Radtke Report on Proposed Revisions to EWC Directive

By Tom Hayes, BEERG Executive Director

Here we go again

The European trade unions, and their allies in the European Parliament, are once more trying to change the European Works Council Directive.

This time the architect of the proposed changes is Dennis Radtke MEP, a German Christian Democrat (EPP) Member of the Parliament. He has just published a set of legislative changes that he would like to see made to the Directive. His ten-page report can be read **HERE**.

The effect of Radtke's proposals would be to turn EWCs from what they are, forums for informing and consulting employees' representatives (with the EWC able to offer a non-binding opinion on decisions under consideration), into bargaining bodies with the ability to block and frustrate organisational change… or else extract a high price for agreeing to such change.

How is this to be done?

First, by changing the definition of "transnational." This would, in effect, make practically all decisions "transnational":

> *Matters shall be considered to be transnational where they concern,* ***directly or indirectly****, the Community-scale undertaking or Community-scale group of undertakings as a whole, or at least two undertakings or establishments of the undertaking or group situated in two different Member States.*
>
> *In order to determine the transnational character of a matter, the scope of its possible effects must be taken into account. This includes matters which, irrespective of the number of Member States involved, are of concern to European workers in terms of the scope of their potential impact, as well as matters which involve the transfer of activities between Member States.*
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> (BEERG Note: This wording in the second paragraph is currently to be found in the Recitals to the Directive. This moves it into the body of the legal text).

Further, Radtke proposes placing the burden of proof on management to show that EWC information and consultation was not necessary because a matter was not "transnational":

> *If there is a dispute between the central management and the European Works Council or the employees' representatives as to whether an information and consultation procedure is to be carried out, the central management shall provide reasons why the information and consultation requirements under this Directive or under agreements concluded pursuant thereto do not apply, in particular because of the absence of transnational issues*

In view of the amendments he wants to make to the definition of "transnational" it is a given that EWCs would be quick to make the case that any and all proposed changes should be regarded as transnational. We don't have to guess at this. It already happens in practice under existing legislation/agreements, with EWCs demanding to be consulted over matters that management does not consider "transnational."

Next, Radtke wants to amend the definition of "consultation" to make it clear that the EWC must give its opinion **prior** to management finalising any proposed transnational decision. The definition of consultation would now read:

> *…consultation' means the establishment of dialogue and exchange of views between employees' representatives and central management or any more appropriate level of management, at such time, in such fashion and with such content as enables employees' representatives to express a* ***prior*** *opinion on the basis of the information provided about the proposed measures to which the consultation is related, without prejudice to the responsibilities of the management, and within a reasonable time, which* ***is to*** *be taken into account within the Community-scale undertaking or Community-scale group of undertakings.*

There is no question that this would quickly be interpreted to mean that not only could management not finalise a decision before the EWC had given its opinion, but it would also be blocked from opening local-level information and consultation procedures. Of course, the EWC would find multiple reasons for refusing to offer its opinion. "We need more" information being the most obvious such reason.

Back to the bad, old "French" days, before Sarkozy, Holland and Macron reshaped the system. I suspect the French would not want to see blocking procedures they took years to get rid of reintroduced by a European Directive. The employer community should not be slow in making this point to the French.

To enforce this new right on the part of EWCs to be able to offer a **prior** opinion on the widely extended definition of proposed **transnational decisions**, Member States would be obliged to establish "procedures" that would allow the "temporary suspension" of management decisions where EWCs allege that their information and consultation rights have been infringed. Radtke proposes that:

> *Member States shall establish procedures to enable the temporary suspension of decisions of the central management where such decisions are challenged on the basis that there has been an infringement of the information and consultation requirements under this Directive or under agreements concluded pursuant thereto.*

What constitutes "temporary" and what conditions would have to be satisfied for such "temporary suspension" to be lifted are not clarified. Presumably, the EWC returning to court and telling the judge that it has now been properly informed and consulted. What price would management be expected to pay for this?

Further, companies found to have breached information and consultation obligations are to be hit with eye-watering penalties:

> *The financial penalties referred to in paragraph 2, point (a), shall amount to a maximum of at least €10,000,000 or 2% of the undertaking's total annual worldwide turnover in the preceding business year, whichever is higher.*
>
> *In the case of intentional infringements, Member States shall provide for a maximum financial penalty of at least €20,000,000 or 4% of the undertaking's total worldwide annual turnover in the preceding business year, whichever is higher.*

This wording suggests that companies could be fined up to €10M for **inadvertently** infringing information and consultation obligations, as opposed to **intentionally** doing so.

