

Coming Soon: The EU's Employee Free Choice Act?

Monday, Jan 14, 2008 --- In the next few weeks the European Commission will kick-start the process of updating the 1994 European Works Council (EWC) Directive.

While no official announcements have yet been made, the Commission's proposals to revise the Directive sent to business representatives and trade union leaders are circulating freely in Brussels.

The adoption of these proposals would: 1) mean a major increase in the powers of EWCs to put a brake on corporate restructuring in Europe; 2) multiply the number of EWC meetings that need to take place every year; and 3) give trade unions a legal right to participate in EWCs, irrespective of the wishes of either management or employees' representatives.

The proposed revisions to the Directive contain definitions of consultation that in reality amount to European-level collective bargaining over transnational restructuring.

To put it in a way U.S. executives will understand: The proposed changes to the EWC Directive would have the same impact on EU employment law as the passage of the Employee Free Choice Act would have on U.S. law.

The current Directive applies to multinational companies with more than 1,000 employees within the European Union (EU), and at least 150 employees in at least two of the 27 EU Member States and the three European Economic Area countries (Norway, Iceland and Liechtenstein).

The laws require international companies to inform and consult with employees' representatives at a European-level on what are called "transnational issues," at least once per year with additional meetings where programs with transnational implications are announced.

Academic researchers suggest that around 2,200 companies come within the scope of the Directive with between 800 and 900 having already set up an EWC. The 2,200 includes about 350 U.S.-owned companies, of whom about 120 have an EWC.

The current EWC Directive has allowed communication with employees without significant interference in necessary business decisions.

The impact of the 1994 Directive in most companies has been felt in planning for and holding meetings with an international group of employee representatives.

Meetings typically take a significant amount of management time and attention and cost between \$100,000 and \$200,000 each in travel, accommodations, and interpretation/translation expenses.

There are notable exceptions, but most companies with EWCs would suggest that in reality they have interfered little with the ability of management to make necessary business decisions...even where these have involved plant closures and painful job losses.

Labor unions quickly came to the conclusion that while the Directive appeared to “talk the talk” on involving employees’ representatives in corporate decision making it didn’t “walk the walk.” They have, for a number of years, called for changes to give the Directive “more teeth.”

In 2008, the EU Commission seems set to answer their prayers.

The proposed changes will not only lengthen the information and consultation requirement but permit EWCs and trade unions to stall unwanted business decisions.

The changes being proposed by the Commission fall under four broad headings:

Consultation: The Commission will propose a very substantial expansion of what is to be understood by “transnational employee information and consultation.” In the existing Directive, consultation is defined in very brief and “weak” terms in a European context, i.e. “the exchange of views and the establishment of dialogue.”

“Transnational” generally refers to an issue affecting employees’ interests in at least two EU Member States. The Commission will suggest that the definition of consultation be brought in line with the definitions to be found in other national and European level laws. The changes would require companies to:

Enter into consultations with EWCs at a much earlier stage of the decision-making process;

Consult “with a view to reaching an agreement” on substantial changes in work organization and employment contracts (A recent European court case has already determined that this phase should be understood as “implying negotiations”);

Redefine “transnational issues” as meaning any issue “beyond the powers of decision-making bodies in a single Member State.” For a U.S. corporation, this means all decisions made at Global or European headquarters;

Explicitly link European-level consultation with the many and complex national-level consultation obligations, suggesting that any national-level

consultations may not be concluded before European-level consultations are finished.

The net impact of these proposals will be to considerably lengthen the time information and consultation processes will take. Under the current laws, most companies are able to consult their EWC on changes in a single meeting.

The new definition almost certainly calls for three meetings: The first at which management outlines the proposed changes and gives the EWC all supporting data; the second meeting after the EWC has had a chance to consider the information and draft a response to management's proposals, probably with the assistance of trade union experts; the third meeting would be called "so that workers' representatives may meet the employer and obtain a reasoned response to any opinion they might formulate with a view to reaching an agreement on decisions within the scope of the employer's powers which could lead to substantial changes in work organization or in employment contracts."

Such a protracted and complex process opens the door for EWCs, national works councils and trade unions to coordinate their activities at the European and national levels in order to stall decision-making for a considerable length of time.

