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European Works Council's entitlement to reimbursement of expert fees (AT)

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Summary

The costs incurred by a European Works Council for necessary expert consultations are to be borne by the central management. The European Works Council is not obligated to primarily use free services provided by employee representative bodies for legal advice.

Legal background

Article 7 of the European Works Councils Directive (Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees) provides for subsidiary requirements, *inter alia*, in the event that an agreement on a European Works Council is not reached, according to which the legislation of the Member States must in this case comply with the provisions set out in Annex I of the Directive. According to Annex I paragraph 5, the European Works Council and the select committee may be assisted by experts of their choice if this is necessary for the fulfilment of their tasks. Pursuant to paragraph 6, the administrative expenses of the European Works Council shall be borne by the central management. The central management concerned shall provide the members of the European Works Council with the necessary financial and material resources to enable them to fulfil their duties in an appropriate manner.

In implementation of Directive 2009/38/EC, the Austrian legislator has enacted provisions on the 'European Works Constitution' in Sections 171 to 207 of the Labour Constitution Act (ArbVG). In the event of the establishment of a European Works Council, a corresponding agreement must primarily be concluded between the special negotiating body and central management. If such an agreement is not reached or is terminated, the provisions on the 'European Works Council by operation of law' (Section 191 *et seq.* ArbVG) apply. According to these provisions, the costs incurred in connection with the activities of the European Works Council and the select committee are to be borne by the central management. This includes the administrative expenses of the special negotiating body necessary for the proper fulfilment of its tasks, in particular the costs incurred for the organisation of the meetings and any preparatory and follow-up meetings, including interpreting costs and the costs for at least one expert, as well as the accommodation and travel expenses for the members of the special negotiating body and for one expert by the central management (Section 197 in conjunction with Section 186(2) ArbVG).

Facts and initial proceedings

In the proceedings in question, a 'European Works Council by operation of law' sued the central management of a group of companies based in Austria for reimbursement of various management costs, in particular expert costs. The main issue was the commissioning of a company operating throughout Europe and specialising in advising European Works Councils. This company had itself provided legal advice to the European Works Council and had also pre-financed the services of other contractors. The European Works Council demanded that the central management cover the costs of these consultancy services.

The central management disputed the necessity of these services and the appropriateness of the fees charged (based on an agreed hourly rate of EUR 300 net). Thus, costs exceeding the rates of the Austrian Lawyers' Fees Act (RATG) which primarily regulates the remuneration claims of lawyers in civil proceedings, were not to be borne under any circumstances, as these costs would not have been incurred if a lawyer had been engaged. The European Works Council should also have first

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sought free legal advice from interest groups (trade union, Chamber of Labour).
The Labour and Social Court of Vienna (ASG Vienna) and the Higher Regional Court of Vienna (OLG Vienna) essentially followed the position of the plaintiff and awarded it a large part of the claims asserted. The defendant appealed against this decision to the Supreme Court (OGH).

