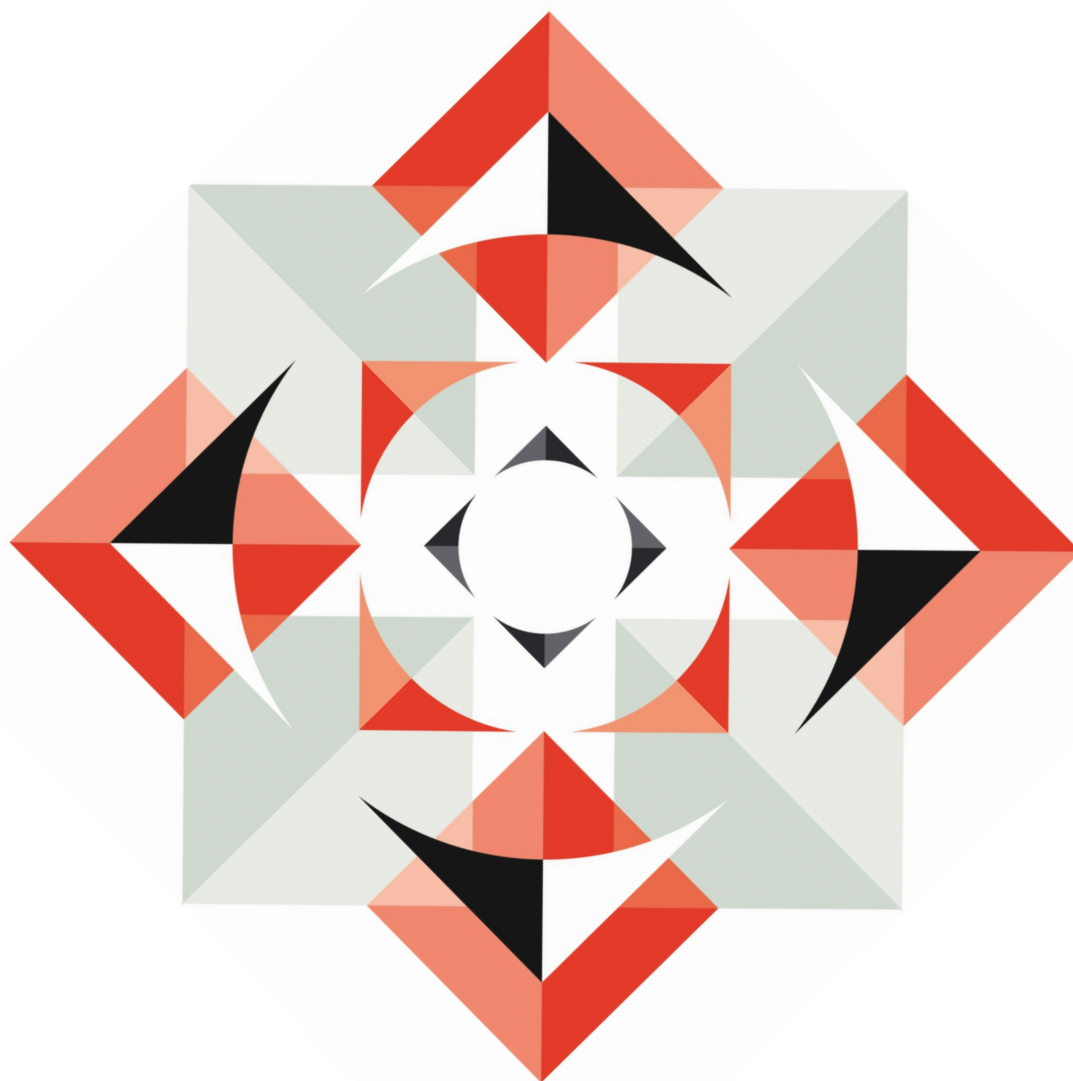


European Works Councils under UK Law



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Introduction

European Works Councils are the only legally -mandated bodies for transnational information and consultation with employees in the world.

This inbrief details which employers can be required to establish an EWC and the rules that apply to them. It also considers the likely implications for them at the end of the UK's Brexit transition period.

