Significant structural changes

European Works Councils: Impact of Brexit and actions required

By Dr Hagen Köckeritz, LL.M. oec. int.

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Where community-scale undertakings or groups of undertakings were previously UK-centric, the role of UK presences as central management or designated representative agents may have ended and existing EWC agreements may no longer be governed by UK law.

Following the UK's withdrawal from the European Union (commonly known as "Brexit") and the expiry of the transition period on December 31, 2020, the UK is no longer a member state of the EU. It is considered a third country with regards to the implementation and application of EU law. The European Works Council Directive 2009/38/EC ("EWC Directive"), which is transposed to local/national law by the countries of the European Economic Area (EEA), no longer applies to the UK. This has consequences for the establishment of new EWCs, but also for existing EWCs as well as any central management or representative agents previously located in the UK. A company or group of companies may even no longer qualify as a "community-scale undertaking" or "community-scale group of undertakings", respectively, for purposes of the EWC Directive.

Companies have to consider (i) whether the EWC Directive continues to apply to them at all and, if not, whether existing EWCs may have ceased to exist, (ii) whether employees of a UK undertaking may continue to participate in an EWC, (iii) what the location requirements are for central managements or representative agents, (iv) whether the law governing existing EWC agreements changes or

Dr Hagen Köckeritz, LL.M. oec.int.
Mayer Brown LLP, Frankfurt/Main
Attorney-at-Law (Germany)

hkoeckeritz@mayerbrown.com
www.mayerbrown.com

should be changed and (v) in which way ongoing or future negotiations are impacted by a changed headcount ratio between businesses in the remaining EEA countries.

Thresholds for the applicability of the EWC Directive

Community-scale undertakings are defined as undertakings with at least 1,000 employees within the EEA and at least 150 of those employees in each of at least two EEA countries. A community-scale group of undertakings is defined as a group of undertakings with (i) at least 1,000 employees within the EEA, (ii) at least two group undertakings in different EEA countries, and (iii) at least 150 employees in each of at least two EEA countries. Since January 1, 2021, undertakings and employees in the UK are no longer counted against these thresholds. If, following the UK's departure from the EU, a company or group of companies no longer meets the relevant thresholds for community-scale undertakings or community-scale groups of undertakings, respectively, the EWC Directive does no longer apply.

As a general rule, if an undertaking or group of undertakings that previously met the "community-scale" criteria, no longer qualifies as a community-scale undertaking or community-scale group of undertakings following the UK's exit from the EU, the fate of existing EWCs depends on whether the EWC was established by negotiation and agreement or based on the default rules. It is generally understood that EWCs established based on the default rules (i.e. without an agreement) will cease to exist. For EWCs established by negotiation and agreement, the consequences primarily depend on what has been agreed. If, for instance, the EWC agreement is expanded to include undertakings and employees in third countries, which may include the UK going forward (please see below), the EWC may continue to exist. However, without such a contractual expansion, the prevailing opinion is that an EWC established by agreement will automatically cease to exist.

Continued membership of UK employees in an EWC

As a minimum consequence of the UK's departure from the EU, the EWC Directive does no longer provide for an automatic entitlement of UK employees to have representatives on the EWC. However, Article 6(2) lit. a) in conjunction with Article 1(6) of the EWC Directive and corresponding local law allows for the participation of representatives from third countries in EWCs. Therefore, if provided for in an agreement on the establishment of an EWC, representatives from the UK will be able to continue to participate. Article 13 of the EWC Directive describes a procedure by which existing EWC agreements can be amended in the absence of adapting provisions established by the agreements in place.

The decision as to whether an EWC agreement can be expanded to include third countries is subject to negotiation between the special negotiating body or, once established, the EWC on the one hand and the central management on the other hand. It is not something the EWC can decide unilaterally.

It should be noted that the UK government has already amended the UK EWC legislation (Transnational Information and Consultation of Employees Regulations 2010 (as amended)) with effect as of the withdrawal date. The revised law essentially states that as of the withdrawal date, companies that have an EWC under UK law will be legally required to continue to apply the UK regulations to the operation of that EWC. There is no consensus as to what this means in practice. The continued applicability of UK law may serve as an interim solution for those companies or groups of companies that have not yet considered or agreed upon a change of the governing law. This applies especially since UK law has been known to be rather employer-friendly when it comes to community-scale consultation and information processes. However, it should not be viewed as a permanent solution. The European Commission issued a notice to stakeholders clarifying, among other things, that an amendment of existing agreements is not legally required but is highly recommended for the sake of clarity and legal certainty.

Location requirements for central managements or representative agents

According to Article 4(1) and (2) of the EWC Directive, the central management or the central management's representative agent have to be situated in a member state. Therefore, after the end of the transition period, for those EWCs for which the thresholds in Article 2 of the EWC Directive continued to be met within the EEA, either the role of central management could have been transferred to a member state or the central management (if located out-

side the EEA) could have designated a new representative agent in a member state, if the central management or the representative agent were previously located in the UK. In the event that a company failed to take such a step before the end of the transition period, as of that date, the role of central management automatically transferred to a member state. This role would have been assumed by the establishment or group undertaking employing the greatest number of employees in a member state, which is considered the "deemed central management" pursuant to Article 4(3) of the EWC Directive. This responsibility would have transferred automatically and immediately as of the withdrawal date. Where a company's or group of companies' central management is located outside the EEA, a representative agent has to be established within the EEA. Otherwise, a default representative agent will be deemed to exist in the member state with the group undertaking that employs the largest number of employees. If on or prior to December 31, 2020, a UK undertaking was named representative agent, and a company failed to appoint a new representative agent in a member state with effect from January 1, 2021, the default mechanism applied.

Companies have to make a choice as to which jurisdiction should be designated for their central management or representative agent in the EU as the default position applies only as long as there is no subordinate central management in the EEA or a representative agent is not designated. Furthermore, it is highly recommended that the legal rules for the EWC are adapted to the law of the jurisdiction where the central management is located or that is designated as representative agent in the EEA. While it is the default position pursuant to Article 3(6) of the EWC Directive that the EWC is governed by the law of the jurisdiction where the central management or representative agent is located, the wording of existing EWC agreements (if under UK law) may not be fully aligned with the law applying by default.

The choice of jurisdiction for the future central management or representative agent may significantly impact the scope of consultation and information rights of EWCs and how they can be enforced in court. But how should one "select" a new home jurisdiction for the EWC? As a starting point, companies or groups of companies should look at the jurisdictions currently represented on the EWC and the respective local/national laws by which the EWC Directive has been transposed. There are laws that are more favorable for employers than others. Often, Irish law is recommended as it is an English-speaking jurisdiction and, like the UK, has a common law background and is very much comparable with the regulatory framework in the UK. As a second step, companies should consider whether the existing presence that they have in a preferred jurisdiction can actually take on the role of central management or representative agent and serve as a counterpart for the EWC.

Impact on ongoing or future negotiations of EWC agreements

The expiration of the transition period and the UK's exit from the EU may have also had an impact on the members of the special negotiating body to be elected or appointed in proportion to the number of employees employed in each member state by the community-scale undertaking or community-scale group of undertakings. The rules for the formation of the special negotiating body require to allocate in respect of each member state one seat per portion of employees employed in that member state amounting to 10%, or a fraction thereof, relating to the number of employees employed in all the member states as a whole.

Summary and outlook

For many existing EWCs, the UK's withdrawal from the EU and the expiry of the transition period on December 31, 2020 has led to significant structural changes. Where community-scale undertakings or groups of undertakings were previously UK-centric, the role of UK presences as central management or designated representative agents may have ended and existing EWC agreements may no longer be governed by UK law. Unless companies have taken action before the end of the transition period, it is highly recommended to review existing agreements and consider the designation of a central management or representative agent in a jurisdiction that allows companies to maintain flexibility and avoid surprises. ←