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CONSULTATION ON THE UK EXPERIENCE OF EUROPEAN WORKS COUNCILS: SUMMARY AND DTI RESPONSE

Introduction and brief background to the European Works Council Directive

The DTI held a public consultation between 7 July 2003 and 7 October 2003 on the operation of European Works Councils (EWC) in the UK.

The main purpose of the consultation exercise was to gather evidence in advance of the proposed review of the EWC Directive by the European Commission.

The Directive has been in operation since 1996 and in the UK for just over four years following the decision by the UK government to accept the social chapter in 1997[1]. The prime purpose of the Directive is to give employees in larger multinational undertakings a mechanism for information and consultation about a range of trans-European issues affecting the business. The Directive provides for agreements between management and employee representatives. EWC agreements usually come in two forms. Article 13 agreements are ones concluded by 22 September 1996 (or 15 December 1999 in the case of companies who were covered by the directive as a result of its extension to the UK). Article 13 agreements are exempt from the provisions of the EWC directive if they provide for transnational information and consultation of the employees across the entire workforce in the EEA. Article 6 agreements are ones that come into being as a result of a request in writing by at least 100 employees or their representatives in two or more Member States, or on the management's own initiative. This will entail the setting up of a Special Negotiating Body (SNB). The SNB's role is to negotiate an agreement for an EWC with the central management of the undertaking. Where no agreement is reached an EWC must be set up in accordance with the statutory model set out in the Annex to the Directive.

Overview of consultation responses

There were twenty-five formal responses made up of 12 from business/business representative organisations; 7 from trade union groups; 3 legal respondents and 3 other responses.

There was a general acknowledgement that EWCs have had some

[1] This position was formalised when the Amsterdam Treaty, incorporating the social chapter, entered into force on 1 May 1999

beneficial impact on employee communication at the trans-European level. The EWC has helped facilitate better communication of important strategic messages across the undertaking and in some instances has played a key role in helping to manage change. However, some business respondents thought their EWC was more of symbolic value and did not add anything of substantive use to the communication strategy of the organisation. Also there is little employee demand for European information and consultation bodies. Nevertheless, many companies are keen to make best use of their EWC and would not want to discontinue it even if there was no obligation to have one.

A number of trade union respondents thought that too many EWCs had yet to realise their full potential. It was felt that the typical EWC tended to operate in a rather mechanistic way, with little effort made to turn them into bodies that could make a difference on important issues affecting their organisation. Some trade union respondents also disputed notion that there has been relatively little demand for changes to the rules governing EWCs. This was not true as far as the trade union movement was concerned.

There were different views expressed as to whether specific regulatory changes were needed to help make EWCs function more effectively. Some respondents, mainly unions, thought that the Directive's provisions did need strengthening, while others, mainly business, thought that it was too soon given that the concept of an EWC is a relatively new one. Although many agreements (both Article 6 and Article 13 ones) have been based on the model set out in the annex to the Directive, this is less so with newer and re-negotiated EWC agreements. EWC agreements and practices are, therefore, evolving and need more time to continue to do so. A number of respondents felt that best practice guidance could play an important role in helping EWCs to function more effectively.

The implications of the legislation to implement the Information and Consultation Directive (due in March 2005) were also considered significant by many respondents. Many believe that national level consultation should take precedence over European level consultation. A further key concern is that the enlargement of the European Union will of itself have a significant impact on some existing EWCs, as well as bringing other organisations within the scope of the Directive for the first time.

Responses to specific questions

The nature of EWCs, including details of their size, frequency of meetings, subjects discussed, costs of operation, duration of agreements and procedures for re-newing/terminating them, as well as general views on what makes for an effective EWC and what are the obstacles to an effective EWC?

Responses to the consultation suggested that the most common features of successful EWCs included senior management buy-in; more than one main meeting per year; knowledgeable representatives; rotating chairs so that management does not always choose the agenda; and a select committee/sub-group of the main EWC which meets more regularly, sometimes on an ad-hoc basis, to talk about detailed issues affecting a smaller number of locations. The absence of such features were seen as obstacles to effective EWCs. Other negative factors cited were employee apathy and the difficulty in some cases of identifying genuinely transnational issues.

Do you think there should be any changes to the level of the directive's thresholds? If so, at what level should they be set and what is the case for making such a change?

A majority of views were opposed to lowering the threshold levels. Currently the Directive applies to undertakings or groups of undertakings with at least 1000 employees across the Member States of the European Economic Area (EEA)[2] and at least 150 employees in each of two or more of those Member States. The main arguments were the low demand for an EWC under the existing thresholds – only about a third of organisations that could have an EWC at the moment actually do have one, and the disproportionate cost impact that smaller firms would face. The main arguments in favour of a lower threshold were that there are some smaller multinational companies in certain niche sectors for whom an EWC would be appropriate and in any case, employees would not request an EWC unless they saw a need for one.

