

Brexit and European Works Councils: A confused scenario*

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Brexit has finally arrived and its consequences are still unpredictable. This exit is unique in European Union history, as are its effects on economies, transportation, and workers. While the Withdrawal Agreements signed by the European Union and United Kingdom aim to soften the economic effects and grant a stable collaboration, there are some loopholes that could deprive British workers of rights that they enjoyed during their membership in European Union, such as transnational information and consultation rights enshrined in the art. 27 of the Charter of Fundamental Rights in the European Union and disposed by Directive no. 2009/38/EC: a Directive that no longer applies in United Kingdom since January 2021. This essay retraces and contextualizes the effect of Brexit on Directive no. 2009/38/EC, mainly known as European Works Councils Directive. The analysis deals with the exclusion of British workers and British representatives from the rights of information and consultation granted by such Directive. Apart from the position of British representatives in many European Works Councils, also the fate of some of these bodies is at the stake due to the exclusion of British workers from the calculation threshold for their creation. This issue will be dealt looking at clarifications set out by the European Commission to face the several legal implications brought by Brexit in the context of European Works Councils.

Keywords: Brexit, European Works Councils, information and consultations procedure, withdrawal agreement, European Labour Law.

1. Introduction

Brexit has finally arrived and its consequences are still unpredictable. Due to the transition period between the United Kingdom and the European Union and to the dramatic effects of COVID-19 on the labour market, the impact of Brexit on British workers is still to be assessed in the medium and long run (Peers and Harvey 2020; Craig 2016). However, the debate on workers' rights related to Brexit is a fluent one. From one side, there is an ongoing discussion about the effects on domestic workers with the threat of a devaluation in terms of employment rights. From the other side, Brexit can have some indirect effects on the application of the Directive 2009/38/EC on European Works Councils¹ (hereinafter EWC) in the entire European Union, namely concerning the participation of British workers in meetings and for thresholds for the creation of such bodies.

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¹ 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 (Recast) // EUR-Lex. Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32009L0038> (accessed: 13.08.2021).

Since 1973, when the United Kingdom joined the European Communities², it is undeniable that European Union played a relevant role in increasing the level of protection of British workers. As noted by some commentators, “it is unquestionably the case that without EU influence, British labour law textbooks would be very much thinner, lighter and cheaper” (Countouris and Ewing 2019). Working time, Business restructuring, equality, atypical forms of work are some of the areas where the European Union influence over the British legislation is tangible, creating a minimum level playing field in terms of rights and protection for British workers.

While most of these areas will be tough to be dismantled in the short run because already translated in the domestic legislation and daily applied in workers’ life, Brexit, instead, has a dramatic and instant effect over the EWC Directive and the rights of transnational information and consultation enshrined in it. Since the exit from the European Union, there are no more rules concerning the information and consultation of British employees working in European firms and groups of undertakings as the Country regained the status of a non-European Country (third Country)³. As stated by a European Commission’s communication, entitled “UK withdrawal and EU rules on European Works Councils”, issued in April 2020, British workers should be excluded from the calculation of the workforce that applies in the context of the establishment of an EWC. According to the Directive 2008/38/EC, an EWC must be established where there are at least 1000 employees in the European Union or the European Economic Area and when at least two establishments in two different Countries have at least 150 employees each (or two companies in case of a group) (Senatori 2018). Due to the exclusion of British workers from this calculation mechanism, there are many implications at the stake, such as the consequences for already existing EWCs in the European Union that will lose a consistent piece of the workforce for their legitimacy, the fate of British representatives in these bodies, their role and the modification of the applicable legislation for EWCs based on United Kingdom Law or with the central management in the United Kingdom.

These topics will be pivotal in the essay, evaluating the effect of Brexit over the set of norms for a European Works Council or a transnational information and consultation procedure concerning Community-scale undertakings and groups of the undertaking, looking at the context and the new status of Non-European Country regained by the United Kingdom.

2. Basic research

2.1. *Brexit and EWC: a problematic context*

As briefly anticipated, Brexit will have an immediate effect on the application of the Directive 2009/38/EC in the entire European Union, mainly due to the importance of the British workforce for the creation and functioning of EWCs. As noted by The

² From 1 January 1973, the United Kingdom became a Member State of the European Communities (now EU), principally the European Economic Community, European Coal and Steel Community and Euratom. On 29 March 2017, the British Prime Minister May triggered art. 50 of the Treaty on European Union for the exit from the European Union. After two years of intensive negotiations and being threatened by a No-Deal scenario, both parties agreed on a Withdrawal Agreement that sets the exit from the EU on 31 January 2020.

³ Except for the case when national legislation expressly refers to the United Kingdom instead of the generic “Member State”.

