



Revision of the European Works Councils Directive

The revised European Works Council Directive was finally published in the *Official Journal of the European Union* on 16 May 2009. Member states have until 5 June 2011 to give effect to its provisions. This briefing analyses the proposed changes and their possible effects on businesses.

Introduction

The objective of the revised European Works Council Directive is to increase the number of European works councils (EWCs) established within corporate groups of the requisite size and to ensure that employees' transnational information and consultation rights are effective (notwithstanding that many employers will have taken the view that there are sufficient consultation rights under the existing legislation). The proposal is also intended to increase legal certainty and bring the EWC legislation in line with other directives dealing with information and consultation processes (such as the Works Councils Directive and the legislation relating to employee participation in European Companies).

Member states have until 5 June 2011 to transpose the changes into national law.

The existing law on EWCs

The concept of the EWC was introduced in the 1994 directive (94/45/EC). That directive applies to companies or corporate groups with 1,000 employees or more in the European Economic Area (EEA) and at least 150 in two separate member states. There is no obligation to set up an EWC when these thresholds apply unless a request is received from at least 100 employees in at least two countries, or the employer elects to take steps to set up an EWC by unilateral initiative. On receipt of a request, or if it initiates the process itself, the company is required to set up a special negotiating body with the aim of agreeing the terms of an EWC agreement. If an agreement cannot be reached, statutory subsidiary requirements apply.

Importantly, the 1994 directive did not apply to agreements providing for transnational information and consultation of employees that were signed before 22 September 1996. This exclusion is laid down in article 13 of the 1994 directive. Almost 50 per cent of existing EWCs are based on 'article 13 agreements'. Because they fall outside the scope of the 1994 directive and its requirements, article 13 agreements have traditionally been more flexible from an employer's perspective.

The principal changes to the revised EWC Directive

Definition of 'transnational matters'

EWCs are competent in respect of transnational matters. The revised directive re-confirms the meaning of a transnational matter: 'Matters shall be considered to be transnational where they concern the Community-scale undertaking or Community-scale undertakings as a whole, or at least two undertakings or establishments of the undertaking or group situated in two different Member States.' This wording duplicates that found in the subsidiary requirements (ie the statutory requirements that will apply where the terms of an EWC agreement cannot be agreed between the company and negotiating representatives) in the 1994 directive.

This helps to clarify the position following a decision by the Cour du travail de Bruxelles in December 2006 in a case involving British Airways. The case concerned a restructuring that was proposed in one country but to be

implemented at a single location in a different country – Vienna airport. The restructuring was found to fall within the competence of the EWC.

However, there is still potential scope for future dispute, given that the recitals of the revised directive appear to take a broader view of transnationality, emphasising that 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. The recitals continue by saying ‘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 there may still be some scope for the British Airways case to be decided in the same way today.

Definitions of ‘information’ and ‘consultation’

The revised directive contains definitions for both terms and, broadly, brings them into line with definitions used in other recent directives.

Moreover, information is required to 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 consultations with the competent appropriate organ of the Community-scale undertaking or Community-scale group of undertakings’. This is clearly an onerous obligation, requiring employers to provide detailed information in advance of any decision being taken. There is express acknowledgement of the right of the employee representatives to conduct an ‘in-depth’ assessment, which arguably goes rather further than the reference to ‘an appropriate study’ that had been included in the Commission’s original July 2008 draft of the revised directive. It is also not entirely clear precisely what information is required to be given in practice to enable the relevant assessment to be undertaken.

The recitals of the revised directive do emphasise the need for the information procedure to be carried out ‘without slowing down the decision-making process in companies’. In practice, however, it seems inevitable that in a number of cases the information and consultation process will take longer; sometimes materially so.

The definition of ‘consultation’ in the revised directive repeats the general principles of ‘exchange of views’ and ‘establishment of dialogue’ contained in the 1994 directive but also requires it to occur at such time and in such a way that employee representatives are able to express an opinion to the management before a decision is taken. The definition also makes explicit the right to be consulted ‘without prejudice to the responsibilities of the management’ and that the opinion must be delivered within ‘a reasonable time’. Unhelpfully, though, there is no guidance on what a reasonable time is likely to be (and what happens if the EWC refuses to give an opinion) or what ‘without prejudice to the responsibilities of the management’ actually means in practice. Certainly, it is unlikely to mean that management can simply ignore its consultation obligations because it deems it necessary to proceed to a commercial decision in short order.

In summary, the new definitions envisage a more structured, a more onerous and, in many cases, a longer process of interaction with the EWC.

