HRPA HR POLICY ASSOCIATION
HR POLICY GLOBAL EUROPE

Newsletter
Issue #21 – June 6th 2024

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EWCs: Directive revision proceeds, at speed

Summary: *EU Member State Ambassadors agreed to move forward with the Belgian presidency draft of the revised EWC Directive. The revised directive could become national law by early 2027.*

Late last week, the Council working group on the proposed revision of the Directive sent the Belgian draft to a meeting of Member State Ambassadors to the EU for their approval. Yesterday, Wednesday, the Ambassadors agreed to forward the text to a meeting of the Council of Ministers to be held on June 20th. All indications are that the Ministers will approve the text as the Council's mandate for negotiations with the Parliament and Commission later this year.

Once the negotiations are opened agreement on a common text could be reached quickly, with formal agreement early in 2025. This would see the revised Directive becoming national law in early 2027. When it becomes law, employees in the 350 or so undertakings with A13 arrangements in place would be able to trigger SNB requests to negotiate EWC agreements.

Undertakings with Article 6 agreements would have a further two years, until 2029, to bring their agreements into line with the provisions of the rewritten directive. Clearly, much will depend on the exact wording in the final, agreed text. But the direction of travel is known.

EWCs: First appeal heard in Ireland by Labour Court

Summary: *The Irish Labour Court has started hearing the first appellate case about the operation of EWCs in Ireland. A member of the Verizon EWC, is appealing against decisions made by the Workplace Relations Commission last year*

On 30 May 2024, and some 28 years after Ireland's EWC legislation was first enacted, the Labour Court in Dublin started to hear the first appellate case about the operation of EWCs in Ireland. The dispute in question involves an appeal by Jean-Philippe Charpentier, a member of the Verizon European Works Council and its select committee, against decisions of the Workplace Relations Commission (WRC) last year about his financial entitlements to training, and to the 'means required' to pay for expert assistance by the EWC Academy, a German consultancy.

The first issue in the appeal concerns whether, despite Verizon having paid for the members of the Verizon EWC to receive training on EWCs in Ireland, after it moved its EWC there from the UK in anticipation of the end of the Brexit transition period, by trainers including Kevin Duffy, former Chair of the Labour Court, Mr Charpentier is entitled to be reimbursed for attending additional training in Hamburg by EWC Academy, despite Verizon having told him in advance that it would not do so.

The second issue concerns whether Mr Charpentier is entitled to have Verizon pay an invoice addressed to him for 'expert assistance', such as an expert from EWC Academy reviewing minutes of a meeting of a select committee and providing hours' advice on whether UK employees are entitled to be represented on an EWC operating under the Irish 'Subsidiary Requirements' after the end of the Brexit transition period.

The case is listed to last for four days, with the final day being 17 June 2024. A decision is anticipated later this summer, and we will provide a detailed analysis of it as soon as it is available.

For further see this article by David Hopper of Lewis Silkin LLP, which is representing Verizon in the case.

BEERG COMMENT

The Verizon EWC is established under the Irish 'Subsidiary Requirements' set out in the second schedule to the Transnational Information and Consultation of Employees Act 1996 (TICEA). Whilst TICEA does not allow for EWCs operating under the 'Subsidiary Requirements' to refer issues as a collective body to the WRC or the Labour Court, section 17A of TICEA does allow an individual EWC member to complain to the WRC. Section 17B of TICEA enables an individual EWC member to appeal against the WRC's decision to the Labour Court.

The EU Commission is currently challenging the Irish government over the inability, among other issues, of an EWC collectively to challenge a business's compliance with the 'Subsidiary Requirements'. Nonetheless, the relevant government department continues to deny that TICEA is deficient. We understand that, regrettably, it now takes the view that any necessary changes to TICEA's dispute resolution provisions will be made at the same time as transposing any revised EWC Directive into Irish law.

