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European Works Council Directive: Brexit first victim?

Summary: **1.** Preliminary remarks. **2.** United Kingdom and EWCs: a problematic context even before Brexit. **3.** European Works Council and Brexit: applicable law and quantitative requirements. **4.** European Commission's intervention. **5.** British amendment to EWC Regulation: a new piece to the puzzle? **6.** Conclusions.

1. *Preliminary remarks*

After six years from the results of the 2016 Referendum on the permanence of United Kingdom in the European Union, many commentators are still engaged in evaluating the consequences of the Brexit. From a political perspective, the outcome was surprising, both domestically and internationally, with only a 3.8% divide between "leavers" and "remainers". On the legal perspective, Brexit, and the implicit status of third-country gained by United Kingdom, had a profound effect on the lives of EU citizens in the UK and UK nationals living in European Union[1], but its consequences at large spectrum are still unpredictable.

Due to the transition period between UK and European Union – ceased on the 1st of January 2021 – and to the dramatic effects of COVID-

[1] One of the main debated issues regards the citizenship of EU individuals and the freedom of movement to and from UK, Cfr. Barnard, Leinarte, *Brexit & free movement of workers*, in *LD*, 2020, 3, p. 442; Gumbrell-McCormick, Hyman, *What about the workers? The implication of Brexit for British and European Labour*, in *C& C*, 2017, vol. 21, 3, pp. 169-284; More, *From Union Citizen to Third-Country National: Brexit, the Uk Whitdrawal Agreement, No-Deal Preparations and Britons Living in the European Union*, in Cambien, Kochenov, Muir (eds.), *European Citizenship under Stress. Social Justice, Brexit and Other Challenges*, in *Nijoff Studies in European Union Law*, 2020, vol. 16, p. 458 ff.

19 on the labour market, the impact of Brexit over British workers has still to be assessed in the medium and long run[2]. However, the debate on workers' rights related to the Brexit is already 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[3]. A devaluation that poses the question whether the British government would dismantle or not the European social *acquis*[4].

From the other side, Brexit can have some indirect effects[5] on some specific rules belonging to the sphere of transnational rights. Among these stands the application of the Directive 2009/38/EC on European Works Councils[6]. Not only within the British boundaries, but with regard to the entire European Union, as for the participation of British workers to meetings and for the calculation of the thresholds for the creation of such bodies.

Since 1973, when UK joined the European Communities[7], 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 un-

[2] Peers, Harvey, *Brexit: the legal dimension*, in Barnard, Peers (eds.), *European Union Law*, 2020, 2nd ed., pp. 850-874; Craig, *Brexit a Drama in six Acts*, in *ELR*, 2016, 41, 4, pp. 447-468.

[3] Giovannone, *Social protection in the UK after Brexit: the Agreements' provisions and the role of the European Social Charter*, in *Federalismi.it*, 2021, 6 October 2021, 23, pp. 91-102.

[4] For a skeptic comment please see Ford, *The effect of Brexit on workers' rights*, in *King's Law Journal*, 2016, vol. 27, 3, pp. 398-415, especially p. 400. On the promises to not dismantle the EU acquis please refer to Theresa May's announcement at the Conservative conference in 2016. See May, *Brexit Speech to Conservative Conference in Birmingham*, 2nd October 2016. Please refer to https://www.astrid-online.it/static/upload/protected/a73b/a73b6ebe0c227f6807d65785ee16-faf7.pdf.

[5] On the effect of the Brexit over the European Labour Law, refer to Kenner, *Il potenziale impatto della Brexit sul Diritto del lavoro europeo e britannico*, in this Journal, 2017, 1, pp. 5-12.

[6] Senatori, *Directive 2009/38/EC on the establishment of a European Works Council*, in Ales, Bell, Deinert, Robin-Olivier (eds.), *International and European Labour Law. Article-by-Article Commentary*, Nomos, Baden-Baden, 2018, p. 1601 ff.; Dorssemmont and Blanke (eds.), *The Recast of the Europea Works Council Directive*, Intersentia, Antwerp-Portland, 2010. For a criticism on the Recast Directive 2009/38/Ce see Alaimo, *The New Directive on European Works Councils: Innovation and Omission*, in *IJCL*, 2010, vol. 26, 2, pp. 217-230.

