

Recent legal developments

EFBWW EWC Coordinators meeting
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Agenda

- New court cases 2020
- Political initiatives on EWCs / Democracy at work
- Bonus cases

Brexit stream: Easyjet



- Easyjet: UK airline (EFFAT)
- EWC since 2011 (subsidiary requirements)
- **Context & case**
 - In the wake of Brexit, easyJet wanted to get rid of its EWC
 - EWC took legal action
 - now easyJet has two EWCs: one in the UK and another one in Germany.
- **Judgement:**
 - On 1 June 2021 CAC in London decided that it would **still have jurisdiction over EWC disputes in British companies after Brexit**
 - Grounds: the British EWC Act (TICER) has not been abolished, the term "Member state" has simply been replaced by "Relevant state"

Brexit stream: HSBC (2 judgements) „exclusion of UK members”

- HSBC, UK bank (financial services, UNI)
- EWC established: 1996 (2011 and 2015 renewed)
- **Context & case**
 - Following Brexit excluded its entire British workforce (40,000 employees) from its EWC as of 01/01/2021 and now applies Irish law;
 - As a result, the EWC loses 8 of its 20 mandates.
- **Judgement:**
 - CAC on 22 June 2021
 - CAC declared the exclusion of the British parts of the company from the scope of the EWC and the termination of the British EWC mandates **admissible**.
 - The decision is based on a precise analysis of the wording of the EWC agreement, which only covers the countries which are members of the EEA (e.g. thus CH with 782 employees, was not represented in the EWC).
 - The amendment to the UK TICER, where the term "Member state" has been replaced by "Relevant state", **has no effect on a valid EWC agreement**.
 - This is **different** in the case of a "**default**" EWC (see easyJet) or when there is **unclear wording**
 - The CAC did **NOT decide on applicable law** → The unilateral decision of CM to move to Ireland may be challenged by the EWC within 21 days.



Brexit stream: HSBC (2) „unilateral change of jurisdiction”

- Judgement 2:
 - On 11 August 2021 the CAC announced the 2nd part of its decision
 - Question: can a UK company change the applicable law without the express consent of the employee representatives?
 - The UK is the only non-EU country to have EWC legislation in force → all UK companies operating across Europe must comply, even after Brexit.
 - The CAC declared the unilateral decision of HSBC's CM **to be lawful** (although recommended some form of prior consultation)
 - The EWC now has 3 months to appeal to the Employment Appeal Tribunal.



- Company: Atos (FR), IT provider (UNI), 110,000 employees, as a result of numerous acquisitions (Siemens, Bull)
- SE Works Council created in 2012 (FR law) (by CEO T. Breton, FR Finance Minister and Member of EC since 2019)
- **Context & case:**
 - The SE agreement concluded was considered to be very good
 - **SE Agreement terminated by CM** on 16 October 2020.
 - When negotiations on a new agreement failed, **CM dissolved the SE works council** on 16 April 2021
 - CM initiated the process to establish an SNB
 - The SE works council **applied for an injunction** against its dissolution, together with the Dutch works council, the German group works council and trade unions from six countries (including IG Metall and GPA, AT).
- **Judgement**
 - district court in Pontoise, on 23/06/2021 rejected this request.
 - According to the court, **the SE works council no longer exists** and the remaining plaintiffs must bear the costs of the proceedings.

Walgreens Boots Alliance

- Walgreens Boots Alliance: retail pharmacy chain (US and EU)
- The representative agent situated in the UK
- EWC: created om 2015
- Contentious issue: Mr. Olive Plaza alleged to have revealed confidential information (presentation to EWC + Fiscal 2020 report) and excluded from EWC meetings, despite requests for translated meeting with the CM
- **Complaint to CAC (08/10/2020):**
 - Exclusion of a lawfully elected member of EWC from participating to EWC meetings (alleged confidentiality breach)
 - Confidentiality: exclusion of access to information for EWC member
 - Obstruction to create Select Committee
 - Failure to provide the EWC with means necessary to communicate among themselves and thus to represent collectively the rights of workers
 - Videoconferencing: Technical problems (connection, video, sound) and interpretation issues (no interpretation for non-English speakers) obstructed the I&C proces
 - Rejection of mediation procedure by employer

Walgreens Boots Alliance (2): judgement

- Judgement of CAC:
 - the Employer did not have grounds to exclude Mr. Olivé Plaza from any further participation in EWC meetings (Plenary and Limited Committee);
 - The Employer did not prevent Mr. Olivé Plaza and did not effectively remove an elected member of the EWC duly elected
 - the Employer has prevented the Limited Committee from being properly constituted

Adecco

- Company: Adecco Group AG, a Swiss company (global talent advisory and solutions)
 - Olsten (UK) Holdings Limited (“Adecco UK”) was the representative agent of Adecco CH for EWC purposes
- Adecco EWC: created 1999 (reneg: 2013, 2018)

- **Case & complaint:**

1) CM of the Adecco Group failed to inform and consult the EWC about **collective redundancies** concerning Adecco Group undertakings in at least two countries within scope of the EWC Agreement.

- On 26 May 2020 the EWC Steering Group discovered that collective redundancies had already been made or announced in Hungary (13% of the workforce), the Netherlands (43% of the workforce) and Sweden (25% of the workforce), and further redundancies were subsequently announced in Germany in June 2020.
- CM claimed these were “**national**” **issues not linked to a decision** taken by European or global management
- Part of a series of similar occurrences including in Dec 2018 and Oct/Nov 2019

2) **Refusal** to provide the most recent business sales performance data **per country (national breakdown figures)**

- **Judgement**

- the Employer failed to convene an Extraordinary Meeting to provide information and engage in dialogue with the Steering Group about collective redundancies which significantly affected existing Adecco Employees in each of at least two countries in which Adecco has employees
- the Employer failed to comply with the law by refusing to supply business sales performance data broken down by country

New initiative for a Framework Directive



- On 1 July 2021, the **draft report on "Democracy at Work"** (**Gabi Bischoff, MEP**) was discussed within the Employment and Social Affairs Committee.
- It calls for a **framework directive on information, consultation and board-level participation** of employees to **consolidate existing directives** (including EWCs, SEs, SCEs, information and consultation at local level, company mergers).
- It also **calls for a revision of the EWC directive**.
- The committee will vote on the report in autumn 2021 and the plenary of the European Parliament in November 2021.
- With regard to the EWC Directive, the report calls on the European Commission:
 - to guarantee information and consultation rights so that the European Works Council is able to give its opinion before a consultation is concluded
 - to guarantee access to justice
 - to put an end to the exemptions for old, "voluntary" agreements after more than 20 years
 - to introduce sanctions
 - to consolidate the concept of the "transnational character of a matter"
 - to prevent the abuse of confidentiality rules
 - to ensure effective coordination of information, consultation and employee participation at local, national and European levels.

Further pending EWC cases

- Google UK Ltd. in CAC (May 2021)
- Adecco EWC CAC (May 2021)

Bonus: Letterbox companies / forum shopping

- **Context:**

- Temporary work agency Team Power Europe, based in Varna (BG), which has a license from the German (Düsseldorf) Employment Agency to supply personnel in Germany + hires temporary workers with Bulgarian employment contracts.
- The service contracts with the hiring companies are subject to German law.
- Team Power Europe does not conduct any business in Bulgaria + 100% turnover comes from Germany.
- Thus BG authorities refused to issue an A1 certificate (the workers concerned would be covered by Bulgarian social security) → Team Power Europe took legal action against this before the Administrative Court of Varna, which referred the issue to the European Court of Justice (2019)

- **Judgement**

- On 3 June 2021, EUCJ
- "such exploitation of that legislation would be likely to have a '**race to the bottom**' effect on the social security systems of the MS or might even lead to a reduction in the level of protection that they offer."
- it would create "a distortion of competition in favour of recourse to temporary agency work".
- The Advocate General of the Court had taken a different position in his conclusions (protest of trade unions)

Bonus: workers and AI: UBER



- UBER: 6 drivers dismissed
- On 24 February 2021, the **Amsterdam District Court** ordered the European HQ of the US transport service provider Uber, to **reinstate the six drivers** + pay **compensation** (8-20K EUR).
- Ground: drivers were wrongfully dismissed because the **decision was made automatically by the company's algorithm.**
- Uber will have to pay the legal fees+for each day that Uber does not implement the ruling penalty of 5,000 €.
- first decision in Europe based on Article 22 of the EU GDPR: any person from whom data is collected "shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her
- See also: Deliveroo (Dec 2020) damages for couriers because of an disadvantage due to an algorithm

Bonus: workers and AI

- Foodinho: food delivery service (belongs to Glovo, a Barcelona-based start-up that operates in 21 countries)
- On 5 July 2021, the Italian Data Protection Authority fined Foodinho 2.6 million € for **the unlawful use of algorithms**
- Foodinho had **not adequately informed** its 19,000 drivers on **how the algorithms worked** + had not taken precautions to ensure the **accuracy and fairness of the results**, which were then **used to evaluate driver performance**
- In some cases, **drivers were excluded from the platform** by an automated decision without being able to challenge the decision (compare UBER)



ETUI publications

- Confidentiality manual (to be translated)
- Coming soon:
 - book EWC survey ,EWCs: Contested and still in the making' (2021)
 - Translations (FR, CZ, DE, ES) of ,Can anybody hear us?' (printed)
 - Working paper (2021/22): EWCs information and consultation: pre-Covid and in Covid
- Coming in (early) 2022: Mapping EWC rights
- Coming in 2022:
 - Renewed www.ewcdb.eu
 - Renewed www.worker-participation.eu
- Working on: EWC court cases database (review)



- Thank you for attention
- Questions & comments welcome

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More information & downloads:

www.ewcdb.eu

Court cases db: www.ewcdb.eu/court-cases

www.worker-participation.eu

www.etui.org