Bird & Bird

# The Impact of Brexit on European Works Councils - another update


January 2020

# The impact of Brexit on European Works Councils – another update

*Pieter De Koster shines a spotlight on the question of Brexit's impact on European Works Councils ('EWCs'). Despite turbulent debate over the risks and disruptions emerging from Brexit, EWCs appear to have received little attention. Employers should not underestimate the inevitable impact of the UK's exit from the EU: it is clear that, even with a deal, existing EWCs will be affected, and so the real question is not whether, but how much and to what extent.*

## Executive summary

**Since a Brexit deal was struck, leading to an effective Brexit on 31 January 2020**, in line with the Withdrawal Agreement (as amended on 19 October 2019), the legal framework for EWCs will remain unchanged until the end of the transition period on 31 December 2020.

**As of the end of the transition period**, the impact of Brexit will vary, depending on the terms of the future UK-EU relationship currently unknown and unpredictable, but certainly also on the terms of the EWC agreement.

Specific arrangements for EWCs could be adopted in the future EU-UK relationship, taking inspiration for instance in the EFTA-EU arrangements, which will then govern the future of EWCs with a UK headquarters/content/component. In the current political climate, it seems quite unlikely that arrangements similar to the EEA arrangements will be agreed between the parties.

Absent such specific arrangements, for EWCs which are not governed by UK law, the critical concern will be the future of UK delegates on such EWCs. The default position is that UK employees will no longer be entitled to have representatives on the EWCs, and the UK delegates' seats will need to be reallocated, unless the parties to the EWC agreement agree otherwise.

Those governed by UK law will need to designate another EU country to govern the EWC. This article sets out the requirements to be satisfied in order to select a new governing law. The choice of law has strategic implications for the composition of the EWC, its decision-making process, its standing in court, and will also result in the EWC becoming subject to the national legal concepts, industrial relations customs and culture of the chosen law. The governing law may therefore also affect the ease of managing and operating an EWC.

Where this applies, the choice for a new governing law - if not already made, should ideally be made well before the end of the transition period (so well before 31 December 2020) to have its full effect.

## During the transition period

As the Withdrawal Agreement (as amended) has been approved by UK Parliament there is a degree of certainty surrounding the treatment of EWCs for the transition period (which in principle expires at the end of 2020). The Withdrawal Agreement stipulates that EU law will remain applicable in the UK until 31 December 2020. As the key legal framework for EWCs is set out by and derived from EU Directives, the approval of the Withdrawal Agreement effectively means that nothing will change. Existing EWCs, irrespective of whether they are subject to UK law, shall continue to operate as before, and any UK delegates will be unaffected. For companies that are, on the date of the UK's exit, still in the process of negotiating the establishment of an EWC with a Special Negotiating Body, specific issues are likely to arise dependent on the circumstances.

Employers should be warned that this continuity will cease when the transition period ends. Much will then depend on how the future relationship between the EU and the UK unfolds.

## After the transition period, from 2021 onwards

### (1) Specific 'EEA like' arrangements

Possible specific arrangements may be comparable to those which currently govern the relationship with EFTA countries (Norway, Liechtenstein, and Iceland). Under those arrangements, the different EFTA countries have enacted regulations (by way of statutes, collective agreements or otherwise) transposing the provisions of the EU EWC Directives in their national laws. The result is that the EWC rules apply indiscriminately throughout the European Economic Area (EEA).

In the rather unlikely event that the future relationship between the UK and the EU would resemble that of EFTA and the EU, the result may well be that all currently prevailing rules and practices on EWCs will continue to apply after the end of the transition period. This would require the UK, amongst others, to maintain the current Transnational Information and Consultation of Employees (TICE) Regulations in effect, in a manner compatible with the EU EWC Directives.

### (2) No specific arrangements governing EWCs

Unless specific provisions or arrangements are being agreed with respect to EWC's in the context of the future relationship between the EU and UK, the post-2020 situation will be one where the UK is treated like any other third country (the USA, Japan, Canada etc).

#### a) Impact for non-UK EWCs

For EWCs that are not governed by UK law, in the event of future relationships without particular provisions on EWCs, the main question will be the future status of UK employee delegates on EWCs. The employer's management and trade unions, as the parties to the EWC agreement, have the discretion to negotiate and agree on their future. Potential options include retaining the UK delegates on board as employee representatives, deciding that they should leave the works council entirely, or defining a new 'observer' status for them. Without an agreement with all parties involved, the fall-back position is that the UK

delegates would have to leave the EWC, as they will become 'uninvited' non-EU delegates. This would lead to the necessary reallocation of mandates between the remaining employee delegates. In any event, irrespective of their continued presence on any EWC, the statutory protection of UK delegates (as employee rep) may well vanish.

The parties to the EWC agreement may also decide on the eligibility of UK nationals to be appointed as 'experts' during the initial establishment negotiations and/or the operation of a works council.