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

questionably the case that without EU influence, British labour law text-books would be very much thinner, lighter and cheaper"[8]. Working time, Business restructuring, equality, atypical forms of work are some of the areas where the European Union influence over the British legislation has been tangible. It entailed the creation of a floor of employment protection for British workers. This consideration was confirmed in a 2016 survey, where TUC (Trade Union Congress) noted that, since their EU membership, British workers improved their working conditions in many areas of labour law, sadly concluding that "remaining in the European Union may provide significant opportunities to extend employment protection for working people"[9].

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 been having a dramatic and instant effect over the EWC Directive and the rights of transnational information and consultation enshrined in it.

Since Brexit, there are no more rules concerning the information and consultation of British employees working in European Community-scale undertakings as the Country regained the status of non-European Country (third Country)[10]. 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 2009/38/EC, an EWC is a permanent body, set up following negotiations between the company's central management and a transnational delegation of employees from every Member State where a Multinational Companies has its own branches. Its function is to engage in "discussions on topics that concern the workforce as a whole, or that at least encompass employees' interests with a cross-border reach or impact"[11].

[8] Countouris, Ewing, *Brexit and Workers' Rights*, Institute of Employment Rights 2019, p. 8.

[9] Trade Union Congress, *UK Employment Rights and the EU: Assessment of the Impact of Membership of the European Union on Employment Rights in the UK*, 2016, p. 17.

[10] Except the case when a national legislation expressly refers to the United Kingdom instead of the generic "Member State".

[11] Senatori, Rauseo, *European Works Councils*, in ter Haar, Kun (eds.), *EU Collective Labour Law*, Edward Elgar, 2021, p. 257.

European Works Council shall be established where there are at least 1000 employees in the European Union or in the European Economic Area and when at least two establishment in two different Countries have minimum 150 employees each (or two companies in case of a group)[12].

Due to the exclusion of British workers from this calculation mechanism, there are obvious implications that could hinder not only the effectiveness of European Works Council for British workers, but indirectly, also the existence of EWCs in other Member States.

Firstly, an implicit consequence for already existing EWCs in European Union will regard the loss of a consistent piece of workforce for their legitimacy, both from the quantitative perspective, related to the 1000-workers threshold and the consideration about their existence and from the qualitative one, losing British representatives that could be strategic in case of consultation with a British Central Management of a Community-scale undertaking. Secondly and directly related to the first point, there are concerns about the fate of British representatives in these bodies, their role and their powers and prerogatives. Lastly, the modification of the applicable legislation for EWCs based on UK Law or with the central management in UK will have a clear impact on the reorganization of existing European Works Councils and consequences on new one.

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

2. *United Kingdom and EWCs: a problematic context even before Brexit*

As briefly anticipated, Brexit will have an immediate effect on the application of the Directive 2009/38/EC[13] in the entire European Union,

[12] Senatori, *cit.*, p. 1601 ff.; Laulom, Dorssemmont, *Fundamental principles of EWC Directive 2009/38/EC*, in Jagodzinski (ed.), *Variations on a Theme? The implementation of the EWC Recast Directive*, ETUI, 2015, p. 33 ff.

[13] For a criticism on the Recast Directive 2009/38/Ce see De Spiegelaere, *Too little, too late? Evaluating the European Works Councils Recast Directive*, ETUI, 2016.

mainly due to the importance of British workforce for the creation and functioning of EWCs. An impact that some commentators defined as an example of "hard Brexit"[14].

However, before looking at the current problems deriving from the Brexit, it seems useful to recall that the ambigous relationship between UK and the European Works Council, seen as a measure to grant information and consultation within undertakings with a European dimension, was problematic already in the framework of the original Directive 94/45/EC.