Subsidiary Requirements: The "subsidiary requirements" are the "fall-back" provisions that only come into play if employee representatives and central management fail to reach agreement on the make up of an EWC.

In that sense they reflect the "minimum terms" that underpin any voluntary agreement. At the moment these requirements are fairly minimal.

They provide for one meeting a year; the right to additional meetings in "exceptional circumstances;" and outline company financial support for EWC meetings, which is limited to hotel and travel costs, payment for interpretation and the fees associated with one "expert" adviser to the employees' representatives on the EWC.

It is the "light" approach to these requirements in the current law that facilitates the conclusion of agreements that generally allow management to conclude European level consultations relatively quickly.

The European Commission now proposes to rewrite these requirements significantly. They would require:

- i) A redefinition of what is meant by "transnational" which in the future would mean any issue beyond the decision making powers of local management;
- ii) Two meetings a year;
- iii) A minimum of two further meetings in "exceptional circumstances,"

involving “substantial changes in work organization or employment contracts;”

iv) The inclusion of additional agenda items, e.g., environmental issues.

This will undoubtedly result in pressure from existing EWC’s to renegotiate their current agreements to bring them into line with the new minimum requirements.

Today about 90% of existing agreements provide for one EWC meeting a year, with the right to additional meeting in tightly defined circumstances. The proposed revisions would see EWC’s typically meeting five to six times a year.

A situation in which EWCs are meeting almost every two months, and in which management is under an obligation to consult “with a view to reaching an agreement” will increase the role of employee representatives and amount to the creation of European-level collective bargaining on employment related changes.

The role of trade unions: Unions are to be given a formal right to participate “in the negotiations and support” of EWCs. This would result in the on-going involvement of union officials in the work of EWCs irrespective of whether or not this is acceptable to the company or all of the employee representatives on the EWC.

Given the proposed expansion in the numbers of EWC meetings per year (previous point) this has the potential to greatly expand the scope of union influence in the European operations of all companies covered by the Directive.

As UNI, the Swiss-based international services union has been demanding, union officials could then use their seat on EWCs to push for the negotiation on International Framework Agreements endorsing trade union rights and collective bargaining.

Other issues: The Commission will also propose the following key changes:

i) EWC members will be given the right to visit all sites in the country(ies) they represent on the EWC. This would mean EWC members being able to go on company funded visits, before and after each EWC meeting, to talk to local works councils or to the entire workforce on each site;

ii) The right of EWCs to take legal action against the company in the event of an alleged failure to inform and consult will be clarified and strengthened.

The past two years has seen a steady rise in the number of companies being taken to court by EWC’s, with companies such as British Airways, Gaz de France and Alcatel-Lucent being ordered to have further discussions with their EWCs before implementing restructuring plans.

The Commission wants to make it easier for EWCs to be able to block corporate decisions through the courts.

iii) The European Commission wants to introduce a clause into the Directive to make it clear what happens to EWCs in the event of mergers and takeovers.

At the moment it is unclear what is to happen when two companies which both have an EWC either merge or when one takes over the other.

iv) The Commission wants unions and employers to negotiate an agreement defining the circumstances in which management will be able to declare business information as confidential.

Ideally, the Commission would like to see information being marked as confidential more of an exception than it is today.

v) Finally, other proposals involve changes to the way agreements are negotiated and the right for employee representatives in joint ventures to participate in the EWC's of both parent companies.

The Time Line for implementing these proposed changes could be short

It is expected that the Commission will consult European trade unions and employers' organizations in the first few weeks of 2008 over the proposed changes.

Under EU law the unions and employers have the right to jointly request the Commission to suspend the legislative process to give them an opportunity to negotiate on the issue. If they do opt for negotiations they have nine months in which to reach an agreement.

However, at the moment, early indications coming out of both camps suggest that there is no appetite on the part of either unions or employers to negotiate. It will then be up to the Commission to produce draft legislation which could be published within a few months.

For the proposals to become law, both the Council of Ministers (representing all 27 EU national governments), and the European Parliament (directly elected by the European public) must vote the measure through. It is at this point in the process that employers will need to lobby hard to ensure that a revised EWC Directive does not unduly complicate corporate decision-making in the EU. Given the Commission proposals, this will be no easy task.

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