Are there changes that could be made to the Special Negotiating Body (SNB) procedure that would better facilitate effective EWC agreements?

The SNB consists of representatives of all the employees in the EEA Member States in which the undertaking has operations. It is the SNB's responsibility to negotiate an agreement for an EWC with the central management of the undertaking (or group of undertakings).

A clear majority of views were in favour of reducing the period for negotiating an EWC agreement (currently 3 years). Views on the amount of time that should be allowed differed from 6 months to 2 years. Some respondents were against reducing the period on the basis that some negotiations were quite complex and would become more so where the size of the SNB would increase due to enlargement.

Some trade unions that responded to the consultation thought that there should be a requirement to inform the relevant European Trade Union

[2] The member states of the EEA are the 15 EU Member States plus Norway, Liechtenstein and Iceland.

Industry Federation at the beginning of the SNB process, as well as rights to pre-SNB meetings without management being present. There was some general consensus that changes to the formula for deciding the SNB seats might be useful – e.g. a fixed minimum number of employees in any one country in order to qualify for an SNB seat. There was also some agreement that the position of the SNB needed clarification if a restructuring of the undertaking occurred during a negotiation.

Are there any changes that could be made to Article 6 of the directive that would make for better agreements or make it easier to reach an agreement? How can more innovative EWC agreements be fostered? Do you think any changes in relation to Article 13 agreements should be made?

There were differing views on whether there should be a prescribed list of core topics for discussion with the EWC set out in Article 6, and whether there should be more requirements on employers in terms of the quality and timing of Information and Consultation, especially in the event of a restructuring. There was more agreement that the Directive should be clearer about what should happen to the EWC during and after a major restructuring.

The general view on Article 13 agreements was that these should not be interfered with unless the parties think otherwise. Many respondents thought the legal status of such agreements should be clarified and that these agreements should be legally enforceable. There was less consensus on whether there should be another opportunity for companies coming within the scope of the Directive for the first time to negotiate Article 13 type agreements.

Are there any changes that could be made to the fallback provisions in the directive. For example, are the minimum and maximum number of members for the EWC appropriate. Should they be altered as a result of the expansion of the EU?

The statutory model set out in the Annex to the directive lays out requirements concerning the size (a minimum of 3 members and a maximum of 30), establishment and operation of a European Works Council. In particular, the Annex lists topics on which the European Works Council has the right to be informed and consulted (e.g. the economic and financial situation of the business; its likely development; probable employment trends; the introduction of new working methods; and substantial organisational changes).

As with Article 6 requirements, similar points were made about the content of the agreements and the number of meetings that should be held per year. There were differing views on whether there was a need to revise the size of a statutory EWC, with the majority of respondents agreeing that it should not rise above the current maximum level of 30 members, but others saying

that the numbers need increasing to accommodate EU expansion.

Some respondents thought that it would be useful to clarify whether the statutory EWC was a single (i.e. employee representatives only) or a bilateral body (i.e. joint management and employee representatives' body).

A general point made in relation to this question was that any changes made to the statutory model would become the de-facto minimum standard for most new or re-negotiated agreements because in practice the statutory model has a significant influence on negotiated EWC agreements.

Should the directive contain specific provisions that would provide for rights to time-off for training of EWC representatives? Are any changes needed to the provisions concerning the use of outside experts in the setting up and running of EWCs?

There was general support for a right to time off for training, though some employers felt that this should be a matter for the EWC itself to agree on. There were differing views on prescribing the nature of the training, especially when it comes to matters like language tuition.

There were very differing views on experts. Some companies were opposed to the idea of further involvement for experts and believed that the role of experts was something that should be agreed by the EWC rather than being prescribed in the Directive. Unions on the other hand, argued that the role of experts is vital as without them it's too easy for management to force through weak agreements. It was also argued that the position of the expert needed clarifying in the Directive because it is not clear what the term "assisted" means in relation to outside experts actively participating in SNB meetings.

Do you consider that the directive's provisions on sanctions require strengthening in any way?

Views on this issue were split with the majority against any major changes. Most Union respondents supported the ETUC/EP proposals to introduce tougher sanctions such as the staying of decisions affecting workers until EWC representatives have been properly informed and consulted, or higher financial penalties. Business on the other hand argued that the current sanctions regime is sufficient to ensure adequate enforcement of the Directive.

Do you see any implications for the EWC directive, or for the Commission's review, from the introduction of the Information and Consultation directive?

