European Works Councils
A practical briefing

2nd edition
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Part 1
Background

European Works Councils Briefing

Introduction

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 also the cost of these meetings and 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. As such, briefing the board of a multinational on EWCs can be a challenge. But experience tells us that it is unwise to duck such issues, particularly where the risks of getting it wrong can include adverse publicity, delays to restructuring as well as fines and other legal complications.

The legal background

What is an EWC?

The 1994 EWC directive (since replaced by a 2009 directive) provided for the establishment of EWCs, or a procedure to inform and consult employees on transnational issues, and there are now approximately 1000 EWCs in existence. Typically, this 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.

Which employers must have an EWC?

EWC laws apply only 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 in two or more countries.

A moving picture: how EWCs are changing

From the late 1990’s, European trade unions began to dismiss some EWCs as little more than ‘talking shops’ and lobbied successfully for greater EWC rights, resulting in the revised 2009 EWC directive (implemented from 6 June 2011) which is, at times, complex, unclear and has the potential to delay restructuring and add significant costs.

In addition, unions became increasingly adept at enforcing their EWC rights in national courts, sometimes at great cost to the businesses involved. For example, in 2001 a court order suspended the closure by Marks and Spencer of its French stores until EWC consultation took place. In 2006, the merger of Gaz de France and Suez was delayed after the EWC won a court order demanding an expert report analysing the social consequences of the merger. In 2007, a Belgian court prevented British Airways outsourcing its customer service department in Austria until it had informed and consulted its EWC. To a great extent, these examples rely on employee-friendly enforcement regimes, however, it would be wrong to dismiss them, particularly given the strengthened 2009 EWC directive. As such, businesses contemplating transnational change are well advised to take their EWC more seriously than has perhaps previously been the case.
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British EWC law

Introduction

The Transnational Information and Consultation of Employees Regulations ("TICER") 1999 set the governing rules for the creation, operation and enforcement of EWCs in the UK. From 5 June 2011, TICER 1999 were amended by TICER 2010 in order to implement the 2009 revised directive. With a regime of moderate fines for any failures to observe the Regulations, rather than the requirement in some other EU jurisdictions to halt or undo workplace changes until EWC consultation has been completed, TICER has continued to make the UK a popular choice of jurisdiction for those multinationals based outside the EU when setting up new EWCs.

It should be noted that this briefing is written on the basis of TICER and UK jurisdiction applying. There are material differences in the way in which individual member states have transposed the EWC directive into local laws.

New EWCs: responding to a valid request for an EWC

The responsibility of central management

For the directive to apply, the business, or group of businesses, must have 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. Upon receipt of a written request for an EWC from at least 100 employees in two or more countries, responsibility then lies with the ‘central management’ of the employer, or group of employers, in whichever EU state that management is located, to respond. If that central management is located outside the EU/EEA, a ‘nominated agent’ is usually appointed to act as local representative. In the absence of a nominated agent, the establishment or undertaking in the member state with the greatest number of employees will act in that capacity. TICER apply when the central management (or its representative agent) of the employer group is situated in the UK.

Employers on the receiving end of a valid request need to act fast and take the initiative, while educating management so that they are better able to participate in the ensuing negotiations. European employee bodies (federated unions and national works councils) are now highly experienced in negotiating EWC agreements, are well-funded to do so and will have fixed views on how the agreement should look.

The special negotiating body (SNB)

Once a valid employee request has been received, a Special Negotiating Body (SNB), must be established within six months to agree an EWC arrangement. On the SNB, each member state is entitled to one SNB seat for each 10 per cent, or a fraction thereof, of the total number of employees employed in all the member states taken together. For example, where a member state has 32 per cent of total employees, it would have 4 SNB members. The SNB representatives are selected or elected in line with the requirements of the EWC law in the member state from which they are appointed. Detailed balloting arrangements for the election of UK SNB members are contained in TICER, or provision for the nomination of SNB members by a qualifying and pre-existing consultative committee. The SNB must inform the European social partners (including the trade union - ETUC) of the composition of the SNB and the date they propose to start negotiations.

