

Discussion Points for EWC Online Open Forum,

October 29, 2024

The Legislative Process

- The Commission published proposals in January 2024.
- The Council adopted its position in late June.
- We know the Parliament's position, but it has yet to be adopted formally.
- We expect negotiations between the three institutions, known as a trilogue, to begin in December.
- It is likely agreement on a common text will be reached in the first half of 2025.
- With a two-year transposition, it will become law in the first half of 2027.

What are the Key Changes We Can Expect?

- Article 13 Agreements will go (see below)
- We think it is unlikely that the Council or the Commission will agree to injunctions and "GDPR-size" fines, whatever the Parliament might wish. Financial penalties will be left to national governments to determine.
- There will be a new definition of "transnational," but it is unlikely to bring greater clarity.
- The information and consultation procedure will become more formal, with management needing to give a "reasoned" response to the EWC's opinion.
- Article 6 agreements will need to include wording on how the costs of experts, legal advice, and training will be managed.
- The Subsidiary Requirements will provide for 2 meetings a year, one of which must be held in person.
- Under the SRs, experts will be given a right to attend meetings between management and EWCs.
- When the rewritten Directive is transposed into national law, undertakings will have two years to bring existing agreements into line with the new provisions. This can be done through negotiations with the existing EWC if the agreement provides for that. Otherwise, and SNB can be triggered.

Article 13 Agreements

- Back in the early 1990s, when the original EWC Directive was under discussion, it was agreed that undertakings that has arrangements in place for the transnational information and consultation of all employees would remain outside the scope of the Directive.
- These arrangements became known as "Article 13 Agreements", even though in the 2009 Directive the relevant article is Article 14.
- It is estimated that out of the 1,200 undertakings with EWCs, about 350 have Article 13 Agreements.
- European-level trade union federations participated in negotiating most of the Article 13 agreements. However, in recent years they have become critical of these agreements and have pushed for the exemption to be brought to an end.
- The three institutions, the Commission, Council, and Parliament all support the ending of the exemption, so it will happen.

What Does This Mean?

- On the day, the written Directive becomes nation law, the exemption no longer protects an undertaking with an Article 13 agreement from a request to set up a Special Negotiating Body to agree the establishment of an EWC.
- Such a request can be submitted by 100 employees spread across at least 2 EU/EEA Member States. Or it can be submitted by their representatives, meaning it just needs 2 people to submit a request to start the process.
- The “Article 13 Agreement Forum” will have no say in the matter and cannot block it.
- Once a request is received, management will have six months to set up and the SNB and meet with it. A failure to do so will see the Subsidiary Requirements imposed. Thereafter, a further 18 months will be available to reach an agreement with the SNB. Again, a failure to reach an agreement, results in the Subsidiary requirements.
- Management and an SNB can:
 - Reach an agreement on the establishment of an EWC in conformity with Article 6 of the Directive.
 - Reach an agreement on an information and consultation process
 - Decide to apply the Subsidiary Requirements
- The SNB on its own can vote by a two-thirds majority to discontinue the negotiations. If this happens, a new SNB request cannot be submitted for at least 2 years, unless the parties agree otherwise.

Central Management and Representative Agent

- Article 13 Agreements are outside the scope of the Directive. Once undertakings with Article 13 Agreements come within scope, then that means they are subject to law. Normally, the law of the country in which the undertakings is based is the law that will apply.
- However, for third country undertakings, such as those based in the US, they will need to nominate a representative agent based in an EU Member State to act on behalf of “central management.” They are free to choose whichever EU Member State they wish. They are not confined by any references in their Article 13 Agreement to any EU Member State that governs the Article 13 Agreement.
- It is advised that any third country undertaking with an Article 13 Agreements take time to consider this issue now.

What Happens our Article 13 Agreement if we get SNB Request?

- That depends on a number of considerations. However, the default position is that the agreement continues in force until the parties end it. Whether and how it can be ended depends on the wording in the agreement.
- It may also depend on whatever country in which the agreement is notionally based and how those countries regulate collective agreements between employers and employees’ representatives and whether legal sanctions are available in the event of a breach of such agreements.
- Assuming that many of those on your Article 13 EWC will also be on the SNB, you will also want to consider whether it would make sense to continue to run the EWC in parallel with the SNB to create a constructive atmosphere for the negotiations.
- No, you can’t just say to the SNB “here is our existing agreement,” can we continue with it? The new agreements must include the provisions outlined above that will be included in the new Directive.