

INTERNATIONAL

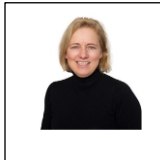
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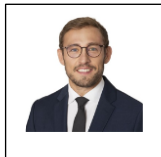
The European Parliament is calling for far-reaching changes to the EWC Directive – including preliminary injunctions and fines.

European Works Councils: Comprehensive Reform and Preliminary Injunctions are Planned!

ABOUT THE AUTHORS



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ABOUT THE COMMITTEE

The International Committee is the core international group in IADC and serves those members who have an interest in transnational or international legal matters including transactions, litigation, and arbitration. Thus any member, whether in the USA or abroad, who does cases with a foreign element (inbound or outbound) will find involvement in this committee extremely useful. Many of the members of the committee are from outside the USA, and this provides a rich mix of experiences and expertise as well as great networking opportunities. The International Committee also organizes European, South American, and Asian Regional Meetings and contributes to the International Corporate Counsel College. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



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The European Parliament is calling for far-reaching changes to the EWC Directive - now it is the hands of the Commission.

The final vote in the plenary of the European Parliament (EP) on the report on the revision of Directive 2009/38/EC (EWC Directive) took place on 2 February 2023. The [resolution](#) which is mainly based on what is referred to as the [Radtke Report](#) (MEP), was adopted by a large majority and calls on the European Commission to initiate the legislative procedure for a new EWC Directive by 31 January 2024. We have reviewed the key demands and assessed their potential impact on practice:

Preliminary injunctions by European works councils to be expected in the future

If the EP is able to push through its ideas, preliminary injunctions by European works councils (EWC) will also be possible in Germany in future.

Given the fact that there is no corresponding legal basis, the prevailing legal view so far has been that the EWC was not entitled to injunctive relief under German law – even where its rights to information and consultation had been violated. No preliminary injunctions were therefore possible to date either (see Cologne Regional Labor Court, decision of 8 September 2011 – [13 Ta 267/11](#)).

Now, the intention of the EU parliamentarians is to ensure that "legal

recourse is open to the EWC". This will also include court proceedings seeking central management decisions to be halted by way of preliminary injunctions. Providing for such an extensive possibility of legal protection, even for a body to merely be consulted, does not appear to be objectively justified and is incompatible with German works constitution law. There is no provision for preliminary injunctions (especially by the EWC) in other EU Member States at present either.

Our French neighbor has already demonstrated what injunctions by the EWC can lead to: in France, as in other jurisdictions of the Romance legal family, works councils and/or trade unions can obtain preliminary injunctions to stop management from implementing decisions (for example, where there is insufficient and/or no information, in the case of requests by experts, etc.). The Gaz de France merger in the years 2006 to 2008, in which the Gaz de France EWC was also involved, attracted a great deal of media [attention](#). The merger was suspended pending full consultation of the EWC (Paris Court of Appeal, judgment of 21 November 2006 – RG N [06/59279](#)).

Interestingly, in the plenary session of the Parliament on 19 January 2023, it was declared that the right of the EWC to seek injunctions in court was introducing co-determination at the European level through the "backdoor" since actions for injunctions force companies to negotiate agreements

with the EWC before certain measures can be implemented.

Court costs to be borne by the company

In this context, it is worth mentioning that ensuring that "legal recourse is open to the EWC" is intended to additionally include corresponding obligations on the company to bear the costs.

In many EU Member States, this is also novel, but this is not the case for German law: Pursuant to section 40 (1) German Works Constitution Act (*BetrVG*) and section 39 (1) German Act on European Works Councils (*EBRG*) companies are required to bear the works council's or the EWC's necessary costs of legal enforcement. In any case, the proposed amendment does not limit the obligation to bear the costs based on the criterion of necessity that applies in Germany.

Threat of hefty fines for violations of EWC rights

The EP proposal goes even further: fines for breaches of EWC law, as provided for in antitrust law or the GDPR, are to be up to EUR 20 million or up to 4 % of the annual worldwide turnover in the preceding fiscal year. Merely by way of comparison, the administrative offense provision in section 121 German Works Constitution Act (*BetrVG*) currently provides for fines of up to EUR 10,000. This shows how inflated the proposal is. Such drastic penalties are regarded critically by the liberal group,

Renew Europe, of which the FDP is a member. How the European Commission will implement this proposal remains to be seen.

Shortened negotiation procedure planned

Unlike the German employee bodies with which we are familiar (in particular, works councils and supervisory boards), an EWC is established based on an agreement ("negotiated solution" or also EWC "by agreement"). For this, negotiations are initiated between the special negotiating body and central management.

The negotiating time to establish an EWC is to be cut by half in the future. If no agreement on an EWC agreement is reached within 18 months (previously three years), the subsidiary requirements (EWC "by operation of law") automatically apply.