SNB negotiations

At the outset of the SNB negotiations, the parties need to decide between either:

- **Option 1**: setting up an EWC which meets certain minimum requirements (see box below), or,

- **Option 2**: creating or endorsing an alternative, less formal, procedure for informing and consulting on transnational issues.
There is a third option; putting in place the fallback EWC procedure, provided for in TICER. However, this is regarded as more demanding and inflexible and therefore employers have hitherto sought to negotiate their own bespoke arrangement.

<table>
<thead>
<tr>
<th>TICER minimum EWC requirements (option 1 above) - an agreement must specify:</th>
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<tbody>
<tr>
<td>• the undertakings or establishments covered</td>
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<tr>
<td>• the composition of the EWC, the number of members, the allocation of seats and the term of office. There is a requirement to take into account, so far as reasonably practicable, of the need for a balanced representation of employees with regard to their role, gender and the sector in which they work</td>
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<tr>
<td>• its functions and the procedure for information and consultation and arrangements to link EWC information and consultation with corresponding national information and consultation duties</td>
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<tr>
<td>• the venue, frequency and duration of meetings</td>
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<td>• where the parties decide to establish a select committee, it should state the composition, procedure for appointing its members, the functions and procedural rules</td>
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<tr>
<td>• the financial and material resources to be allocated to the EWC, and</td>
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<tr>
<td>• the date of entry into force, the duration of the agreement, arrangements for amending or terminating the agreement, the circumstances in which the agreement is to be renegotiated including where there is structural change and the procedure for its renegotiation.</td>
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If parties opt for the alternative option 2 procedure, then the agreement must specify by what method the representatives shall have the right to meet to discuss the information given to them.

The matters on which information and consultation apply are generally restricted to ‘transnational’ matters - in other words, 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 (but see below concerns over ambiguity regarding this definition under ‘2011 changes to EWC law’).

SNB negotiations can continue for a maximum of three years from receipt of the request. A failure to agree at the end of this period will result in the application of the fallback arrangement below. Employers need to consider whether the SNB representatives are playing a waiting game with the aim of securing the fallback arrangement, in preference to a negotiated agreement. This inevitably weakens management’s hand in that negotiating hard to secure a business-friendly EWC will usually fail as the SNB may prefer a three year wait for the fallback option.

**What happens if no agreement is reached? The ‘fallback’**

TICER set out the arrangements for the setting up and running of a fallback EWC, where the parties fail to agree their own arrangement or the employer refuses to commence SNB negotiations. The fallback rules provide for the composition of the EWC, the election of a select committee and the replacement of the fallback version with one subsequently agreed by the parties. The fallback EWC has the right to meet with central management once a year, to be informed and consulted on the basis of a company report on the progress of the business and its prospects. The meeting must cover:

- information on the organisation’s structure, economic and financial situation, the probable development of the business and of production and sales
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British EWC law

- information and consultation on the employment situation, including the use of agency workers (if any) and probable trends, investments, substantial organisational changes, the introduction of new working methods or production processes, the transfers of production, mergers, cut-backs or closures and collective redundancies (assuming they are transnational).

In practice, almost all EWCs include the above list of issues, even in the non-fallback type. However, the rules also provide that where there are exceptional circumstances affecting the employees’ interests to a considerable extent (such as collective redundancies, relocations or closures of establishments), the select committee or the EWC has the right to be informed and consulted and to meet with appropriate management as soon as possible.

The fallback rules also provide that central management must meet the cost of the EWC and that the representatives have the right to a pre-meeting without management and may be assisted by experts (although national rules may limit funding to only one expert). In practice, this “expert” usually turns out to be a full-time trade union official, or sometimes an accountant in order to interpret financial information.

