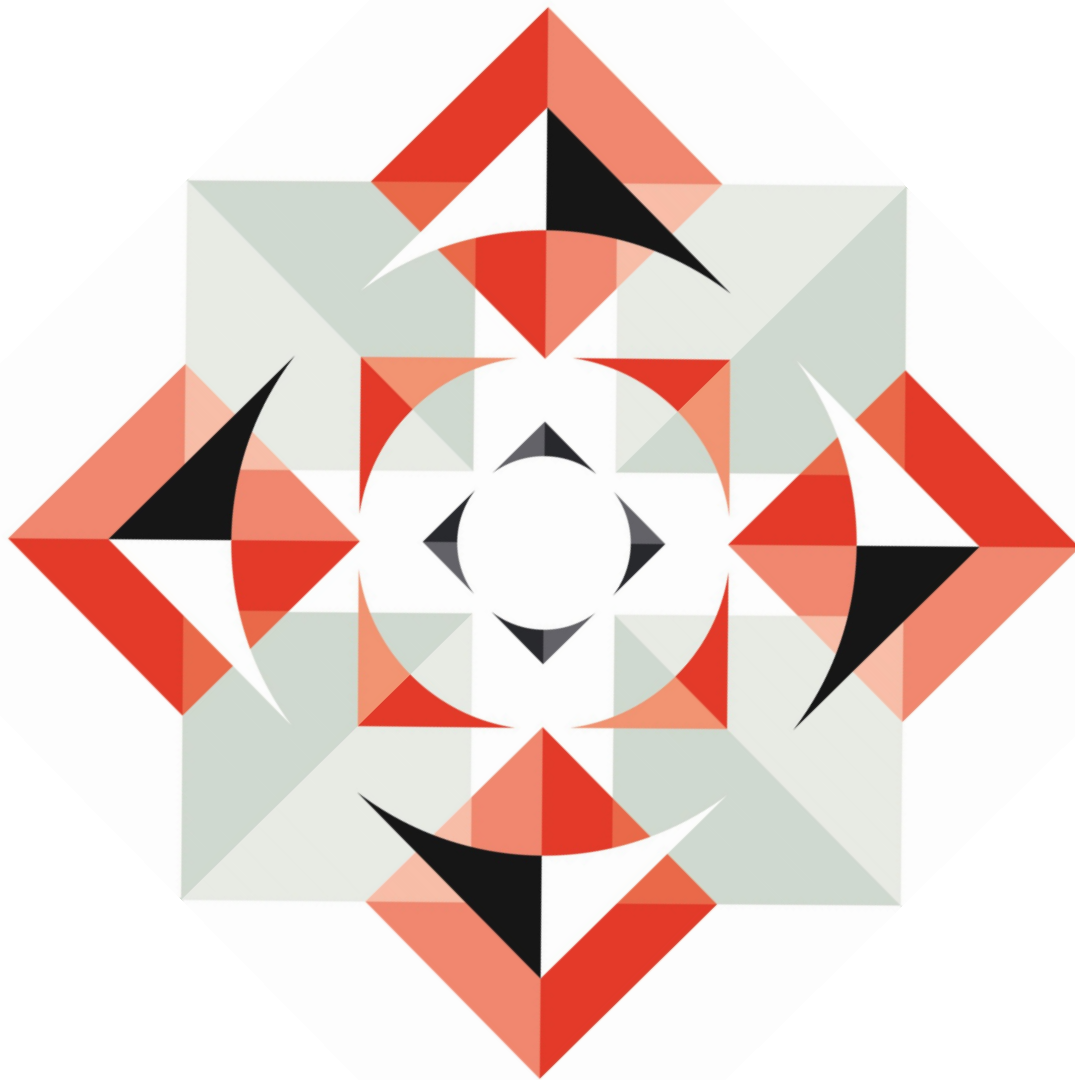


# European Works Councils



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## Introduction

European Works Councils are becoming increasingly common as a forum to negotiate pan-European issues.

This Inbrief sets out the key steps for employers dealing with a request to set up an EWC, and employers' obligations when negotiating an EWC agreement.

## Background

The European Works Council Recast Directive (2009/38/EC) (the "Directive") provides for the establishment of a European Works Council ("EWC") to inform and consult with employees on transnational issues. The Directive only applies to multi-national employers with over 1,000 employees within the European Economic Area (the "EEA") and at least 150 employees in two separate EEA states.