But it could be at least three years from now before that happens, *leaving some EWCs without resort to the WRC or Labour Court during those years, and all EWCs facing issues about resolving disputes over confidentiality (as, 28 years on, the government has still failed to issue the regulations necessary to enable these disputes to even be heard).*

During the three-day hearing, both parties were represented by legal teams even though, no matter what the outcome, the Labour Court does not have the power to award costs to anyone who appears before it (although, given the nature of the issues in this appeal then, depending on its outcome, Mr Charpentier might seek to recover his costs from Verizon as 'means required'). The Court also has no power to sanction complainants who bring vexations or frivolous claims. However, reflecting the individual (as opposed to collective) nature of complaints, the Court could also order the company to reimburse Mr Charpentier for the costs which he incurred attending EWC Academy's training and to put him in funds to pay EWC Academy's invoice.

The revised EWC Directive currently under discussion in the Council of Ministers would require management to pay the "reasonable" legal costs of EWCs operating under the 'Subsidiary Requirements' in the absence

of an EWC agreement. EWC agreements would have to include provisions on the payment of expert and legal costs agreed between management and the SNB/EWC.

How the word "reasonable" might be defined during transposition and how it might be interpreted by the WRC and Labour Court is, for now, unclear. Helpfully though, the European Commission's proposed amendments to the EWC Directive say that national governments can write appropriate budget rules covering the costs provided for under the 'Subsidiary Requirements.' So, there would be scope for the government to bring clarity to this issue at an Irish national level.

***There are two key questions the Irish government must address** if it ultimately needs to transpose a new Directive into national law and chooses to write budgetary rules.*

> ***First,** if EWCs have access to legal costs funded by the employer but national employee representative bodies do not, could this destabilise existing industrial relations arrangements with local bodies asking EWCs to take up issues on their behalf? This risk would be particularly great if the definition of what is "transnational" is expanded as proposed.*
>
> ***Second,** how can it avoid the "build it and they will come" trap? If EWCs are given unlimited access to company funding to support legal challenges, then there will be legal challenges aplenty. Build a perverse incentive into a system and it will be taken advantage of – both by EWCs and by for profit consultancies such as EWC Academy. It is inherent in the nature of labour relations that leverage will be used to gain advantage. If, for instance, managements turn down a request for funding on the grounds that it is "unreasonable", then this denial will itself become a cause of dispute. We don't have to guess that this will happen. Just look at some of the complaints made to the Central Arbitration Committee in the UK over the payment of an EWC's legal costs, including by Mr Charpentier.*

Whatever definition of "reasonable" may be arrived at, what is "unreasonable" is to put businesses at constant risk of legal challenges whenever EWCs, or the activists who have captured them, feel "upset" at management and then expect it to fund their challenges, without limit.

We will, as stated above, report on the Labour Court's decision in the Verizon case when it is available. However, so far, it has taken three days of Labour Court time to hear relatively trivial complaints. How long will it take it to hear much more substantial complaints, especially if EWCs can avail of management-funded "free legal aid", with many lawyers willing to encourage them to take cases? It needs to be remembered that European labour relations activists are much more used to referring matters to courts than their Irish counterparts.

The capacity of the WRC and the Labour Court to deal with what may be coming their way also needs to be considered, with a series of further complaints by Mr Charpentier to the WRC already filed and paused until the resolution of the current appeals before the Labour Court.

Europe: Sidestepping SE codetermination

***Summary:** A Court of Justice of the European Union (CJEU) judgement highlights a flaw in the European Company Statute (SE) that allows companies to escape the German system of employee participation*

The European Company Statute (SE), in force since 2001, enables companies to incorporate at a European level, allowing them to operate as one company across the EU. Accompanying the Regulation allowing companies to set up in this way, is a Directive on board-level employees participation, which also provides for an EWC-type information and consultation structure.

Trade unions, which had pushed for such a structure for many years, believed that it would "export" the German model of codetermination to the rest of Europe. Instead, it has turned out to be a way of enabling German companies to escape from the German system. The "escape mechanism" has now been taken to its ultimate conclusion by the Japanese company, Olympus, as documented in a judgement handed down by the Court of Justice of the European Union (CJEU). See CJEU, 16 May 2024, Case C- 706/22.