That Directive was adopted under the Maastricht 'Social Chapter' from which the UK imposed an opt-out clause[15]. Due to the British refusal to agree on the revision of the Social Chapter at Maastricht, as promoted by the Dutch Presidency, the EEC adopted a Protocol, added to the Maastricht Treaty, containing an "Agreement on Social Policy concluded between the Member States of the European Community with the exception of the United Kingdom". An agreement that granted an opt-out clause to the United Kingdom from 1 November 1993 when the Maastricht Treaty came into force, that ceased on the 1 May 1999 when the Amsterdam Treaty, agreed by the Labour Government in 1997, substituted the former[16]. Ironically, the

[14] GUMBELL-MCCORMICK, HYMAN, *cit.*, p. 9. Cfr. PISARCZYK, *The consequences of Brexit for the labour and employment law: challenges for the EU from a Polish perspective*, in *NILQ*, 2018, vol. 69, 3, p. 317.

[15] CARLEY, HALL, *The implementation of the European Works Councils Directive*, in *ILJ*, 2000, vol. 29, 2, pp. 103-124.

[16] Such opt-out clause was hailed as a "negotiating triumph" (LOURIE, *Employment Law and the Social Chapter*, in GIDDINS, DREWRY (eds.), *Britain in the European Union. Law, Policy and Parliament*, Palgrave Macmillan, 2004, p. 122) by Conservative Ministers and politicians, because applying to such clause they could "protect" the British labour market from an excessive regulation prompted by EU Law, especially in the field of working time on which the Tories were involved in an unsuccessful challenge to postpone it after the Maastricht Treaty came into force. A dramatic opposition that brought the Conservative Government to challenge the Working Time Directive at the European Court of Justice, arguing that the legal basis on which was adopted the Directive could not be the one disposed by art. 118, with the Qualified Majority Voting system. A challenge that was rejected by the ECJ. Case C-84/1994, *United Kingdom of Great Britain and Northern Ireland v. Council of the European Union*, 12 November 1996. A decision that effectively weakened the opt-out clause disposed by the Social Protocol. Cfr. FRIEDHOLM, *The United Kingdom and European Labor Policy: Inevitable Participation and the Social Chapter Opportunity*, in B*oston College International and Comparative Law Review*, 1999, vol. 22, 1, pp. 229-248. On the contrary, Labour politicians highlighted that British workers would be excluded from the ongoing improvement in employment standards in European labour market, with a negative effect on national competitiveness.

first topic that experienced the effect of the opt-out clause was the European Commission proposal for a European Works Council Directive. The proposal, presented by the European Commission fifteen days before the Maastricht Treaty came into force, immediately raised the issue about how the UK Parliament should deal with draft proposal from the European Community that would not apply to the UK, due to the adoption procedure still to be started. According to the Conservative perspective and recalling the ratio belonging to the opt-out clause, the British Parliament had no scrutiny power/interest on something that would not apply to British law. On the contrary, the European Legislation Committee requested a Parliamentary debate and scrutiny on the applicability or not of the proposal. A scrutiny that was voluntarily postponed and arranged from the Government after the adoption on the Directive on 22 September 1994 in accordance with the previous "dismissive line stating that the operation of the Agreement on Social Policy is not matter for the United Kingdom Government"[17].

The situation evolved with the election of 1 May 1997, won by the Labour party and one of the firsts actions of the new Premier Tony Blair was the appointment of a Minister of Europe with the announcement of the future conclusion of the opt-out experience[18]. This was achieved already during the Amsterdam Summit in June 1997 and effective after the Amsterdam Treaty came into Force on 1 May 1999. The main reason for this action was primarily related to the direct consequences borne by British Multinational Enterprises that were obliged to apply rules based on a Directive adopted during the opt-out regime with an indirect effect on domestic workers that were denied of such rights and protections. Moreover, the idea of a dual-speed Europe was detrimental for the accomplishment of a fair and healthy internal market. In light of that, the Council of European Union adopted the Directive 97/74/EC regarding the application of the Directive 94/45/EC on European Works Council to the United Kingdom, setting a two-year period for its implementation in British law. In fact, the previous Directive on EWCs came into force on 15 January 2000, after a motion for annulment by the Conservative opposition in the House of Commons, still threatened by the impact that a mechanism for a transnational information and consultation procedure could have brought in their industrial relations systems[19].