Judgment

The Supreme Court dismissed the defendant's appeal because, in its opinion, the legal situation had been sufficiently clarified and it confirmed the content of the decision of the Vienna Higher Regional Court.
As the Supreme Court explained, the 'subsidiary' provisions pursuant to Article 7 and Annex I of Directive 2009/38/EC provide, among other things, that the European Works Council and the select committee may be assisted by experts of their choice if this is necessary for the fulfilment of their tasks (Annex I paragraph 5). The Austrian Labour Constitution Act (ArbVG) also regulates in the provisions on the European Works Constitution, in which the involvement of an expert is expressly standardised (Sections 182, 220, 235 ArbVG), that it is an expert 'of his choice' (i.e. at the choice of the employee body).
In the opinion of the Supreme Court, it cannot be deduced either from the principles of proper management or from the observance of the respective rights and mutual obligations standardised in the Directive that the European Works Council may only make use of the free information provided by interest groups of a particular Member State when consulting an expert. This would also not be compatible with the principle of free choice of expert. The task of an expert is to replace the European Works Council's lack of expertise, i.e. to advise it on specific issues – often relating to several legal systems – in order to enable it to conduct negotiations with the employer in an informed manner. The selection of the expert must therefore be based on the content and importance of the issues to be dealt with.
It is true that the employee body is not entitled to compensation for costs higher than those reasonable for the expert services provided. However, which costs are actually reasonable can only be assessed on a case-by-case basis.
With regard to the defendant's objection that costs exceeding the tariffs of the RATG were not to be honoured, the Supreme Court stated that in the specific case it was unclear at what reasonable price similar services would have been provided by a lawyer. Hourly rates in this range had already been judged to be reasonable in another decision of the Supreme Court (Supreme Court 30 March 2011, 7 Ob259/10d).
The Court also took into account that, in addition to the proven expertise in the field of the European Works Constitution, the commissioned consulting firm had pre-financed the costs of its activities or commissioned sub-experts. Since the plaintiff had no assets of its own and the financing by the defendant was not secured, this circumstance was also relevant.
Whether the expert consulted uses other sub-experts to provide their services was ultimately not decisive, as long as no additional costs are incurred as a result. On the other hand, the Court added that costs arising from the coordination of several experts required for different specific issues – areas of expertise – could be considered necessary in individual cases.

Commentary

Court decisions on questions of the European Works Constitution are rare, which is why any – even purely national – case law is helpful in practice. The decision is primarily relevant in the event that no agreement is reached on a European Works Council (Annex I of Directive 2009/38/EC) but can also serve as a 'guideline' for an agreement with the central management.
In this specific case, the clarification that the European Works Council is not obliged to first obtain free legal advice from interest groups is particularly important. The defendant had argued in the proceedings that the European Works Council had to observe proportionality when incurring costs and choose the most cost-effective option. The European Works Council therefore had to seek legal representation or legal advice from the employees' interest groups because this is free of charge. The Supreme Court did not follow this argument because this would in any case contradict Annex I paragraph 5 of Directive 2009/38/EC, according to which the European Works Council and the select committee can be assisted by experts of their choice. If the European Works Council were to be required to prioritise the services of interest representatives, this would remove the 'right to choose' with regard to the expert to be commissioned.
Proportionality is maintained by the fact that such advisory or representation services may only be commissioned at the expense of the central management if they are really necessary (in the case of conducting court proceedings, these must also be sufficiently promising from an ex ante perspective of the European Works Council) and that the fees must be appropriate or in line with market conditions. However, for reasons of 'equality of arms' alone, this does not rule out remuneration according to agreed (reasonable) hourly rates, even if lawyers are commissioned (and even in court proceedings), especially as the central management will, for its part, generally remunerate such advisory and representation services according to such hourly rates due to the complexity of the legal situation.

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Comments from other jurisdictions

Germany (Dr. Elisabeth Sechtem, Luther Rechtsanwaltsgesellschaft mbH): Given that there is no fully comparable case adjudicated by the German Federal Labour Court (*Bundesarbeitsgericht*, 'BAG'), the Austrian Supreme Court's decision is noteworthy from a German point of view since it clarifies that a European Works Council may hire experts for its support even if there are other (less costly) means of obtaining advice on the topic at hand.

Generally, pursuant to the German implementation Act of the European Works Council Directive (*Europäisches Betriebsräte-Gesetz*), the central management shall bear the costs of the activities performed by the European Works Council; this may include costs for experts, insofar as their engagement is necessary for the proper performance of the European Works Council's duties. Notably, prior approval from the central management, as mandated by the German Works Constitution Act (*Betriebsverfassungsgesetz*, 'BetrVG'), is not required – which can lead to legal (and financial) risks on both sides if no agreement can be reached between the parties prior to the European Works Council engaging an expert.

