

## Anticipating the impact of Brexit on multinational companies

### Joint European Trade Union Federations' Recommendations to EWC/SE Coordinators and worker representatives in SNBs, EWCs and SEs

April 2020 (update)

#### Brexit: current state of play

On 29 March 2017, the United Kingdom (UK) formally notified its intention to leave the European Union (EU). On 31 January 2020, the UK left the EU and entered a transition period during which all EU laws continue to apply to and in the UK. At the time of writing, the transition period is set to end on 31 December 2020. Should the UK and the EU both agree, the transition period could be extended up to a further two years, until end 2022. While UK Prime Minister Boris Johnson has repeatedly rejected that option, the disruption in the UK-EU negotiation caused by the Covid-19 crisis is putting the extension option back on the negotiation table.

Indeed, negotiations on the new relationship between the UK and the EU are ongoing, but their outcome remains so uncertain that it makes any prediction about the future very difficult. Different scenarios are still on the table, including that of a possible no deal.

Against this background, what happens to workers' rights originating from EU law once the transition period is over remains unknown.

In 2018, the UK adopted legislation<sup>1</sup> according to which direct EU law (EU regulations and decisions), as well as UK laws which transposed EU directives (such as the EWC Directive), will automatically be transferred into UK domestic law at the end of the transition period. This is meant to allow UK institutions to unilaterally decide thereafter which pieces of legislation will be maintained, changed, or repealed.

**Concerning EWCs**, the UK government has announced that it "will make sure the enforcement framework, rights and protections for employees in UK EWCs" will continue to be made available as far as possible once the transition period is over<sup>2</sup>. Moreover, the UK government "would encourage businesses to continue to allow UK workers to be represented on EWCs on a voluntary basis". The use of caution wording ("as far as possible", "would", and "on a voluntary basis") indicates that no legal certainty is to be expected from the UK government.

<sup>1</sup> The [European Union \(Withdrawal\) Act 2018](#).

<sup>2</sup> See [Guidance: workplace rights from 1 January 2021](#) published by the UK government on 8 August 2019.

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## Our trade union guiding principles

European trade unions reject a 'hard Brexit' which would not be beneficial either for workers in the UK or workers in the EU. Workers on both sides of the Channel have shared concerns about the future: existing workers' rights must be protected and there should be a common level playing field so that the UK continues to uphold EU employment and social standards<sup>3</sup>. Preventing social dumping and a race to the bottom is fundamental.

Transnational solidarity, which has been fostered over the years in EWCs and SEs, must grow even stronger. It is more than ever needed to fight attempts by multinational companies to jeopardise workers' rights or use Brexit to play off workers and sites of different countries against each other. Trade unions and worker representatives in multinational companies must therefore ensure that:

- **Information, consultation, and participation rights are not watered down.** Workers' right to a strong say on envisaged company decisions and their potential social consequences is a fundamental right which must be safeguarded for workers across Europe.
- The **likely impact of Brexit** on both the Special Negotiating Body (SNB)/European Works Council (EWC)/Works Council and board of companies under the *Societas Europaea* statute (SE), as well as on company strategy, is to be discussed as early as possible. European Trade Union Federations stand for a genuine **anticipation and management of change in a socially responsible way** and will not let multinational companies use Brexit as an excuse to trigger attacks on terms and conditions of employment.

The magnitude of the challenge requires careful anticipation: more than 700 multinational companies which have established an EWC or adopted the SE statute have operations in the UK; at least 2,400 representatives of UK workers in EWCs and SEs are wondering about their future; and the situation of the ca. 140 EWCs and SEs based on UK law remains a moot point.

**Now is the time to act.** The European Trade Union Federations have thus jointly adopted and then updated the following recommendations to EWC and SE Coordinators, as well as to worker representatives in SNBs, EWCs and SEs.

### #1. A transition period is running! Nothing changes until (at least) 31 December 2020

The only certainty is that, at present and at least until end December 2020 (unless the transition period is extended), European law still applies in the UK. Although the UK is formally no longer a member of the EU, a transition period is running during which the UK is covered by all EU laws<sup>4</sup>.

The situation of EWCs and SEs based on UK law, as well as the situation of UK representatives in SNBs, EWCs and SEs **thus remains unchanged for now**.

The same rights and duties are secured and continue to fully apply. Should multinational companies question the right of UK representatives to participate in SNBs, EWCs, SEs or any other EU activities, or whether certain obligations still apply, it should be made crystal clear that **nothing at all has changed as yet**. Should

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<sup>3</sup> See ETUC positions [On the future partnership between the UK and the EU](#) (December 2017) and [Laying the foundations for a level playing field – ETUC statement on the future EU-UK partnership](#) (March 2018).