Involvement of trade unions

The final version of the revised directive confirms that there will be a new obligation to inform European trade unions and employers’ organisations of the start of the negotiations. Further, employee negotiating representatives may request assistance from trade union representatives as experts for the purpose of negotiating an EWC agreement. Trade union representatives are specifically empowered to be present at negotiation meetings on request. This express recognition of trade unions’ role potentially gives them scope to become more involved in the EWC process and, particularly in the current economic climate, they may be keen to take up the opportunity.

How EWC consultation interacts with local law obligations

The 1994 directive did not address how national and transnational consultations interrelate. This led to considerable uncertainty and (largely in France) litigation.

The initial draft of the revised directive put forward by the European Commission indicated that the sequencing of obligations could be established by the EWC agreement itself, provided that it complies with national laws. The

proposal for EWC agreements that are silent on the subject was that national and pan-European processes should start at the same time if decisions likely to lead to substantial changes in work organisation or contractual relations are envisaged.

Unfortunately the final version of the revised directive is rather less clear. Joint advice from the European social partners submitted to the French minister for labour, social affairs and solidarity in August 2008 suggested removal of references to the processes being conducted in parallel. So, if the EWC agreement is silent on the matter, member states are required to ensure that necessary processes are conducted in the EWC 'as well as' in the local information and consultation body. It remains to be seen whether member states will be more prescriptive in implementing legislation. If not, it seems likely that the current uncertainty over the interrelationship between national and pan-European obligations will continue.

The effects on existing agreements

Although the revised directive will not trigger a general obligation to renegotiate existing EWC agreements, one of its most significant changes imposes an obligation to renegotiate existing agreements if the structure of the company or community-wide group 'changes significantly' and either the existing EWC agreement does not expressly cater for what should happen or there is a conflict between the provisions of two or more applicable EWC agreements (for example, in a merger whose parties' agreements adopt differing approaches).

The renegotiation process can either be undertaken by the company on its own initiative or following a written request from at least 100 employees or their representatives in at least two undertakings or establishments in at least two different member states. In these circumstances, the renegotiation process will take place under the terms of the revised directive.

The practical difficulty with this is to identify what will constitute a significant change. Clearly, a full-scale corporate merger will be a significant change in structure, but what about the sale of a large but self-contained subsidiary? No guidance is given on this in the revised directive and we can expect disputes over whether the provisions of article 13 have been triggered, with employers looking to take a narrow view

and employee representatives pushing for a broader interpretation. Many of the 'older' EWC agreements do not contain detailed provisions for renegotiation on a change in corporate structure.

However, where there is no significant change, the revised directive provides that its obligations do not apply to either 'article 13' (as per the 1994 directive) agreements, including any agreements that have been adjusted because of changes in the structure of the company or group, or to negotiated agreements under article 6 of the 1994 directive, including those signed or revised in the two-year period after the revised directive came into effect (ie before 6 June 2011). The language in the revised directive is difficult to follow but the correct conclusion appears to be that an 'article 13' (as per the 1994 directive) agreement would need to be renegotiated if going forward there is a significant structural change and the agreement does not cater for what happens in that situation.

This means that if an employer has an existing EWC agreement (under either article 6 or 13 of the 1994 directive) it should consider carefully whether existing adaptation clauses are sufficient and, if not, consider whether it is feasible to amend and introduce these before the period for the revised directive's transposition has elapsed.

The revised directive's likely effects

The changes will make employer obligations more burdensome at a time when many businesses would prefer to concentrate on ensuring that they survive the recession. Employee representatives, on the other hand, will point to the relatively toothless nature of EWCs under the 1994 directive and will argue that none of the changes ought to inhibit organisations that have a commitment to making their EWCs work and to using them for a proper and meaningful interaction on transnational matters.

It remains to be seen whether the changes will improve the effectiveness of information and consultation in existing EWCs. Certainly, employers will be concerned that decisions may take longer to make and implement as a consequence of what appears to be a more onerous and, in some cases, more opaque process.

Coherence between EWCs and other national-level procedures is also not likely to improve, given that the revised directive fudges the question of the interrelationship between EWCs and national-level procedures.

As for any improvement in legal certainty, it is clear that a number of the changes described above are likely to decrease rather than improve certainty, at least in the short term.

The upshot of all of this is that we cannot predict the directive's ultimate effects. Instead, companies must ensure that they plan for what is likely to be a more arduous regime, at least until employers and employees alike accustom themselves to the new landscape. In addition, employers should analyse the sufficiency of existing adaptation clauses. Where those clauses prove insufficient, employers should consider amending their existing EWC agreements.

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