Background on EWCs

A European Works Council (a "EWC") is a body that facilitates information and consultation with European employees on transnational issues. EWCs are composed of employees' representatives from each country that is a member of either or both of the European Union and the European Economic Area, and the UK during its Brexit transition period, in which a business has employees (a "Member State").

EWCs operate separately from national information and consultation bodies. They derive from Directive 2009/38/EC (the "EWC Directive") as transposed into UK law by the Transnational Information and Consultation of Employees Regulations 1999 (as amended) ("TICER").

When do the EWC Directive and TICER apply?

The EWC Directive applies to undertakings or groups of undertakings with at least 1,000 employees in Member States and at least 150 employees in each of two Member States.

Even if the EWC Directive applies then TICER will only apply if an employer's central management is situated in the UK. Central management is the management that can exert ultimate control over an undertaking or group, or which acts as the representative agent of such management located outside of a Member State (such as in the United States).

Which rules apply?

The EWC Directive recast Directive 94/45/EC as extended to the UK by Directive 97/74/EC when the UK ended its opt-out from the Social Chapter. This means that there are three legal frameworks:

1. EWCs established prior to 22 September 1996 in advance of a business falling within the scope of Directive 94/45/EC (commonly known as "Article 13" agreements) or prior to 15 December 1999 in advance of falling within its scope as extended by Directive 97/74/EC (commonly known as "Article 3" agreements). These EWCs generally fall outside of the scope of the EWC Directive and TICER although if a business's structure

changes significantly or the agreement terminates then management may need to negotiate a new agreement fully subject to both the EWC Directive and TICER;

2. EWCs established or revised between 5 June 2009 and 5 June 2011. These EWCs generally fall outside of the scope of the EWC Directive and TICER although if a business's structure changes significantly or the agreement terminates then management may need to negotiate a new agreement fully subject to both the EWC Directive and TICER. However, unlike "Article 13" and "Article 3" agreements, these agreements are subject to Directive 94/45/EC and TICER as in force prior to 5 June 2011; and
3. EWCs which are fully subject to both the EWC Directive and TICER.

This guide focuses on EWCs that are fully subject to both the EWC Directive and TICER. It is nevertheless of relevance to all businesses as the rules on adaptation apply to all EWCs if a business's structure changes significantly.

Appointment of a representative agent

Central managements located in a country outside of the European Union and the European Economic Area that have not already nominated a representative agent should carefully consider proactively appointing one. A default representative agent will otherwise be deemed to exist in the Member State in which the group undertaking which employs the greatest number of employees is situated.

The forthcoming end of the Brexit transition period means that we recommend against businesses appointing a representative agent in the UK. We suggest that they instead consider appointing one in Ireland and further information on EWC's under Irish law is available [here](#).

Information requests

Employees and their representatives may request information for the purpose of determining whether TICER applies to an employer. The employer must then provide specified information on its employee numbers and on the structure of its workforce.



Commencing the process to establish an EWC

An employer may choose voluntarily to establish an EWC but is under no obligation to establish one unless it receives a written request made by or on behalf of at least 100 employees from at least two Member States.

Establishing a special negotiating body

An employer must establish a special negotiating body (an "SNB") to negotiate an EWC agreement once it has chosen to establish an EWC or received a valid request. An SNB is a body of employees' representatives that has the sole purpose of negotiating an EWC agreement. It does not have any information and consultation role.

An SNB must be composed to consist of one employees' representative from each Member State in which an employer has employees and an additional employees' representative from each Member State in respect of each tranche or fraction of 10% of employees who are employed in that Member State. Members of the SNB must be appointed or elected in accordance of the laws of the Member State in which they are employed. The employer must bear all costs involved in establishing the SNB.

Negotiations with an SNB

Employers must initiate negotiations with its SNB within six months of the commencement of the process for establishing an EWC. The employer and the members of the SNB must then work in a spirit of cooperation with a view to reaching a written agreement on the detailed arrangements for the information and consultation of employees. Negotiations may and often do last for up to three years and an SNB's decisions must be made by a majority of its members.

Members of an SNB enjoy rights to assist them to negotiate an EWC agreement including:

- to meet without management before and after any meetings with management;
- to be assisted by experts of their choice and for management to pay for the reasonable costs of one such expert;

- to receive training to the extent necessary for the exercise of their duties;
- for management to pay for their reasonable and necessary costs relating to the negotiations such as travel expenses, accommodation expenses, and translation and interpretation support; and
- paid time off work for the performance of their duties.

