

Opening statement to the Joint Committee on Enterprise, Trade and Employment, 8 February 2023

I am the Managing Director of the EWC Academy in Hamburg, Germany, a private limited company providing training, conferences and consultancy for employee representatives and a quarterly bulletin on EWC issues in three languages (www.ewc-news.com). We have no official connection with trade unions, but all our consultants have a professional experience in trade union-related institutions or as members of works councils. We have been working with larger EWCs like Airbus, Unilever or Zurich Insurance, but mostly smaller Councils representing up to 20,000 workers in Europe in electrical, automotive, pharmaceuticals, packaging, finance, transport and IT in a variety of jurisdictions. This includes USA companies that were already operating under Irish law before Brexit, or Bombardier, a Canadian business jet manufacturer with an EWC based near Belfast airport under the law of Northern Ireland at the time. We are currently working with the Verizon EWC under Irish law.

Some EWC figures

According to the database of the European Trade Union Institute in Brussels (www.ewcdb.eu), there are currently 1,200 EWCs, more than 500 of them with Irish delegates. Unfortunately you can not find reliable statistics on post-Brexit changes. I would estimate that Ireland now ranks third in the EU in terms of the number of companies under the respective law. Germany hosts nearly 25% of all European Works Councils, France 15-20% and Ireland 12-15% (so maybe 140 to 180 companies, but only 11 of those are proper Irish companies like Smurfit Kappa, Kerry Group or Aer Lingus). Number 4 is Sweden with less than 6%. Many EU member states have only a handful of EWCs or none at all.

Can MNCs choose the country in which the EWC is based?

Any company with global headquarters in an EU member state must locate the EWC there. Companies from third countries (USA, Canada, Japan, Switzerland etc. and the UK after Brexit) are free to choose the national law, the location and a legal entity ("representative agent").

Does a company have to have many employees in a particular country to locate the EWC there?

No. It is possible to choose Irish law without having a single employee in Ireland, without having an office space in Ireland and without paying one euro of tax in Ireland. There are examples like this from Luxembourg. I personally know a company that has thousands of employees in Europe but only 29 in Ireland and the EWC has been based in Ireland. Consequently, there is no automatic link and maybe no impact at all with the labour market at the seat of the EWC.

Do EWCs in Ireland have to hold their meetings in Ireland?

No. Meetings can take place anywhere, in Paris, in Brussels, in Berlin or in Bucharest. They may never take place on Irish soil, and that's legally fine. National law only has meaning when it comes to legal disputes.

What legal disputes might arise?

In practice, conflicts repeatedly arise over the functioning of the EWC, over the competence of the EWC in transnational issues, over the scope of information and consultation in restructuring, over the extent of the reporting obligation on business data and over confidentiality. However, the overall number of court cases is not very high. Some practical examples:

1. EWC members have training needs and central management does not want to pay for it. A complaint then has to be made to the Workplace Relations Commission in Ireland. The Workplace Relations Commission requires each side to bear its own costs. What does this mean for a workers' representative from Bulgaria or Portugal with no legal training or proper understanding of the procedure? Who pays for the interpreter and – if no remote hearing is arranged – for flight, hotel and meals? The company,

however, has access to leading firms of solicitors and eminent barristers, the cost of engaging whom can be written off against tax.

2. A US company wants to close sites in Spain and refuses to involve the EWC. Such a court dispute has actually taken place, once in Germany and another case in the Netherlands. In such cases the EWC has to act quickly and needs a short-term enforceable decision from a court. Does Irish law provide for this?
3. If one side wins a case in the Workplace Relations Commission or Labour Court, the other side can appeal, possibly all the way to the Supreme Court. Who pays solicitors and barristers for the EWC? And if the EWC loses, costs of over €100,000 may be incurred. Will the EWC chair from Slovenia then have to sell his private home to pay the company's solicitor and barrister in Ireland? But even if central management ends up being ordered to pay all the EWC's legal fees, that can take years. What lawyer in Ireland is willing to take such a risk and wait years for payment?

These examples show that it is not about a small detail of EWC law, but about the principle of the rule of law. If a law is valid, framework conditions must be implemented so that all parties involved can enforce the law in court. The party in EWC disputes is not an individual workers' representative, but the Council as a collective body without its own budget.

The question of arbitration

Arbitration in section 21 TICEA is not clearly regulated. What are the competences of an arbitrator? How long does it take for an arbitrator to be appointed by the Labour Court, if at all? And what does it mean: "the parties to an arbitration under this section shall bear their own costs."? An EWC has no bank account and no budget of its own. Who pays for flight, hotel, legal assistance and the arbitrator's fee? Under section 7 TICEA, the Minister is empowered to make Regulations not just in relation to the appointment of an arbitrator but also the expenses to be borne by central management in funding EWCs. No such Regulations have ever been made! Why?

Northern Ireland had clearer rules pre-Brexit

In cases of infringement of the obligations arising from the EWC Directive, sanctions should be applicable "that are effective, dissuasive and proportionate in relation to the seriousness of the offence" (Recital 36). In Northern Ireland, the EWC can ask the High Court to impose a penalty against a company of up to £100,000. In the Republic, proceedings in relation to a summary offence may be brought and prosecuted by the Workplace Relations Commission with the maximum fine being limited to €4,000; a prosecution on indictment, before a judge and a jury, can only be brought by the Director of Public Prosecutions but here the maximum fine is €22,219.75. The person may be based in another EU member state or in the USA. How can the penalty then be enforced?

The European Parliament last week called for improving dispute resolution and ensuring access to justice. Fines are said to be up to 4% of global turnover, as in the General Data Protection Regulation. As far as I know, only two MEPs from Ireland voted against (both are from the Left). See press report: <https://www.euractiv.com/section/economy-jobs/news/eu-parliament-wants-to-strengthen-european-works-councils>

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