The fallback rules also require consultation to be conducted in such a way which permits the EWC members to obtain a reasoned response from central management to any opinion expressed by those representatives to the company reports presented by the employer. This may involve further meetings and additional time required for consultation.

Confidentiality

EWC laws assume that worker representatives will see and hear unpublished corporate information. Otherwise, information and consultation about upcoming developments would not be effective. Management can withhold information if substantial harm would be caused by its disclosure. However, the exercise of that right can be tested in the courts; UK courts are generally regarded as more balanced than some other jurisdictions. In any event, management which is new to EWCs have to get used to the idea of sharing a large amount of information in circumstances it will be instinctively reluctant to disclose.

As a result, it is normal to include confidentiality provisions in the EWC agreement setting out the consequences for representatives and their expert of breaching confidence. In addition, provisions clarifying the types of information that will be treated as confidential or non-disclosable to the EWC and detailing the control of documentation are also recommended.

Requiring representatives to sign confidentiality agreements is now more important than ever. This is because the new definitions of “information” and the strengthened transnational consultation obligation introduced by the recent legal changes (see below under “more demanding information and consultation duties”) envisage the provision of more extensive information at an earlier stage in the process.

Enforcement

Enforcing an EWC set up in the UK is divided between three main bodies: the Employment Tribunal (ET), the Central Arbitration Committee (CAC) and Employment Appeal Tribunal (EAT).

TICER provides protections and time off rights with pay for representatives who serve on SNBs and EWCs and these are enforced in the ET. Complaints about breaches by central management of their obligations under EWC law are made to the CAC. Also, employees may complain to the CAC about the failure of the EWC to provide feedback on their work. There is a six-month time limit applying to CAC complaints (from the alleged breach
occurring). If it upholds a complaint, the CAC is empowered to make declarations and order any of the parties concerned to act or cease acting in a particular way.

The EAT hears appeals against decisions taken by the ET and CAC and, upon application by the EWC, SNB or an employee, may issue a penalty notice of up to £100,000 in cases where the CAC has decided that central management has breached one of its duties.

**Pre-existing EWCs - what are Article 13 agreements?**

The 1994 directive provided an incentive, set out in Article 13, which encouraged employers to agree their own transnational information and consultation arrangements before the directive was implemented in each member state, or, at the latest by 22 September 1996 (although for the UK, the relevant date is 15 December 1999). These so-called Article 13 agreements needed only to specify how information and consultation on transnational issues would be handled and were exempt from the requirements of the 1994 directive (provided they covered the entire workforce within the EEA) and, to a large extent, this exemption has carried forward under the 2009 revised directive.

Qualifying Article 13 agreements are excluded from TICER meaning that they are not subject to the duties and enforcement regime imposed by the law. There is, however, an exception: a provision in TICER, that deals with all EWCs (including Article 13 agreements) during mergers, acquisitions and other significant structural changes, 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.

Where this adaptation provision is triggered, TICER provide that some of the provisions regulating SNB composition and negotiations apply. However, the last government confirmed its understanding that the 2009 directive and TICER 2010 maintains, to a large extent, the existing exemptions of EWCs despite the adaptation clause being triggered. In other words, such renegotiated agreements would maintain their status, for example, outside the scope of TICER for Article 13 agreements. However, where the company party to the EWC itself ceases to exist as a result of the change, for example, after a takeover, then a new EWC agreement may fall under the full extent of TICER.

Unfortunately, employers need to be aware that the last government’s approach to maintaining exempt status may come under attack as we are aware that European and UK trade unions disagree over the interpretation of the 2009 directive in this respect.

**The 2011 changes to EWC law**

It should be noted that the 2011 changes do not apply to all pre-existing EWCs. For further information, please refer to ‘Responding to the 2011 changes’ below.

In overview, the key changes to TICER implemented in 2011 are as follows:

- more demanding information and consultation duties, with a related increase in the use of external experts
- the greater involvement of trade unions
- 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
• the CAC has become the main enforcement body and the maximum penalty has risen to £100,000.

