Say Goodbye to Article 13 EWCs

By Tom Hayes

Summary: *Whatever the outcome of the trilogue negotiations between the Council, Commission, and Parliament, one thing is clear… the "Article 13 Agreement" exemption will be ended and undertakings with such arrangements can be requested to set up a Special Negotiating Body to negotiate an EWC Agreement under Article 6 of the Directive or, failing agreement, to default to the Subsidiary Requirements. The exemption will end the day a revised Directive becomes national law.*

The revision of the EWC Directive is now at a standstill as we wait for the European Parliament to formally adopt its position on the proposed revision so that negotiations can open between the Council, the Parliament, and the Commission, known as a trilogue.

We think it is unlikely that the Council and Commission will agree to the Parliament's demand for EWCs to be given the right to ask for injunctions to block management decisions. Giving EWCs the right to seek injunctions would be to invite unnecessary delays to management decision making, as well as destabilising national industrial relations systems as local actors pressurised EWCs to seek injunction of their behalf. Experience tells is that this is what would happen.

However, a push by the Parliament for the right of EWCs to seek injunctions should not be underestimated and, as we have previously advised, member companies should use all available channels to make Member State governments aware of the problem injunctions would cause. Nor is it likely that the Council and the Commission will agree to "GDPR-size" fines. The level of fines will be left to Member States to determine.

So, instead of injunctions and mega fines, the Parliament and the unions get the ending of A13 agreements. We believe that the ending of the exemption is unnecessary, but sometimes you have to accept the inevitable.

Landing ground

That said, the "landing ground" for agreement on a revised Directive seems clear. As well as ending the A13 exemption, there will be:

- A new definition of "transnational" that could open the door to local issues being "Europeanised."
- An information and consultation procedure that will require a written response from management.
- The need for provisions in EWC agreements covering the funding of experts, legal advice, and training.
- New wording around how confidential information should be treated.
- In the Subsidiary Requirements, EWCs will be given the right to meet with management twice a year.
- Also, in the Subsidiary Requirements, EWCs will be entitled to bring their experts with them to meetings with management.

The first meeting between an SNB and management will need to be held within six months or else the Subsidiary Requirements will apply.

National governments will be entitled to set out budgetary rules covering expert, legal, and training costs as far as SNBs and the Subsidiary Requirements are concerned. But under the Subsidiary Requirements there does not appear to be any limit on the number of experts an EWC could bring to a management meeting if they have the right to do so. For example, in exceptional circumstances, there could be one paid expert and three or four union officials who come at the unions' cost and at the invitation of the EWC.

While these issues will require existing agreements to be revisited, there is nothing that cannot be managed. The procedures may become a little longer and take a little more time, but the end of the process will be an opinion from the EWC and a reasoned response from management. Probably the trickiest question to be dealt with is the funding for experts, legal costs, and training. There can be no blank cheque to cover these costs.

One possibility is to give the EWC a budget and let them management things themselves. Let the EWC decide if it wants to give the money to experts, or use if, for instance, on additional training for themselves.

We will look at these issues in more detail when we have the final text of the revised Directive. What we want to do in this paper is examine the Article 13 question.

What's wrong with A13 arrangements?

The A13 exemption says that undertakings that had in place on or before September 22, 1996, arrangements for the transnational information and consultation of all employees within the EU/EEA, are exempt from the provisions of the EWC Directive.

A13s are collective agreements between the parties outside the scope of the Directive but whether they are outside the scope of national law depends on whether the parties reference a national law in the agreement and what such national law has to say about collective agreements. It is estimated that around 350 undertakings have A13 arrangements in place.

There is no evidence that A13s are inferior to Article 6 EWC agreements, despite union claims to the contrary. In fact, many A13s were originally negotiated by unions who saw them as a pathway to "Europeanising" labour relations in multinational undertakings. There is also little evidence that the majority of employees' representatives who participate in A13 bodies are unhappy with the way they work. Unfortunately, it has become an ideological point of principle for the trade unions, and their political allies in the European Parliament, that A13 bodies are somehow "inferior" to agreements within the scope of the Directive.

