This article by HR Policy Global's Tom Hayes appears in this week's Irish Industrial Relations News (Link to paywall site). The article is a robust response by Tom to Dr Werner Altmeyer's recent IRN article suggesting that EWCs follow a Franco German model.

EWCs do not need to follow a Franco-German model

How European Works Councils operate in Ireland is generating significant debate. In this article, Tom Hayes, executive director of the Brussels European Employee Relations Group (BEERG), responds to Dr Werner Altmeyer's recent IRN article on EWCs, outlining why he disagrees with Dr Altmeyer's thesis, and pointing out what he believes is the way forward for EWCs in Ireland.

It is curious that Dr Werner Altmeyer implies, in his IRN Article, 'European Works Councils: "You can't drive a car without wheels" (27 April 2023), that works councils in Ireland should adopt the EWC model used in Germany or France.

There are a great number of European Union (EU) Directives which say that the Directive should be transposed into the laws of Member States "in accordance with national laws and/or practices". None state that they should be transposed "in accordance with German laws and/or practices" or "French laws and/or practices".

The European Union is not France or Germany writ large. Nor are European Works Councils German or French works councils writ large.

The EU is a union of 27 member states. Each of the 27 have their own industrial relations cultures, histories, and traditions. To suggest- as Dr Werner Altmeyer does in his *IRN* article- that European Works Councils should conform to a Franco-German model would be to disregard this diversity.

If European legislators had wanted a one-size-fits-all model for the 27 EU Member States (28 when the UK was included) then they would have written a law to that effect and set out detailed structures, process, and rules for EWCs.

They did not do that. Instead, as is made clear in Article 6 of the Directive, it is left to the parties to determine how to work together and is what has happened in over 1,000 companies, each finding a way that works for them.

Central Thesis

As set out in the *IRN article,* Dr Altmeyer's central thesis appears to be as follows. Unlike unions, German works councils do not have a right to strike. As compensation, they have unlimited use of company funds for training, legal fees, and the use of experts like himself. Such unlimited funding gives them "parity of arms" with management, which is, he says, possessed of limitless resources.

This "implicit bargain" may or may not be true about Germany.

But it is certainly not true about European Works Councils. For the simple reason that European Works Councils could never have a right to strike.

Why could they not have such a right? Leave aside the difficulties of an EWC trying to organise a strike across 27 different countries, when there would be little chance of consensus among the members of

the EWC on the need for the strike because many of them would have conflicting interests. Why would Polish workers, for instance, go on strike to protest the switch of jobs from, say, France to Poland. Not a chance.

But there is a more fundamental reason. European Works Councils can never have a right to strike because the European Union has no legal competence when it comes to strikes. You cannot give a body a right to do something when you do not a right to do so.

The European Treaty reads at Article 153.5

> *The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.*

In other words, the EU cannot legislate for strikes. Which means that EWCs could not have, and never have had, the right to strike. So, EWCs cannot be compensated for the absence of something they could never have had to begin with. Nonetheless, Dr Altmeyer suggests EWCs should have the same unlimited access to company funds as German works councils.

The fact that EWCs cannot strike is why Denis Radtke (CDU/EPP) MEP, a former German trade union official, has put forward proposals for EWCs to be given the right to go to court to seek an injunction to stop management decisions being implemented if they believe they have not been "properly" informed and consulted. With management paying all the EWC's legal costs.

Radtke is trying, through the back door, to give EWCs the type of powers, and finance, that German works councils have.

Dr Altmeyer appears quite convinced that Ireland should now follow German practice and accept that without prior management knowledge or approval EWCs should have the right to unlimited funding for training, experts and legal fees.

Who Pays?

Dr Altmeyer opens his IRN article as follows:

> *According to a new WRC decision (ADJ-00034402), the EWC chairman of the US company Verizon is to personally pay several thousand euro for consultation and training, not the central management. This contradicts fundamental principles of the EU Directive.*

The WRC decision does not say the EWC chair must pay the other 50% of the €11,220 invoice. It says that management did not have to pay because there were no objective reasons for the EWC to seek external advice on the issues covered by the disallowed costs.

(Note: the fee in question was owed to the EWC Academy, run by Dr Altmeyer, who gave evidence at a hearing of the Verizon case).

The French chair of the EWC appears to have made assumptions about his entitlement to impose costs on management, assumptions that are appear incompatible with Irish law.

This leaves these two parties with a few options. The organisation due the money can either:

- Go to court and sue the chair of the EWC who commissioned the advice without either the prior approval or knowledge of management – or,
- The organisation can waive the 50% on the basis that it and the chair of the EWC misunderstood Irish law.

Dr Altmeyer appears to believe that dialogue between the EWC and management can only be properly constructed if it is supported by experts like himself.

