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Brexit, European Works Councils, and why subjecting them to Irish law may be unwise

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Brexit has prompted many companies to change strategy and relocate resources and headquarters to European Member States in order to continue operating within the EU perimeter and to maintain access to the common market and all the of the benefits of EU membership. Ernst & Young's report of 2 March 2021 showed that around 40 per cent of companies had relocated or intended to relocate activities and operations from the UK to other EU member states because of Brexit, while 12 per cent of companies had chosen multiple locations in Europe[1].

In terms of workers' rights and, specifically, information and consultation rights in multinational companies, what impact has Brexit had on European Works Councils (EWCs)?

The EWC is the instrument for dialogue between the multinational company and employee representatives from different member states on transnational issues affecting them. It is a collective body representing the employees of the multinational company at European level and whose members are entitled to information and consultation rights on transnational issues concerning certain matters provided for in the agreement constituting the EWC itself or, in the absence of an agreement, identified by Directive 38/2009/EC (the so-called Recast Directive). The constitution of EWCs is governed by Directive 45/94/EC and the subsequent Recast Directive, thanks to which the EWC has been granted its own legal status to represent employees within the multinational company.

The Trade and Cooperation Agreement establishes a non-regression clause according to which Brexit may not have the effect of reducing or weakening workers' rights compared to the situation before 1st January 2021[2]. There are two main consequences of the impact of Brexit on EWCs or works councils/boards of Societas Europaea (SE)[3]:

1) ensuring the representation in the EWC (or works council/board of SE) of employees from non-European Economic Area (EEA) countries, through an amendment of the EWC agreement aimed at ensuring the competence of the EWC/SE on transnational matters concerning the UK, and at recognizing and maintaining the rights of EWC/SE members from all countries to be informed and consulted on transnational matters that also concern the UK[4];

2) identifying a new national regulation for the EWC governed by UK law prior to Brexit.

In the second case mentioned, according to the EWC Directive, if the central management of the EWC is not located in a member state, it must be transferred within an EU member state [5]. In case of no choice of the member state in which to establish the EWC's central management, there will be an automatic transfer to the site or headquarters of the group's company employing the largest number of employees in a member state, which will then become the EWC's central management according to the meaning of the Recast Directive[6].

In compliance with the above-mentioned sources, many multinationals with their EWCs' central management in the UK have relocated their headquarters and appointed a representation – with specific competence for the relations of the group with the EWC – in another EU Member State by the 31st of December 2020 (Brexit transition period). Until this date, according to the UK-EU Withdrawal Agreement[7], European law continued to apply and, in the absence of specific provisions, as of the 1st of January 2021, Directive 38/2009/EC on EWCs will no longer apply to the UK. The automatic transfer, as a consequence of the non-choice of the applicable law post Brexit, had the effect of subjecting the EWC to a law that differs (even by a great deal) by the EWC rules under UK law.

Due to its business culture, language and legal framework, Ireland would be the most attractive country for multinationals in choosing the national legislation applicable to EWCs governed by UK law prior to Brexit, especially in view of the low recognition of collective bargaining and the imperfect compliance of Irish legislation with the standards of the EWC Directive. The massive migration to Ireland of the central management of many EWCs of UK-based multinationals[8] ante

Brexit raised trade union concerns about the tools available for dispute resolution concerning the interpretation of EWC agreements and the breach of the provisions contained therein, or the interpretation and breach of subsidiary requirements, which were clearly inadequate in relation to the resolution of disputes involving UK-based EWCs.

Directive 45/1994/EC was transposed into Irish law by the Transnational Information and Consultation of Employees Act of 1996 (TICEA)[9]. According to the Directive, the National law provides for the establishment of an EWC or a procedure for the information and consultation of employees in community-scale undertakings and groups of undertakings. Community-scale undertakings are large multinationals with at least 1,000 employees in all member states and at least 150 employees in each of at least two member states. The TICEA of 1996, subsequently amended following the entry into force of Directive 38/2009/EC, applies if the central management of the group, or the representation of the central management of the group, when it is located in a non-EU member state, is situated in Ireland. The process for the establishment of the EWC is triggered by a request sent to the group's central management by or on behalf of at least 100 employees from at least two member states.

