***BEERG Commentary on ETUF paper on Brexit and EWCs ***

*In this commentary you will find our comments on the on the specifics of the ETUF’s paper on EWCs and Brexit can be found below in burgundy.*

*Notably, there is no suggestion in the paper that, contrary to the claims being made by some in the UK, EWCs can continue to be legally based in the UK for EU law purposes after the end of the transition period, on December 31 last.*

*The paper also accepts that UK representatives can only continue to sit on EWCs by mutual agreement between management and the EWC, though it tries hard not to say this explicitly.*

*Further, the paper avoids any mention of UK union officials or consultants continuing to act as experts to EWCs.*

*The paper is also non-committal on any future role for UK law when it comes to EWCs that may have previously been based in the UK but have now moved to an EU jurisdiction.*

*The paper has all the hallmarks of a carefully agreed text between the EU trade unions and UK unions, with the UK unions desperately trying to convince their EU colleagues that there may still be a way that can continue to be legally involved in EWCs, and their EU colleagues reluctant to tell them that they are wrong.*

*Jan 2021*

**Managing the impact of Brexit on multinational companies**

**Joint European Trade Union Federations’ Recommendations to EWC/SE Coordinators and worker representatives in SNBs, EWCs and SEs**

January 2021

**Brexit: current state of play**

Four years after the UK referendum, Brexit has taken place.

*Brexit took place on February 1, 2020. However, a transition period until December 31, 2020, disguised this fact.*

Since 1 January 2021, the United Kingdom is no longer a Member State of the European Union, nor part of the European Economic Area (EEA). As from that date, a new Trade and Cooperation Agreement governs the relationship between the UK and the EU with a view to regulating their economic and social partnership[[1]](#footnote-1) 1

As far as workers’ fundamental rights at work, their right to information and consultation at company level, as well as their rights in the event of a restructuring are concerned, the new Trade and Cooperation.

Agreement sets in stone a non-regression clause:

*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.*

*Source: Trade and Cooperation Agreement, Part two, Heading one, Title XI, Chapter six, Article 6.2*

The non-regression clause ensures that Brexit cannot lead to workers’ rights being reduced or weakened compared to the situation which was in force before 1 January 2021.

*This is not actually what the clause says. If you read it carefully, it says that rights can only be reduced in a “manner affecting trade or investment” between the parties. It is arguable whether UK non-participation in EWCs would affect trade and investment in anything like the same way as if the UK weakened its rules on working time or collective redundancies, or even at all.*

In addition, the UK adopted a legislation in 2018[[2]](#footnote-2) according to which direct EU law (EU regulations and decisions), as well as UK laws which transposed EU directives (such as the European Works Council Directive), were automatically transferred into UK domestic law on the day of Brexit. Under that UK domestic law, representatives of UK workers in EWCs, as well as in works councils and corporate boards of companies under the Societas Europaea statute (SE), can keep their rights.

*This ignores that:*

* + *what an ex-EU country does when it comes to its own internal laws, whether derived from EU laws or not, cannot have any impact outside the borders of that country;*
  + *the UK Parliament in fact proceeded to amend the UK’s laws on both EWCs and Societas Europaea in 2019 in case, as happened on 1 January 2021, the UK left the EU’s legal frameworks for these kinds of bodies.*

**Our trade union guiding principles**

Building on the non-regression clause and the transfer of the EWC and SE Directives’ transposition laws into UK domestic law post-Brexit, the European Trade Union Federations will oppose any attempt to reduce the rights of Special Negotiating Bodies (SNBs), European Works Councils (EWC), works councils and corporate boards of companies under the Societas Europaea statute (SE) which existed prior to Brexit, as well as the UK representation therein. Preventing social dumping and a race to the bottom is fundamental.

*As noted above, this has in fact already happened as a result of the UK’s laws passed in 2019. For example, the UK Government does not even suggest that UK employees can any longer submit information requests prior to the establishment of an SNB or an actual request for an SNB to be set up.*

Although a deal has been reached, Brexit may be disruptive in many sectors and lead to potential job losses. Hence, transnational solidarity, which has been fostered over the years in EWCs and SEs, must grow even stronger. It will be needed - more than ever - to fight attempts by multinational companies to jeopardise workers’ rights, or to use Brexit to play off workers and sites of different countries against each other. Trade unions and worker representatives in multinational companies must therefore ensure that:

* **Information, consultation, and participation rights are not watered down.** Workers’ right to a strong say on envisaged company decisions and their potential social consequences is a fundamental right which must be safeguarded for workers across Europe.
* **The likely impact of Brexit** on an SNB, EWC, SE Works Council or SE Board, as well as on a company strategy, should be dealt with as early as possible. European Trade Union Federations stand for a genuine **anticipation and management of change** **in a socially responsible way** and will not let multinational companies use Brexit as an excuse to trigger attacks on terms and conditions of employment.

The magnitude of the challenge requires careful attention: more than 700 multinational companies which have established an EWC or adopted the SE statute have operations in the UK; at least 2,400 representatives of UK workers in EWCs and SEs are wondering about their future; and the legal situation of the ca. 140 EWCs and SEs based on the UK transposition laws of the EWC and SE directives will change. Now is the time to act. The European Trade Union Federations have thus jointly adopted and later updated the following recommendations to EWC and SE Coordinators, as well as to worker representatives in SNBs, EWCs and SEs.

*All of the above are simply trade union aspirations and contentions.*

**#1. If UK representatives sit on your EWC, SE-WC or SE board: Secure their rights**

On 31 December 2020, the UK government released a guidance note on UK participation in EWCs following the ratification of the EU-UK Trade and Cooperation Agreement. The guidance note states that:

**Participating in a European Works Council**

How to participate in and make complaints about a European Works Council (EWC).