Some of these changes are considered in more detail below.

More demanding information and consultation duties

TICER require the provision of sufficient information early enough to allow representatives to undertake a detailed assessment of its possible impact and for them to express an opinion to management during the consultation process. They require the sharing of more detailed and confidential information at an earlier stage than previously existed. Employers should expect representatives to demand detailed and comprehensive information before they are satisfied and this may be used as a stalling tactic in some situations. They also risk confidentiality leaks and an increase in the scope for litigation over the timeliness and quality of the information and consultation. Deciding in advance what, in practice, is sufficient information (and how it will be provided) is critical to managing these risks and may need to include information on the costs, benefits, alternatives, impact, rationale and more in relation to substantial changes.

The opinion must be provided "within a reasonable time" of the receipt of the information, and "may" be taken into account by management within the context of their effective decision-making. What is a reasonable length of time will differ according to a range of factors including the complexity of the information, the numbers of jurisdictions and employees affected and the timescales for national consultation. Some employers will seek to agree time-scales in their agreements for the giving of an opinion, to help provide certainty during restructuring and other business change.

The fallback provisions anticipate that management will produce a reasoned response to any opinion given by the EWC; management in all EWCs should be prepared for their representatives requesting the same.

More requests for external experts

Once the EWC is agreed, there is no general and ongoing legal right to the services of an external expert. However, there is such a right where the fallback provisions apply in “so far as this is necessary” for the EWC to be able to carry out its tasks. This, together with the fact that representatives have now the right to produce an opinion as part of the consultation process (above), fuels the increasing number of requests for external experts. In addition, clauses providing for access to, and the funding of, experts have become a common feature of EWC negotiations and re-negotiations.

Typically comprising a mixture of full-time trade union and specialist accountant experts, they are employed to assess information provided by the employer during one-off restructurings and the like. A recent communication from the Unite union described how, upon the announcement of a company sale triggering EWC consultation, it "used the new UK legislation to request the services of an independent expert to conduct an in-depth assessment of the potential impact of this proposal on the company's workforce." These services, it suggests, cost "in the region of 40,000 euros". Employers should bear this trend in mind, given the longer timescales involved for experts to undertake an assessment, the costs, the information sought by experts as well as requests for direct contact with management and access to the company's facilities. This will, in turn, require a balancing exercise as to what is reasonable and proportionate in the circumstances, within the context of EWC law. In addition, confidentiality clauses need to be reviewed to ensure they cover third party experts and are sufficiently robust.
One option is to offer representatives the services of an internal expert, for example, a business accountant, where they do not have the requisite skills or expertise to analyse the information provided. In addition, where timescales are short and the smooth running of the information and consultation process is paramount, it may be in the interests of the business to provide an analysis of the information to the representatives, to avoid delay and to reduce the scope for external experts to become involved.

Another option is to resist requests for the use of experts to analyse routine financial, economic and organisational information provided at regular EWC meetings (in the absence of substantial changes impacting on employment). This reflects the ‘fallback’ TICER provisions which provide only for such information to be shared (not consulted upon). In the absence of this greater consultation right, any argument in favour of having to hire an expert is weaker.

**Greater involvement of trade unions**

A new obligation requires the SNB to inform the EU social partners (which includes ETUC - the European Trade Union Confederation) of the date negotiations will start for an EWC and the composition of the SNB, even where the workplace is union-free. This has the potential for specialist national and international union officials to become more involved in the setting up and ongoing functioning of EWCs, which would undoubtedly change the tone and content of negotiations. It may encourage trade unions to seek collective bargaining arrangements, as opposed to just information and consultation rights.

**Central management to provide the means required**

TICER requires central management to provide the members of the EWC with “the means required” to enable them to fulfil their collective duties. Government guidance states that such means may include travel, translation and accommodation costs and facilities to support EWC duties and makes the point that the means must be “required”, and therefore does not include superfluous expenditure. Separately, the Government noted that it was unclear whether “means required” includes the legal costs of EWC representatives taking legal action against central management for non-compliance with TICER and this remains to be tested by case law. Given this situation, employers are advised to define clearly what they are agreeing to fund and to provide in order to reduce the risk of a broader definition, in the event of a future court challenge.