At this point, the Special Negotiation Body (SNB) is set up, whose sole task is to negotiate with the company on the contents of the agreement establishing the EWC. Upon conclusion of the negotiations between the SNB and the central management, the agreement reached must specify: (a) to which companies in the group the agreement will apply; (b) the composition of the EWC, the number of delegates, the allocation of seats and the mandate of the members; (c) the functions and the procedure for information and consultation of the EWC; (d) the provisions concerning the link between the information and consultation of the EWC and the information and consultation of the national level of employee representation e) the location, frequency and duration of the meetings; f) the composition, appointment procedure, function and procedural rules of the select committee; g) the resources, including financial resources, to be allocated to the EWC; h) the effective date of the EWC agreement, its duration, the modalities for its amendment or termination, the circumstances and modalities for renegotiation, even in case of significant changes to the company structure. If the agreement is not reached within three years after the start of negotiations, the EWC shall – in any case – be established and the subsidiary requirements of Section 2 of the TICEA shall apply[10]. These provisions, provided for in the EWC Directive and referred to in the National transposing act, contain several implementation guidelines to enable the EWC to operate by default. They provide for an annual meeting between the EWC and the central management in order to facilitate information and consultation on the general situation of the company, as well as additional meetings in the event of exceptional circumstances affecting the interests of employees to a considerable extent, e.g. in the case of collective redundancies involving more than one member state. The subsidiary requirements also apply if the central management does not start negotiations within six months by the request.

Ireland is the only EU country where it appears that disputes over information and consultation rights within the EWC should be decided by arbitrators appointed by the parties, rather than by the Labour Court; not even following the establishment of the Workplace Relations Commission (WRC)[11], which lacks jurisdiction in EWC matters, unlike the Central Arbitration Committee (CAC) in the UK. Disputes regarding the confidentiality of information and regarding the interpretation or operation of EWC agreements are resolved by arbitration. No provisions appear in the TICEA for the resolution of disputes arising in EWCs established under the Subsidiary Requirements and management's compliance with them. In addition, for violation of the Subsidiary Requirements, the WRC may impose a penalty not exceeding EUR 4,000 and/or

imprisonment for a period not exceeding six months, notwithstanding the use of criminal law instruments to enforce and vindicate the rights of Irish-based EWCs is entirely inconsistent with the general approach of the legislator in seeking to resolve industrial relations and labour rights disputes involving the WRC and the Labour Court.

The lack of clarity in Irish legislation on how to resolve EWC disputes and the consequent non-compliance with the requirements of the Recast Directive has raised the concerns of the Services Industrial Professional and Technical Union (SIPTU), mainly due to the activism of companies and employers to elect Irish law as the applicable law for EWCs transferred to Ireland following Brexit. These companies are likely attracted by the non-recognition of the collective bargaining and the existence of what could be described as non-existent legal remedies in EWC matters. In this situation, SIPTU drew the attention of the European Commission and asked it to verify the conformity of the transposition of the European EWC legislation in the Irish legal system. This is not the first time that the Irish trade union has complained about the lack of protection tools for the violation of workers' information and consultation rights in multinational companies, as happened in the case of the establishment of the EWC in the Kingspan multinational group. Specifically, once the procedure for setting up the EWC was initiated, the central management of the Kingspan group never set up the SBN, violating the six-month deadline set by the Recast Directive. Faced with the complaint to the WRC, which invited the parties to conciliation, the group did not respond to the request[12].

Trade union activism and complaints about the loopholes in Irish legislation, which make it tough for EWCs to take legal action in the event of violations of their rights and obligations under the Directive, led the European Commission to request the Irish government to amend national legislation, through a letter of formal notice on 19 May 2022[13]. In the absence of a reply within two months, or in the event of an unconvincing solution, the Commission may issue a reasoned opinion and, as a last remedy, bring the matter before the Court of Justice for failure in the transposition of the European law.

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References

[1] According to the report, the most popular destinations are Dublin, Luxembourg and Frankfurt: https://www.ey.com/en_ie/news/2021/03/ey-brexit-tracker-dublin-remains-most-popular-eu-relocation-city-for-uk-fs-firms.

