The establishment of a European Works Council (EWC) is a major step for any business. It is not just that it opens up the prospect of convening meetings of employee representatives from across Europe with senior managers, it is the cost of these meetings, the management time spent in preparation, attendance and in the follow up. For union-free employers, EWCs provide an opportunity for trade unions to make inroads into their business. For senior executives from outside Europe who are unfamiliar with continental works councils, they can also demand a change in mindset. Typically, this involves acting earlier to provide information and to consult over proposals, as opposed to simply announcing decisions involving workplace change. This continental approach is even more evident in a recent change to EWC law, effective from June 2011 and described below.

The 1994 EWC Directive provided for the establishment of EWCs, or a procedure to inform and consult employees on transnational issues and there are now at least 900 EWCs in existence. Transnational matters are usually those which concern all the operations of the business in Europe, or those which concern undertakings or establishments in at least two different qualifying countries. Typically, an EWC involves dealing with a forum of employee representatives from across the EU member states about workplace change with cross-border implications. Such employee representatives may come from the local trade union, however this depends on the country; in some, the EWC operates independently of the unions, while in others, the unions dominate the EWC make-up.

The 1994 Directive only applies to multinational employers with 1,000 plus employees throughout the European Economic Area (EEA: the EU plus Norway, Iceland and Liechtenstein) and at least 150 employees in two separate EEA states. However, there is no obligation to set up such arrangements in the absence of a request from at least 100 employees or their representatives in two or more countries. Alternatively, the process may be started on management’s own initiative. In either case, a ‘Special Negotiating Body’ (SNB) of employee representatives must be convened with the aim of reaching agreement on EWC arrangements. The role of the SNB is to negotiate with management to create one of the following:

- An EWC complying with minimum requirements (including setting out its composition, duration, resources, the frequency of meetings and more)
- An information and consultation procedure which is less complex but must also meet minimum requirements (including setting out the method that will be adopted to inform and consult)
- A statutory EWC: a formal and complex ‘model’ EWC which is imposed if the SNB and management fail to agree within three years of a formal request. However an alternative or amended arrangement can be agreed between the parties in due course if they so choose.

If management refuses to negotiate within six months of receiving a request for an EWC, one must be set up in accordance with the above statutory model.

The 1994 Directive contains a provision, set out in Article 13, whereby undertakings which already had an agreement for transnational information and consultation in place on the date of its transposition into national law need take no further action. The requirements of the Directive did not apply to them – provided that they had an agreement about informing and consulting that covered the entire workforce. Some multinationals took advantage of these provisions to negotiate agreements with trade unions, works councils or specially elected worker representatives during the two year period from the adoption of the Directive in 1994 and its entry into force in the individual states. By doing so they hoped to achieve agreements that were better suited to their organisational requirements.

The 1994 Directive did not apply in the UK until January 2000 (due to an initial opt-out). The Transnational Information and Consultation of Employees Regulations (‘TICER’) 1999 currently sets the governing rules for the creation, operation and enforcement of EWCs in the UK. It was also made possible under TICER 1999 for businesses to conclude voluntary, Article 13-style agreements on a similarly voluntary basis prior to the formal implementation date in the UK.

With a regime of moderate fines for any failures to observe TICER 1999, rather than the requirement in some other EU jurisdictions to halt or undo workplace changes until EWC consultation has been completed, it has continued to make the UK a popular choice of jurisdiction for those multinationals based outside the EU when setting up new EWCs.
As with national works councils, enforcement is through the CAC/CO and the EAT in Great Britain and the Industrial Court in Northern Ireland with a £75,000 maximum penalty. As from June 2011, enforcement moves primarily to the CAC/CO and the maximum penalty rises to £100,000.

In addition, the employees and SNB members have similar statutory protections when asserting their rights or performing duties under the Regulations. In relation to confidentiality, again similar to national works councils, management can withhold information if substantial harm would be caused by its disclosure and it is normal practice to provide for confidentiality in the terms of the EWC agreement.

Recent developments

In a bid to increase the number and perceived effectiveness of EWCs, the EU is implementing the 2009 EWC Directive from June 2011. As a result, the UK government has issued new regulations (TICER 2010) which take effect from 5 June 2011. TICER 2010 sits alongside TICER 1999, the latter being amended but not repealed.

It is important to note that the existing employee threshold qualifying criteria remain. In addition, it should be noted that TICER 2010 may not apply to existing EWCs. Whether it does depends on several factors including when the EWC will be or was established and whether it is revised in the two years before 5 June 2011.

In summary, TICER 2010 applies to EWCs agreed on or after 5 June 2011 and those established between 16 December 1999 and before 5 June 2009, unless they are revised in the two years before 5 June 2011. All EWCs, regardless of when they were agreed, are subject to the adaptation provisions (see below) under TICER 2010.

In overview, the key changes contained in TICER 2010 are as follows:

- more demanding information and consultation duties
- greater involvement of trade union experts
- a threat to existing EWC agreements in relation to ‘adaptation’ clauses whereby significant change (such as a merger) triggers the renegotiation of the EWC where the agreement does not provide for the continuance of the EWC in such circumstances by means of an adaptation clause (or it does but there is a conflict between clauses where more than one EWC is involved) and there is an employee request to renegotiate
- an obligation on central management to provide the means required to allow EWC representatives to fulfil their duties - the trade unions are pushing for such means to include employers funding litigation brought by the EWC against the employer
- changes relating to the SNB, for example, a right for SNBs to meet pre- and post- meetings with central management, without management being present
- paid time-off for training, such training to be funded by the employer
- a requirement for agreements to provide how national and EWC information and consultation is linked
- the meaning of “transnational” is defined, however, the introduction to the 2009 Directive gives a wider meaning. The unions will seek to rely on this wider meaning.

Unfortunately, these changes are far from straightforward, particularly how they relate to existing EWCs, and employers are advised to seek expert assistance. Employers should also be aware that trade unions are keen to harness these changes to transform existing EWCs and to make in-roads into qualifying organisations currently without an EWC.

For those readers looking for a comprehensive review of how EWCs work in practice and how they are changing, in the light of the 2009 Directive, we have a detailed briefing. Please contact Thomas Player at thomasplayer@eversheds.com for a copy.