

Transnational Information and Consultation of Employees Act 1996

Proposals for Reform

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Introduction

The Act has its origins in Directive 1994/45/EC on the establishment of European Works Councils (EWCs) and a procedure in EU-scale undertakings and EU-scale groups of undertakings for the purposes of informing and consulting employees.

That Directive was recast by Directive 2009/38/EC to which effect was given by *European Communities (Transnational Information and Consultation of Employees Act 1996) (Amendment) Regulations 2011* (S.I. No. 380 of 2011).

There have been very few EWCs based in Ireland and subject to Irish law. Consequently, in practice, the provisions of the Act have not been tested or applied to any significant degree since its enactment.

Since their operation and practice is primarily governed by the Directive, the Court of Justice of the European Union is the ultimate arbitrator in disputes or differences concerning compliance with its provisions. It is, therefore, a requirement that EWCs be subject to the jurisdiction of the CJEU, which can only apply if they are located in a Member State of the European Union.

EWCs are subject to the law of the Member State in which they are located. However, where the “central management” of an undertaking is located in a country outside the European Economic Area, for example, a US-based multinational, then the central management is free to decide in which EEA member state it will locate a “representative agent” who acts of behalf on central management in matters relating to EWCs. The EWC process is then subject to the laws of the Member State in which the representative agent is located.

Until now, many non-EEA undertakings have chosen to locate their representative agents in the UK. This will no longer be possible after December 31 next, when the UK leaves the Single Market and the Customs Union. Further, UK undertakings which, because of their size in the EEA come within the scope of the Directive, will need to keep EWCs in place and they also will now need to appoint a representative agent within the EU.

There are currently upwards of 200 EWCs located in the United Kingdom. Many of them have expressed a preference to relocate in Ireland. Some have already done so. In considering the jurisdiction in which to locate, the mode of dispute resolution will be a significant consideration.

Disputes inevitably arise within EWCs, and Special Negotiating Bodies (SNBs), between employee representatives and Central Management concerning the legal rights and responsibilities of the parties. It is

imperative that the laws of the Member State in which they are located provide an easily understood, efficient and coherent system of dispute resolution that conforms with the requirements of the Directive.

Dispute Resolution Process Under the Act

In its general provisions, the Act, as amended, follows the provisions of Directive 2009/38/EC faithfully. However, in respect to its provisions dealing with dispute resolution and enforcement, there are significant anomalies. This is a matter which will be of concern to those enterprises considering relocating their EWCs in Ireland.

Dispute resolution procedures are provided for by section 41(1) and Schedule 5 of the Workplace Relations Act 2015 and by sections 17A, 20 and 21 of the Act.

Section 17A of the Act, as inserted by section 52(1) and Schedule 7 of the Workplace Relations Act 2015, deals with the provision of redress for a contravention of section 17 of the Act. Section 17 prohibits penalisation of employees because of their status or reasonable activities as employee representatives. That section also places an obligation on central management to provide the members of an EWC with the means necessary to collectively represent the interests of employees. That includes paid time off for the purpose of discharging their duties, including attendance at meetings of the EWC or SNB.

It should be noted that disputes have already arisen in the UK and have been referred to the Central Arbitrations Committee over whether the words “means required” are to be understood as obliging undertakings to put EWCs in funds to hire lawyers to represent them in legal proceedings.

Disputes in this category are dealt with through the procedures provided for by section 41 of the Workplace Relations Act 2015. That is to say, a complaint may be referred to the Director General of the WRC and adjudicated upon by an Adjudication Officer of the WRC. The decision of an Adjudication officer may do one or more of the following: -

(a) declare that the complaint was or, as the case may be, was not well founded,

(b) order the employer to take a specified course of action,

(c) order the employer to pay to the employee compensation of such amount (if any) as the adjudication officer considers just and equitable having regard to all of the circumstances.

Section 17B of the Act provides that the decision of an Adjudication Officer may be appealed to the Labour Court.

This procedure is in line with those generally applicable for resolving workplace disputes in Ireland.

Section 20 of the Act provides the procedures for resolving disputes in relation to confidentiality and withholding sensitive information. It provides: -

20.— (1) Disputes between the central management and employees (or their representatives) employed in the State concerning the withholding by the central management of commercially sensitive information or as to whether information disclosed by the central management in confidence to employees’ representatives is of a kind that, pursuant to section 15, may not be revealed, may be referred by either the central management or employees’ representatives to an independent arbitrator appointed by the Minister under regulations made for the purposes of this section.

(2) An arbitrator appointed under subsection (1) shall be paid, from moneys made available for that purpose by the Oireachtas, such fees as the Minister, with the consent of the Minister for Finance, may determine.

(3) The parties to an arbitration under this section shall each bear their own costs.

(4) The procedure adopted by the arbitrator shall, as far as practicable, protect the confidentiality of the information concerned.

(5) A party to an arbitration under this section may not appeal to a court against a determination of the arbitrator except on a point of law.

Section 21 deals with disputes concerning the interpretation of agreements and matters referred to in section 17. It provides: -

(1) Disputes between the central management and employees or their representatives concerning —

(a) the interpretation or operation of an agreement referred to in section 11(1), or

(b) matters provided for in section 17,

may be referred by either the central management or employees' representatives to an independent arbitrator, appointed on such terms as to remuneration or otherwise as agreed between the parties.

(2) If the parties cannot reach agreement on the appointment or terms of appointment of an arbitrator, either of them may apply to the Labour Court established by [section 10](#) of the [Industrial Relations Act, 1946](#), which shall refer the dispute to the arbitration of one or more persons as it thinks fit.