The point is rarely made by trade union "researchers" obsessed with the legal status of EWCs that what really counts is not the legal status of the agreement but the nature of the relationship between management and the EWC and whether bonds of trust have developed between the parties. But why let reality get in the way of ideology?

What does ending the exemption mean?

We think that a revised Directive will be agreed early in 2025, meaning it would become national law sometime in 2027. For undertakings with an A13 arrangement headquartered in an EU Member State the applicable law after the ending of the exemption will be the law of the Member State in which they are headquartered. For undertakings headquartered outside the EU, such as in the US, they will need to nominate a representative agent in an EU Member State who will function as "central management" for the purposes of the Directive.

It will come as no surprise that we recommend Ireland.

Non-EU headquartered undertakings should pay attention to this issue now. We know of a number of US undertakings who have their A13 agreements in various EU Member States. They should remember that once they come within the scope of the Directive, they must nominate a "representative agent," and that agent does not necessarily have to be in the country in which their A13 agreement is currently based. New dawn, new day, decide where makes most sense for you to be.

The ending of the exemption will mean that from the day the revised Directive is transposed into national law 100 employees, or their representatives, from at least 2 EU/EEA Member States, can submit a request for the establishment of a Special Negotiating Body (SNB) to negotiate the creation of an EWC within the framework of the Directive.

If there is no request, the existing A13 arrangement can continue to operate, but there would always be the risk that an SNB request could be submitted at any time in the future. There is no way an SNB request can be blocked.

Proposed language in the Directive could see the SNB timeline reduced from three years to two. A failure to reach an agreement within the two years would result in the imposition of the Subsidiary Requirements. Allowing that it could take several months to set up an SNB with SNB members being elected/selected in accordance with the rules set out in national law and/or practice, this would leave about 18 months for actual negotiations. Further, there is no guarantee that existing members of an A13 EWC would be returned as SNB members.

The SNB would have the right to be assisted by exerts of its choice. Those experts can attend meetings between management and the SNB. Management would be obliged to pay the costs of these experts. It will be open to national governments in transposing national laws to set out budgetary rules on SNB expert costs. Currently, under the existing Directive, management only has to pay the cost of one expert. We think this should continue to be the case under national rules.

Just 2 representatives sitting on an A13 agreement who between them represent at least 100 employees from 2 countries could trigger an SNB request, even if the majority of their current colleagues are against it. They already know one another so this would make it easy to put a request together. We know from talking to member companies that this is going to happen.

However, the 2 employees' representatives do not need to be members of the current A13 agreement. They could be two representatives from two different countries from anywhere across the EU, provided they represent at least 100 employees. It is just that it is a bit more difficult for such representatives to connect with one another. But it can be done, and it will be done.

There will be no "veto" mechanism in a rewritten Directive for existing A13 agreement representatives to oppose SNB requests, even if the majority on the A13 are not in favour of such a request. European law will not give a private group, which is what an Article 13 arrangement is, the right to stop the application of an EU law in an undertaking which comes within scope of that law.

Once an SNB request is received, then an SNB must be set up. Otherwise, the Subsidiary Requirements will apply. In our experience, management generally has limited ability to influence the membership of an SNB, giving rise to the risk that the SNB is "captured" by a couple of activists working with union or other experts.

There is always the possibility that if an SNB is set up against the wishes of a majority of the current A13 arrangement, then a two-thirds majority on the SNB could vote to discontinue discussion and no new request could be submitted for at least two years. Two-thirds is a high hurdle and even if there were to be such a vote, there can always be other requests in the future. Best not to count on this happening.

Must A13 EWCs run in parallel with an SNB?

It seems to me that a rewritten Directive cannot mandate that an Article 13 arrangement must continue to run in parallel with an SNB. To put it bluntly. Once the Article 13 exemption is ended, the law is indifferent to the existence of private arrangements and their continuation or otherwise is a matter for the parties to such arrangements.