European Trade Union Institute, Brexit will impact more than two-thirds of EWCs due to the presence of United Kingdom representatives in these bodies (De Spiegelaere, Jagodziński 2020). Moreover, about 15% of EWCs are based on United Kingdom national law, obliging these bodies to renegotiate a new legal basis to avoid future problems with the Central management of the undertaking (or groups of undertakings) or being in breaching with European Union law (De Spiegelaere, Jagodziński 2020). It will also have an implicit effect on the future opportunity for the creation of new EWCs in undertakings or groups where they are now lacking. The United Kingdom will no longer be included in the calculations regarding the employee thresholds that determine whether a company falls within the scope of the EWC Directive or not. Some undertakings, due to the exclusion of British workers, will no longer be subject to the rights and obligations stemming from the Directive 2009/38/EC, indirectly neglecting the possibility for European workers to exercise their rights for information and consultation procedure at a supranational level.

The European Commission is aware of the possible consequences brought by the exit of the United Kingdom, in respect of the conspicuous number of British workers employed in MNEs and the Community-scale undertakings. At the same time, another concern stems from the situation where the Global or European headquarters of the Community-scale undertaking was based in the United Kingdom: a situation that happened in more than 16% of EWCs. This case would request major attention both on the research for a new Central management location in a Member State and the discussions related to the presence of third Country representatives.

2.2. How to deal with Brexit?

European Commission sets out a Communication with the aim of clarifying how to deal with Brexit in the short run. Having in mind that the United Kingdom is now a third Country, neither a Member State nor included in the European Economic Area, European Commission highlighted its exclusion from the scope of application of Directive 2009/28/EC.

This exclusion has some implications that European Commission tried to focus on, and on which tried to prepare EWCs.

Firstly, according to art. 2 of the Directive 2009/38/EC, an EWC could be created if there are at least 1000 employees in the European Union or the European Economic Area and when at least two establishments in two different Countries have at least 150 employees each (or two companies in case of a group). Due to Brexit, the exclusion of British workers will affect the existing EWCs and in case “the relevant thresholds [would] no longer be met at the end of the transition period, a European Works Council, even if already established, will no longer be subject to the rights and obligations stemming from the application of Directive 2009/38/EC”. However, the abolition of an EWC is not automatic and it seems quite controversial that the Central management of a Community-scale undertaking (or group of undertakings) could invoke Brexit for the closure of already existing EWCs, being more an option than an obligation. In fact, during the transition period and even before the publication of the “Withdrawal Agreement” between the United Kingdom and the European Union, the impact of Brexit has been discussed and, in some cases, already resolved. Some Community-scale undertakings, such as General Electric, Cargill,

Coca Cola and Centrotec⁴ have already negotiated a renewal for their EWCs, even deciding the fate of British workers and representatives (De Spiegelaere, Jagodziński 2020).

The theme of the fate of British workers and their representatives is in a certain sense, the biggest challenge for Trade unions, as well as their role and voting prerogatives.

Even if British workers are not taken into consideration for the calculation related to the establishment of an EWC or its existence, the Directive 2009/38/EC, namely art. 1 (6) in conjunction with art. 6 (2) (a), allows for the participation of representatives from third Countries in such body. However, the possibility granted by the Directive needs to be negotiated during the establishment of the EWC with the central management or renegotiated for an already existing one, to determine the role of United Kingdom representatives within this transnational body. Such negotiations should refer to the participation of United Kingdom representatives as ordinary members with voting rights or as simple observers, defining specific rules for their participation, terms for their renewal and specific methods of appointment, as reported by a Joint European Trade Union Federations' Recommendation to EWC in 2021⁵.

General Electric and Coca Cola, for example, introduced a clause stating that United Kingdom representatives could continue to be members of the already existing EWC, maintaining their voting rights and granting consultation and information rights for British workers even after Brexit.

There's only one case in which such negotiation is ultroneous, namely when the domestic legislation expressly refers to the United Kingdom in the scope of application of the relevant EWC transposition being, at the same time, the applicable legal basis for that specific EWC. A situation that is quite peculiar and inapplicable in European Countries such as Italy⁶ or France⁷ where there is only a generic reference to Member State. However, even if it seems quite impossible at the time for several political reasons related to Brexit and relations with the United Kingdom, in case of a national revision of the domestic legislation on EWCs such direct reference could be inserted if there's the willingness to include British workers without any need for negotiations.

A third implication is connected with the legal basis applicable to the existing EWC. According to the European Works Councils Database, there are 102 EWCs⁸ with their headquarter in the United Kingdom and that refer to British Law as the legal basis for disputes between central management and EWC's representatives. Normally during the negotiation between Central management and the Special negotiating body, namely the committee formed by representatives from each Country with the role of determining the scope, composition and function of the EWC, the legal basis for the EWC is appointed considering the Country where there is the Controlling undertaking, seen as the one that

⁴ Centrotec excluded British Workers from the European Works Council // EWC News. 27.12.2019. Available at: <https://www.ewc-news.com/en042019.htm> (accessed: 13.08.2021).