Companies should also assess whether the departure of the UK from the EU will result in their overall EU headcount falling below the threshold of 1,000. In those circumstances, there may well be a case for disbanding the EWC entirely. Neither the EWC Directive nor any relevant national laws provide for clear guidance on the dismantling of an EWC.

### b) UK-governed EWCs: direct impact

Brexit without particular provisions governing EWCs after the transition period will have critical consequences for existing EWCs which are governed by UK law. There are approximately 150 active EWCs in this category. These encompass both UK headquartered companies/groups (such as BT, NatWest and ICI), where the EWC is legally obliged to be governed by UK law, but also non-EU headquartered companies/groups, which either have the highest headcount in Europe located in the UK or have chosen their agent or representative within the EU to be based in the UK (including companies/groups like General Electric, Kellogg's, Rank Xerox, Honda, Fujitsu, Mondelez, Kühne & Nagel, McCain, Verizon and Hilton).

Works councils governed by the laws of a non-EU country do not satisfy the legal requirements to be an EWC, and therefore, upon exiting the EU, the UK will no longer be able to validly host an EWC.

### c) UK-governed EWCs: governing law

As a result, affected EWCs will have to find another 'home country' in a remaining EU Member State in order to continue to operate.

There are two possible methods for determining a new governing law:

i. The company's management can proactively appoint a representative agent in any EU Member State of their choice, provided they have established a legal presence in that country; or

ii. In the absence of an active management choice, the law of the EU Member State with the highest headcount of the group within the EU will be applied (calculated according the EU regulations).

While the decision may appear to be a clinical, mechanical or innocent choice, this is far from the truth. To the extent that the company has a choice, the determination of the governing law of the EWC is one of the key strategic issues


for companies to decide upon.

This is not a legal fantasy, but a hard business reality. The governing law selected will also subject the EWC to that country's entire legal system, including employment law, industrial relations culture and practice, civil procedure rules and data protection laws, to the exclusion of any other legal system or industrial relations framework.

Some key aspects of an EWC directly affected by the chosen law include:

- the composition of the works council (whether it consists of employee representatives only, or as a joint body of employees and managers) which influences the confrontational or constructive nature of information and consultation activities,
- the decision-making process and rules within the EWC, i.e. by majority vote or consensus or otherwise,
- its entitlement to bring a court action, or to engage in arbitration, and hence the risk of judicial conflict,
- the enforcement of the I/C rights entrusted to the EWC,
- the application of national interpretations of EWC concepts (such as the definition of 'consultation', the existence of works council 'opinions', or the use of external experts),
- its assimilation within a national culture and tradition of industrial relations, which may be more confrontational and more ideological, or rather more compromise-driven and pragmatic, and which can be a key factor if the company anticipates structural change, important trans-formations or heavy disruption in the foreseeable future.

All of these elements and many more, are affected by the mere choice of a national law governing the EWC. A well-considered choice of governing law can thus be instrumental to ease the burden of operating and managing an EWC.

A comparative assessment of a series of parameters and criteria between potential host countries is highly recommended. The company should therefore shortlist a number of EU Member States, where it has a legal presence (in order to be able to serve as an agent), and where the above criteria are most favourable, particularly within the market where, or under the economic circumstances of which the company operates.

Choosing another or a new home (governing law) for an EWC does not need to be negotiated or agreed with trade unions or the employee delegates. As stated above, either management appoints an agent or representative in any EU country with a corporate presence or it allows the 'highest headcount' rule to prevail. Neither of these options requires the involvement or agreement of employee delegates or trade unions. Although the trade union movement has objected to this type of 'forum shopping', this rule remains clear, settled and unchallenged.

**Bird & Bird has prepared a comparative table covering a number of EU Member States (including Ireland, Belgium, France, Germany, Sweden, Italy and The Netherlands) with relevant parameters and criteria (as indicated above) to assist companies in making that choice.**

### d) Timing of the choice of governing law

Although there are no legal requirements under EU law, we would certainly advise companies to select a new governing law as soon as possible, well before the expiry of the transition period. If the implementation of Brexit without particular post-2020 provisions materialises, this will minimise disruption by ensuring that a valid governing law is in place, and will avoid the risk of involuntary imposition of the 'highest headcount' rule.

The current political situation is inspiring many companies with EWCs governed by UK law to urgently consider these issues and take appropriate action in this respect.

Please do not hesitate to reach out to our experienced team if you require tailored advice on the impact of Brexit for your European Works Council.

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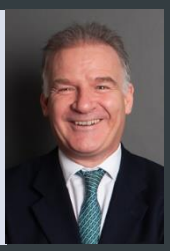

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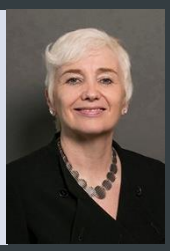

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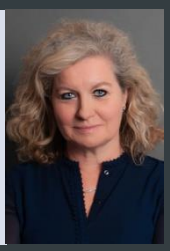

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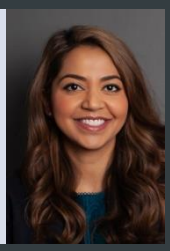


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