The case involves two companies belonging to Olympus – one of them British (O Ltd), the other German (O GmbH) – which decided to merge and create a European company (SE), on 28 March 2013. As neither of these companies had any employees or any subsidiaries with employees, no special negotiating body was set up to negotiate an agreement on employee involvement, as provided for in Articles 3 to 7 of Directive 2001/86/EU. So, no board participation or EWC.

The following day, the new company, known as O Holding SE, became the sole shareholder in O Holding GmbH, registered in Germany. The latter employed workers and had a supervisory board, one third of whose seats were held by workers' representatives. A few months later, O Holding GmbH was converted into a limited partnership, called O KG.

Following this conversion, the requirement for employee involvement on the supervisory board ceased to apply to the company. In October 2017, O Holding SE, which until then had been registered in the United Kingdom, moved its registered office to Hamburg. The group, which has several thousand employees in the EU, neither took over the employee involvement arrangement that previously existed at the main company, nor established a SE works council to represent its European employees.

Moreover, as the employees now worked for an SE, they were not able to call for the creation of a European Works Council. A European-level works council in an SE can only be set up through agreement. There is no "Subsidiary Requirements" fallback should there be no agreement. O KG's German works council claimed that there should have been "retrospective" negotiations on employee involvement and information and consultation. They referred the matter to the Federal Labour Court which, in turn, referred it to the CJEU.

The European Court has now said that Directive 2001/86/EU does not create any obligation to enter into negotiations on employee involvement when "structural changes are made to a holding SE already established by participating companies which do not employ employees, and do not have subsidiaries employing employees". Moreover, in such a situation, it does not extend the guarantee on maintaining workers' involvement rights in cases where a company is converted into a SE.

There is no appeal against a CJEU judgement. The only way that this judgement can be overturned is for the European legislators to change the law. Will other companies be tempted to now follow the "Olympus Model"?

UK: Trade union membership

Summary: *The proportion of UK workers in a union increased to 22.4%. And while UK union membership remains low, there are some signs of growth among private sector employees*

The UK Department of Business and Trade has published updated figures on trade union membership in the UK. The proportion of UK workers in a union increased from 22.2% to 22.4% (about 90,000 workers), driven by a rise in private sector union membership. There were 6.4 million workers in a union, of whom 3.8 million worked in the public sector, meaning there were 2.6 million private sector workers in a union. Union membership density among private

sector employees increased from 12.0% in 2022 to 12.3% in 2023, and from 48.5% to 49.2%among public sector employees.

The trade union pay premium also increased to 4.2%, meaning union members earned, on average, 4.2% more than non-union workers, though just how better off they were after paying union subscriptions is not clear. Union membership remains low by historical standards and membership rates amongst younger workers, lower earners and those with lower levels of education are all below the national average.

In Wales, Northern Ireland and Scotland around a third of all workers are union members. Union density across the UK is 29% in organisations with 50+ employees. The proportion of workers whose pay is set as part of a collective bargaining agreement is 39%, and there is a trade union presence in around half of workplaces.

Download the full report

Ireland: How to decide if a worker is self-employed?

Summary: *Ireland's Revenue Commissioners have issued 'Guidelines for Determining Employment Status for Taxation Purposes' following the recent Karshan Case. See their five-point framework*

Following the Irish Supreme Court's unanimous decision in *The Revenue Commissioners v Karshan (Midlands) Limited t/a Domino's Pizza* (the "**Karshan Case**") in October 2023, which held that pizza delivery workers were employees and not self-employed, the Revenue Commissioners have recently published their ' Guidelines for Determining Employment Status for Taxation Purposes', to reflect the principles set out in the Supreme Court judgment in the Karshan Case.