**Other changes**

- A new right to paid time-off for representatives to receive training, such training to be funded by the employer. The main issue here is retaining reasonable control over the timing and content of such training (particularly when provided by trade unions).

- Changes to the SNB:
  - TICER seeks to clarify who must provide certain information, and when, at the start of the request and SNB negotiation process (including information about employee numbers to determine whether the regulations apply).
  - A right for the SNB to hold pre-and post-meetings in advance of, or after, meetings with central management without central management being present. Such meetings to take place “within a reasonable time” of the meeting with management.
  - The above SNB changes apply to all EWCs where an SNB is set-up, including the renegotiation of those otherwise excluded from the application of TICER.

- A requirement to provide, in the EWC agreement, for the linking of national and transnational information and consultation to improve clarity and certainty.
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between EWCs and national representatives. Where there is no such express linkage in the agreement, then TICER requires national and transnational consultation to be linked where there are substantial changes in work organisation or contractual relations so that one begins within a reasonable time of the other. Employers should be aware that the EWC may push for its consultation to take place ahead of national consultation. However, this risks a protective award in terms of breaching national duties. Employers are advised to plan the interface between national and EWC consultation, ensuring that linkage does not stop one operating independently of the other (so that delays in one does not frustrate the other). In addition, it should be noted that some trade unions are leveraging the need for linkage to pressure employers into setting up national works council bodies. However, this is not a legal requirement under TICER.

- An EWC’s remit is triggered by “transnational” matters, now defined as matters which concern undertakings or establishments situated in at least two member states or the organisation as a whole. However, a recital to the 2009 directive suggests that some matters involving just one member state might be “transnational”. The courts may rely on recitals to aid the interpretation of the terms of the directive meaning that employers should be aware that future litigation may result in the definition being widened.

- TICER makes the CAC the main enforcement body for all EWC complaints, replacing the role currently undertaken by the Employment Appeal Tribunal (EAT). The EAT retains its penalty-awarding status and the maximum fine has increased to £100,000. The penalty applies primarily to those EWCs agreed since 16.12.99, however, in exceptional circumstances it could apply to earlier EWCs where they fail to comply with the new adaptation clause (see above explanation of Article 13 EWCs). Moving enforcement to the CAC is expected to result in an increase in EWC challenges. Already familiar with the CAC, trade unions are more likely to lodge a complaint reflecting its less formal and legalistic approach which, in some instances, will reduce the need for a union to incur external legal advice and representation.

How to respond to the recent changes in EWC law?

Businesses with an existing EWC

The 2011 changes introduced by TICER may not apply to existing EWCs. Whether they do depend on several factors including when the EWC was established and whether it was revised in the two years before 5 June 2011:

- The changes apply to all new EWCs agreed on or after 5 June 2011.
- They also apply to those EWCs established between 16.12.99 and before 5 June 2009, unless they were revised in the two years before 5 June 2011. If such an EWC was revised (or newly agreed) in this two year period, then only TICER 1999 will apply together with the TICER 2010 adaptation provisions. For enforcement purposes, it is the date that the agreement was signed or revised that will determine which regime (TICER 1999 or as amended by TICER 2010) that applies.
- The 2011 changes do not apply to existing Article 13 agreements (those pre-dating 16 December 1999) with the exception of the adaptation provisions, discussed above under ‘Pre-existing EWCs - what are Article 13 agreements?’

