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Trade, Labor and EU Law Perspectives

Brexit and workers' rights: the meaning of a No Deal for transnational consultation

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As the deadline for Brexit is fast approaching, the UK government published guidance setting out the consequences of a No Deal with the European Union on its exit on 29 March 2019. While the [announcement](#) emphasised the priority to reach a deal with the EU, the government sought to provide advice to business and citizens on the impact of a No Deal. The aim is to 'ensure a smooth and orderly exit whatever the outcome of the negotiations'. The meaning and consequences of the No Deal option is explained through a number of technical reports. Among the 25 made public in August, with another 55 to follow in September, workplace rights were featured in the first batch of guidance.



Source: www.debatingeurope.eu

In the first place, the government maintains what has been the mantra since the outcome of the 2016 referendum, that Brexit will not lead to detrimental changes in employment law: 'This government firmly believes in the importance of strong labour protections'. The previous minister responsible for the exit of the EU and the Prime Minister had indicated on a number of occasions that EU derived labour rights would not be sacrificed on the altar of Brexit. As the [EU Withdrawal Act 2018](#) simply transferred what were EU law workers' rights into UK statutes, the No Deal would not have any different effects than if there was a deal. A caveat is however that a few adjustments will need to be made to statutes to remove references to the EU. It is planned for those changes to be done via secondary legislation, as permitted by the EU Withdrawal Act.

There are two substantial exceptions to the statement that a No Deal would have no impact on UK workers. One concerns insolvency, primarily for UK workers located in the EU (but this will not be discussed in this blog) and the second transnational consultation. The [European Works Councils Directive](#) gives employees across the EU the right to have access to information and to be consulted on changes in their company, through their representatives who are usually members of a European Works Council. The Directive is a truly transnational instrument on a number of levels. In relation to its scope, it only applies in undertakings that operate over at least two Member States (article 2(1)(a)). The trigger for the establishment of such body also transcends frontiers as employees can request the start of negotiations for a EWC but only if they come from at least two countries (article 5(1)). Additionally, the process of information and consultation must be on transnational matters, defined as ‘affecting the whole undertaking or at least two different countries’ (article 1(4)). Finally, the composition of the EWC is multinational as, usually, most of the countries where the business operates will be represented by at least one employee representative.

As a result of the cross border elements of the European instrument, a no deal for the UK would mean a potential number of changes despite the transfer of the national measure that transposed the European Directive into UK law ([the Transnational Information and Consultation of Employees Regulations \(TICER\) 1999](#) amended by [TICER 2010](#)). Existing EWC agreements, in the UK or the EU where EWC have UK representatives, are likely to remain unchanged as most are negotiated but the UK government states that such agreements may need revisiting if there is no reciprocal agreement between the EU and the UK following Brexit. However, any new request to set up EWCs will be done without the UK. This has impacts on several levels: first as the UK will not be part of the EU, transnational companies in the UK will only have to establish EWCs if they meet the threshold of 1000 workers across two EU states. If that is the case, like any other multinationals based outside the EU, they would need to appoint a headquarter in the EU for the purpose of EWCs (eg Italy or France). This new EWC would not need to include UK workers, just like US or Japanese multinationals do not have to have their national workers representatives on EWC. Second, multinationals based in the EU and including a UK workforce will not need to count those workers in their thresholds or appoint representatives from that country.

The government has partially acknowledged those effects in the technical report: it is advising companies and workers that post 29th March 2019, no request for new EWC will be accepted. However, any request started prior to that date will be valid and could lead to the establishment of a new EWC. As a result, technical amendments will need to be made to the legislation via statutory instruments under section 7 of the EU Withdrawal Act 2018.

While the No Deal option remains only one of the scenarios that could apply once the article 50 process is complete, there is a theoretical possibility that for a number of UK workers, the right to have a say on changes that affect their livelihoods may be taken away when the firm is based abroad or if they wished to apply for a EWC in their own country past 29th March 2019. It has to be remembered however that the majority of EWC are established by negotiations. In many agreements, the UK workforce could be included as was the case before TICER came into force. Between 1994 and 1997, the EWC directive did not apply to the UK because of the optout from social measures. However, the difference was that the UK was a member of the EU.

If No Deal was reached by the negotiation deadline, transnational consultation may therefore be the first victim of Brexit for UK workers.

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