

Bird & Bird & European Works Councils

Update - The potential impact of Brexit on European Works Councils



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The potential impact of Brexit on European Works Councils – an 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, with or without a deal, existing EWCs will be affected, and so the real question is not whether, but how much and to what extent.

Executive Summary

If a Brexit deal is still struck by 31 October 2019, in line with the Withdrawal Agreement, the legal framework for EWCs will remain unchanged until the end of the transitional period, on 31 December 2020 or at any later date as agreed.

In the – more likely - event that no deal is agreed between the UK and the EU by 31 October 2019, the impact of Brexit will vary, depending on the terms of the EWC.

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 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 should ideally be made before 31 October 2019 to have its full effects. Given the extension of the deadline for reaching a deal, and the imminent risk of a 'no deal Brexit', many companies have already started that process and have engaged in this exercise.

In the event of a deal

If the Withdrawal Agreement is still approved by UK Parliament, there is a degree of certainty surrounding the treatment of EWCs for the transitional period (which in principle expires at end 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 potential approval of the Withdrawal Agreement would effectively mean 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 transitional period ends. All will then depend on how the future relationship between the EU and the UK unfolds.

No deal Brexit

In light of recent political developments in the UK and the unpredictability of future events, the risk of the UK leaving the EU on 31 October 2019 without a transitional agreement in place is becoming more realistic by the day.

a) Impact for non-UK EWCs

For those EWCs which are not governed by UK law, in the event of a 'no deal' Brexit, 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.

b) UK-governed EWCs: direct impact

A 'no deal' Brexit 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, Marks & Spencer 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 nor viable to validly host an EWC.

c) UK-governed EWCs: governing law

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

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

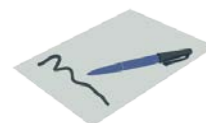
- i) The company's management can proactively appoint a representative agent in any EU Member State of their choice, provided they have established a legal presence in that country; or
- ii) In the absence of an active management choice, the law of the EU Member State with the highest headcount of the group within the EU will be applied (calculated according to 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 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 which are 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 transformations 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.

a) Timing of the choice of governing law

Although there are no legal requirements under EU law, we would advise companies to select a new governing law by 31 October 2019. If a 'no deal' Brexit 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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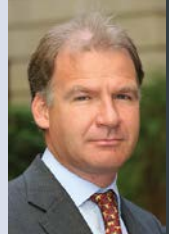
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