When you consider that, at best, all an EWC can do is to offer a non-binding opinion on proposed decisions, injunctions and billion Euro fines seem excessive and disproportionate. What possible justification can there be for the **$9.4 billion** fine that Amazon could be hit with because management **inadvertently** infringed the EWC's right to offer an opinion that is not binding in any way? Or even a **$1.12 billion** fine that could be imposed on HP?

Company	2021 Turnover (Billions $)	2% Fine (BN $)	4% Fine (BN $)
Amazon	470	9.4	18.8
Apple	365	7.3	14.6
HP	56	1.12	2.24
IBM	58	1.16	2.32
Coca-Cola	40	.8	1.6
PepsiCo	80	1.6	3.2

Source: Google

This table illustrates the size of the fines for which 6 well-known US companies could be liable because, without meaning to do so, they **inadvertently** failed to follow procedures in the eyes of the EWC, which then complained to a court about the matter. What sort of a signal do potential fines of such magnitude for a relatively minor offence in the scheme of things send to investors?

Radtke makes it clear that management must pay the EWC's legal costs for any case it chooses to take:

> *The central management shall bear the direct costs incurred in carrying out the procedures, including the costs of legal representation and the subsistence and travel expenses for at least one workers' representative.*

Now, anyone familiar with labour relations practices and procedures knows that if you give employees' representatives the resources, incentive, and opportunity to challenge decisions they do not like they will take that opportunity. Under Radtke's proposed wording, every decision would be challenged on the grounds that the EWC was not properly informed and consulted and therefore could not give a **prior** opinion.

There would be no downside or cost to the EWC in doing so. They could go to court anytime they liked, with their legal bills being covered by management. Going to court on a cost-free basis to challenge decisions would be the rational thing for them to do. They would have nothing to lose in doing so. Win and they are ahead. Lose and they are no worse off. It is an invitation to run legally riot. And there are plenty of union-side lawyers and consultants who would be only too willing encourage them to do so.

Summary:

Experience with EWCs over the years lets us know exactly how the "game" will play out.

- *EWCs will regard every decision as transnational*
- *They will delay giving their opinion on the grounds that they have not been given enough information and need more (encouraged in this by commercial consultancies acting as "experts," and interested in racking up fee-earning days)*
- *If management pushes ahead, or refuses to accede to their information requests, they will go to court alleging breaches of information and consultation rights*
- *If the EWC succeeds in getting decisions suspended, management will have to negotiate to get the suspension lifted. Consultation morphs from being an exchange of views and establishment of dialogue into negotiations with a view to reaching an agreement.*

In a word, were Radtke's amendments enacted, they would hand enormous leverage to EWC and severely limit management prerogatives.

Whatever the theoretical niceties about EWCs being representative of all a company's European employees, we know from long experience that they are often subject to "political capture" by one or two determined activists, or by "commercial capture" by fee-earning consultancies acting as "experts".

A few people end up running the "game" because the rest are disinterested and there is no cost to them in letting the activists do so.

Radtke is nothing more than an invitation to ramp up such political and commercial activism.

Radtke makes for bad law and bad labour relations.

Other issues

Radtke also wants to give EWCs the right to meet with management twice a year, cut the timeline for SNBs from three years to one, and severely limit the ability of management to label information as "confidential." We have not touched on these issues in this paper as we wanted to focus on his key proposals which would fundamentally alter EWC dynamics.

What happens next?

The Radtke Report is still just a draft. First, it will have to be approved by the Parliament's Employment Committee and may be subject to amendments during discussions on it. Then, if adopted by the Committee, it will have to be voted on by the full Parliament.

If Parliament in plenary decided to back it, it will be sent to the European Commission. The Commission, after taking time to consider it, must either bring forward legislation as requested, or else explain in detail why it is refusing to do so.

If legislation was to be proposed, as such legislation would be employment legislation, the Commission would be obliged under Article 154 of the Lisbon Treaty to consult "management and labour" on the matter, over two rounds of consultation. At this point, the employers and the unions would have the option of negotiating an agreement between themselves on the issue or declining to do so.

If the social partners declined to negotiate, then Commission would then present a legislative proposal to both the Parliament and the Council of Ministers and normal law-making process would have to be followed.

If the proposed amendments to the 2009 EWC Directive were adopted, then there would be a further two years until they were transposed into national law. So, all things considered, it could be up to five years from now before any change come into force.

However, if there were moves to amend the legislation, the management in individual companies could come under pressure to amend existing agreements in anticipation.

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