He further suggests that the WRC, and presumably the Labour Court, should follow some questionable precedents of the UK's Central Arbitration Committee which he believes aligns with "European practice".

That is not going to happen. Labour relations practices in Ireland are fundamentally different from the UK. Ireland has developed its own enterprise culture, which is why it is one of the most successful small economies in the European Union. By contrast, Britain today is riven with public sector strikes and constant battles between unions and government over employment laws.

Ireland has built its labour relations institutions with a view to finding consensus, not encouraging confrontation.

EWCs are Not Corporate Governance

Dr Altmeyer also appears to assert that EWCs are part of corporate governance:

> *The agenda of an EWC is very similar to the agenda of a supervisory board. Important strategic issues of transnational significance must be submitted to both the Board and the EWC.*
>
> *Implementation is only allowed after the Board has agreed and the EWC has completed consultation.*

The EWC Directive says no such thing.

While a German supervisory board does have to sign off on management proposals – and remember that the employer side always hold a majority on such boards – all an EWC can do is to offer a non-binding opinion. There is nothing in the legislation which says that management much await the EWC's opinion before it can act.

Dr Altmeyer should re-examine the decision in *Oracle.* Both the UK's Central Arbitration Committee (CAC) and Employment Appeals Tribunal (EAT) said that management does not have to wait for the EWC's opinion before opening and closing national level information and consultation.

Dr Altmeyer quotes two court decisions which he claims substantiates his argument. The first refers to an Austrian decision in which he was involved in as an advisor to the EWC in Mayr-Melnhof, the works council involved in this dispute over interpretation costs.

The second is a European Court decision of December 2022. But, this case, in which Dr Altmeyer was also involved, did not refer to funding of EWCs by management but to the ability of EWCs without bank accounts to apply for European Union funding for project work.

Dr Altmeyer suggests that the European Commission (in INFR(2022)4021) is questioning the Irish legislation over the use of experts by EWCs. This is simply incorrect.

The reference to "experts" which appears in the notice is purely illustrative of problems that *could* arise, rather than issues that have arisen. As is the reference to confidential information. The Commission is not saying these are problems. What it is saying is that the disputes procedure for dealing with such problems were they to arise is inadequate.

Problems with Irish law

There is a lacuna in the Irish EWC legislation when it comes to disputes. Indeed, BEERG/HR Policy Global was the first to flag this to policy makers, over three years ago. We foresaw this as a Brexit consequence issue as EWCs working under UK law began to move to Ireland.

We encouraged the move to Ireland for reasons of language, the legal system, and a policy environment supportive of business. Because of the problems we had identified, BEERG/HR Policy Global commissioned Kevin Duffy, the former chair of the Labour Court, to write a paper which looked at the issue and suggested a way forward. Kevin is not someone who could be described as "management side".

Kevin pointed to the procedure for disputes in the *Employees (Provision of Information and Consultation) Act 2006* which sees disputes referred to the WRC for mediation, and then to the Labour Court for, first, a recommendation, and then a binding decision if the recommendation does not work. We sent Kevin's paper to the Department of Enterprise, Trade and Employment. To this day, it denies that a problem exists. But such denialism cannot last, and the problem will be fixed.

One of the great things about the European Union is that member states have the flexibility to transpose laws in accordance with "national laws and/or practices". Irish laws and practices are different from Germany and from the UK.

EWCs have to be able to go to the Workplace Relations Commission and to the Labour Court if they believe that their rights have been infringed. But that should not have to involve massive fee outlays to lawyers and consultants.

Ireland has procedures that allow collective cases to be processed without the need for legal involvement. If Irish trade unions, such as SIPTU, are involved in such representation, then that is part of the Irish system and multinationals with EWCs under Irish law will adjust to that.

Sometimes EWCs may need to have access to funds. This is a matter that can be examined as the EU consults the social partners on a possible revision to the Directive. Solutions can be found. What is not needed is open access by EWCs to the company cheque book to hire experts.

The Way Forward

The Irish system of collective dispute resolution is based on voluntary principles. The parties use the mediation services of the Workplace Relations Commission to try and find an agreement. Failing agreement at the WRC, the dispute is submitted to the Labour Court. Some 95% of Labour Court Recommendations are accepted by the parties. Ireland can use this system with EWCs, with the addition step of a legally-binding Labour Court Determination, if a Recommendation does not work.

The Irish experience is that a solution that both parties accept and can live with is better than a decision imposed by a judge.

The WRC and the Labour Court will need to acquire some new expertise to deal with what are multinational issues.

Both the WRC and the Court have adjusted in the past to meet previous challenges. They can do so again to meet the challenges posed by EWCs.

Tom Hayes
Tom.hayes@beerg.com
May 9th, 2023