Some respondents thought that the introduction of legislation to implement the Information and Consultation Directive should help address the skills

deficit suffered by some UK EWC representatives. The main concern of business is that the EWC should not impact on, or take priority over, local level consultation, or lead to a hierarchy of information and consultation requirements culminating with the EWC. There were some arguments put forward that this is a good reason not to strengthen the definition of consultation in the Directive as this would risk undermining consultation at the local level. Other respondents, especially Unions, argued that stronger definitions were needed and that it makes sense to harmonise the EWC definition of consultation with the ones used in the Information and Consultation Directive or the European Company Statute Directive.

Do you think the number of SNB members or EWC members under the annex requirements should be revised as a result of the extension of the directive to the accession countries? Are there any other implications for EWCs as result of the expansion of the European Union that need to be taken into account during the review of the directive?

The question of the size of an EWC is addressed above. There was some consensus that the number of SNB members would have to be reviewed following accession. Views varied on how this should be done. Some thought it should be on a one member per country basis. Others, concerned that the body might become too unwieldy, thought that seats should be allocated according to where the largest number of employees were based.

One further point concerned the possibility of Article 13 agreements unwittingly becoming invalid unless they could take account of employees in the Accession countries. It was suggested that the Directive should allow a specific period for re-negotiation in these circumstances.

Are there any changes of a deregulatory nature that might help better achieve the aims of the directive? Would best practice guidance be helpful in addition or as an alternative to changes to the directive? If so, guidance on what?

Many respondents agreed that best-practice guidance on matters like, training; 50/50 joint ventures where there is no joint venture partner with a dominant influence; suitable matters for transnational discussion; confidential information; and how to get the most out of EWC meetings would be useful. Others (Unions), while agreeing that this would be useful, thought that this should not obscure the need to make revisions to the Directive.

Are there any aspects of the UK implementing regulations (TICE) that needs to be addressed or on any other aspects of the regulations that could be improved.

Most of the comments about this question focused on the legal status of the EWC and its ability to bring a complaint about the operation of an EWC

agreement. This is connected to the question referred to above as to whether an EWC is a joint or a single body. This is considered to be a significant issue because only the central management or the EWC itself can initiate legal action in the UK. As far as the latter is concerned, this seems to imply that the whole EWC must agree to take action which, depending on its constitution, may be difficult in practice.

Other comments related to whether the £75,000 financial penalty was sufficient; whether the Employment Appeal Tribunal was the correct body to hear first instance EWC disputes; a more prominent role for Trade Unions and additional rights for EWC members to report back to their constituencies.

The Government Response

The Government is grateful to all the respondents to this consultation. It has demonstrated some divergence of views as to whether and how the Directive should be revised. It has also shown a degree of consensus about some aspects of the operation of the Directive, particularly in the following areas:

- the period for negotiating an EWC agreement should be reduced
- the size of the SNB needed to be considered post-EU enlargement
- a revised formula for determining the composition of the SNB
- clarification of the legal status of an EWC in the event of a restructuring
- the need for best practice guidance

The Government will be forwarding the results of this consultation to the European Commission and the Social Partners.

While the Government cannot pre-empt the social partner discussions that will take place about the Directive, all of this information has been very useful in helping the Government to prepare for the Commission's review of the Directive. The Government's position remains that it is will look at any possible changes to the Directive from a pragmatic point of view, focusing on how to make the directive a more effective tool for transnational employee involvement.

The Commission Review

When the consultation document was published in July 2003, the European Commission's review of the Directive was due to begin before the end of 2003. However, the review was delayed until the Spring. The Commission launched on 20 April 2004 a first stage consultation of the

European level Social Partners[3]. The Social Partners are asked to consider three main aspects of the Directive: first, how best ensure the potential of EWCs is fully realised in the future; second, to consider what changes are necessary to allow European Works Councils (EWCs) to work better; thirdly, what role the social partners themselves can play in addressing issues related to managing change and its social consequences. The Social Partners have 6 weeks to respond. The Commission can issue a more detailed second stage consultation at any point after that. The text of the Commission paper can be accessed at http://europa.eu.int/comm/employment_social/news/2004/apr/ewc_consultation_en.pdf

The Commission consultation follows an "exploratory opinion" the European Economic and Social Committee (EESC) on the practical application of the European Works Council directive and on any aspects of the directive that might be need to be revised. That opinion was adopted in September 2003. The text can be accessed at http://eescopinions.esc.eu.int/EESCopinionDocument.aspx?identifier=ces\soc\soc139\ces1164-2003_ac.doc&language=EN

[3] The Social Partners at the European level are Union of Industrial and Employers Confederations of Europe (UNICE); Organisation representing crafts, trades and SMEs (UEAPME); European Trade Union Federation (ETUC); and the European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP)