



Conference Call Transcript

****ACC - Trade Unions and Work Councils and how they work in Europe**

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Richard Mosher - Association of Corporate Counsel - Immediate Past Chair of ACC International Affairs Committee

Hello and welcome. Welcome to an audio web cast program, presented by the Association of Corporate Counsel's International Legal Affairs Committee and Eversheds LLP. The subject of today's web cast - Trade Unions and Work Councils and How They Work in Europe. This is Dick Mosher. I'll be moderating the discussion. Owen Warnock, a partner at Eversheds will be putting on the presentation for us. And we'll save some time for questions and answers at the end of the program.

A few preliminary matters. If you're looking at the slides online, you should note that there are two different versions of slides. The HTML slides can be printed, but only one at a time. And there's also a PDF file, which is fairly large, if you want to download the slides at one printing. But all of those are available or you can just be watching online and flipping slide to slide on your computer screen.

Secondly, I'll mention again, this is sponsored by the International Legal Affairs Committee of ACC. The committee - and we encourage you to come to the annual meeting in Chicago, October 25, 26 and 27. Our committee will be meeting at 7:30-8:30 in the morning on October - Tuesday, October 26. We certainly welcome your attendance at the executive staff meeting and your thoughts and ideas. There will also be a committee cocktail reception, Tuesday evening, the 26th that you're welcome to attend.

As I mentioned, this is being really sponsored by Eversheds LLP. I want to mention that Eversheds is the new 2004-2005 sponsor of our International Legal Affairs Committee. If you look on our web site, you'll see five or six outstanding articles that are posted with links to the Eversheds Web site and directly to the articles. I'd encourage you to look at those articles. We expect Eversheds to do a great job providing additional support to the committee. And this is just one of a number of broadcasts that we're going to have.

There will be no web cast in August, but in September we're going to have a web cast on Building Your Business in the European Union. And that's tentatively set for September 16. In October, we'll have a web cast on the Directors Law of Europe - Common Themes and subsequent web casts will cover real estate litigation and a variety of other topics. Again, we welcome Eversheds as a sponsor. I know they're going to do a wonderful job and this will be the first of many services that they'll be providing to all of our members.

Let me also now introduce the subject and the speaker very briefly. In terms of the current importance of the topic - European works councils - I can say that nowadays maybe the most important measure of how important and how current a topic is, is measured by a Google search. And I looked this morning on Google, and just Googled European Works Councils and found 700,000 hits. If you restrict that to just the year 2004, you get 350,000 hits. A very, very important topic with the expanded EU and regulations to require works councils in other EU countries besides those that had them in the past. A very, very current topic.

Now, let me introduce our speaker today and also remind you that, during the web cast, if you want to send e-mail questions to me, I'll try to include those in the broadcast. My e-mail address is on the Web site, but it's hajime01.msn.com. And also to remind you, the web cast is being taped and you can listen to it later, if you'd like to.

Now, let me introduce Owen Warnock. Owen is a partner in - for Eversheds in the Norwich office - for American lawyers, that would probably be pronounced Norwich - in the UK. Practice groups include human resources, product liability and employment law and a specialty called food, which I'll let Owen explain to you. Owen is also the head of the East of England Human Resource Group. I'll also let Owen explain what exactly East of England includes. But he has a wide range of expertise.

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He lectures frequently. He's a consultant legal editor to several employment manuals and texts and has particular experience in trade union recognition. He's a member of the Industrial Law Society and the Employment Lawyers Association. He graduated in Law from Cambridge University in 1979 and is admitted as a Solicitor in both England and Wales, specializing in employment law. Owen - turn things over to you.

Owen Warnock - Eversheds LLP - Partner

Well, thank you, Dick, and I'm going to start by resisting the temptation to get involved in European food law, which you gave me there and instead get straight to our topic, which is trade unions and works councils and how they work in Europe.

Of course, we could spend hours on the law and practice on that topic in just one European country. And very what are (ph) what I propose to do is first of all, try and give listeners an understanding for the areas in which trade unions and works councils are often significant in Europe. And secondly, a feel for the variety of influence and legislation practice that affects trade unions and works councils, and therefore employers in European countries.

What I'm aiming for, really, is to give listeners the ability to be a discerning and even a demanding consumer of advice in this field, whether that advice comes from lawyers or from HR consultants and practitioners. In other words, what questions to ask and what points to challenge and what areas the same quality (ph) if he hasn't covered that, he obviously doesn't know what he's talking about and I'll choose another advisor.

I'm conscious that, for this session, there's a wide variety of degrees of knowledge amongst the listeners and so what I plan to do is to start with some basics and move onto more sophisticated and elaborate materials we progress through in the hope that that's going to be more value and interest to people, at every level of knowledge and experience in this field.

So, to start with some basics and if you're following on the slides, then it's slide number two now, you could argue that Europe is really 47 sovereign countries. There is, however, a key part of that, which is the European Union. Until recently, that was 15 major Western economies. And in May, 10 more countries joined, mainly from the former Eastern Block.

The European Union's federal system, created in the 50s, initially purely as an economic treaty regulating tariffs and trade, but things have changed steady since then. And to look at the current EU model, where we stand at the moment - slide 3 - the fundamental aims of the European Union are to ensure economic and social progress and to create a single market without barriers by practice legislation, tariffs or - and other features.

But in this context, very important subsidiary aims are to improve working conditions and promote good management-labor relations. And the practical consequence of that is - slide 4 - that in the European Union countries, most employment law legislation now comes from the European Commission in Brussels. And indeed, a high proportion of all new European Union law impacts on the workplace. So it's very important. European influence is significant now in relation to the laws and practices of employers and employees in all of those 25 European countries.

The European goal is full workplace harmonization with the same rules and the same practices in broad terms throughout Europe. And the tool for achieving that is what's known as a directive. And a directive is, in effect, an instruction from the European Commission to the governments of the member states to change their laws so that they at least meet the standards set out in the directive. So in practice what happens is that through various different forms of subsidiary legislation, each country's parliament or government introduces the necessary laws to meet the standards in the directive.

The consequence is that there's a broad similarity of approach in many areas because, in many areas of employment law and in many areas to do with works councils and trade unions, there is a directive, which requires a basic common standard. But it's important to stress, I think, by way of general understanding that there are frequently many differences of detail. And they come from a number of sources. The first is that, of course, each country has its own local starting point. And in many cases, that means that they've got some way to travel to get the European norm.

In other cases, they'll be well ahead of that middle (ph) and European floor. A classic example of that is in relation to working time directive. That's a requirement that in every European country, the maximum average weekly working hours is 48 hours. But in some countries, it was already better. And the classic example there is France, where the average - the law requires an average of no more than 35 hours a week, obviously considerably different.

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Another reason why the detail varies from country to country is what's called by anti-European cynics in the UK gold plating. And this typically a process where the civil servants get hold of a directive and say, oh, let's use this as an excuse for lots of other legislation we've wanted to do for years and make the systems either more sensitive in that coverage or more difficult to operate than actually is required by the European minimum.

And a good example of that is what happened with our data privacy legislation, which was the creature of the European directive where, in the UK, to give us an example with which I'm particularly familiar, the civil servants who were responsible for creating the administrative party to look after data privacy, went a great deal further than the European standard required, with the effect in the employment field. But really any file to do with an employee, even if it was an entirely paper-based file and with (inaudible) as well, so you couldn't cause an organized set of data at all, would be covered by the legislation and the employee would have full access.

Well, I'm pleased to say the UK Court of Appeal put the regulators back in their box on that one last Christmas and we have now have a more sensible situation. But that feature of gold plating directives is quite common.

But a third reason why you often get differences of detail is that, very often, directives give member space flexibility as to how they implement the legislation. And we'll see that in a number of occasions in the topics we're going to talk about in this hour. And a final, not insignificant reason for differences is disobedience by member states. So from that time, governments set a blind eye or deliberately ignore some piece of legislation they should be introducing.

The techniques adopted are different. If you're in the southern part of Europe, you just ignore it completely. If you're, for example, in Germany, which is essentially a law-abiding nation, what you do is say oh, no, this is not for the federal parliament to implement. This is for the parliament of the German state - each individual German state. And they just take absolutely ages getting around to bringing the law into force.

So, we're going to discuss that broad variety because it is an important thing to understand. But having said that - and I'm on slide 5 here - change is a constant feature in the employment law field. We have an ongoing program of anti-discrimination legislation going through Europe - a (inaudible) of family-friendly policies on issues such as part-time working maternity leave. And indeed, an underpinning charter for fundamental rights.

But the two that we want to concentrate on here is really a program in effect to extend the role for unions and to, particularly, to extend works councils and their power and influence over decisions made in the workplace.

Richard Mosher - Association of Corporate Counsel - Immediate Past Chair of ACC International Affairs Committee

Owen, I'm sorry to interrupt you, but could you speak up just a little bit or keep the phone a little closer to your mouth while you're speaking?

Owen Warnock - Eversheds LLP - Partner

Certainly.

Richard Mosher - Association of Corporate Counsel - Immediate Past Chair of ACC International Affairs Committee

We're getting - thank you very much.

Owen Warnock - Eversheds LLP - Partner

I'm going to look then, first of all, briefly at the practical division of trade unions in Europe at the moment. They're pretty common throughout the European Union and, in many respects, their structure and latitude is similar to the United States. Membership density varies considerably across the European Union, but the overall trend is for continued decline in membership.

And if you look at the chart, which is slide 7, we have there the European countries and the percentage union membership amongst the workforce. And I want to just particularly point out that the third bar there - F - is not France, but Finland. Perhaps to many people's surprise, certainly many Americans, I think, France actually has the lowest level of union membership amongst the 15 states that were the constituent members of the European Union until May, right down at the bottom end there, despite the significant impact which unions have on the workplace in France.

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Just to -- play that slide, if you look at slide 8, we can see thereby way of comparison where the United States stands in that measure, Japan and then what are called new, which is the 10 new members of the European Union. And again, that's perhaps surprisingly low. Given that they come from former communist countries, by and large, you might have expected a higher level of union participation. Indeed, and maybe a reaction to the fact that they were communist countries, but it's now so low.

In many European countries, unions have a huge impact not only on collective issues, but on individual rights. But one very significant difference between the European situation and the American one, for example, is their role of lawmakers. If we look at slide 10, this really stems from the fact that they are what is called the social partners. The European Federation of Trade Unions and the two employers organizations - one public sector and one private sector - are often given the job by Europe of devising law on some topic that is felt to need some regulation. Recent examples are a directive on parental leave, another one on part-time work and the third one on fixed contracts.

And in each case, in effect, there was a negotiation between employers and employees, a deal was done and then all the European legislative system did was rubberstamp that deal. The final example on that slide, which is about home working and tele-working, an agreement was reached by the European social partners, but its not going to become legislation. And so, that means that means that the impact of that secure agreement will vary significantly from country to country.

In a country where that kind of agreement carries very little weight for historical cultural reasons like the UK, it'll have mixed to no improvement at all. But in other countries, because it is an industry-wide agreement, it's likely to be extremely influential in dealing with the terms on which people who work from home or work at a distance from the normal place of work and the terms from which they are engaged and employed.

So, how do trade unions work? Well, the methods by which they gain recognition and the means through which they exercise their influence varies significantly from state to state. But they often work at an industry level rather than an establishment or company level. So, the deals that are done, for example, on rates of pay and hours of work are done in the whole industry by negotiation at that level. And generally speaking, you do have the power to negotiate terms and conditions collectively.

So just really to illustrate that point, in a case I was involved in this year, I had a client who wanted to set up a business serving tourists in France, Italy and Spain - so, essentially, the sunny countries that we Northern Europeans go to for our holidays. And they would need to have employees in those countries and they would need a headquarters. And the brief that we got was to help advise them where was the right place to go in terms of their freedom to organize themselves in the way they want to be organized, rather than in the way, for example, a union or a work council might demand they should.

And so, what we identified for them was that, in relation to the particular kind of business they're in - I don't want to say what that was, that in France, for example, there was a collective agreement governing the terms and conditions for people working in the industry. And there was no option but to pay the rates, have the working hours and the rules about leave and holidays and sickness and so on that have been negotiated, even if none of the employees came into the union. And very often in France, none of them are. And even though there was no recognition by our client of that union in France.

In Italy, that was a default position, but it was possible to contract out of it. So, you could do what you wanted if you did a deal with workers who said I'm going to hire you on different terms. And in Spain, it depended on where you were, so that our plants were hoping to set up Barcelona, which is in Catalonia and as it happened in that province - there was no collective agreement, governing terms and conditions for that particular industry.

Although some of the participants in that industry, followed the terms and conditions of a different collective agreement, but there was an obligation to do so. But it might have (ph) to be setting up the head office in Madrid, they would have been bound by an effective agreement governing that industry in Madrid and the surrounding area.

So, often those issues can affect the question of where you choose to set up and how you set up and what you do. And very often there are significant restraints that would seem unusual to, for example, someone used to practicing in the North American area. And it's certainly a bit of preliminary research that it is proven to be and that would - did influence our client's choice of where they were going to set up.

Richard Mosher - Association of Corporate Counsel - Immediate Past Chair of ACC International Affairs Committee

Owen, may I interrupt you and ask you ...

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Owen Warnock - Eversheds LLP - Partner

Sure.

Richard Mosher - Association of Corporate Counsel - Immediate Past Chair of ACC International Affairs Committee

... just a couple of related questions. You mentioned earlier, I believe, that trade union membership was decreasing, if I heard you correctly. My question is do you see the influence of trade unions in Europe increasing or decreasing?

Owen Warnock - Eversheds LLP - Partner

It is varying country by country. To some extent, it is cyclical. So to take the UK example of a huge decrease in influence for 15, 20 years through the fractured administration and the early years of the labor administration. But now they are gaining more influence for a whole variety of reasons. But not very much related to membership levels.

In other countries, the influence is pretty well steady because they are embedded. And a good example of that is France where even through membership levels are very low, the structure for works councils is perhaps that, in effect, to be a works council representative in an enterprise, you have to be nominated by the union. So, the unions have enormous influence.

The other thing is that unions, of course, have realized that their traditional influence grew directly to the industrial action strikes and the like is reigning because they have lower membership levels and because their members are less keen to go on strike than they were in days when they had less to lose. Now, people are very well off, they've got lots of payment to make on their cars and their houses and they're pretty reluctant to lose pay.

And so, they're seeking other methods of gaining influence, particularly institutional ones like sending works councils and we'll see later on that works councils now are going to be compulsory as a system in every European country. And that's something that they've been very strongly behind to try and replace the reigning industrial muscle.

Richard Mosher - Association of Corporate Counsel - Immediate Past Chair of ACC International Affairs Committee

A related question, Owen. You know, most American lawyers, for example, are certainly used to working with unions. And although some of those matters can become criminal, most of them are not. We had one experience when I was working for Hoover (ph), closing a plant in Dijon, France, where we didn't provide the proper notification to the works council and the next thing we know our - the president of our French subsidiary was arrested. And, I mean, it completely caught me by surprise that a matter between works council and regulations could be that serious and be criminal.

And so, I wonder - you may not be that familiar with American unions, but can you tell me just a little bit about, you know, how seriously we should take, you know, works councils in that respect?

Owen Warnock - Eversheds LLP - Partner

They need to be taken, in most European countries, very seriously indeed for three reasons. The first is the one you just mentioned - the risk of your CEO and you know -- facing criminal proceedings. The second is that, in many countries, and again, it always, as always, varies from country to country. If you seek to do something without consulting properly with the works council and all the trade unions, depending upon the set up in the country concerned, the act may be actually totally ineffective. So, you may have ported to dismiss everybody and close the factory, but the law says you haven't - just keeps it going. So, in other words, your attempts to manage the business are being defeated completely by the law.

And the third reason for not going this is because the culture is so different from some countries that to act that way just irritates everybody, gets the government against you and makes life pretty unbearable for the business, which is seeking to be an important part of the economy and the community. So, it is important and it's very important when planning any major changes, to take on board what obligations there are to inform or consult unions, elected representatives and works councils and what the planning scales are going to be.

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Richard Mosher - Association of Corporate Counsel - Immediate Past Chair of ACC International Affairs Committee

Thank you. Please continue.

Owen Warnock - Eversheds LLP - Partner

All right. Well, what I want to look at, having done a little bit of an overview there is three particular areas. And they are, first of all, what are called European works councils, which I'll touch on, -- briefly only. Then I want to look at, in some detail, at works council legislation in individual European countries. And to give you an idea of the variety and the scope there and that will come back very much to the question that Dick has just raised.

And finally, I'd like to look particularly at some features of relationships, which are governed by the law between employers and trade unions and other (inaudible). So those are the three broad areas, but they do, of course, merge one into the other.

So first of all, European works councils and we're here at slide 13. A multi-national enterprise which employs 1,000 or more employees within two or more European Economic Area countries may be required to set up EWC. And I ought to say that the European Economic Area is, in essence, the European Union plus a few other countries in the near vicinity. And the obligation - the condition that it's multi-national means that, in addition to have 1,000 employees, you have to have at least 150 in two of those countries.

And if that basic condition is met, then it is possible for the workers to demand that a European works council is established. And the trigger for that is 100 or more employees seeking the creation of a council. And if that happens, then a special negotiation body has to be established, which then works to agree on a constitution that suits that particular organization.

Of course, there's a danger there that the employers will simply drag their heels. And so, there's default system, a model European works council, which comes in if the parties can't reach agreement and, of course, gives the worker representatives at least a minimum standard, which they can be pretty sure they can achieve. So, a word about that model European works council standard. It doesn't say only a default. It would provide for one worker representative per member state with an extra one for any state where more than 20% of the organization's employees are based.

And it provides for an annual meeting at which those representatives are informed and consulted about company progress and prospects. And of course, it will immediately strike you that unless you're lucky and, for example, the two countries involved are Southern Belgium in France or Ireland in the UK, you are going to have interpreters and translation involved there to even make the meetings and the discussions work. There are about 600 works councils on that European basis across Europe, so it's relatively rare, but, of course, many of the larger companies have them.

And the sort of topics that are covered are set out in the - in slide number 15 - the annual meeting, the structure and financial situation of the business and its surrounding economic environment. Probable developments of the business - we're going to get into this field. We're going to pull out of that. Issues about the employment situation and trends, so we are increasingly automating and that's going to mean fewer jobs. Or that we're going to open up in this field, which means jobs of this kind may be starting and we're thinking of locating them in this particular country. Or perhaps not as more likely, we're thinking of a location in India or China and not in Europe at all.

The question is in investment and possible changes concerning the organization of the business, working methods, production, mergers, cut backs or redundancies. So a general briefing, but only on an annual basis. I'll say a word in a moment about special meetings when particular crises emerge.

The obligation is consultation and that's a fundamental European Union concept, except that its meaning changes according to the particular context. When it's considering here with the European works council, it involves the exchange of views and the establishment of a dialogue. In other words, you have to listen and you have to give people information in time for them to be able to think about it and get expert advice. But you don't have to reach agreements going back even to seek to reach an agreement provided you're prepared to talk.

And as with all works council legislation in Europe, there is an entitlement for an employer to withhold information if it meets a particular standard of threatened harm to the undertaking if it would be disclosed. Now, I said I would say a word about special meetings, as well as those annual meetings in the model system and therefore in reality in any negotiating system. If something big is going to happen, which may affect jobs, then there'll be a need, probably, to call either a meeting of the whole works council or of a committee of it to consider those issues.

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For example, in the model system, that obligation is triggered if there is a proposal affecting employees interests to a considerable expense, which is wonderfully vague language for legislation. And it then gives examples of relocations, plant closures, selective (inaudible) and so on. And in those circumstances, there's a right for those elected European representatives to be informed and consulted.

I'm going to move on now to the national works council legislation because, in many respects - in fact, nearly all, this is much more significant businesses operating in Europe and it's also an area of active current change in the legislature. So, we're looking now at slide 18. What we're talking about here is a representative body for the purposes of giving of information by the employer to workers and consultation and discussion about that information.

It's a concept that's, certainly from my discussions with U.S. employers, it's by and large pretty well alien to U.S. businesses. But it is a firmly established concept in most of the European Union and, indeed, in some countries, dates back to more than a century. It has significance in the context of trade union influence and we'll look at that as we go through.

What's happened recently is, the European Union has decided that there is a need for at least a minimum degree of harmonization in this field. As so, a directive has been adopted and that is now going to require a works council system in every country in Europe. Of the 15 member states up until May, all of them have a system already, other than Ireland, Sweden and the UK.

The directive concern, which is called the Information Consultation Directive will require all European countries to have a legal system for worker representatives, staffing in 2005 for employers with 150 or more employees and, by 2008, governing even those with just 50 employees. So, really all employers of any significance. Important to stress the directive creates only a baseline and many, many European states go much further already in their own systems. And the cost (ph), of course, of that is that the standards and the obligations and the time scales vary significantly from country to country.

Basically, the European directive creates a framework for the provision information and a consultation, in some cases, with a view to reach an agreement, though no obligation to agree in the European minimum standard in three main areas. One is economic and strategic developments. One is changes in work organization. And another is the structure and the foreseeable development of employment. So, this is the long-range warning that there might be job losses around.

And that is probably the most significant element to date. And I'll explain why through the next slide. In answering the question why did the union adopt legislation on works councils at this point in time? I think there was a generally recognized need in some countries to promote mutual trust and to strengthen dialogue within undertaking. And there's a recognition, at the moment, European legislation in this deal was very piecemeal. And also, I think a recognition of the decline infamous trade union.

And trading generally and particularly, their membership levels in most European states. But probably, the most important factor was a general feeling that, in many cases, the involvement of the employee representatives came too late in the decision making process, particularly decisions which affected jobs, the rate to pay (inaudible) people were going to work, outsourcing and redundancies. And a classic example would be the Renault factory in Belgium - big car factory in Belgium, owned by the French car company, Renault. And they basically announced very shortly that they were going to close the whole thing down.

Massive adverse reputational effects on the Renault and very much a kick to encourage this legislation to its final state in adoption - the feeling that really - there should have been longer range warning before it became specific proposals upon which the employer was obliged to consult under general risk consultation requirements.

That there should have been a longer range indication that there was maybe a problem with jobs there, that there were too many car manufacturing locations in Renault, that prices and ranges are getting too high. Or whatever it was to that decision. And so, there's a very difficult issue there about when something is a sufficiently clear proposal that you have to consult on it. That was always a vague thing in relation to our obligations in Europe, to warn unions and workers if it's about large job losses. We work in a gray area - how firm your decision has to be, how clear a proposal it needs to be before you're obliged to consult.

What we know now is that under the European - I'm sorry - under the works councils families imposed by Europe and whatever that vague point of time is, it's slightly earlier than it was before. But it's still not very clear. And that's, again, an issue we'll need to look at carefully, on a country-by-country basis because we're talking here about obligations to consult with works councils under the legislation of each member statement, just to the European floor.

Well, this new minimum standard wasn't welcomed. The UK's effective state (ph) to trade and industry, Patricia Hewitt, said that she wanted to see an end to the client where people only hear about job losses from the media over their breakfast. On the other hand, the director general of the CBI, which is the UK's employers organization, said I do wish that Brussels would leave alone our very flexible labor market, which has created so many jobs compared with the rest of the EU. That's a constant theme from UK employers. The truth is they're not being very successful in keeping ourselves free of that regulation.

Interestingly enough, the secretary general of the European employers federation made a very similar comment about this directive, when it was a proposal. He said that it was harmful to companies and that it constituted a totally unwarranted interference in member states systems of industrial relations. And it called on the EU's policy makers to block it on the basis that it was an attack on companies and on their ability to adapt and to create new jobs. I think we have two ideas in there. One is a similar one to the UK guy, which was to say that this is restricting the flexibility and ability of companies for that to charge.

But the other more important one was the recognition that it was proposing a minimum standard on systems of industrial relationship that is very different from one country to another. I think that's probably an exaggeration. It's true that there are differences, but this European minimum standards for works councils is at such a low level. Within reality, it's something that could be fitted in with most countries. And I will look at France and Germany in a moment to illustrate that point because there you'll see how extensive works council obligations can be.

So, to summarize, really, in relation to works councils, the state-to-state variation is substantial and the examples of the extent to which works councils can impact on day-to-day operations can perhaps be seen best by looking at two countries. The two I've chosen are France and Germany because of their significant economies and because they are also quite different. So, I'm looking here at slide 27.

I have quite a lot of information in the slides about the French and German systems, but I don't intend to go through its latest figure in the session. It's there for you to read. What I want to do is highlight some of the key elements because I think that will give you a fair picture of the variety of requirements.

Looking at France, therefore, first - works councils are actually compulsory if the organization has 50 or more employees. And although the members are elected by the workforce, the candidates are nominated by the union only, which gives them, of course, significant influence. And the works council has the right to express itself on any project or decision which might affect the structure or organization of the company, what's called its economic or judicial situation. So that might be something like a merger. Or anything which may affect the number of employees.

And the council must have enough information to form a well-reasoned opinion on those issues and importantly no decision can be made or implemented until the works council has had time to consider and express an opinion on the issue. And an attempt to push through a decision before that is void and unenforceable. And a striking illustration of that was what happened to Marks & Spencer, which is a multiple retailer based in the UK, a very large employer. Had 18 stores in France. It was the owner of Brooks Brothers for awhile in the States. And they announced that were just going to close the whole of their French operation - all 18 stores. And it was announced overnight and most people heard it over the radio.

I remember I was driving to work that morning and heard it on the new program and I thought, crumbs, they're in trouble. And they were in trouble because, in fact, the unions went to court and got an order from the court stopping the closure and saying it cannot take effect until you've been through the correct process. That took many months. And in fact, the effect was that instead of closing the stores and selling on the real estate, in the end, Marks & Spencer sold the business to another operator.

Now, I think we might argue in terms of broad economics. It didn't make much difference. These were prime site retail sites, so someone was going to operate a shop there anyway. But the difference, of course, was that the workers were the workers who Marks & Spencer employed rather than some other people recruited off the street.

So, a significant effect there, an issue that wasn't planned properly by Marks & Spencer, caused some real problems with their share prices, and it's a good illustration of the need to get this right and to make sure that what you're proposing works for the country you're going to do it in.

Richard Mosher - Association of Corporate Counsel - Immediate Past Chair of ACC International Affairs Committee

Owen, if I can interrupt for just one question here regarding France, but it probably applies to all the countries. If you have an obligation to talk or consult with the works council, is there any obligation on their part to keep matters nonpublic or quiet?

Owen Warnock - Eversheds LLP - Partner

There are obligations in most of the systems to keep things confidential. The trouble, of course, is the reality. The reality is that things leak out even if the representatives or the unions are doing things in good faith. And my general experience is that, in fact, if the system is one which is dominated by a union, as it would be in France, the chances of keeping it confidential are much better than if the representatives are not based on a union structure because they're more used to dealing with those things.

And although, the representatives may be ordinary workers rather than full-time officials of the union, they have decent training and support and indeed, they'll call in the union, the officials, when something significant has happened. The full-time paid officials will come in. And it's often easier to keep things confidential with them than it is with non-union reps

But either way, there clearly is a risk there and that's, of course, why, despite the legislation, even in countries like France, the legislation is often still preached because the employer simply does not want to disclose the information at this stage and is prepared to take the risks that go with it. And that's a decision that really has to be made on a case-by-case basis.

You mentioned just a moment ago what's on the next slide that improperly (inaudible) consultation, including not doing it at all, of course, is a criminal offence in France. I'm going to move onto the final point on France, which is slide 31, just as, really, a light relief. French works councils carry ultimate control over social functions of the business such as the Christmas party. And indeed, the employer is required to allocate a budget for that purpose.

Let's look at Germany, now, slide 32 - difference here. The minimum size for a works council is only five employees, but there will be a works council only if the employees decide to set one up. And in many, many cases, they don't. It varies with size, so 24% of private enterprises in Germany have a works council. That covers about 60% of the workforce. If you look at the smaller employees - say those between 40 and 50 workers - only about half of businesses that size have a works council. If you get through those, between 100 and 250, it's something like 84%. So, it does vary by size.

Again, the members of the works council are elected, but there's no special rights to trade unions in terms of who sounds as candidates. And the three areas where works council have rights in Germany are, broadly, social issues, human resources issues and economic issues. Now, economic issues, it's largely, again, an entitlement fee informed (ph) by the economic situation. And I'm not going to spend any more about those. But a word or two about social issues and HR issues.

Social issues, that is slide 35, sorry, it's slide 33. It covers things such as working hours, holidays, health and safety issues and salary structures. And in those areas, social issues, the works council has the right to co-decision with the employer. In other words, you do have to agree on those points with the employer and if you fail to do so, there's a system of compulsory arbitration to resolve the matter.

On HR issues and that includes, in particular, hiring, firing and strategic personnel planning, the works council must be informed of general personnel plans and be consulted first and manage the risk of disadvantage to employees. So this is how we plan to recruit to retain for this list and what do you think about it. And general rules on selection. For example, when hiring or firing, it has to be - it can be made only with the works council's consent. And looking at slide 35, works councils must be heard before any dismissal is effected. And attempt to dismiss someone without letting the works council be heard first is void. It just doesn't exist as matter of law and the person who's still working for you.

But more than that, if your company has more than 20 employees, then the works council has to give its consent to every individual personnel measure. For example, not only firing someone they have to consent to them being fired, but to hiring someone in the first place. And I remember being astounded when I discovered that a few years ago. (inaudible) a manager at Siemens who had a sub (ph) placement there while she was a university student, and the manager she was working for instantly said I'd love you to come and join the team permanently when you graduate. And she then had to hang around for months while the proposal to recruit her went through the works council.

If consent isn't available, then, of course there is a route, you have to go to the employment court to get sanctioned for the action concerned. So, I'm not going to say anything more about Germany and that means I'm going to move through, in a moment, to slide 38. But really, by way of summary, I think what we need to say is that because of that enormous variety in the rights and obligations of works councils, if one is doing - first of all, if one is planning and setting up a system of consultation with workers, first of all, it has to be two way in Europe. But secondly, it needs to be crafted to fit the countries concerned. And therefore, a model, one has one country or, for example, for America, it may not work and those factors have to be built into design to make it work well.

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But secondly, if you're going to do something big and, in particular, if it's something that actually threatens jobs, then you have to plan into the timing process the obligation to consult with the works council about the detail issues of the decision and, in many cases, you're going to have to go back further than that. And even when it is a risk rather than a reality, you should be consulting. And if you fail to do so, you run the risk of finding that your decisions are invalidated and you have to back to the beginning. They would, of course, in those circumstances, have been better to do it in the first place.

Richard Mosher - Association of Corporate Counsel - Immediate Past Chair of ACC International Affairs Committee

Owen, this might be a good point to address a question we had from one of our listeners about the role of work councils and outsourcing transactions. There were a number of questions here, just to remind you of what he was asking. Do they have to - do works councils have to be informed in a timely manner of potential outsourcing? How far in advance? Do they have the ability to object, negotiate or delay the outsourcing? And there are several other related questions. Can you address that ...

Owen Warnock - Eversheds LLP - Partner

Sure. I think the way I'll do that is first of all to say that broad answer is yes to all your questions and the detailed answer - I've actually got a couple of slides to illustrate it further on. So if I take it then, then perhaps people have got something in front of them that they can relate those answers to. Is that OK?

Richard Mosher - Association of Corporate Counsel - Immediate Past Chair of ACC International Affairs Committee

OK. That's fine.

Owen Warnock - Eversheds LLP - Partner

Yes. What to say then about the interrelation of trade unions and works councils in practice - this is slide 38. I'm sure listeners have obviously have thought of this point themselves, so we not only have to relate with trade unions, but we have this other relationship, potentially, with works councils. Generally speaking, the rights and power of the two types of representative body are distinct rather than shared. And the part of bargain collectively is normally reserved to the trade unions. Occasionally, you get boundary disputes. They're not unheard of, but they're not particularly common.

I've heard people say from North America, well, you crazy Europeans. What a terrible system. And it's interesting to look at, for example, what the Dunlop Commission recommended in the - I think it was the late - the mid to early 90s about transforming the industrial relations systems in the United States and approaching that and, indeed, increasingly, for example, trying to adopt the partnership approach. It's also fair to say that, on the whole, you only hear bad things about works councils. And actually, in the real world, they generally work fine. You just have to adjust your management technique and approach to get them.

And the small practical point is that, in many countries, the works council chair will be at a full-time roll, so a worker has responded to that. And that means that day to day cooperative working is facilitated and you make sure that he and his colleagues or she and her colleagues are well trained and understand their general roles.

So that brings us to the final area I wanted to talk about and it goes back to the question you raised on behalf of one of the listeners as well, about collective labor relations and some of the notifications requirements. The first thing to say, just briefly again on wage and conditions bargaining. As I said before, it's often done at an industry level. A good example of that is a case that I handled a few months ago for a UK-based record company who also had a significant operation in France. And they wanted to recruit a chief executive officer for their French business.

And the initial job was for my colleagues in our French office to prepare his contract. But what surprised my clients was that even though he was going to be the top man - he was the boss in Paris - nevertheless, his terms and conditions were subject to minimum standards imposed by the relevant collective agreement which, in that case, was the (inaudible), the music editing collective agreement. Nothing to do with my client. There just happened to be one in existence for that particular industry.

A peculiar twist to his particular case was that his previous employer, a major multinational in the record industry, happened in France historical regions, to operate the collective agreement of the (inaudible) industry. It's very hard to see what the logic was. Our French colleagues say, well,

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it's just history. But the point about that was it had quite good severance terms and so he extracted as a services recruitment that if he ever was released by my clients, he would get the metrology (ph) severance terms and he would count his service with his previous completely separate employer in working out the value of that service agreement.

The rules on recognizing unions varies significantly from country to country and there isn't time to go into the detail here. Some systems are very similar to the U.S. system for compulsory recognition and others are very different. And the rules vary enormously on strikes and other industrial action. In those two fields - recognition of unions and strikes - there is no European minimum legislative standards. It's entirely up to each country and therefore, enormously different. So, in some countries you need, for example, a secret postal ballot before you cause industrial action. In others, you barely get a show of hands. And it varies enormously from one to the other and that clearly affects tactics in labor disputes.

Now, special rights, really, the final thing just to touch on. There are special rights for employee representatives in circumstances of risks or mass large-scale layoffs and also when businesses are going to be transferred. Basically, it's the same obligation. So just be clear, first of all, about what we're talking about. Situations in relation to redundancies where, in essence, and again, it varies because different countries have implemented the directive in different ways.

But in essence, if there's more than about 20 layoffs, going to take place in 90 days - in any period of 90 days - then there's an obligation to consult with employee representatives. If there's a proposal to transfer a business - now, that might be for one company to sell its assets and order book to another company. Or it might be in outsourcing. It might be to say we are no longer going to run our IT function in-house. We're going to contract someone to do it. Or it could be cleaning, (inaudible), whatever.

In those situations, what's called a transfer of (inaudible) directive applies. And many of you may know that that has the interesting effect that rather - that employees go across to the business, whether or not the party is wanted, the new owner of the business, the new contractor and outsourcing situation inherits the employees on their current terms and conditions. They also have an impact at the collective level because not only does the new employee inherit the collective agreement that the old employer had, but, in addition, the employee representatives, whether it's a union or works council are entitled to be informed about the proposal in advance.

So, who's entitled to be informed and what's the time scale? Well, that is on our final substantive - on then, really, our final substantive slide, that's to say number 41. The consultation has to be either with the recognized union, if there's a recognized union, or otherwise, with other representatives. Now, the exact dividing line between when you have to do it with the union and when you have to do it with employee representatives does vary from state to state. But, in essence, if it's a recognized union, normally you have to do it with the union. Otherwise, you do it with employee representatives. And in those countries where there's a works council, normally that is with the works council.

In some countries, like the UK where hitherto there's often not been a works council, if you haven't got a recognized trade union, you actually have to get workers elected for the purposes of consulting them about the fact that you're going to sack some of them, you're going to fire them. And that, of course, is deeply unattractive. To say, make an announcement, we're going to lay quite a lot of you off, would you please like to have a secret ballot for some representatives with whom we can consult and negotiate about that proposal. You don't seem to get the people you wanted elected in those circumstances.

And a bit of advice that my colleagues and I usually give in a normal works council situation is to say, well, you may not be obliged to have one at the moment. And there may be employees that haven't demanded one. But it's not a bad idea to have one in place for two-way communication purposes. And also, because if something happens, like you want to sell part of the business or you need to lay people off, you don't have to go through this process of electing people with the delay that that involves. You can get on talking with people who are already representatives, who have been trained and who have developed some level of trust where the management is concerned.

Richard Mosher - Association of Corporate Counsel - Immediate Past Chair of ACC International Affairs Committee

Owen ...

Owen Warnock - Eversheds LLP - Partner

How long before?

Richard Mosher - Association of Corporate Counsel - Immediate Past Chair of ACC International Affairs Committee

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Owen, excuse me. One of our listeners has asked - if a company has both a European-wide employees forum and individual country works councils must both be appraised.

Owen Warnock - Eversheds LLP - Partner

Very often they will. It'll depend upon what deal is being done when setting up the European works council and what the arrangements are in that member state from national works councils, but it's entirely possible. And indeed, usually, in those circumstances, the real discussion goes on in the national works council because inevitably, the European works council is very remote. It has one or two representatives from each country. And they really don't know their constituency in detail. They won't know all the different categories of workers who might be affected. And you'll have much more effective discussions, in reality, at the local level with members of the works council within the country concerned. So usually, it's a matter of general information added to the European works council and the real business being done with the local ones.

I mentioned before this issue in timing that the - with both - with both types of works council, there is an obligation to try and give warning of these issues when they're still on the horizon, when they - the (inaudible) press to employment. And you talk about how we avoid it. That's something that's deeply unattractive, not just to American employers, but to all employers. And it is quite often not honored. In contrast, when there actually is a proposal to lay people off or to sell part of a business, it is normal, at that point in time, to formally notify direct entities concerned and tell them what's going to happen, why, what the timing is and whether there will be any employment protection measures. Will your jobs be safe or not? If not, what will the proposed payoff be? If there's an issue of selection amongst the workforce, for example, some can be retained and some will have to go, how the management propose to select from those issues.

And there's then a process where the workers of the entities, whether they're unions or others, have their say on those issues, challenge them, come up with all kinds of proposals. And then the employer has to make a decision. And in most cases, at (inaudible), I think, in Europe, in the end, it's the employer's decision in relation to this field. The obligation is for the employer simply to take on board and to respond in a rational and, indeed, a reasoned way. In other words, to actually say why they disagree and respond to what the representatives say and then come to conclusions.

And then to say, if the members are high enough, you could have a significant period. So, to take a part of you, so hopefully most European countries because this is one of the options under the directive, if a 100 or more employees are to go, then you're going to need to start that consultation process 90 days before the layoffs are likely to take effect - three months. A significant lead-in period and one, of course, of considerable unrest in the workplace while it's going on.

So, just really by way of wrap-up, an interesting comment reported of Representative Steve Buyer who said European Union rules illustrate the good judgments by my ancestors to leave the continent. And another colleague of mine, speaking to a U.S. attorney said, we're told, Martin, you don't understand. We have a substantial business in the U.S. with very well developed systems. This is not the way in which we want to run our business in Europe.

That really, in my view, is the starting point. It may not be the way in which they want to run their business, but they're going to have to take account of that that some of it will have to be done. And the club of it is making sure that you can get your approach, your style, your method of communication, to work, using a different framework and a very different cultural starting point.

And (inaudible) different cultural starting points - of course, the other comment we always get when we talk about European - there's nothing to do better relationships is you people have way too much holiday. That's true and it's also true that we give our workers more holiday than the law requires. But you can't recruit and retain them without.

So, is it better, worse or different in Europe? It's a matter of pure opinion, really. It's certainly different. And I think the key to success isn't trying to judge that, but trying to understand the nature and extent of those differences, asking intelligent questions and operating with a free mind and a creative thought as to how we make it work in the European countries where we're operating.

Richard Mosher - Association of Corporate Counsel - Immediate Past Chair of ACC International Affairs Committee

Well, thank you, Owen. Very good. We just have three or four questions here. We may go a little bit over, but I understand that's OK. The first question from one of our listeners. Do works councils have a right of consultation or approval over a change of control transaction where A - the subsidiary located in France or Germany is being sold or B - the parent company located in the U.S. is undergoing a change of control?

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Owen Warnock - Eversheds LLP - Partner

Right. I'm going to have to answer that from my general knowledge of European law rather than the specifics, obviously, of French and German because I'm not either a French or German qualified lawyer. But in principle, his change of control - in other words, if someone is selling the shares to someone else, that (ph) transfer situation, normally, there is no obligation to consult. Or if there is, it would only arise at the most general level of telling them that it's happening. Because it doesn't essentially affect the workers situation.

They remain employed by the subsidiary they were employed by previously and their legal and economic situation isn't regarded in European legal terms as significantly different. So, I think the general answer is likely to be low or a very limited obligation, simply to report it rather than get involved in detailed consultations.

Richard Mosher - Association of Corporate Counsel - Immediate Past Chair of ACC International Affairs Committee

OK. Next question. Are there any methods to bring the work councils onto your teams? You help - get their help in matters like outsourcing or other important decisions. Or is this almost always an adversarial relationship?

Owen Warnock - Eversheds LLP - Partner

It can often be a very creative and positive relationship. It's easy to make some broad generalizations about some countries being either than others. And really hidden, it's about the attitude of management. And certainly, a large part of the work that the employment lawyers and the HR consultants inevitably had to do is trying to help employers set up structures and the training and their history of cooperation with their works council to ensure that these things can be dealt with creatively.

And you know, people aren't stupid in Europe. They do understand that the ability to manufacture shoes in Europe is not really a long-term viable operation. You can't do it cheap enough anymore and they're prepared to talk about outsourcing a large part of that. The same is now true, as it is in the States, with regard to services. So, help desks and insurance, financial services, a lot of those jobs are fleeing to the Far East. That's understood by workers and their representatives in Europe and the issue, the debate, in most cases is about what can we save and how can we find other good jobs and opportunities for people. So, I think if this thing is approached sensibly, then it's not very often you can get along way in working out good systems.

Richard Mosher - Association of Corporate Counsel - Immediate Past Chair of ACC International Affairs Committee

Excellent. And in summary here, just two questions that I like to ask at the end of web casts. What are the two or three biggest mistakes you see U.S. lawyers or U.S. companies make in dealing with European works councils?

Owen Warnock - Eversheds LLP - Partner

I think the first is to regard them as optional - just not to take it on board at all. You'd have thought that that would be a very stupid decision to make, but it is something that we still happen. In other words, that if - the view is, well, if there is a theoretical legal rock for these people to do or say these things, I don't really believe it can possibly be reflected in practice because it will be such a bizarre thing that it can't be something that the Europeans do. And that then leads to difficulties about decisions being void or, most often, delay.

And that's the second key point I'd make that, generally, it is underestimated how long things are going to take. And clearly, the first thing one should be thinking about when planning anything of this kind is to get some good advice about what the likely time scales are and then add a bit of time onto that advice. In other words, even though you - the American will underestimate how long it will take, the chances are you advisor in Europe will try and be optimistic, too, and they're underestimate it, too. So, add a bit onto what they tell you.

Richard Mosher - Association of Corporate Counsel - Immediate Past Chair of ACC International Affairs Committee

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OK. Well, related to that last question and my final question, relating to timing. Assume that my chief executive officer comes into my office this afternoon and tells me that we're going to acquire a European company in the next 30 days that they basically negotiated the entire business deal. And so, I need to get moving and finalized this transaction. What are the two or three things that I ought to be doing immediately - aside from calling you, of course - but the things I ought to be doing immediately to get up to speed on what my works council obligations are. I mean, are some things that I've got to look at first and second or a source I can go to or ...

Owen Warnock - Eversheds LLP - Partner

Yes. I think there are two things - the law and the facts. You need to find out what the legislation of the country concerned is, how it operates in practice. And the second thing - you need to find out the detail for that company. I mean, if it's Germany, there may well not be a works council. So, you need to find out on the ground is there a union? Which is it? What's its reputation? Is there a works council? What does its constitution say? Is it a happy works council or a difficult one? In other words, to get a practical feel for how things are. And I think the third area is you need find out whether the people who are being acquired, whether management that is being acquired are on your side or not.

Because if they're not on your side, the information you get, for an example, the chief HR guide, may be designed to other make the whole process uncomfortable or actually make it - make you want to back - try and get you to back out of it. It's important to try and bottom out whether they really are on your side and maybe even, if you think they are, but you're not sure, to get in, for example, an external HR specialist who knows the company and the arrangements, but can be your person rather than someone who may have greater loyalties to their business and to their colleagues than actually for the economic entity as an economic entity.

Richard Mosher - Association of Corporate Counsel - Immediate Past Chair of ACC International Affairs Committee

Excellent. Outstanding, Owen. I really appreciate your presentation. Very practical. Very current. And some good examples of things that have happened. So, I want to personally thank you on behalf of the ACC and the International Legal Affairs Committee and your material and this entire presentation, including the PowerPoint slides will be available to listeners to review later or to tell others about for approximately one year from the date of broadcast. I'd encourage all the listeners again to contact us as the annual meeting or by e-mail, if you're interested in legal affairs committee matters or future web casts. And thank you again and thanks to Eversheds. That concludes the presentation. Thank you and good-bye.

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