EWC Legal Advisers Speaking Note for the Joint Committee on Enterprise Trade and Employment

European Work Councils and legislative provisions for dispute procedures

Meeting on Wednesday 8 February 2023, Leinster House, Dublin

1. Thank you for this opportunity to address the Committee. I have sent the Committee a Briefing Paper setting out what I'm about to say in more detail.

2. I am Director of EWC Legal Advisers. I specialise in providing advice, support and training to European Works Councils.

3. I have been working in this area for a little over 20 years. From 2001 – 2005 I was Assistant Director in the Department of Trade & Industry in London with responsibility for EU and UK legislation on employee involvement, including European Works Councils. I devised the enforcement scheme in the UK Information and Consultation Regulations which was subsequently adopted by the EWC legislation – the Transnational Information & Consultation of Employees Regulations. This enforcement regime involves bringing almost all disputes relating to EWCs to a body known as the Central Arbitration Committee, through a civil procedure.

4. Since 2005 I have been in the private sector advising in the area of EWCs, initially on the employer side, but now exclusively on the employee side, including bringing several legal complaints on behalf of EWCs to the Central Arbitration Committee.

5. So I have a fairly good knowledge of EWCs and of the enforcement regime in the UK.

<u>TICE Act 1996</u>

6. In the run up to the EU referendum in the UK in 2016 I started looking much more closely at the Irish legislation on EWCs - the Transnational Information & Consultation of Employees Act 1996, because I could see that if the UK voted to leave the EU it was very likely a lot of companies with EWCs based in the UK would seek to move them to Irish jurisdiction. And that is exactly what has happened. I don't know the precise number, but I believe there are dozens that have appointed a representative agent in Ireland in order to make their EWC subject to the TICE Act.

7. I confess that what I read in the Act about enforcement surprised me, and I became more surprised when I contacted the Workplace Relations Commission, the Department of Business, Enterprise and Innovation, and its successor the Department of Enterprise, Trade and Employment, to ask how the enforcement regime would work in practice.

8. I have to say, I cannot see how the enforcement regime in the TICE Act complies with the EWC Directive. Specifically, Article 11 of the Directive requires Member States to "ensure" that the management of establishments or undertakings situated within their territory "abide by the obligations laid down by [the] Directive". It requires Member States to provide for "appropriate measures in the event of failure to comply" with the Directive, ensuring that "adequate administrative or judicial procedures are available to enable the obligations deriving from [the] Directive to be enforced".

9. As a general principle of EU law, reflected in recital 36 to the Directive, "administrative or judicial procedures, as well as sanctions that are effective, dissuasive and proportionate in relation to the seriousness of the offence, should be applicable in cases of infringement of the obligations arising from [the] Directive".

Subsidiary requirements

10. The TICE Act provides for enforcement of the subsidiary requirements, and certain other obligations, through criminal enforcement by the Workplace Relations Commission. Criminal prosecution requires a very high standard of proof – "beyond reasonable doubt". I do not think this is suitable for the type of breach that would typically be in dispute under the subsidiary requirements, for example:

- whether adequate information had been provided by management to enable the EWC to undertake an "in-depth assessment of the possible impact";
- whether that information had been provided early to allow that assessment ahead of a meeting with management;
- whether management should have consulted the EWC at an earlier stage in the decision-making process;
- whether an issue involved a "substantial change concerning organisation", or whether employees interests were affected "to a considerable extent".

11. Many of these are questions involving fine judgments and are not at all clear-cut. So to have to prove them "beyond reasonable doubt" in a criminal prosecution seems, to coin a phrase, like using a "sledgehammer to crack a nut". The same could be said of the other offences subject to prosecution.

12. I was told by the WRC that it had "absolute discretion" whether to bring a prosecution under the Act, and that it would weigh various factors when deciding whether to do so, one of which was "the efficient use of resources". I can understand that the Commission would not want to use its resources inefficiently, but I do not see how that "ensures" that obligations deriving from the Directive can be enforced.

13. I was also told that the District Court in which a prosecution may be brought could not order any remedy where a company had breached the subsidiary requirements, all it could do is issue a penalty. And that penalty is rather low – a few thousand euros at most. I do not see how that can be said to be "effective, proportionate or dissuasive".

EWC agreements/confidentiality/SNB negotiations

14. In relation to the enforcement of EWC agreements, this is exclusively through private or Court-appointed arbitration under section 21 of the Act. But I understand that regulations have still not been made under section 7 of the Act regarding the powers and procedures of arbitrators, the conduct of arbitration proceedings or the expenses to be borne by central management. And the Act states that the parties must bear their own costs in arbitration.

15. So as things currently stand it is unclear whether it is even possible to seek arbitration under the Act, unclear what procedure should be followed, and unclear what powers an arbitrator would have for example to order remedies or to impose a penalty for breach of an EWC Agreement. The threat of having to cover their own costs will also act as a severe deterrent to any EWC wishing to bring a dispute.

16. Similar comments could be made about disputes regarding the **confidentiality rules** in section 15 of the Act, but the situation here is even worse because a dispute can only be brought where it involves Irish employees or their representatives. It seems to me that this discriminates against other EU employees and their representatives on the EWC, and I complained about this and other problems with the confidentiality rules to the European Commission who opened infringement proceedings against the Irish government in May last year on this point.

17. Finally, I note that the obligations on central management regarding **SNB negotiations** in section 11 of the Act are not enforceable at all. This is the subject of related infringement proceedings by the European Commission.

Recommendations

18. In terms of recommendations, it seems to me that the best enforcement regime would involve civil proceedings, brought by the complainant themselves, eg the SNB or the EWC, to a specialized body with expertise in industrial relations. The Labour Court or the Workplace Relations Commission are the obvious candidates. There should be the possibility of an effective remedy, ie an order by the Court or the WRC against central management requiring it to make good its breach of the legislation or of the EWC agreement. And there should be a financial penalty that is proportionate to the nature of the offence but also "dissuasive".

19. It seems to me that the enforcement regime in *The Employees (Provision of Information and Consultation) Act 2006*, involving the Labour Court and the WRC, provides a good model. Or alternatively, give the initial enforcement role for all obligations to the WRC, with a combination of mediation and adjudication of disputes, and possible appeal to the Labour Court on points of law.

Thank you