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Are European Works Councils ready for Brexit? An inside look

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Policy pointers

- Brexit will have an immediate effect on about 14% of all EWCs because they are based on UK national law.
- There are also UK representatives in more than 70% of EWCs.
- By 2018, most UK-based EWCs had already discussed the impact of Brexit. However, almost half of the EWCs with UK representatives had not yet discussed what will happen.
- Of those EWCs with UK representatives, most think the UK members will remain members of the EWC, quite a few do not know, and about 16% predict that they will not remain members.

Introduction

On 31 January 2020, at 23:00, the United Kingdom (UK) officially ceased to be a member of the European Union (EU). A few days prior, on 28 January, the UK had also formally withdrawn from the European Economic Area. Brexit had finally happened.

However, in practical terms, nothing much has changed yet. January 2020 marked the beginning of an 11-month transition period during which an encompassing post-Brexit trade deal between the EU and the UK should be negotiated. At the end of the transition period (31 January 2021) the UK will become a 'third country'. At the centre of these negotiations will be the question of what constitutes a 'level playing field', meaning the set of common rules and standards that ensure fair and open competition between businesses in the UK and the EU.

A commitment to maintain this level playing field is laid down in the (non-binding) political declaration of October 2019 which sets out the framework for the future relationship between the EU and the UK (EU and UK 2020): 'The Parties should [...] maintain environmental, social and employment standards at the current high levels provided by the existing common standards.'

The EU has made it clear that a level playing field must be maintained with respect to workers' rights, environmental protection, taxation and state aids for businesses. Yet UK Prime Minister Boris Johnson has insisted on the UK's right to diverge or move away from EU

rules and regulations. At the time of writing, it is entirely unclear what solutions, if any, will be found.

One of the many areas that will likely be directly affected with regard to workers' rights is the organisation and functioning of European Works Councils (EWCs). EWCs are company-level institutions set up in multinational companies (MNCs) to enable the provision of information to and consultation of employees on transnational matters. In EWCs, the central management of an MNC meets with employee representatives on a regular basis to discuss company strategy, employment issues and much more (De Spiegelaere and Jagodziński 2015, 2019).

Since their inception, over 1400 EWCs have been established, and approximately 1000 are in operation today (EWCdb.eu, April 2020), regularly bringing together employee representatives from different Member States of the EU and the European Economic Area (De Spiegelaere and Jagodziński 2015). EWCs are an (albeit imperfect)

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embodiment of social Europe as they provide an essential platform for employee representatives from all Member States to cooperate in order to defend the interests of the workforce across Europe, and because the law obliges management to discuss transnational employment matters with them.

Because EWCs are established in multinational companies, the regulatory framework for their functioning is laid down in EU directives which have been transposed into the national law of each Member State (Jagodźński 2015).

But what happens if a Member State leaves the EU? A notice of the European Commission of 21 April 2020, sets out to provide clarity (European Commission 2020). According to this 'notice to stakeholders', an impact can be expected in different areas:

1. The UK 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, and this might impact some EWCs as they would no longer be subject to the rights and obligations stemming from it;
2. The UK representatives will be considered as third-country representatives in EWCs ;
3. Companies whose central management or representative agent is in the UK will need to assign another representative agent in the EU;
4. It is highly recommended that in agreements establishing EWCs which refer to UK legislation, the applicable law be changed to that of another EU Member State;
5. There might be an impact on the composition of SNBs as the UK employees will be disregarded from the calculations; and
6. Brexit might lead to significant structural changes in some companies, which would thus require a full renegotiation of the existing EWC agreements.

In many EWCs, the impact of Brexit has already been discussed and in some cases largely resolved. For example, the EWC agreements at Ardo, Asahi ASL, General Electric, Korian, LafargeHolcim, UTC, Cargill, Yildiz Holding, Total, Coca-Cola, Bombardier, Rockwell Collins, Kuehne and Nagel, and Westinghouse have introduced clauses stating that UK representatives will continue to be members of the EWC even after Brexit has happened. In other companies, however, such as Centroteck, Lactalis and EPH, it was decided that representatives of the UK workforces would not or no longer be members of the EWC.

The European trade union federations distributed joint recommendations to the EWCs regarding Brexit (EFBWW et al. 2018, 2020). Among other things, these recommendations urged EWCs to:

- start discussions on the issue of Brexit as soon as possible;
- secure the rights of UK representatives by explicitly including them in the scope of the EWC's activities beyond 2020;
- ensure legal certainty by already choosing and applying an alternative legislation if the EWC is governed by UK law; and
- check if the company will still fulfil the employment threshold to qualify for setting up an EWC.