[2] Trade and Cooperation Agreement, part II, title XI, chapter 6, article 6.2: "*non-regression from levels of protection 1. The Parties affirm the right of each Party to set its policies and priorities in the areas covered by this Chapter to determine the labour and social levels of protection it deems appropriate and to adopt or modify its law and policies in a manner consistent with each Party's international commitments, including those under this Chapter. 62 For greater certainty, this Chapter and Article 9.4 [Rebalancing] do not apply to the Parties' law and standards relating to social security and pensions. 216 2. A Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its labour and social levels of protection below the levels in place at the end of the transition period, including by failing to effectively enforce its law and standards. 3. The Parties recognise that each Party retains the right to exercise reasonable*

discretion and to make bona fide decisions regarding the allocation of labour enforcement resources with respect to other labour law determined to have higher priority, provided that the exercise of that discretion, and those decisions, are not inconsistent with its obligations under this Chapter. 4. The Parties shall continue to strive to increase their respective labour and social levels of protection referred to in this Chapter".

[3] The SE is a company model that allows multinationals operating in the European perimeter (in case of a merger or incorporation of two or more companies, or in case of the transformation of an existing company) to have the registered office in one Member State, with operations within all Member States. It is governed by the Regulation on the Establishment of SEs 2157/2001/EC and the Directive on Employee Involvement in the SE 86/2001/EC, inspired by the EWC Directive 45/1994/EC. Within the SE, the establishment of the EWC is left solely to the initiative of the company.

[4] The agreement for the constitution of the EWC recognized the same rights and protections for non-EU countries EWCs' representatives as for other members, the amendment of the agreement for adaptation should not be deemed necessary. With specific reference to the United Kingdom, the same national law transposing the EWC directive (the Transnational Information and Consultation of Employees Regulations) of 1999, having been retained even after Brexit, as the national reference legislation protecting workers' information and consultation rights in multinational companies, protected by the non-regression clause of the UK-EU Trade and Cooperation Agreement, continues to regulate the rights and duties of UK representatives in all EWCs and guarantees the execution of their mandate. See also the guide available for British workers' representatives in the post-Brexit EWCs at the link: https://www.gov.uk/guidance/participating-in-a-european-works-council.

[5] Directive 38/2009/EC, article 4, paragraph 2: *Where the central management is not situated in a Member State, the central management's representative agent in a Member State, to be designated, if necessary, shall take on the responsibility referred to in paragraph 1. In the absence of such a representative, the management of the establishment or group undertaking employing the greatest number of employees in any one Member State shall take on the responsibility referred to in paragraph 1*".

[6] Cfr. nt. 6.

[7] The Agreement, signed on 24 December 2020, regulates the relationship between the UK and the EU from the end of the transition period (31 December 2020): https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/TXT(02)&from=IT.

[8] Verizon, Adecco, HP, Oracle, Emerson, GE, and many others multinational groups, have identified the Irish subsidiary as their new representation within the EU, establishing a new EWC according to the requirements of the Transnational Information and Consultation of Employees Act (TICEA) of 1996.

[9] Directive 45/94/EC was extended to the United Kingdom by Directive 74/97/EC (transposed into Irish law by the Act No 386 of 1999) and was adapted following the accession of Romania and Bulgaria to the European Community by Directive 109/2006/EC, transposed by the Act No 599 of 2007. The recast Directive 2009/38/EC, which repealed the two Directives, was transposed into Irish law by an amendment to the Transnational Information and Consultation of Employees Act

(TICEA) of 1996 – Amendment by Regulation 380, which came into force on 13 July 2011 (Regulations 2011 – SI No 380 of 2011).

[10] See: https://revisedacts.lawreform.ie/eli/1996/act/20/revised/en/pdf?annotations=true.

[11] Established with the Workplace Relations Act 2015 to reorganize the system of Labour Courts and the conciliation procedure, the Workplace Relations Commission, has jurisdiction in labour cases as first instance, while the Labour Court for the appeal procedure.

[12] https://www.siptu.ie/services/europeanworkscouncil/ewcdirectivetranspositionintoirishlaw/.

[13] https://www.siptu.ie/media/pressreleases2022/featurednews/fullstory_22996_en.html.

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