EWC agreements

The SNB and management enjoy significant flexibility to negotiate the precise terms of an EWC agreement but it must detail the following:

- the group companies covered by the EWC agreement;
- the composition of the EWC, the number of its members, the allocation of seats and the term of office of the members;
- the functions and the procedure for information and consultation of the EWC;
- arrangements to link information and consultation of the EWC with information and consultation of national employee representation bodies;
- the venue, frequency and duration of meetings of the EWC;
- the composition, procedure for appointment, function and procedural rules of any select committee of the EWC;
- the financial and material resources to be allocated to the EWC; and
- the date of entry into force of the EWC agreement, its duration, the arrangements for amending or terminating it, and the circumstances and manner in which it is to be renegotiated including if the structure of the business changes significantly.

If it is not possible to conclude an EWC agreement within three years then an EWC must be established operating under the subsidiary requirements detailed in TICER. These provide a default set of provisions under which the EWC must operate. They provide for one

annual meeting between the EWC and central management to facilitate information and consultation on the overall state of the business. They also provide for additional meetings in the event of exceptional circumstances affecting employees' interests to a considerable extent, such as in the event of significant collective redundancies in more than one Member State.

The SNB and management may also choose for the subsidiary requirements to apply at any time and they apply by default if management fails to initiate negotiations within six months of receiving a valid request.

Operation of an EWC

The EWC agreement or the subsidiary requirements govern an EWC's operation. TICER nevertheless imposes certain overarching obligations with which management must comply. These include:

- to work in a spirit of cooperation with its EWC having due regard for its rights and obligations;
- not dismissing or subjecting employees' representatives to any form of detriment in connection with their proper performance of their duties; and
- providing employees' representatives with the means required for them to fulfil their duties, training to the extent necessary for the exercise of their duties; and paid time off to perform their duties and receive training.

Confidentiality

Management may give information to an EWC on a confidential basis if it is commercially sensitive. It does not need to give information to employees' representatives at all if that would be prejudicial to or otherwise seriously harm its interests.

Adaptation

If the structure of a group with an EWC changes significantly then, in certain circumstances, it can be required to negotiate a new EWC Agreement. This is one of the ways in

which "Article 13" agreements, "Article 3" agreements and agreements dating from between 5 June 2009 and 5 June 2011 are slowly being replaced by agreements fully subject to both the EWC Directive and TICER.

Enforcement

Disputes regarding the operation of an EWC are resolved by the Central Arbitration Committee. If a complaint is well-founded then it may order an employer to take such steps as are necessary for the employer to comply with its obligations. However, it may not suspend or alter the effect of any act already done by management. This reflects that information and consultation with an EWC does not affect management's prerogatives to manage its business. If a complaint is well-founded then the EWC may also apply to the Employment Appeal Tribunal for the imposition of a punitive fine payable to the Government of up to £100,000.

Brexit

The UK ceased to be a member state of the European Union on 31 January 2020. As at the date of this inbrief, its Brexit transition period will end on 31 December 2020. EU law will cease to be applicable in and to the UK on that date.

As a matter of EU law, EWCs other than ones operating under an "Article 13" agreement or an "Article 3" agreement will cease to operate under UK law and begin operating under the laws of a member state of the European Union on 1 January 2021. Central managements should therefore proactively plan for this eventuality to avoid defaulting to its EWC being governed by the laws of the country in which a group undertaking employs the greatest number of employees. "Article 13" and "Article 3" agreements should be unaffected but it is still prudent for businesses to take proactive steps before 31 December 2020 in case the end of the Brexit transition period is ultimately held to have triggered adaptation.

As a matter of UK law, Brexit is unprecedented but it appears likely that existing:

- statutory obligations under TICER will fall away as the Government's "no-deal" Brexit legislation amends TICER in a way that effectively ends EWCs operating under UK law. Despite Theresa May's Government stressing that Brexit would mean no reduction in UK employees' rights, Government guidance now recognises its implications on employees' rights. The Government now merely "encourage" businesses to maintain UK employees' rights to representation "on a voluntary basis"; and
- UK law contractual obligations under EWC agreements will fall away under the UK law doctrine of frustration.

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