[17] LOURIE, *cit.*, p 124.

[18] KAMPFNER, *First Steps Taken Towards Social Chapter*, in *Financial Times*, 6 May 1997.

[19] Mrs. Browning' speech for the annulment requested on the Transnational Information

However, the UK Multinationals even before the adoption in British law were already obliged to establish EWCs in Member States where they were employing workers according to the workforce requirements, so the need to protect British companies proclaimed by the Conservatives was a false claim.

3. *European Works Council and Brexit: applicable law and quantitative requirements*

After almost two decades and after the transposition of the Recast Directive, the bound between UK and EWCs has begun really impressive in terms of numbers and to the importance gained by British representatives in existing bodies. Due to that, it is undoubtable that Brexit dramatically impacted on the transnational provisions granted by the Recast Directive.

In fact, as noted by ETUI, Brexit impacted on more than two third of EWCs due to the presence of UK representatives in these bodies[20]. According to the EWCDB (European Works Councils Database) and the last data available, there are 1206 EWC still active[21], so more than 800 EWCs are interested by a mutation in their legitimacy related to workforce or by a revision of the managing body with the presence of British representatives[22].

Moreover, about 15% of EWCs were based on United Kingdom with the choice of the British law as the applicable law for legal actions and legal

and Consultation of Employees Regulations 1999, transposing the Directive 94/45/EC: "The Government think that works councils are right for the United Kingdom, but they are not. Their attitude displays a lack of understanding of the way in which British companies have developed. The Government have not acknowledged how management and work forces work together. They do communicate. Representations are officially placed on the table when there is a matter for negotiation or discussion. One of the Government's first acts was to sign up to the social chapter as part of the Amsterdam treaty. We are not discussing a new measure. It has already been imposed by Europe. The Government signed up not just for legislation that is yet to come-I am sure that there are more horrors in store-but for retrospective legislation". For the verbatim please refer to: https://publications.parliament.uk/pa/cm199900/cmstand/deleg7/st000203/-00203s01.htm.

[20] De Spiegelaere, Jagodzi ski, *Are European Works Councils ready for Brexit? An inside look*, in *ETUI Policy Brief - European Economic, Employment and Social Policy*, 2020, no. 6, p. 2.

[21] Even if the European Works Council is the main body, there could be other forms of consultation and information body.

[22] Https://www.ewcdb.eu/stats-and-graphs (Last access 29 March 2022).

procedures. Brexit obliged these bodies to switch to a new legal basis to avoid future problems with the Central management of the undertaking (or groups of undertakings) or being in breach of EU Law. In fact, the Recast Directive states at art. 3, points 6-7 that a new or already existing EWC shall have as applicable law the one of the Member State where is situated the controlling undertaking[23].

As expected, due to nearness between UK and Republic of Ireland, around 150 companies moved their Central management to the latter, from a third County (UK) to a Member States[24]. It happened with many MNEs from US, China or British MNEs with operations in European Union and obliged to respect the EWC Directive[25]. Therefore, Ireland has become one of the Member States with the largest number of EWCs, following Germany and France. One may think that the main reason for this movement is related to the language or to culture. However, as stressed by the EWC Academy GmbH, "Irish EWC law appears particularly attractive because it is considered deficient and does not meet the standards of the EU Directive, especially when it comes to taking legal action"[26]. In fact, according to the Transnational Information and Consultation of Employees Act 1996, as reviewed after the Recast Directive, in case of legal disputes the Central Management and EWC representatives shall submit to an independent arbitrator, ap-

[23] De Spiegelaere, Jagodzi ski, *cit.*, p. 3.

[24] Https://www.siptu.ie/services/europeanworkscouncil/ewcdirectivetranspositionintoirishlaw/ (Last access 30 March 2022).

[25] That is the case of the Bank HSBC or Verizon. The US Management of Verizon, an IT group, dissolved the EWC in UK as of 20 October 2020. Consequently, it moved the European headquarters to Dublin to initiate the procedure to set a new Council. A procedure that was too long and created a lack of EWC and, during this period, the management could be free to carry out any restructuring without information and consultation. The British EWC, even if ceased, filed a complaint against this choice made by the Management against the Central Arbitration Committee CAC in London (15 December 2020) who was set as the forum for legal disputes. According to the CAC, the Central Management was free to switch the applicable law due to the expiration of the previous EWC's agreement, regardless of the Brexit. However, the CAC pronounced in the sense that due to the long and failed negotiations for the renewal of the EWC, the subsidiarity requirement, namely the "default EWC", could come into force since that date, in order to avoid any obstacle to the respect of transnational information and consultation procedure, as stated by art. 7 of the Recast Directive. For the Decision of the Central Arbitration Committee no. EWC/33/2020: https://www.gov.uk/government/publications/cac-outcome-verizon-ewc-verizon-media/application-progress.

[26] EWC news, 1-2021: https://www.ewc-news.com/en012.

pointed by both parties or established by the section 10 of the Industrial Relations Act of 1946, with unclear powers and prerogatives. Moreover, such legal procedure hinders the possibility for a trade union or employee representative to take legal action for the establishment of an EWC in court. A gap that according to the Irish trade union SIPTU, Service Industrial Professional and Technical Union, is attracting MNEs Companies due to the miniscule penalties for any obstacle to the negotiations with the EWCs representatives. Due to that, SIPTU requested to the Irish Government to review the Transnational Information and Consultation of Employees Act 1996 in order to properly transpose the EU Directive on EWCs. A request that was not followed by any actions, bringing to an official complaint to the European Commission, made by the Unions. A complaint that was translated by the EU Commission in an infringement notice launched against Irish Government for the failure to properly transpose the Directive on EWC[27]. Even if expected, the fact that the notice was mainly driven by the Brexit represents a failure of the transposition of the Directive in Ireland and in terms of monitoring process of EU institutions over EU Law.

The situation is still evolving, however it is so far clear that the Brexit impact over the Irish EWCs legislation, and the abuse of its gaps, could have repercussions on transnational rights for workers[28], affecting also other Member States[29].

Another issue related to the impact of Brexit over EWCs is the implicit consequence on the future possibility for the creation of new EWCs in the Union. In fact, 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 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, so leading to the exclusion of the possibility for European workers to exercise their rights to cross-borders information and consultation.

European Commission is aware of the possible consequences brought

[27] European Commission, Non-conformity of Irish legislation with the European Works Councils Directive, Formal Infringement INFR (2022) 4021.

[28] Https://www.siptu.ie/media/media_22381_en.pdf.

[29] Letter sent by SIPTU Deputy General Mr. McCormack to the Minister for Enterprise, Trade and Employment, 20 November 2020: https://www.siptu.ie/services/europeanworkscouncil/ewcdirectivetranspositionintoirishlaw/.

by the exit of UK from European Union, even in reference to the conspicuous number of British workers employed in MNEs and in Community-scale undertakings.

4. *European Commission's intervention*

European Commission set out a specific Communication[30] with the aim of clarifying how to deal with Brexit in the short run as for 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 in 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 definitely 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 UK and 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 Centrotec[31] have already negotiated a renewal for their EWCs, even deciding the fate of British workers and representatives[32].

The destiny of British workers and their representatives is in a certain

[30] European Commission, Notice to Stakeholders – Withdrawal of the United Kingdom and EU Rules on European Works Councils, 21 April 2020, REV3: https://ec.europa.eu/-info/sites/default/files/brexit_files/info_site/transnational_workers_council_en_0.pdf (Last Access: 30 March 2022).

[31] Centrotec excluded British Workers from the European Works Council. Please refer to: https://www.ewc-news.com/en042019.htm.

[32] De Spiegelaere, Jagodzi ski, *cit.*, p. 2.

sense, the biggest challenge for Trade unions, alongside with 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 UK representatives within this transnational body. Such negotiations should refer to the participation of UK representatives as ordinary member 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 2021[33].

General Electric and Coca Cola, for example, introduced a clause stating that UK representative could continue to be members of the already existing EWC, maintaining their voting right 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 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 Italy[34] or France[35] where there is only a generic reference to Member State. However, 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. Though it seems quite impossible at the time for quite obvious political reasons.

A third implication is referred to the already mentioned legal basis applicable to the existing EWC. According to the European Works Councils Database (EWCDB), UK was one of the EU Country with the highest

[33] ETUC recommendations on Brexit. Https://www.etuc.org/sites/default/files/2021-02/ETUF%20recommendations%20to%20EWC%20SE%20on%20Brexit_Jan%202021%20update%20EN.pdf (Last access 30 March 2022).

[34] Art. 2, Legislative Decree no. 113/2012.

[35] Articles L. 2341-1 and seq. of the French Labour Code.

number of Community-scale undertakings[36]. These undertakings, having their headquarter in UK and referring to the British Law as the legal basis for disputes between central management and EWC's representatives, are now obliged to move their headquarters to other EU Member States. 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 can "exercise a dominant influence over another undertaking by virtue, for example, of ownership, financial participation or the rules which govern it". The EC 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 European Union. A provision that has been respected by the majority of UK MNEs or Non-EU MNEs by switching to Irish Law with the mentioned gaps in terms of legal actions and sanctions in case of breaches of the transposed Directive, or in other Member States such as Germany and France.

To this issue is refereed 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 undertakings shall be situated in the European Union, obliging those with the Central management in UK to relocate its offices within an EU-27 jurisdiction. To avoid any delay in this relocation, the EU Commission imposes an automatic transfer in the Member State already indicated by Directive 2009/38/EC, as specifically set by art. 4 (2) and art. 4 (3), that is to say that Member State hosting the undertaking with the largest workforce[37]. The automatic change[38] could be avoided by an unilateral decision by the Central Management[39], made before the

[36] At the time of writing there are 1206 EWCs and other procedures of information and consultation in EU. For detailed data please refer to: http://www.ewcdb.eu/stats-and-graphs (Last access 30 March 2022).

[37] The relocated Central Management is named "Deemed central management" and will act as the official one. A new Central management could be appointed after a new round of negotiation at EWC level.

[38] As readable also in Point no. 50, CJEU, C-440/00, *Gesamtbetriebsrat der Kühne & Nagel AG & Co. KG vs Kühne & Nagel AG & Co. KG*.

[39] See HSBC's case in Paragraph no. 5.

Brexit according to the decision taken by the British Central Arbitration Committee (CAC) on 15 February 2021 for a complaint filed by the Adecco EWC against the choice of the Central Management (US/Swiss) to choose the applicable law or the EU headquarters without any negotiations[40]. Not surprisingly, also in the Adecco case, the selected applicable law was the Irish one.

5. *British amendment to EWC Regulation: a new piece to the puzzle?*

In light of Brexit, the British Government amended the Transnational Information and Consultation of Employees Regulation 1999 (hereinafter TICER) with the aim of maintaining on its territory at least some of the EWCs belonging to British Community-scale undertakings. The Employment Rights Amendment Regulation no. 535/2019 modified the previous regulation replacing the recipient of the EWC legal framework from "Member States" to "Relevant States" with the idea of giving the opportunity for EWC established under British law to be compliant with the law and not infringing any EU veto. The rewording was aimed at keeping jurisdiction over already established EWC as happened with the very specific easyJet case disputed before the Central Arbitration Committee (CAC)[41].

According to the amended wording, "Relevant State" means any "State which is a Contracting Party to the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 as adjusted by the Protocol signed at Brussels on 17th March 1993" and the United Kingdom. Due to that, according to the UK Government, the UK EWC regulations could still be applied to EU Member States due to their participation to the Oporto's conference.

[40] Central Arbitration Committee, Case No. EWC/34/2020, Adecco Group European Works Council and Adecco Group: https://www.gov.uk/government/publications/cac-outcome-adecco-group-ewc-adecco-group-2/application-progress (Last Access 1 April 2022).

[41] The Easy jet PLC's case is not so relevant because the Agreement was not set by the parties but as a result of Subsidiarity procedures. Due to that it was still governed by UK Law. Easy jet PLC to overcome the issue decided to create a European based (in Germany) EWC maintaining the two, with the first only refereed to UK workers. See Central Arbitration Committe, Case Number EWC/36/2021, *easyJet European Works Council and easyJet PLC*, 1 June 2021: https://www.gov.uk/government/publications/cac-outcome-easyjet-ewc-easyjet-plc/application-progress.

On the other side, the Transposition of the EWC Directive in all Member States covers only other Member States and there is no reference to any other Country. Just think that even if Switzerland was part of EFTA but not part of European Economic Area, the EWC constituted in HSBC did not include Swiss workers although the workforce was consistent in terms of numbers. Moreover, UK ceased to be part of the European Economic Area since the 31st of December 2021, intricating the situation. So the rewording could not be as successful as expected by the British Government.

In this scenario there is still another problem on the table, mainly related to the existing EWC and the applicable law.

United Kingdom is actually the unique non-EU Country nor EEA Country to have an EWC legislation still in force and presumable applicable to all UK companies operating in Europe. Due to that, according to British law, British mother company with UK based EWC should respect it and remain under the British jurisdiction. On the other side, EU stressed the fact that EWC should have a new headquarters in another EU Country, or in any Member of EEA, and a corresponding new jurisdiction.

However, a first decisive case has been disputed before the Central Arbitration Committee (CAC) and has the merit to stress the relevant implications that a Company, even if based in UK, should consider after Brexit.

The complaint was disputed by the HSBC European Works Council, based in UK with a British representative agent against the HSBC Continental Europe, the new central management of the company after Brexit.

The problem arises from the decision of the HSBC management to transfer the EWC to Ireland and set the Irish jurisdiction as new applicable law without communicating any information to the existing EWC or requesting any vote for the amendment to the EWC agreement. According to the British representative, it constituted a breach of the EWC agreement, and he complained also on the decision to the exclusion of British workers from the EWC.

The CAC, in his decision started from the fact that "it is common ground between the parties that the Employer was required by EU law to designate a representative agent within an EU Member State for the purposes of the Directive once the transition period following the UK's withdrawal from the EU ended"[42]. So, any amendment to the existing agreement,

[42] Central Arbitration Committee, Case Number EWC/38/2021, 11 August 2021, *HSBC*

namely the one setting the new center of operation in EU and HSBC Ireland as representative agent, "was a necessary consequence of the change" related to the mutating scenario post Brexit. Moreover, being an amendment "required by law rather than being proposed at the will of the parties", it constituted an exception to the procedure for amendment by the parties as disposed by the EWC agreement. As stressed by the HSBC Continental Europe, the amendment, and the corresponding transfer to Irish jurisdiction, "occurred as a matter of law rather than as a matter of choice to the parties to the Agreement and that the amendments to Articles 2 and 19 merely informed reader of the accurate situation".

For what concerns the application of UK law, according to the CAC "once the Employer's central management ceased to be situated in the UK for the purposes of the Directive, HSBC Ireland being the 'deemed central management' for those purposes, the Agreement ceased, under the terms of that Agreement, to be subject to TICER": meaning that it ceased its effects over British workers.

In the end, the unilateral decision of HSBC's central management was considered lawful, giving the possibility to conclude the relocation of the EWC to Dublin.

In fact, the HSBC Bank by moving the Central Management to Ireland excluded "its entire workforce [40000 employees in UK] from its European Works Council". Due to this exclusion, the Company excluded from its role 8 British representative out of 20 EWC members.