A timeline at the end of this section provides a summary of how TICER applies to different EWCs.
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British EWC law

Given the complexity of applying the changes to existing EWCs, employers are advised to seek advice for their individual EWC. We are seeing an increasing number of companies with existing EWCs (irrespective of the type of EWC) receiving requests for renegotiation. This reflects better organisation amongst trade unions as they identify those EWCs which remain unchanged over recent years. In addition, most EWCs are renewable, often on a four yearly basis, and representatives are being advised of new EWC rights as part of preparations for renewal negotiations. As such, employers with EWCs are well-advised to plan for renegotiation requests in these circumstances.

Businesses with an Article 13 agreement

As stated above, TICER does not apply to such agreements unless the adaptation provisions are triggered requiring renegotiation and, even then, in most circumstances they retain their exempt status (according to government guidance, an interpretation at odds with the trade unions and discussed above). Older EWCs are less likely to have robust adaptation clauses and employers should audit their position to assess whether to open negotiations for such a clause (the danger being that employee negotiators may seek changes far beyond just adaptation), and, in any event, how to respond to requests for renegotiation from representatives (or termination of the existing agreement) wishing to take advantage of the 2011 changes.

Employers opening negotiations must be prepared to deal with likely demands for other revisions from worker representatives who will have regard for the strengthened rights introduced in 2011. A failure to reach agreement might be followed by a withdrawal by the employee representatives and a new request for an EWC under TICER. While this will take some years to play out, the end result may nonetheless be one that employers should seek to avoid.

Businesses with EWCs agreed between 16.12.99 and 5.6.09, not revised

The TICER changes apply to EWCs established between 16 December 1999 and before 5 June 2009, unless they were revised in the two years before 5 June 2011. As a result, employers should be aware that their unrevised agreements need to be read in the light of the 2011 changes and that there is uncertainty currently over how far existing agreements will be applied by CAC, if at all, where they differ. Businesses are advised to review such agreements to identify the scope for challenge by representatives and to communicate the 2011 changes to managers involved in EWC procedures.

In-scope businesses which do not currently have an EWC

There is no automatic obligation on in-scope businesses to establish EWC arrangements. Options are:

- take the initiative and put in train a process for negotiating a compliant arrangement; or
- do nothing and await a valid request, either directly from 100 employees in two or more member countries or from their representatives.

Where employee relations are good and employee information and involvement is working effectively, it is fairly unlikely that a valid request will be forthcoming. In such situations, taking no action would seem sensible. However, businesses should realise that trade unions are becoming increasingly active in orchestrating EWC requests. Their objectives for so doing include building their membership and influence within the business and extending EWC information and consultation into collective bargaining. Therefore, before deciding to take no action, employers are well advised to risk assess their operations for such a request.
If a valid request is received, seeking expert assistance, giving time to detailed planning and information-gathering, assessing risks and controlling communication are all key to achieving a good outcome (for further information, please see ‘responding to a valid request’ below). It is also worth noting that once a valid request is received, an EWC will come into existence. There is no opportunity for the employer to campaign against having an EWC and there are no ballots for or against the request. A valid request triggers a process whereby the employer is limited to influencing the type and detail of the EWC agreement, not whether it happens at all.

Focus on mergers and acquisitions which involve EWCs

As noted above, the TICER changes require the adaptation of all EWCs following significant change in the structure of the business, for example, after mergers and acquisitions. TICER provides for two ways in which the business can adapt:

- by putting into effect a pre-existing adaptation clause which has anticipated the change, or,
- where there is no such clause or there is more than one (for example, where there is a merger and both employers have EWCs) and they conflict, then entering into a renegotiation when requested by the employees.