But never say never and it is always possible that the legislators could decide A13 arrangements should continue to run in parallel with an SNB. However, this would be at cross-purposes with the legal advice that the representative's involved in an A13 arrangement cannot veto an SNB request. How can the law say that exiting A13 representatives cannot veto an SNB request but that they must continue to meet while the SNB negotiates?

But then, who ever said that the law is always consistent?

However, and assuming the Directive does not say that an A13 arrangement must continue to run in parallel with an SNB, the submission of an SNB request does not bring the Article 13 agreement to an automatic end. What happens will depend on the terms of the agreement, especially what the agreement has to say about its termination. It will also depend on the jurisdiction, if any, in which the Article 13 agreement is based.

The answer to that question will turn on: What happens if management were to unilaterally cancel the collective agreement because of the *"force majeure"* circumstances of the rewritten Directive and the subsequent SNB request? Take Ireland as an example.

In Ireland were management to cancel a collective agreement unilaterally it would be faced with the possibility of a strike. But that is not going to happen if management cancels an A13 arrangement. A13 transnational European representative bodies simply do not have the capacity to organise strikes. It is doubtful if they even have the right to do so. How many employees across Europe would be prepared to strike over such an issue?

Under Irish law, there is no legal sanction available against a company that unilaterally cancels a voluntary collective agreement. A13 representatives whose agreement had been cancelled could complain to the Workplace Relations Commission (WRC) and the Labour Court about the cancellation of the agreement, but all the Court could do is to issue a Recommendation which would not be legally enforceable.

I believe that Ireland may be an "outlier" in this regard. Most A13 arrangements are to be found in Western EU Member States. They do not have the "laissez-faire" approach of Ireland. The A13 agreements may be outside the scope of the Directive. They will not be outside the scope of national law. Try unilaterally cancelling a collective agreement in Belgium and see where it leaves you.

Think ahead

If we accept, and I think we must, that A13s are going to go, then the managements in undertakings with A13s need to start thinking ahead. It is not possible to turn an A13 agreement into an A6 agreement through negotiations with the existing representatives. Since 1996, the only way to create an EWC within the scope of the law is through a Special Negotiating Body. There are no shortcuts, no way around it.

It seems to be all but inevitable that any undertaking with an A13 arrangement will get an SNB request as soon as the revised Directive is transposed into national law. Is there an A13 agreement out there where one or two representatives have not been agitating for this for years?

If you know something is going to happen, then the sensible course of action is to decide beforehand how you are going to deal with it. First, it is best to wait until we have the text of a revised Directive.

I said earlier that I expect there to be an agreement probably in the first half of 2025, meaning a new Directive would become national law sometime in 2027. But it is always possible that the negotiations could take longer. If the Parliament insists that EWCs should have the right to seek injunctions, and the Commission and the Council refuse, then matters could become deadlocked. There is no halfway house on injunctions. EWCs either have the right to seek them, or they don't.

Once the text of the revised Directive is available then, it seems to me, that undertakings with A13 agreements have two options.

- Do you wait until the Directive becomes national law two years later and deal with the SNB request when you get it? Possibly, as we discussed above, ending the A13 agreements in view of the SNB request, if you are able to do so. Or do you leave the A13 agreement running in parallel with the SNB as many representatives will be on both the agreement forum and the SNB?

- Or would it be better to take the initiative and call an SNB as soon as the final text of the Directive is known? An SNB can be set up at the initiative of the employer at any time, even an employer with an A13 agreement. Tell existing representatives that you know change is inevitable, and you think it would be in your mutual best interest to set up the SNB now rather than wait for national law to come into force, and you would hope many of them will be on the SNB so that you can build on the knowledge and experience of the past 30 years.

Whatever approach you decide on, and there will be no one-size-fits-all approach, management with A13 agreements should be looking at their options now. At the very least, they should be scoping out what an A6 agreement would look like, taking what is likely to be in the revised Directive into account.

Fortune always favours those who are prepared.

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