative)



Central Management (3)

- If central management is not in the EU and/or the EEA then it may designate a “representative agent” in a member state
- Default rules apply if no “representative agent” is appointed based on the establishment or undertaking employing the greatest number of employees in any one member state



Brexit (1)

- Does the business still fall within scope of the EWC Directive?
- Do UK employees still enjoy a right to participate on an EWC?
- Who is central management and which laws apply?
 - Non-EU central managements have a right to designate a representative agent of its choice pursuant to:
 - recital 24 and article 4(2) of the EWC Directive;
 - general principles of the law of agency; and
 - EU law principles of commercial freedom except insofar as circumscribed by law.

Brexit (2)

- Every case on EWCs ever decided by the CJEU supports this:
 - *Bofrost* [Case C-62/99], which at [28] stressed the importance of ensuring that employees will be “properly informed and consulted”
 - *Kühne & Nagel* [Case C-440/00], which at [60] stressed the requirement that “the system of transnational information and consultation... function properly” even if “central management is not located in a Member State”
 - *ADS Anker* [Case C-349/01], which at [58] stressed the importance of effectively facilitating “the setting up of European Works Councils”

Brexit (3)

- UK cases support this:
 - *CEMEX* [EWC/3/2006], in which the CAC upheld at [63] the need to “keep pace with [an] evolving workforce and European border issues” and at [53] to [55] that there are no formal requirements for designating a representative agent and that a letter of designation from central management is sufficient
 - *HPE* [EWC/19/2018], in which the CAC upheld HPE’s right to change its representative agent following the Brexit referendum and held that it wouldn’t be impermissible to change jurisdictions to benefit from more favourable laws
- Persuasive French and German court decisions in:
 - *Manpower* [14/56017], in which the Tribunal de grand instance de Paris upheld that an email from American central management designating an undertaking in another member state as its representative agent denied the French courts jurisdiction; and
 - *DXC* [11 BVGa 5/18], in which the appellate Labour Court of Hesse State upheld the right of an American undertaking to relocate responsibility for the purposes of the EWC Directive from a German undertaking to an undertaking in Ireland

Brexit (4)

- Cases since the end of the Brexit transition period:
 - *Adecco (2)* [EWC/33/2020], in which the CAC upheld Adecco's right to change its representative agent from 1 January 2021 in accordance with its EWC Agreement, but left open the question of whether this would affect the EWC Agreement's governing law and jurisdiction provisions
 - *HSBC* [EWC/38/2021], in which the CAC upheld:
 - HSBC's right to exclude UK employees from its EWC on the basis that the EWC Agreement refers to "EEA" countries;
 - that HSBC's appointment of an Irish representative agent means that the EWC Agreement is now governed by Irish law and subject to the jurisdiction of the Irish courts
 - NOTE – both decisions are now being appealed
 - *easyJet* [EWC/36/2021], in which the CAC held that easyJet must continue to operate an EWC under UK law even though the UK's legislation was expressly amended to say that companies like it don't need to comply
 - NOTE – this decision is now being appealed

Operation of EWCs in practice

- Purpose is to ensure employees are **informed** and **consulted** about **transnational** issues
- Complement national and local information and consultation
- Duty for members of the EWC to report back to employees (subject to confidentiality)
- Entitlement to the **means required**

Information

- **Information** means transmission of data by the employer to the employees' representatives in order to enable them to **acquaint** themselves with the subject matter and to examine it.
- It shall be given **at such time, in such fashion and with such content as are appropriate** to enable employees' representatives to undertake an **in-depth assessment** of the possible **impact** and, where appropriate, **prepare for consultation**.

Consultation

- **Consultation** means the **establishment of dialogue and exchange of views** between employees' representatives and central management or any more appropriate level of management, **at such time, in such fashion and with such content** as to enable employees' representatives to express **an opinion on the basis of the information provided**.
- It is **without prejudice to the responsibilities of the management** and any opinion must be provided **within a reasonable time** and need not necessarily be taken into account.

Transnational

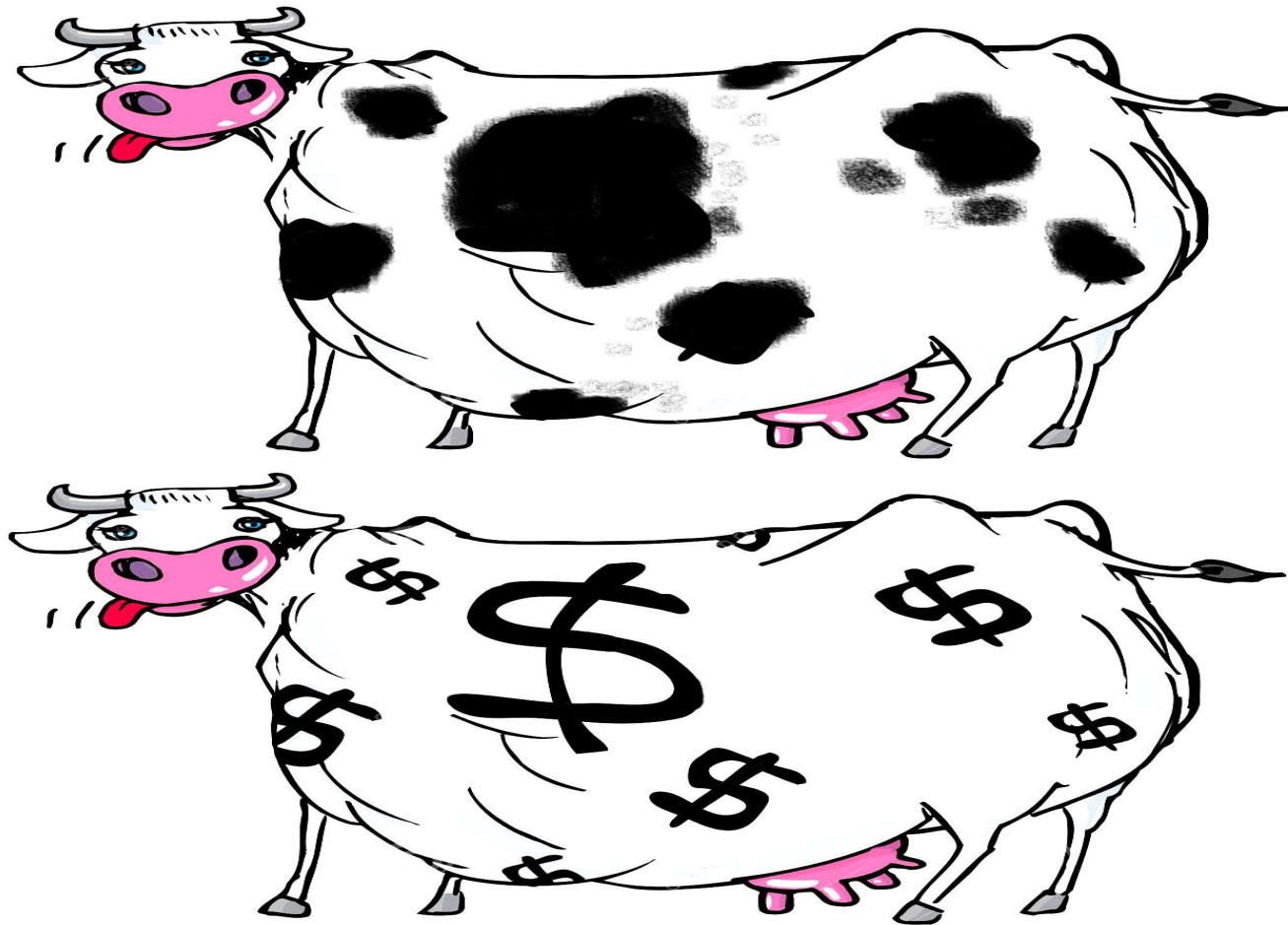
- Article 1(4) of the EWC Directive

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.**

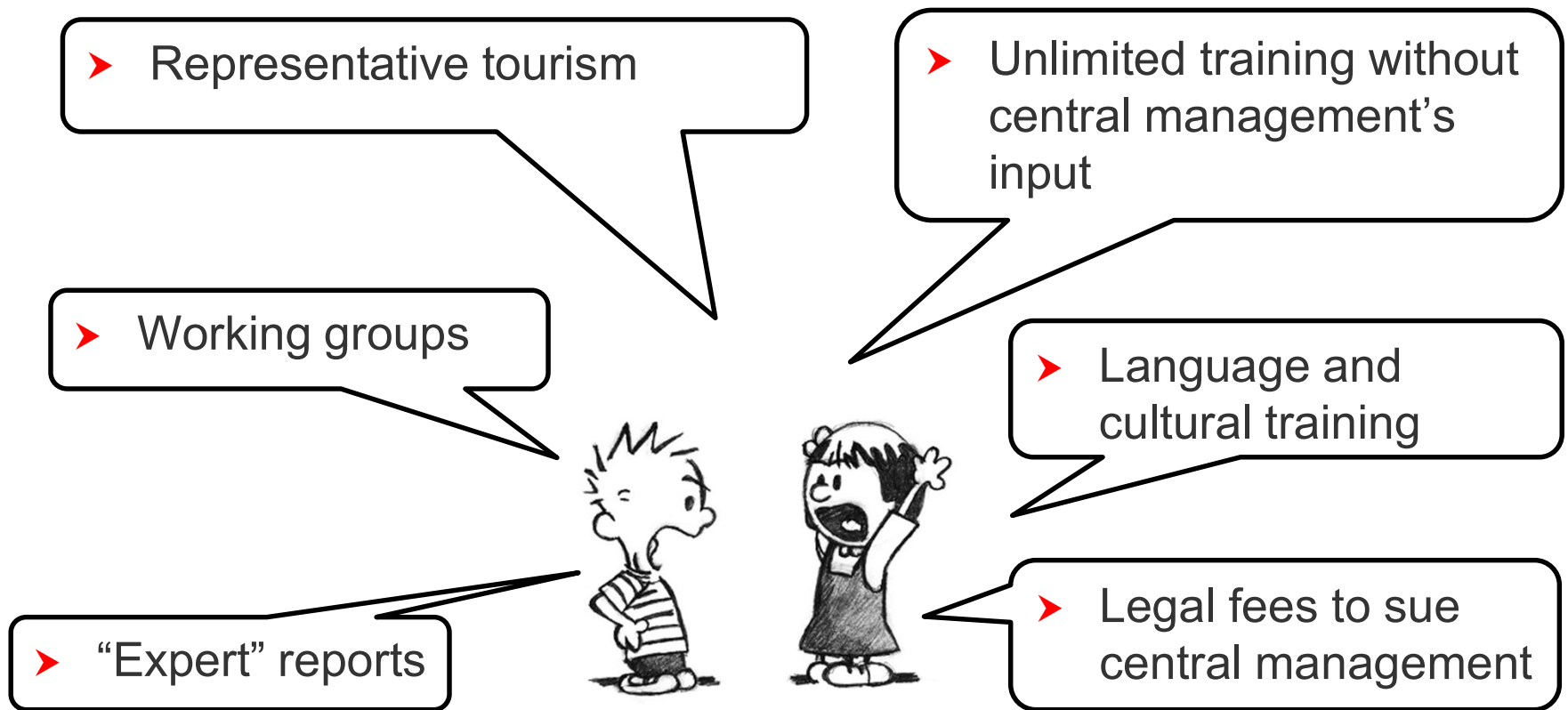
- Recital 16 to the EWC Directive

*... 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.*

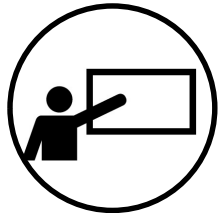
Means Required (1)



Means Required (2)



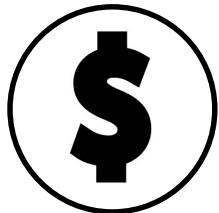
Means Required (3)



Training



Paid time off



Reasonable expenses including travel, accommodation and interpretation



Assistance from experts of its choice

Remedies

- Adequate administrative or judicial procedures to enable the obligations deriving from the EWC Directive to be enforced
- Injunctions
- Fines



Culture and Experience of EWCs in Ireland

- Same legislative background as rest of EU
- Broadly similar to UK with some key differences
- Number of Article 13 Agreements
- Awareness or interest amongst employees very low
- Courts have literally no experience of them
- Where they do exist, Irish employees not active
- Brexit has now made them a feature of Irish IR landscape

Key Feature of Irish EWC Legislation

- Employer provides the training, not the funding
- Irish SRs not ideal but more acceptable to CM than to SNB
- Expert is a natural person, not a consultancy
- Means required exclude legal costs
- Scope for fines and prison terms for CM and EWC
- Dispute resolution mechanisms are incomplete and defective