"Transnational" competence of the European works council

The question of the EWC's competence is just as fundamental: the EP's plans provide for its competence is to be extended. In the future, the intention is for the EWC to also be competent for matters which only affect one country, provided that the decision was made in another country or is of major significance to the European workforce.

At present the EWC is only competent if more than one Member State is affected. This makes sense since in purely local/national matters the local/national

employee representative bodies can exercise the rights of the employees without further ado. In this respect, the planned amendment must be viewed critically, and it is therefore recommended that greater care already be taken now when drafting EWC agreements to ensure that a regulation on competence is agreed which fairly reflects the interests of the parties. This can, for example, provide that the EWC is only competent where a certain number of employees in more than one Member State is negatively affected.

Planned strengthening of the EWC's consultation rights

Unlike national employee bodies (in particular, works councils), the EWC only has information and consultation rights. Central management must primarily inform the EWC once per calendar year about the development of the business situation and the prospects of the company or group and, in addition, on an ad hoc basis in exceptional circumstances. These consultation rights are to be strengthened. The EWC is to always receive a reasoned response to its opinion before central management makes its final decision. As a result, this is a legitimate demand. However, companies should expect additional administrative work.

During an information and consultation procedure, there should be enough time for the EWC to coordinate with employee representatives at national and local level. In principle, there are no objections to this as long as it remains possible to start the

national participation procedures alongside of the information and consultation procedure at European level and to bring them to an end, beforehand even, where necessary. Practical tip: the scope of the information and consultation procedure, in terms of time and content, can be agreed in EWC agreements.

Finally, the role of the European trade union organizations is to be strengthened by having at least one expert paid for by central management in addition to the trade union coordinator and by granting both access to meetings with management.

Two plenary meetings per year

The EP's plan is for the subsidiary provisions to provide for two plenary meetings per year in future. At present, the statutory catch-all provisions (EWC "by operation of law") provide for only one plenary meeting per year.

As part of the negotiations about a EWC agreement, two plenary meetings a year are often agreed anyway. However, given the massive costs of plenary meetings, holding at least one of the meetings virtually is recommended. The European legislator should take the lead here to relieve the burden on companies – but also for ecological reasons – and prescribe virtual meetings for the "default solution". However, there is no indication of this in the parliamentary resolution. It is difficult to see why employee and employer representatives from all over Europe should

fly for one-day or two-day meetings to one place, even though the information and consultation procedure can be carried out at least just as well via MS Teams. Practical tip: agree virtual meetings!

Limited use of confidentiality clauses

Confidentiality agreements are frequently used in the context of cooperation between EWCs and central management and are justified because they help protect sensitive information while at the same time facilitating open communication between the parties involved.

Now, "improper" use of confidentiality clauses is to be limited by way of central management stipulating objective criteria for the confidentiality of information and defining the duration of confidentiality. This is understandable as a starting point since there is no legitimate interest in "improper" use of confidentiality clauses. It remains to be seen, however, what the exact requirements will be for the objective criteria for the confidentiality of information and the duration of confidentiality.

No provisions on the consequences of terminating an EWC agreement

Will the EWC be dissolved immediately? Or will an EWC be formed immediately based on the catch-all solution (EWC "by operation of law")? There are no explicit provisions on this – either in the German Act on European Works Councils (*EBRG*), the EWC Directive or in the proposals for amendments which

have now been put forward. The resulting legal uncertainty is disadvantageous to both the employee and the company.

A final practical tip here as well: it makes sense to regulate the consequences of terminating an EWC agreement (or in the case of a fixed-term agreement: what is to happen when it expires). Often interim regulations are negotiated, or it is agreed that the agreement will continue to apply after it has expired for a limited period of time.

Conclusion: revise EWC agreements

Community-wide companies should pay close attention to developments at the European level. Particularly in those places where the EP is proposing that the catch-all solution be made stricter, the time should be used to conclude EWC agreements or to adjust existing EWC agreements. Relevant provisions in this respect include, in particular:

- provisions on the competence of the EWC (keyword "thresholds"),
- provisions on the number of plenary meetings,
- provisions on the way (plenary) meetings are held (in particular, virtual meetings),
- provisions on the nature and scope of the information and consultation procedure and on the consequences of terminating an EWC agreement.

However, there is no need to act hastily: the European legislative procedure is expected to continue for several months or even years – first it is the responsibility of the European Commission to prepare a bill amending the Directive in cooperation with social partners in accordance with [Article 154 TFEU](#) to which the EP and the EU Council of Ministers must then consent. Only then must any amendments to the EWC Directive be implemented in the national Act on European Works Councils (*EBRG*) – and this, too, will take time.

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