The decision by the Austrian Supreme Court shows how important such communications between the parties prior to the engagement of an expert are, even if they only outline the very basic questions such as limitations to hourly rates of engaged experts or which specific topic is to be examined. Both parties, particularly the European Works Council and also the engaged outside expert firm, face significant risks if the court finds that respective expert costs had not been proportionate and that, at least in the first instance, other means of (free) advice would have been necessary before hiring the outside expert firm. For the case of German local works councils, the latter is one of the predominant arguments against the necessity of an expert (and incurred costs) which is also acknowledged by the BAG. According to the BAG, there is no necessity for a works council to involve an external expert as the works council is obliged by the principles of trustful cooperation (*verantwortungsvolle Zusammenarbeit*) and proportionality to tap into in-house sources of knowledge and to obtain relevant (legal) training before it can consider the commissioning of an expert as necessary. Of course, one could argue that in the case of a European Works Council, the topics at hand might be more complex and thus experts may be hired at an earlier stage of discussions. However, in an economy of increased cross-border growth in larger companies with potentially more 'seasoned' European Works Councils and more in-house sources, it is likely that the priority of the (European) Works Council's obligation to use in-house resources will become more relevant. This could increase risks on the side of the European Works Council when engaging outside experts without any prior agreement with the central management.

It remains to be seen whether an obligatory mechanism (comparable to the German procedure set forth by the BetrVG) will be implemented obligating both parties to agree on the bearing of costs (or having a court rule on such parameters, if no amicable agreement on the bearing of can be reached) prior to engaging an outside expert.

Ireland, (Eoghan Lordan, Mason Hayes & Curran): While the issues reported in this case have not yet arisen under Irish law, this decision is interesting from an Irish perspective. Since the transposition of Directive 2009/38/EC (Recast) on the establishment of European Works Councils (the 'Directive') into Irish law by the Transnational Information and Consultation of Employees Act 1996 ('TICEA'), there have been very few decisions by the Irish courts relating to European Works Councils ('EWC').

In April 2023, a decision was made by the Irish Workplace Relations Commission ('WRC') in the case of *Jean-Philippe Charpentier – v – Verizon Ireland Limited* (ADJ-00034402). In this case (EELC 2023/24), the respondent had operated an EWC in the United Kingdom by means of an EWC agreement. This EWC agreement expired and the EWC began operating in Ireland under the default subsidiary requirements set out under the Directive and the TICEA.

The complainant contended that, in these circumstances, the EWC needed the input of an expert to provide the EWC with training and advice. The EWC subsequently engaged an expert to advise the EWC on a number of issues including in respect of an aborted corporate transaction involving the respondent, to prepare internal rules on behalf of the EWC and to advise on the preparation of board meeting minutes by the EWC and on the post-Brexit status of certain UK employees. The respondent claimed that it had not been reasonable or necessary to engage an expert to advise on these issues and refused to pay the full amount of the expert's invoice.

The WRC ultimately found that while the EWC had been entitled to engage an expert in respect of the preparation of its internal rules, engaging an expert to review the EWC's minutes and to advise on the status of UK employees had not been "required or reasonable".

The WRC also found that the EWC had not been entitled to engage an expert to advise on a corporate transaction involving the respondent, given that it had become clear that the transaction would not ultimately proceed. The WRC noted that central management could be dissuaded from providing an EWC with "tentative, early notice of a possible future transaction" and from acting in accordance with the spirit of cooperation set out under the Directive and the TICEA if this could result in the respondent being required to provide the EWC with legal advice on that potential transaction.

The WRC ultimately found in that case that part (but not all) of the expert's invoice should be discharged by

the respondent and required the respondent to pay an amount of €5,610. It should be noted that the WRC decision is currently under appeal to the Irish Labour Court.

This Austrian decision is useful in underlining that under the Directive costs incurred by a European Works Council for necessary expert consultations are to be borne by the central management. However, it is worth bearing in mind that in circumstances where the assistance of an expert may not be deemed necessary, then EWCs may need to consider the availability of other resources, including free legal advice from interest groups.

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