Employers are not required to take pro-active steps to establish an EWC. However, in response to a request from at least 100 employees in two or more member states, a special negotiating body ("SNB") of employee representatives must be convened with the aim of reaching agreement on arrangements for the establishment of an EWC. If an employer refuses to negotiate after receiving such a request (or fails to reach agreement on the terms of the EWC) a precedent set of articles for the EWC which are set out in the Directive must be adopted (the default "Subsidiary Requirements").

The Directive does not apply to agreements for transnational consultation which were entered into before 22 September 1996 (often referred to as "Article 14 Agreements").

## Setting up an EWC in the UK

A request to set up an EWC can come from employees in any EEA state. However, it will be dealt with under the UK legislation (the Transnational Information and Consultation of Employees Regulations 1999, "TICE") if the "central management" of the undertaking (or group of undertakings) is located in the UK.

Contrary to popular belief, the "central management" need not be in the same state as the European / EMEA headquarters. Employers have some choice as to where they locate their central management for the purpose of the Directive, and businesses should take advice before making this important decision.

Many employers choose the UK as a favourable location for central management, partly because of less stringent penalties for breaches of the Directive than in other jurisdictions.

Presuming central management is in the UK, the first thing to do on receiving a request to

negotiate an EWC agreement is to check its validity. To be valid, a request must be:

- > made in writing
- > by or on behalf of at least 100 employees in at least two different EEA states
- > dated

If the request is valid, central management will only be required to enter into negotiations regarding an EWC agreement if it is a Community-scale undertaking, or part of a Community-scale group of undertakings. This simply means that the employer or its group has at least 1000 employees within the EEA states and:

- > the employer has at least 150 employees in each of at least two EEA states
- > or the employer's group has at least two undertakings in different EEA states each of which has 150 employees

An employee may request information to establish whether or not these criteria are met. If so, an employer must respond within a month to avoid an application to the Central Arbitration Committee (the "CAC").

Once a valid request has been received, the employer has a period of three years in which to reach agreement about the content of an EWC agreement. Whilst this may seem like a long time, the negotiated agreement may well last for another twenty years, so it is important to ensure the EWC agreement is well thought through and prepared. It is important that central management takes steps to initiate negotiations (i.e. have the first meeting with the SNB within six months of the request) because otherwise the default Subsidiary Requirements will automatically apply after the expiry of that six month period. If the parties do not successfully agree on the contents of the EWC agreement within the three year period, these Subsidiary Requirements will apply once the three years have expired.

## The default Subsidiary Requirements

The Subsidiary Requirements provide for information and consultation to take place at an annual meeting between central management and EWC members, on the basis of a report



drawn up by central management on the progress of the business and its prospects. Additional meetings can take place if the EWC (or a select committee representing the EWC if one has been appointed) requests them but are only required in exceptional circumstances affecting the employees' interest to a considerable extent. For example, relocations, the closure of establishments, or collective redundancies. The Subsidiary Requirements allow the EWC (or its select committee) to appoint experts of its choice, and require the central management to fund at least one expert, together with any other expenditure and resources which enable the EWC and its select committee to perform their duties in an appropriate manner.

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### Negotiating the EWC agreement

There is a set process for negotiation of the EWC agreement. Representatives from the employer's central management must meet with a SNB made up of employees appointed by each EEA state (at a rate of one employee elected/appointed by employees in an EEA state for each 10% (or fraction of 10%) which those employees represent of the total number of employees across the undertaking or group of undertakings).

The process for appointment of members to the special negotiating body will vary depending on the local law in those EEA states. The UK members of the special negotiating body must be elected by a ballot, following certain rules set out in TICE, unless they are appointed by a consultative committee. The consultative committee must:

- > have been pre-elected by all UK employees
- > must represent all UK employees in carrying out an information and consultation function
- > be independent of the UK and central management

Negotiation must be "in a spirit of cooperation with a view to reaching a written agreement" on the detailed arrangements for the information and consultation of employees.