⁵ For Etuc recommendations on Brexit see: Managing 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. 2021. January. Available at: https://www.etuc.org/sites/default/files/2021-02/ETUF%20recommendations%20to%20EWC%20SE%20on%20Brexit_Jan%202021%20update%20EN.pdf (accessed: 13.08.2021).

⁶ Art. 2, Legislative Decree no. 113/2012.

⁷ Articles L. 2341-1 and seq. of the French Labour Code.

⁸ At the time of writing, there are 1198 EWCs and other procedures of information and consultation in the EU. For detailed data see: <http://www.ewcdb.eu/stats-and-graphs> (accessed: 13.08.2021).

can “exercise a dominant influence over another undertaking by virtue, for example, of ownership, financial participation or the rules which govern it”. The European Commission Communication clarified the need to set a new legal basis for the already existing EWC in another European Union Member State, to ensure that the rights of employees under Directive 2009/38/EC remain enforceable within the European Union.

To this issue is referred also the location requirements set by the Directive no. 2009/38/EC. In fact, according to art. 4 (1–2), the Central Management of the Undertaking or group of undertaking must be situated in the European Union, obliging those with the Central management in the United Kingdom to relocate its offices within an EU 27 jurisdiction. To avoid any delay in this relocation, European Union Commission imposes an automatic transfer in a Member State already provided by Directive 2009/38/EC, as specifically set by art. 4 (2) and art. 4 (3), in the Member State that host the undertaking with the largest workforce⁹.

3. Conclusions

EWCs have never acted as trade unions, they are a “symbolic and significant development in the history of social partnership” (MacShane 2017). Their main role is to share information about changes, investments and closures in other undertakings belonging to the same company but abroad. An information mechanism that is highly beneficial to discuss and solve problems before they turn conflictual and, in a certain sense, European and global. A right that is also enshrined in the art. 27 of the Charter for Fundamental Rights in the European Union (Ales 2018) and that is more and more actual after the COVID-19 Pandemic, where information about strategies adopted in abroad partner companies played an important role in limiting the disease at the workplace, giving data on the remote-work experiences, about agreements at different levels on short-time work arrangements with a fair wage compensation or the measures adopted for a safe return to work (EPSU 2020). Information that even during the Pandemic has been shared among EWC’s national representatives digitally, through video-call and video-meeting, or through surveys submitted among them, allowing the EWC to actively play an essential role in managing this unprecedented health crisis and protecting workers’ interests¹⁰.

Brexit deprived British workers of this Transnational Social Dialogue net, apart from a limited percentage of them only in cases where the Central management decided to maintain British representatives in their EWCs. However, while most British workers are now excluded by the rights of information and consultation, United Kingdom Companies employing more than 1,000 workers with operations employing 150 workers or more in two or more other European Union member states will still not be able to escape the obligation to set up an EWC and pay for its operation. This is one of the several loop-

⁹ The relocated Central Management is named “Deemed central management” and will act as the official one. New Central management could be appointed after a new round of negotiation at the EWC level.

¹⁰ This is the case of BASF where the EWC requested to share information through a survey. Similarly, Lafarge Holcim, a Swiss multinational company in the manufacturing sector, shared information to EWC representatives not only about internal strategies but also about supply chains: Anticipating and managing the impact in multinational companies Joint European Trade Union Federations’ Recommendations to EWC/SE Coordinators and worker representatives in SNBs, EWCs and SEs. 2020. March. Available at: <https://www.epsu.org/sites/default/files/article/files/ETUF%20joint%20reco%20to%20EWC%20SE%20on%20Covid-19%20EN.pdf> (accessed: 13.08.2021).

holes that British workers and Companies will have to deal with during the first stages of Brexit. While EWCs and the transnational rights of information and consultation have been sacrificed for British workers, British companies, instead, are still obliged to comply with EU law and regulations, including European Works Councils, if they want to operate in Europe. A loophole that is even louder due to the obligation to set new Central management location within the EU, outside British borders, and to pay for the EWC operation in another Country with presumable languages barriers and higher operation costs. Controversial would be the situation where a British Company will be obliged to have an EWC, based in another European Country, granting information and consultation rights for European workers while depriving domestic workers of participation in this body.

Recalling the words of Denis MacShane, former British Minister for Europe until 2012, EWCs and the rights they were protecting are the first victims of the Brexit (MacShane 2017), paving the road for the future employment rights devaluation in the United Kingdom, mainly related to the areas where EU labour law have been more effective (Countouris and Ewing 2019). In a nutshell, European Works Councils are the first victim of an ongoing Labour Brexit, that will be achieved at the expense of the British workers in the future years.

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