<sup>4</sup> See the European Commission's explanation of the transition period ([online HERE](#)).

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management insist on excluding UK representatives from the SNB, the EWC or the SE-Works Council (SE-WC) or SE corporate board, please immediately inform your European Trade Union Federation (see contact list at the end of the document).

This also means that UK-based multinational companies that fulfil the legal requirements to establish an EWC are still obliged to launch the establishment of an SNB if an official request has been submitted.

## **#2. If UK representatives sit on your EWC, SE-WC or SE board: Take an active role in securing their rights**

Given the current level of uncertainty, it is absolutely crucial to ensure that UK workers will still be represented in EWC and SE Works Councils as well as on the board of SE (when applicable) whatever scenario prevails. The situation may differ from one company to the next. The European Trade Union Federations therefore recommend **a flexible case-by-case approach**.

### **Step 1: Review the EWC/SE agreement to see if it needs adaptation**

Some agreements already include provisions on the representation of countries from outside the European Economic Area (EEA) whose member(s) enjoy the same rights, prerogative and protection as the other members in the EWC, SE-WC or SE board. In this case adaptation may not be necessary.

Should representatives of non-EEA countries sit on the EWC, the SE-WC or the SE board with an observer status only, or without the same rights as the other members then step 2 (below) applies.

**Step 2: In cases where adaptation is needed**, it is important to define the scope of the change by amending the EWC/SE agreement (which can be done also in an appendix). The European Trade Union Federations propose the following clause which can be adapted to suit the specific needs of the respective EWC/SE:

In the event that the EWC [SE] Directive (transposed into TICER 2010) [(transposed into the European public limited-liability company regulations 2009)] is no longer applicable to the UK at the end of the transition period, the parties agree that the UK will continue to be fully covered by this agreement and that the EWC [SE Works Council] will remain competent for all transnational issues in relation with the UK.

The EWC [SE Works Council] members from the UK shall continue to enjoy the same prerogatives, rights, and protection as the other members of the EWC [SE Works Council] as outlined in this agreement.

The following arguments can be brought forward when discussing the negotiation, renegotiation or simply adaptation of your EWC/SE agreement with the Management.

Firstly, the Recast EWC Directive (art. 1, §6) foresees the possibility for companies to decide on a wider scope of application than the EU or EEA alone. The European Trade Union Federations have a long-standing experience in securing the participation of workers from non-EEA countries (e.g. Switzerland and EU candidate countries) in EWCs and SEs.

Secondly, even before the EWC Directive applied in the UK (as from December 1999), the vast majority of multinational companies with an EWC voluntarily decided to include representatives of UK workers although there was no legal obligation to do so. Excluding them now would be unreasonable.

Thirdly, a significant number of multinational companies have already agreed to adapt their EWC/SE agreement accordingly. See examples listed in the appendix.

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Such clauses should also help to ensure that the EWC/SE-WC remain responsible for cross-border matters concerning the UK. The rights of EWC/SE-WC members, from all countries, to be informed about and consulted on transnational issues which also include the UK must be preserved.

### **#3. If your EWC/SE is governed by UK law: Take an active role in defining a new governing law**

Some multinational companies have decided to anticipate the uncertainty about the future legal status in the UK of the EWC/SE Directives and have already transferred their European representative agent from the UK to another EU country. Several non-European companies with EWCs headquartered in the UK may also decide not to wait for the outcome of negotiations with the EU and to transfer their European seat without delay.

**We must ensure that the choice of the new applicable national law is driven by an objective criterion and not just a management desire to take advantage of the situation to move to a low-standard country.**

Do not wait for the Management to unilaterally decide where to relocate its representative agent in the EU hence, where to relocate your EWC agreement: be proactive and suggest to discuss this together now.

Although choosing the European representative agent is a management prerogative, the goal is to negotiate an explicit clause based on the objective criterion already foreseen by the Recast EWC Directive (art. 4, §2):

Should the UK law transposing the EWC/SE Directive be repealed, the national law applicable to the EWC/SE will become the law of the country with the highest number of employees.

The European Commission heads in the same direction. In case of a “no deal” Brexit, it states that the new national law applicable to the EWC will automatically and immediately become that of the EU Member State employing the greatest number of employees, unless the company designates another EU Member State before the end of the transition period (by relocating its “representative agent” in that EU Member State)<sup>5</sup>.

However, in some specific instances, you may want to consider other criteria (i.e. country with the most favourable transposition law or case law, and/or country in which the European Management is headquartered).