(3) An arbitrator to whom under subsection (2) a dispute is referred shall be paid such fees as the Minister, with the consent of the Minister for Finance, may determine, which fees shall be paid by the parties or a party to the arbitration as directed by the arbitrator.

(4) An arbitrator to whom under subsection (2) a dispute is referred shall make his or her determination on the basis of the written submissions of the parties, but may conduct a hearing, at which both parties may be present, if he or she thinks the circumstances of the case require it.

(5) Subject to subsection (3), the parties to an arbitration under this section shall bear their own costs.

(6) A party to an arbitration under this section may not appeal to a court against a determination of the arbitrator except on a point of law.

These procedures differ from the standard dispute resolution procedures provided for under the Industrial Relations Acts 1946 -2015, in relation to industrial relations disputes, and those provided for by the Workplace Relations Act 2015 in relation to disputes concerning matters of legal right. For reasons already alluded to, these provisions have never been invoked.

There does not appear to be any provisions in the Act for the resolution of disputes arising in EWCs constituted under the Subsidiary Requirements, the default EWC that comes into existence where management and a Special Negotiating Body cannot reach agreement on the terms of a negotiated EWC

agreement. We are aware of four undertakings with Subsidiary Requirements EWC which have already relocated to Ireland.

A number of significant issues arise in relation to these provisions: -

1. The use of private arbitration is out of line with the normal employment related dispute resolution mechanisms. It is difficult to understand, and to explain, why the normal disputes resolution machinery provided by the State, namely the WRC and the Labour Court should not be available in disputes of this nature. The WRC and the Labour Court provide consistency of approach in dispute resolution and reasonable predictability of outcome.
2. The determination of disputes concerning the rights and obligations of an EWC can involve complex issues of European law and the application of a considerable body of jurisprudence developed by the CJEU, and the Courts of the Member States, in interpreting the Directive over many years. Private arbitration tends to operate on *an ad hoc* basis, can result in inconsistencies and be unpredictable. This results in undesirable uncertainty as to the outcome of any dispute. Moreover, the Act provides no guidance as to what, if any, redress may be awarded by an arbitrator. It is doubtful if private arbitration with uncertain terms of reference is in line with the requirements of the Directive.
3. Section 23 of the Act provides that the Arbitration Acts 1954 and 1980 do not apply to arbitration under the Act. Consequently, there is no provision whereby an Arbitrator can recover his or her fees where a dispute arises. In these circumstances difficulties may arise in getting an arbitrator to act in cases under the Act.
4. Section 20 is operationally dependent on the making of regulations for the purpose of that section. No such regulations have been made. Consequently, that section is inoperative.
5. Section 21 relates to disputes concerning the interpretation or operation of an agreement referred to at section 11(1) of the Act and matters provided for at section 17. Section 11(1) relates to agreements negotiated by an SNB.

The reference in section 21 to disputes relating to matters referred to in section 17 is contradictory of section 41(1) of the Workplace Relations Act 2015 and section 17A of the Act. The combined effect of section 41 of the Workplace Relations Act 2015, and Schedule 5, point 6, of that Act, is that disputes concerning a contravention of section 17 are referable to an Adjudication Officer of the WRC. Section 21 of the Act provides that disputes having the same subject matter are referable to private arbitration.

6. There are other matters that can give rise to disputes, for which no dispute resolution process is provided by the Act. For example, disputes can arise concerning the provision of experts to advise SNBs, including the appropriateness of a chosen expert, the circumstances in which the assistance of an expert is appropriate and the payment of experts. There could also be disputes about the appropriateness of the training provided by management for SNB and EWC members, or around the rights of EWCs to communicate with the employees they represent.
7. The European law principle of equivalence requires that procedures provided by Member States for vindicating rights derived from the law of the Union should correspond to those available for vindicating similar rights arising under the domestic law of the Member State. In an Irish context, it can cogently be argued that the facilities of the WRC and the Labour Court, which are available to resolve disputes arising under domestic legislation, should also be available to resolve disputes arising from the application of Directive 2009/38/EC

8. Recital 36 of the Preamble to the Directive provides: -

- i. In accordance with the general principles of Community law, administrative or judicial procedures, as well as sanctions that are effective, dissuasive and proportionate in relation to the seriousness of the offence, should be applicable in cases of infringement of the obligations arising from this Directive.*

Section 17A of the Act does provide for effective sanctions by way of redress to aggrieved complainants. However, neither section 20 or 21 of the Act makes any provision for the application of sanctions in the case of infringement of the obligations arising under the Act to which those sections relate.

Offences

Section 18 provides for offences under the Act. Section 19 provides for the prosecution and penalties for offences.

Section 18 creates a limited number of offences of failing to comply with specified provisions of the Act.

Section 19 provides that offences can be prosecuted either summarily or on indictment. On summary conviction there is a maximum fine of €1,500 or six months imprisonment, or both. A conviction on indictment attracts a maximum fine of €10,000, or three years imprisonment, or both. It should be noted that Ireland appears to be the only EEA member state that provides for terms of imprisonment for EWC offenses.

In light of recital 36 of the Preamble to the Directive, to the effect that sanction should be *effective, dissuasive and proportionate in relation to the seriousness of the offence*, the adequacy of the fines provided for should be reviewed. However, it should be noted that with the exceptions of the UK and Spain, the current Irish fines are not out of line with those of other EU member states.

Recommendation

The normal disputes resolution machinery provided by the Industrial Relations Acts 1946 -2015 and the Workplace Relations Act 2015 should be available in disputes concerning matters of an individual nature covered by the Act.

In collective disputes, a process of conciliation / mediation should be available followed by reference to the Labour Court for a binding adjudication. That would provide a rational, consistent and easily understood system of dispute resolution in line with that generally available in workplace disputes.