Five-step Framework: In the Karshan Case, the Supreme Court found that the delivery drivers of Karshan (t/a Domino's Pizza) should be classed as employees, rather than independent contractors. In reaching this decision, the Supreme Court extensively analysed the numerous tests that have been developed in English and Irish case law in considering whether an employment relationship exists. In this regard, the Supreme Court set out a five-step framework to be followed in determining an individual's employment status:

1. Does the contract involve the exchange of a wage or other remuneration for the work provided?

2. If so, is the agreement one pursuant to which the worker is agreeing to provide their own services, and not those of a third party, to the employer?

3. If so, does the employer exercise sufficient control over the putative employee to render the agreement one that is capable of being an employment agreement?

4. If points 1 – 3 (above) are satisfied, the decision maker must then determine whether the terms of the contract between employer and worker and the related working arrangements are consistent with an employment contract, or with some other form of contract.

5. Finally, it should be determined whether there is anything in the particular legislative regime under consideration that requires the court to adjust or supplement any of the foregoing.

See this Briefing Document from the Matheson LLP team on what these new guidelines mean for employers and how to determine if a worker is an employee or self-employed.

A BEERG Reflection: ‘Lawdust’ Gets in Your Eyes

As we mentioned last week, *BEERG reflections* is an occasional series of personal thought pieces and commentaries by Tom Hayes on a range of issues of interest to HR professionals.

The latest one looks at lawdust. What’s lawdust, you ask? Lawdust is a word used by Tom Hayes to describe a trade union’s mistaken belief that legislators can solve their problems for them. It is a denial of the fact that labour relations is about the balance of power in the workplace. But, as Tom explains, with declining membership, the unions are losing power So, instead of “membership power” unions increasingly rely on “institutional power” derived from the law. Want recognition and a collective agreement? Then get enough members to oblige the employer to engage.

Read online or download as a PDF

For your diary…

Note that events are 'in person' unless listed as a webinar

UK HR Issues: Non-Competes, Fire & Rehire *1 hr Webinar on Thurs, June 13 @ 3pm UK time*

The U.K. is contemplating major changes to non-competes, including caps on [illegible] bans, plus changes to Fire and Rehire [illegible] obligations. Join HR Policy Global and the Lewis Silkin legal team, on June 13 at 2pm BST/9am ET for a webinar detailing these changes. It will also outline Labour Party manifesto commitments impacting HR and employee relations professionals.

This event has been rescheduled until after the UK general election

Book UK HR issues Webinar

HR Policy Global European Summer Summit *June 19 - 21, Hotel Estela, Sitges, Barcelona*

Supported by Ius Laboris: The 2024 Summer Network Summit will be at the Hotel Estela, Sitges, Barcelona, from Wed evening, June 19 to Fri lunchtime, June 21. The meeting will open with a networking welcome reception on the evening of June 19.

Book Summer 2024 Summit

Download the meeting programme HERE

(The Estela Hotel is now fully booked – contact us for other accommodation options)

Europe Members' Network Meeting *Pullman Hotel, Gare du Midi Brussels Sept 18/19*

Attendance at our September networking meeting in Brussels is open to all members. Click link on right to book your place at the meeting. Guest speakers will be announced soon. Draft meeting agenda and hotel accommodation booking form will be available before the summer break.

Book Brussels meeting

HR Policy Global Members can self-register for events via the links above. If you get a "No Tickets Available for Purchase" message, make sure you are logged in. Non-members should contact **Derek.*

Upcoming Events Across Europe: *See also: Online list of all upcoming HR Policy Global events*

Date	Event	Booking Links	Venue
June 19 - 21	*Europe Members Annual Summit*	***Book Barcelona 2024 Summit***	*Hotel Estela, Sitges, Barcelona, Spain*
TBC	***Webinar on UK HR Issues:*** *Non-Competes, Fire & Rehire*	***Book UK HR issues Webinar***	*Webinar*
Sept 18 & 19	*Europe Members Meeting*	***Book Brussels meeting***	*Pullman Midi Hotel Brussels, Belgium*
Oct 10 - 13	*European Training Academy in Sitges/Barcelona*		*Hotel Estela, Sitges, Barcelona, Spain*
Oct 17	*London Networking Luncheon and Meeting (at Noon – finishes by 3pm)*		*TBC*