This policy brief contributes to this discussion and debate by providing insights from within the EWCs themselves. The European Trade Union Institute's (ETUI) large-scale survey of EWC representatives conducted between January and May 2018 (De Spiegelaere and Jagodźński 2019) sheds some light on how likely it is that EWCs will be affected by Brexit, whether they have already discussed its potential impact, and what EWC members think will happen to the UK representatives in their EWC.

How many EWCs will be affected?

In the EWC survey, the EWC representatives were asked several questions about Brexit and their EWC. It must be emphasised that it is not individual EWC members but rather an EWC as a whole that may need to negotiate a new legal basis or clarify the future status of its UK representatives. In this analysis, therefore, the answers of the individual EWC members are aggregated to represent their EWC as a whole. Furthermore, the percentages are weighted in order to better reflect the total EWC population. In summary, the figures in the table below should be interpreted as follows (to take the first example): 15.9% of all EWCs say the UK is home to the European or global headquarters of their company.

Table 1 provides the results of the EWC survey regarding those questions that help to assess the possible impact of Brexit in terms of (1) companies with their headquarters (HQ) in the UK, (2) EWCs that are based on UK legislation, (3) EWCs with UK representatives, and (4) EWCs with a membership which might fall short of the thresholds of the directive as a result of Brexit.

As can be seen, a significant minority of the EWCs will be directly affected by Brexit as they have their HQ in the UK (15.9%) or are based on UK legislation in terms of how they function (15.2%)¹. In line with the notice of the Commission, these companies and EWCs will need to assign a different representative agent for the former and applicable law for the latter.

However, many more EWCs will be affected because they have UK employee representatives. According to the EWC survey, this is true for no less than 70.2% of the EWCs (this aspect will be discussed in more detail in Part 3).

Lastly, only a few companies (according to the EWC representatives) will no longer comply with the directive's minimum threshold of at least 1000 employees employed within the EU and 150 employees in at least two EU Member States after Brexit. According to the EWC representatives, this would only be the case for 4.0% of the EWCs surveyed.

Table 1 shows that quite a lot of EWCs will be directly (due to the location of HQ or the applicability of UK law) or indirectly (due to the presence of UK representatives) affected by Brexit. It is thus vital that Brexit be discussed in the EWCs. According to EWC representatives, management had discussed the possible impact of

¹ This observation is in line with previous ETUI findings that drew on an analysis of EWC agreements in 2017 to observe that 12.4% of EWCs are based on UK law (ETUC and ETUI 2017).

Table 1 Brexit and EWCs

	No	Yes	Don't know/ no answer	N
The global or European headquarters of my company is in the UK	81.6%	15.9%	2.5%	365
The applicable national law of our EWC agreement is UK law	78.9%	15.2%	6.0%	365
There are employee representatives from the UK on my EWC	70.2%	27.2%	2.5%	365
After the UK leaves the EU, my company will no longer comply with the terms of the EWC Directive as it will no longer employ enough employees in different European countries	88.7%	4.0%	7.3%	365

Source: European Works Councils and SE works council survey 2018. For more information see De Spiegelaere and Jagodziński (2019)

Brexit in only about 40% of the EWCs (in early 2018). According to 53.7% of the EWCs, the issue had not yet been raised at all, and there was no response from 6.3% of the EWCs.

On the positive side, EWCs established in MNCs headquartered in the UK and/or EWCs based on UK legislation are more likely to have discussed Brexit than those that do not have such a direct connection to the UK², indicating that those EWCs which are directly affected by Brexit are more likely to discuss it beforehand.

Similarly, EWCs with UK representatives were much more likely to have discussed Brexit than those without (52.6% versus 11.1%). While it is positive that EWCs with UK representatives are more likely to have discussed the issue, it is also worrying that on the eve of Brexit only slightly more than one in two EWCs with UK representatives had discussed the issue. It is vital that the UK representatives know what their status will be after Brexit in the EWC.

Will UK representatives still be welcome in the EWC?

The main question is what will happen to the UK representatives who are currently active in EWCs. The declared policy of the (European) trade unions is to insist that UK representatives remain members of the EWCs even after the UK leaves the EU. Currently, quite some EWCs have non-EU members such as employee representatives from Switzerland, Norway or Turkey. The UK representatives could obtain a similar status as third-country employee representatives (European Commission 2020).

History also indicates that this is probable. Although the UK joined the EWC framework at a later date (Directive 97/74/EC entered into force in 1999), most EWCs had already decided to include their UK representatives as members prior to that date. Only eight agreements were found which explicitly excluded the UK from the EWC coverage (ETUC and ETUI 2017).

However, whether UK representatives can remain members of an EWC is clearly not just a technical issue. It is also a matter of principle; the idea of transnational solidarity means that when workers talk to

central management, they do so as representatives of all workers. As long as the company is still operating in the UK, excluding the UK representatives would effectively divide the European workforce and erode European-level employee voice in the company.

In the survey, the EWC representatives were asked whether they thought the UK representatives would remain members of the EWC after Brexit (Table 2). The overall picture is mixed. Based only on those EWCs with UK representatives, the results show that almost one in four (21.7%) EWCs indicated that they did not know whether the UK representatives would be able to retain their membership. The majority (62.2%) assumed that the UK representatives would remain members. However, a significant minority (16.2%) said that the UK representatives would no longer be invited to EWC meetings after Brexit.

Table 2 What will happen with the representatives of the UK after Brexit?

	UK representatives will not be EWC members anymore	UK representatives will remain as EWC members	Do not know	N
Total	16.2%	62.2%	21.7%	247*
BE	4.1%	63.2%	32.7%	16
FI	0.0%	74.3%	25.7%	12
FR	23.6%	65.0%	11.4%	37
DE	16.8%	57.0%	26.2%	43
NL	26.3%	60.5%	13.3%	17
SE	7.4%	72.0%	20.6%	13
UK	0.0%	80.7%	19.3%	18
CH	26.1%	45.2%	28.7%	18
US	11.4%	67.9%	20.7%	38
Other (not EEA)	13.5%	60.4%	26.1%	16

Source: European Works Councils and SE works council survey 2018
* These are the HQ countries of companies, yet only includes those countries in which more than 10 EWCs with UK representatives replied.

2 Of those EWCs in UK-headquartered companies, 61.4% said they had discussed the issue versus 37% of those with another headquarters. Of those with UK legislation as applicable law for the EWC, 63.4% said they had already discussed the issue versus 36.1% of those with another applicable law.

Representatives from companies who have their headquarters in the UK were much more likely to say that the UK representatives will stay members of the EWC, along with representatives from companies headquartered in Finland and Sweden. At the lower end were representatives from companies headquartered in Switzerland: of those, only a minority thought that the UK representatives would remain members of the EWCs (Table 2). Similarly, it seems more likely that UK representatives will not continue to be members in EWCs with over 15 members than in EWCs which count fewer members. Additionally, of those EWCs who had already discussed the issue explicitly with the management, about three in four said the UK representatives would remain members. Of those who had not yet discussed the issue, this was only one in two, with significantly more EWCs saying that they did not know yet or that the UK representatives could not stay after Brexit.

What this signals is that those EWCs who depend on the UK representatives in order to function (because they are headquartered there, because most of the employees are there, or because there are only a few representatives in general) opt more often to keep the UK representatives in the EWCs compared to EWCs where UK representatives only play a small role in the EWC.

Conclusions

In summary, based on a large-scale survey of EWC representatives conducted in early 2018, we observe that about 15% to 16% of EWCs will be directly affected by Brexit because their companies are headquartered in the UK and/or their EWCs are based on UK legislation. When Brexit is completed (or, at the latest, after the transition period has expired), they will be obliged to change their legislative base and assign a different representative agent in the EU.

Many more EWCs, however, will be affected because they have UK representatives in their EWC. This is the case for over 70% of EWCs. These EWCs will face the question of whether or not to keep the UK representatives once the UK leaves the EU, and if so, to ensure that there is an adequate legal basis for EWC members from the UK to exercise their rights.

Quite a large proportion of EWCs have already raised this issue with the management, mostly those that are headquartered in the UK or have UK national law as their legal basis. However, as many as one in two EWCs with UK members had not yet discussed the issue by early 2018 even though Brexit seemed imminent at that time.

Of those EWCs which have UK representatives, most indicated that they would remain EWC members even after the UK leaves the EU, while nearly one in six EWCs reported that the UK representatives would cease to be members. Surprisingly, as late as 2018 quite a few EWCs had not yet found an answer to the question of whether the UK will continue to be represented on their EWC.

This policy brief shows that the potential impact of Brexit on EWCs is not to be underestimated. Most EWCs will, in some way, need to address the consequences of Brexit. On the bright side, EWCs are discussing the issue and most have decided that UK

representatives can stay on boards, even after the UK leaves the EU. But in a considerable minority of EWCs, the UK representatives might lose their mandate. This would be a great loss for workers and the effective representation of their interests as well as a blow to transnational solidarity and, more broadly, democracy at work.

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