There is limited guidance as to how these provisions in TICER will work in practice. What, for example, will be deemed to be ‘significant change’, triggering this adaptation duty? In the past, where two businesses who were not equal merged and were in the same line of business, the junior party’s EWC was usually wound up by agreement and the senior party’s EWC was updated and expanded. If the junior party did not have an EWC and the other did, the same applied. If it was the other way around, then the senior one simply adopted and updated the junior EWC. If they were not in the same line of business, or as an alternative to the foregoing, the parties might have kept the EWCs separate. This practical approach often did not reflect the law. But, given TICER’s new requirement to have effective adaptation clauses or to start negotiations for a new EWC, businesses must be aware that the law has changed thereby ruling out their own ‘home-made’ practical solution.
## Applying TICER: a summary

### EWC signed on or before 15.12.99: What law applies?

Such **Article 13** agreements are excluded from TICER (with one exception – see ‘Pre-existing EWCs - what are Article 13 agreements?’ above), meaning that they are not subject to the duties and enforcement regime imposed by the law. A qualifying Article 13 agreement must:

1. specify how transnational information and consultation are to be handled
2. cover the entire workforce within the EEA, and
3. have been agreed on or before 15.12.99.

### Risks arising from recent changes to EWC law?

1. Requests for renegotiation to incorporate recent changes at or before renewal date
2. Significant structural change may trigger the duty to re-negotiate the EWC
3. TU experts challenge whether it is a genuine Article 13 agreement.

### EWC signed between 16.12.99 and before 5.6.09: What law applies?

Such **Article 6** agreements are governed by TICER, including the 2011 EWC changes, with one exception: those Article 6 EWCs that were renegotiated in the 2 years before 5.06.11 (see **hybrid** agreements below).

### Risks arising from recent changes to EWC law?

1. Such agreements need to be read in the light of the employee-friendly 2011 changes
2. There is uncertainty currently over how far the terms of such agreements will be applied by CAC, if at all, where they differ from the 2011 changes.

### EWC signed/revised between 5.6.99 and before 5.6.11. What law applies?

Such **hybrid** agreements are governed by the original 1999 TICER, with only a limited number of the 2011 changes applying, these include: significant structural change may trigger the duty to re-negotiate the EWC and the 2011 changes to remedies and enforcement.

### Risks arising from recent changes to EWC law?

1. Such renegotiated agreements are rare in practice and, typically, contain clauses reflecting some or all of the 2011 changes (failing which, informed employee representatives refused to sign or revise agreements during this period). As such, many will need to be read in the light of the employee-friendly 2011 changes.

### EWC signed on or after 5.6.11. What law applies?

Such **recast** agreements are governed by TICER, including the recent 2011 changes. For further analysis of the risks arising from these changes, see ‘The 2011 changes to EWC law’ above.
Part 3

Setting up an EWC

Setting up an EWC – practical considerations

Potential advantages of an EWC

- Less internal friction and divergences across cultures and national boundaries
- Assists in the integration of businesses post acquisition
- Encourages a wider, global perspective and lessens pre-occupation with narrow, local issues
- Helps employees understand the commercial rationale behind company level decisions, policies and their implications
- Improves understanding of the labour relations climate across different jurisdictions - this can be invaluable when planning future business decisions with European wide implications
- Generally improved communications
- Improved employee retention rates.

Potential disadvantages of an EWC

- Costs, time and loss of resources - the law provides that the cost of maintaining EWC’s should be borne by the employer. The annual cost of running EWC’s will clearly vary widely depending on the number of representatives attending, the frequency of meetings, the number of countries involved and the scale of translation into different languages that is required. An initial provision of at least £150,000 per year would not be unrealistic
- Providing trade unions with a foothold in otherwise union-free workplaces
- Cultural clashes between employee representatives from different areas. Might friction develop, for example, between North European and South European representatives? In addition, there are often difficulties in engaging smaller countries in the EWC
- Potentially damaging perception of HQ country dominance
- Risk of delegates pursuing national agendas inappropriately when a wider agenda should be followed, or, of seeking to promote political agendas
- Failures by delegates to communicate EWC activities to employees, or inconsistent and inaccurate communication to other employees
- Representatives confusing consultation rights with negotiation rights
- Potential leaks of confidential information
- Encouragement of more local works councils in countries where there were none before
- Risk of trade unions seeking to expand EWCs beyond their remit, for example, to incorporate commitments in relation to corporate social responsibility and international (for example, ILO) and similar global labour standards for countries outside the EU. Both areas are normally not legally enforceable against an employer unless it decides, sometimes inadvertently, to enter legally binding agreements such as an EWC agreement.
How an EWC typically works

