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European Works Councils - 5

Brexit and EWCs

by Tom Hayes, BEERG

What is Brexit?

- Brexit is the decision taken by the British people in 2016, for the UK to leave the European Union.
- While a range of possible exits was available, the UK government decided to leave the EU completely, including the customs union and the single market.
- In so doing, the UK will put itself outside the framework of European law and the jurisdiction of the Court of Justice of the European Union (CJEU).
- Brexit will also make it more difficult for UK citizens to live and work in the EU.
- What does all of this mean for EWCs?

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When the UK is finally out

- After the UK leaves the EU's single market on Dec 31, 2020, it will no longer be possible to have EWCs subject to UK law because the UK will be outside the EU's legal framework.
- This means that were there to be a dispute between the EWC and management the dispute could not ultimately be resolved by the CJEU, nor would UK courts be obliged to take CJEU case law into account. Quite simple, UK jurisdiction stops at the newly erected UK borders.
- There are 2 types of EWCs which will need to find a new home:
  - EWCs in UK-headquartered companies which will still have sufficient employees in the EU to be within scope of the Directive
  - Non-EU headquartered companies which based their EWCs in the UK
- While there are no precise figures, there could be as many as 200 such EWCs.

Where to go?

- It has always been our view that the location of choice for EWCs existing the UK is Ireland.
- Why Ireland?
- One reason: language. Management should always seek, where possible, to work within a jurisdiction whose language is its own language. The complications of dealing in a second language are many.
- Also for reasons of the legal system, business environment and a supportive and stable political framework.

How to go? - 1

- Whether it is Ireland or elsewhere companies fall into two categories:
  - *Those with an EWC working under the Subsidiary Requirements,*
  - *Those working under an agreement.*
- Non-UK HQ companies working under the SRs are free to switch jurisdictions at any time. This was confirmed by the CAC in *HPE.*
- In *HPE* the management decided to switch from the UK to Ireland during an SNB process. The SNB challenged this decision. The CAC ruled in management's favour. So did a German labour court in the case of DXC.
- A key factor in the CAC's decision was the CJEU *Polbud* decision.

How to go? - 2

- However, if you have an agreement, things may not be so simple.
- An agreement is a contract signed by the two parties. The agreement will say that it is subject to UK jurisdiction. One party cannot unilaterally change the jurisdiction while the jurisdiction remains available and valid.
- However, at midnight on December 31 next the UK ceases to be a valid jurisdiction and the issue of an alternative jurisdiction reverts to Article 3:6 of the Directive which allows non-EU headquartered managements to decide on the appropriate jurisdiction.
- We advise that managements tell their EWCs that at midnight on December 31, 2020, the jurisdiction of the EWC automatically switches from the UK to wherever management has decided.
- This matter should not open to discussion or negotiation with the EWC.

What about UK representatives on the EWC?

- Once the UK falls outside the scope of EU law then UK employees will no longer be legally entitled to be represented on EWCs.
- The legal scope of EWCs is limited to EU and EEA member states.
- However, the wording in EWC agreements may allow UK representatives to stay on the EWC, at least in the short-term. So, check the wording.
- But, in the long-term they will have no legal right to be involved.
- But should they stay or should they go?

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Stay/go? – The case for Stay:

Some BEERG member companies argue STAY, saying:

- *The UK is a big and important country*
- *UK representatives have been constructive members of the EWC*
- *We don't want the disruption of dropping them*
- *Their colleagues like them*
- *For UK-based companies, it is our home market, we cannot exclude our home-market employees*
- *Who knows what might happen in the future?*

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Stay/go? – The case for GO:

While other BEERG member companies argue GO, saying:

- *We think the EWC should be limited to EU/EEA countries*
- *The UK decided to leave the EU. Therefore, it is outside the scope of the EWC*
- *Keeping UK representatives creates precedents for other non-EU countries, especially countries looking to join the EU. Turkey? Why not the US?*
- *What happens in "exceptional circumstances"? Should the UK be counted in?*
- *What happens if there is a dispute? Can matters in a non-EU country be taken into account by an EU court?*
- *We know the UK representatives may have been good and constructive but we should not let sentiment cloud our judgement.*

What to do?

- Ultimately, each company must decide in the light of its own circumstances, including its approach to employee relations.
- But, it seems to me that it would be wise for companies to be clear that if UK representatives do stay on the EWC that there are legal limits to their involvement because the UK has chosen to place itself outside the framework of European Union law.
- There is also the possibility that in the years ahead UK law will diverge from EU law, for example, when it comes to collective redundancies. But, that is for the future.

Other considerations

- As and from January 1, 2021, UK citizens will no longer be EU citizens. There will be new travel requirements.
- More importantly, UK citizens will lose EU freedom of movement rights. This means it will become more difficult for them to work in the EU, even on a short-term basis, unless there are agreements between the EU and the UK to the contrary.
- EWC meetings are work, and will fall within the ambit of whatever rules govern this in the future when it comes to UK citizens coming to the EU.
- None of this may matter if EWC meetings continue to be run virtually, as of now. But this may not always be the case.

UK experts 1

- UK EWC members coming to an EU meeting in Europe could fall into the category of an “intra-company” transfer. They are not earning anything extra for being there.
- Trade unions officials who act as experts and who are not paid could simply be regarded as visitors attending a conference, with the expenses paid by the host. And they could be seen as representing European trade union federations.
- But what about paid British experts? They are actually earning money while in the EU that they would not earn if they were not there. They are “exporting” services across a border. That may require permission. And relevant qualifications.

UK experts 2

- If a UK expert, from a country outside the EU, why not a US expert, for instance?
- What about confidentiality? If a non-EU expert were to break confidentiality where to hold them legally to account?
- At minimum, it seems to us that any experts should be EU citizens, accountable at EU law for their actions.

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So, that's it…

- Our walk through the Subsidiary Requirements
- And the impact of Brexit
- We hope these sessions have been of some use to you.
- If you have questions, just email and we can take it from there.

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Check out www.beergbrexit.blog