The particular topics which should be included in any EWC agreement are:

- > which EEA states are covered by the agreement
- > the composition of the EWC, including the number of members, allocation of seats, and terms of office of members
- > the functions and procedure for giving information to and consulting with the EWC, and the inter-relationship with information and consultation of national employee representation bodies (such as trade unions)
- > the venue, frequency and duration of meetings of the EWC
- > if a select committee is to be appointed, the procedure for appointing its members, its functions and the procedural rules
- > the financial and material resources to be allocated to the EWC
- > the date of the agreement, its duration, arrangements for amending or terminating it, and circumstances where the agreement should be renegotiated (for example, because of changes in structure of the undertakings)

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### Scope of the obligation to inform and consult

Information is defined in the Directive as the transmission of data by the employer to employee representatives in order to enable them to examine the subject matter. Information must be given in good time and in such a manner so as to enable the representatives to understand the possible impact and prepare for consultation.

Consultation is defined as the establishment of a dialogue and exchange of views between employee representatives and management at such time and in such a manner as to enable the employee representatives to express an opinion.

The information and consultation obligations of the EWC are limited to "transnational matters". Transnational matters are matters which either concern the undertaking/group of undertakings as a whole, or concern at least two undertakings or establishments of the

undertaking or group, situated in two different EEA states.

Negotiation on pay and normal collective bargaining issues are outside the scope of these information and consultation requirements.

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### Employer obligations

The employer must provide the "means required" for EWC members to fulfil their duties. This includes the means required to undertake training of EWC members and the SNB members to the extent necessary for the exercise of their duties. These employees, together with candidates in elections, will also have a right to paid time off during working hours to perform their functions as such a member or candidate.

Such employees are protected from dismissal and other detriments if the reason for the dismissal or detriment is that they performed functions or activities as a member of the EWC, SNB or as a candidate to be so, or that they have requested paid time off during working hours.

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### Enforcement

At present, the maximum penalty for non-compliance is £100,000. Complaints of a breach would usually be made in the CAC.

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### Article 14 Agreements

Article 14 agreements are the old Article 13 EWC agreements which were set up prior to implementation of the Directive. Unlike EWC agreements which have been entered into since the Directive was implemented, Article 14 agreements are not usually legally enforceable, and can retain this status provided they include an adaptation clause (to provide for what will happen to the agreement in the case of significant changes in the structure of the Community-scale undertaking or group of undertakings). However, it is still possible for an Article 14 agreement to retain its non-legally enforceable status even if it currently does not have an adaptation clause. Those businesses with such agreements should seek further advice as to how to retain its Article 14 status, when renegotiating the agreement.

## Brexit

The people of the UK voted to leave the EU in June 2016. It currently appears that the UK will leave not only the EU but also the EEA in March 2019. This would take the UK outside of the scope of the Directive.

As with many things to do with Brexit, uncertainty currently exists about what its implications will be for EWCs. However, as at August 2018 it appears from the Directive, ECJ case law and from UK Government and EU position papers that:

- 1) if a withdrawal and transition agreement is concluded then the UK will remain within the scope of the Directive until 31 December 2020 notwithstanding the UK having left the EU and the EEA. The status of the Directive in the UK would then be settled during the transition period; and
- 2) If no such agreement is concluded then the UK will fall out of the scope of the Directive at 11pm (UK time) on 29 March 2019. The effect of this is likely to be that companies with existing EWCs would need to continue to operate EWCs in the remaining member states of the EU and the EEA on the basis that employees in those countries shouldn't be deprived of their employment rights because of Brexit. However, the exact implications of such a 'hard Brexit', and its impact on UK employees in particular, will depend on the precise terms of any EWC agreement, the structure of the remaining European business and any contingency measures taken in advance of Brexit.

The implications will also depend on whether the UK Government attempts to honour its commitment that Brexit should not lead to any reduction of employment rights. It is likely that political expediency will lead it to attempt to protect UK employees' current EWC rights notwithstanding that those rights are linked to membership of the EU and the EEA. It is difficult

to see how this can be achieved in practice, however, as the Government has set incompatible red lines (of leaving the jurisdiction of the ECJ *and* preserving the right for UK employees to participate in EWCs notwithstanding their operations being subject to the ultimate jurisdiction of the ECJ) and to date the Government has only been able to indicate that details of its proposals are "to be confirmed" in due course.

Businesses concerned about the potentially significant impact on their EWC arrangements and the increased risk of their EWC arrangement defaulting into a less business-friendly jurisdiction without proper contingency planning are advised to obtain specialist advice on their particular circumstances.

For further information on this subject please contact:

**Vince Toman**

Barrister

T + 44 (0) 20 7074 8171

[vince.toman@lewissilkin.com](mailto:vince.toman@lewissilkin.com)