N.B.: Should the Management be reluctant to negotiate where to relocate the EWC agreement with you, tell them they only have two options: negotiating with you or ending up in a very confusing, complex and costly situation. Indeed, a recent amendment to the UK EWC legislation<sup>6</sup> has created legal confusion because it directly conflicts with the above-mentioned European Commission position. It states that EWCs based on UK law will be obliged to continue to operate under that (recently amended then) UK EWC legislation in the event of a “no deal” exit. As puzzling and hard to understand as it is, this implies that those companies would be required to operate **two** EWCs:

- One EWC governed by that UK EWC legislation. UK employees will continue to be included in the EWC, but the EWC agreement will have no legal value outside of the UK.
- One EWC governed by another Member State legislation (as explained by the European Commission). UK employees may no longer be included in the EWC, but the EWC agreement will be deemed lawful across the EU.

Claim that legal certainty, as provided for by the European Commission’s interpretation, is in the benefit of all and that both parties will be better off by negotiating now where to relocate the EWC agreement.

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<sup>5</sup> See the [European Commission’s preparedness notice on EWCs published in April 2020](#).

<sup>6</sup> The TICE regulation was amended by [The Employment Rights \(Amendment\) \(EU Exit\) Regulations 2019](#).

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## #4. Put Brexit on your EWC/SE agenda: Anticipate change in company strategy and businesses

Securing the future of jobs of all European workers will be key as multinational companies might revise their strategies in the light of the consequences Brexit could have on integrated production networks, supply chains and internal trade with the EU.

The European Trade Union Federations strongly recommend putting Brexit as a recurring item on the agenda of your EWC / SE meetings, asking management to provide early information and conduct consultation on the following:

- Forecast of the possible impact of Brexit on the **financial and economic situation, including debt capacity;**
- Forecast of the possible impact of Brexit on the **development of productions and sales, all along the supply chain, in all countries;**
- Forecast of the possible impact of Brexit **on trade and in particular on the import costs of raw materials;**
- Current situation and forecast of the possible impact of Brexit on **employment in all countries and especially in the UK;**
- Forecast of the possible impact of Brexit **on investment plans in all countries;**
- Possible **transfers of production, divestments, cutbacks and closures** resulting from Brexit
- Possible relocation of the European headquarters (from or to the UK).

It is crucial to request to be informed and consulted also on any envisaged countermeasures.

## #5. Have a look at the number of employees per country!

In some instances, the mere existence of the EWC might be called into question as a consequence of the UK leaving the EU. Should the UK headcount no longer be taken into account, some multinational companies will fall below the threshold for establishing an EWC (at least 1,000 employees in the EU/EEA; in at least two undertakings in two different countries with at least 150 employees each). Uncertainty prevails as to the concrete consequences this may have.

In order to pre-empt possible issues, the European Trade Union Federations recommend that each EWC review the distribution of the headcount per country and **assess whether there is a risk of falling below the minimum threshold should the UK headcount be excluded.**

Should that be the case, the EWC chair and/or Coordinator is/are requested to immediately inform the secretariat of their respective European Trade Union Federation (see contact details below) to discuss a possible course of action on a case-by-case basis.



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## Appendix: examples of adapted EWC/SE agreements

Ardo	In the event that the UK is no longer a member of the European Union or EEA and the TICER Regulations are no longer applicable to UK employees, Ardo will continue to allow UK employees to be covered by this agreement and allow UK representation with full rights as outlined in this agreement.
Asahi AEL	In the event of a country leaving the European Union or the European Economic Area, this country shall remain within the scope of this Agreement.
Cargill	The United Kingdom shall also continue to fall within the geographical scope of this Agreement, regardless of the future position of the United Kingdom in the European Union and/or the EEA.
ETEX	Even if a Brexit would happen, management and the EWC agree that the UK shall remain fully within the scope of the EWC agreement. EWC members from the UK shall be treated as all other EWC members as if the UK would still be part of the EU.
General Electric	In the event that the UK ceases to be a member of the EU or the EEA it shall nevertheless continue to fall within the scope of this agreement.
Korian Group	This agreement applies to subsidiaries or facilities located in one of the 28 EU Member States that leaves the EU. Any such countries shall remain members of the [European Works] Council.
Kuehne+Nagel	Any founding country of the EWC as established in 2014 and listed in Annex 1 of the Agreement will remain part of the Agreement irrespective of the country's EU and/or EEA membership status at present or future times.
LafargeHolcim	The present agreement is applicable to all LH Group Companies present in the EEA, plus Switzerland, and shall include acceding countries in keeping with the obligations laid down in Directive 2009/38/EC, or countries leaving the EEA.
Rockwell Collins	The UK will continue to be fully covered by this EWC agreement after Brexit.
UTC Fire & Security	The UK will continue to be considered as a participating country and will continue to come within the scope of the agreement as indicated in art. 1 of the current agreement regardless of its membership status with the EU.