The novelty of this situation could still create some unknown scenarios that need to be observed in the future. While some EWCs decided to maintain their British representative as reported in the previous paragraph, some others, as the HSBC's case, decided to exclude them even if there was a British legislation on EWC still in force. A riddle that only the future could solve.

6. *Conclusions*

Even though the ECWs have never acted as trade unions, they are a

European Works Council and HSBC Continental Europe: https://www.gov.uk/government/publications/cac-outcome-hsbc-ewc-hsbc-continental-europe/decision.

"symbolic and significant development in the history of social partnership"[43]. Their main role is to share information about changes, investments and closures of undertakings belonging to the same company, taken abroad. An information mechanism that is highly beneficial to discuss and solve problems before they turn conflictual and, in a certain sense, European or global. A right that is also enshrined in the article 27 of the Charter for Fundamental Rights in the European Union[44] and that is more and more topical after the Covid-19 Pandemic, where information about strategies adopted by partner companies located abroad played an important role in evaluating the effect of specific actions at the workplace, providing data on the remote-work experiences, about agreements at different levels on short-time work arrangements with a fair wage compensation or about the measures adopted for a safe return to work[45]. Information that even during the Pandemic have 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 unprecedent health crisis and protecting workers' interests[46].

Brexit has been depriving British workers of this transnational social dialogue net, apart from the limited cases in which the Central management decided to maintain British representatives in their EWCs. However, while most of British workers are now excluded by the rights of information and consultation, UK 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 be bound by the obligation to set up an EWC and pay for its operations. This is one of the several loopholes that British workers and companies will have to deal with after the Brexit. A *deja-vu* if

[43] MacShane, *European Works Councils - Another Brexit Victim,* in *Social Europe*, 5 January 2017, https://socialeurope.eu/european-works-councils-another-brexit-victim (Last access 1 April 2022).

[44] Ales, *Article 27 CFREU*, in Ales, Bell, Deinert Robin-Olivier (eds.), *International and European Labour Law. Article-by-Article Commentary*, Nomos, , 2018, p. 217 ff.

[45] Https://www.epsu.org/article/updated-joint-etufs-recommendations-ewcse-members-during-covid-19.

[46] 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: https://www.epsu.org/sites/default/files/article/files/ETUF%20joint%20reco%20to%20EWC%20SE%20on%20Covid-19%20EN.pdf.

we recall the opt-out clause appointed to the original EWC Directive in 1994. 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. An unexpected result that is even more loud due to the obligation to set new Central management location within EU, outside British boarders, and to pay for the EWC operation in another Country with presumable languages barriers and higher operation costs, apart from Ireland. Controversial would be the situation where a British Company would be obliged to have a EWC, based in another European Country, granting information and consultation rights for European workers while depriving domestic workers from the participation to 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 visible victims of the Brexit[47], paving the road for the future employment rights devaluation in UK, mainly related to the areas where EU labour law has been more effective[48]. In a nutshell, European Works Councils are the first victims of an ongoing Labour Brexit, that will be achieved at the expenses of the British workers in the future years. And ironically, while depriving British workers from such rights, the absence of UK and its obstructive behavior on information and consultation rights – among the constant British reluctancy for a deeper EU Social Policy – could actually facilitate the process of expansion of social rights in the European Union[49], as we are already experiencing since the proclamation of the European Pillar of Social Rights.

[47] MacShane, *cit.*

[48] Countouris, Ewing, *cit.*, p. 8 ff.

[49] Novitz, *Re-introducing a human face - the future of EU Collective Labour Law*, in ter Haar, Kun (eds.), *EU Collective Labour Law*, Edward Elgar, 2021, pp. 455-459.

Abstract

Brexit has finally arrived, and its consequences are still unpredictable. The art. 50 TEU notice triggered by the British Government has been unique in European Union history and unique are the effects over economies, transports, and workers.

While the Withdrawal agreements signed by European Union and United Kingdom has the aim of softening the economic effects and granting a stable collaboration, there are some loopholes that could deprive British workers of some rights that they were exploiting during their membership to 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.

The essay retraces and contextualizes the effect of Brexit on the 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 the 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.