- In some cases, central management meet their information requirements through an annual report supplemented by briefings from senior management at the annual meeting. Consultation at EU level is then concluded at one sitting through discussion at the meeting. However, EWCs renegotiated in the light of the 2011 changes are more likely to have more than one annual meeting, for example, providing for two to four full EWC meetings a year. In addition, such EWCs typically invest more time in preparing in advance for such meetings, including providing reports for representatives in advance of the meetings.

- The meeting with the EWC, taking place during the course of a day, is effectively a general catch up for the employee representatives and the opportunity to hear from senior management. It is chaired by management and there will be one or two other management representatives at the meeting to deal with specialist agenda items. It is not advised that the CEO be a permanent management representative as it is sometimes useful for management to claim a need to ‘take instructions’ if difficult questions are asked. The meeting is held in the designated EWC language, with translation facilities available for other language needs. The same applies to the minutes of the meeting. One expert will usually attend to assist the employee delegates.

- Given the need for travel, a pre- and post-meeting for the representatives and the meeting itself, two to three days are usually devoted to scheduled EWC meetings.

- Where European restructurings crop up between meetings, then emergency one-off meetings of the select committee (where there is one), possibly augmented by representatives from countries directly concerned, rather than the full EWC, tend to take place. The more detailed consultation with employee representatives continues to be handled at local level in the individual countries affected by the restructure, much as before.
Part 4

Conclusion

Conclusion: the need for a strategic, considered approach to EWCs

EWC decisions are not to be taken lightly given the cost, delay, reputational and other risks highlighted previously.

Existing EWCs

With an existing EWC (regardless of the type of EWC agreement), a considered and strategic approach is required, having taken expert legal advice, to prepare the business to, for example:

- Avoid disputes and unacceptable delay in corporate decision-making associated with some EWC processes
- Protect corporate confidentiality in key business decisions
- Manage the complexities associated with the disclosure of sensitive information to the EWC
- Respond to requests to amend, or terminate, existing EWC agreements to take advantage of the 2011 employee-friendly changes
- Manage the link between national and EWC information and consultation.
- Pro-actively address the growing role of EWC experts.

Requests for an EWC

Businesses facing a request need to consider their objectives carefully and to have a clear view on relevant issues. These include:

- Agreeing a strategy around the timing of information and consultation and how it is defined in the agreement
- The use of 'experts', their role at meetings, funding and conditions for access to them including confidentiality
- How national and EWC levels of information and consultation are to be linked and managed
- Whether to seek one group-wide arrangement, or one or more arrangements for different businesses within the group - this may not be easy to secure but could be more appropriate where the undertakings involved are diverse
- The subjects central management are prepared to discuss with representatives at this level and which they want to exclude
- How many representatives to have on the EWC and the mix of nationalities (it may be possible to agree with a large SNB that the final EWC will be smaller, e.g. through grouping together some countries where employee numbers are low)
- The number of meetings per annum and the venue and whether IT, such as webcasts and teleconferencing, can be employed to help control costs
- Whether to have a small 'select committee' meeting more frequently; its composition and role
- Confidentiality rules and the disciplining/prosecution of those in breach;
- Control of meetings - who chairs, how the agenda is set, what minuting arrangements apply
- How EWC matters will be communicated back to employees including the respective roles of local managers and EWC employee representatives
Part 4
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- How EWC member training will be managed and funded (with the aim of controlling time off and costs), how training providers/content are approved
- Facilities to be made available to the employee representatives (e.g. for access to their constituents and for language translation) and how other funding/expenses will be managed (including agreeing caps on expenses and other control measures), and
- How the composition of the body will adapt to meet changes in the group or company as businesses are acquired or shed.

A satisfactory determination of these issues can make a great difference to the impact of the EWC on the business and its employees.

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