Published 31 December 2020

…

**If you’re already a representative of your company’s EWC**

If you became a representative of your company’s EWC before 1 January 2021 you can continue to be involved. You will still be entitled to paid time off to carry out your role.

***Source:***[*https://www.gov.uk/guidance/participating-in-a-european-works-council*](https://www.gov.uk/guidance/participating-in-a-european-works-council)*, consulted on 7 January 2021*

*What this means is that UK law will continue to facilitate the involvement of UK representatives on EWCs. But UK law cannot give UK workers the right to sit on EWCs. Their continued involvement is dependent on mutual agreement between management and the EWC, as is the involvement of representatives from any other non-EU/EEA country.*

To best secure that UK workers will still be represented in EWC and SE Works Councils, as well as on the Board of SE (when applicable), the European Trade Union Federations recommend you adapt your EWC/SE Agreement according to the following **flexible case-by-case approach.**

*This underscores the point that UK involvement in EWCs can only be by agreement.*

**Step 1: Review the EWC/SE Agreement to see if it needs adaptation**

Some agreements already include provisions for the representation of countries from outside the European Economic Area (EEA), whose member(s) enjoy the same rights, prerogatives and protection as the other members in the EWC, SE-WC or SE Board. In this case, adaptation may not be necessary. Should representatives of non-EEA countries sit on the EWC, the SE-WC or the SE Board, with an observer status only, or without the same rights as the other members, then Step 2 (below) applies.

*This makes it clear that the unions know that the involvement of representatives from non-EU/EEA countries in the EWC depends on the wording in the agreement.*

**Step 2: In cases where adaptation is needed,** it is important to define the scope of the change by amending the EWC/SE Agreement (which can also be done in an appendix). The European Trade Union Federations propose the following clause, which can be adapted to suit the specific needs of the respective EWC/SE:

*Obviously, any change to the agreement is dependent on the agreement of management. It is not for the members of the EWC to unilaterally decide on this.*

*The parties agree that the UK will continue to be fully covered by this Agreement and that the EWC [SE Works Council] will remain competent for all transnational issues in relation to the UK. The EWC [SE Works Council] members from the UK shall continue to enjoy the same prerogatives, rights, and protection as the other members of the EWC [SE Works Council], as outlined in this Agreement.*

Such a clause should help to ensure that the EWC/SE-WC remain responsible for cross-border matters concerning the UK. The rights of EWC/SE-WC members, from all countries, to be informed about and consulted on transnational issues which also include the UK, must be preserved.

*Management will need to think carefully before agreeing to this. It is inevitable that companies will move production out of the UK and into Europe as a result of Brexit. Some production may also move the other way. Do managements want to set the precedent of agreeing that moving production out of a non-EU country counts towards “exceptional circumstances”? Do managements want to be consulting with their EWCs about moving production out of the UK because of Brexit?*

*Would EU members of EWCs want to be put in the position of saying that they object to the transfer of production and jobs from the UK to the EU?*

The following arguments can be brought forward when discussing the negotiation, renegotiation or simply adaptation of your EWC/SE Agreement with the Management.

Firstly, the Recast EWC Directive (art. 1, §6) foresees the possibility for companies to decide on a wider scope of application than the EU or EEA alone. The European Trade Union Federations have a long-standing experience in securing the participation of workers from non-EEA countries (e.g. Switzerland and EU candidate countries) in EWCs and SEs.

*Of course, this can be done by agreement.*

Secondly, even before the EWC Directive was applied in the UK (as from December 1999), the vast majority of multinational companies with an EWC voluntarily decided to include representatives of UK workers, although there was no legal obligation to do so. Excluding them now would be unreasonable.

*Between 1996 and 1999 the UK was a member of the EU, even if it had opted out of aspects of EU social policy post-Maastricht. Which is very different from now when the UK has left the EU and put itself completely outside the framework of UK law.*

*Further, in 1996/7 it was widely expected that Labour under Tony Blair would displace the Tories as the next government of the UK and Labour was committed to reversing the social policy opt-out.*

Thirdly, a significant number of multinational companies have already adapted their EWC/SE Agreement to secure the representation of UK workers. See examples listed in the appendix.

*Individual companies are entitled to do as they wish in their own best interests. It would be as easy to put together a list of companies which are not involving UK representatives.*

Fourthly, information and consultation rights are part of the level playing field defined by the EU-UK Trade and Cooperation Agreement and are safeguarded by a non-regression clause.

*This might be true although note that the unions make no reference to regression having to affect trade, or the information and consultation rights being at “company level”, an important point when most EWCs covers groups of companies instead of a single transnational company.*

*In any event, the treaty also still does not give UK representatives the legal right to sit on EWCs, which are subject to EU law and the jurisdiction of the European Court.*

Fifthly, the UK transposition law of the Recast EWC Directive (referred to as the “TICE Regulation”[[3]](#footnote-3)) has been retained as part of UK domestic law. It continues to regulate the rights and duties of UK representatives in all EWCs post-Brexit. Moreover, in the specific situation of EWCs which were previously based under UK law, the UK domestic legislation secures the mandate of UK workers representatives. This means that removing now the mandate of UK representatives from EWCs which were based under UK law before Brexit, will be in breach of the UK domestic law. Should such a case arise, please contact your European Trade Union Federation for further advice and guidance (see contact details below).

*As noted above, this again ignores that the UK Parliament enacted laws in 2019 reducing employees’ rights in both the context of EWCs and SEWCs if the UK left the EU’s legal order in the way that it did on 1 January. In any event, the impact of UK law stops at the UK border. UK law is in no way binding on a “central management” or “representative agent” situated in an EU Member State.*

*If UK representatives continued to have a legal right to sit on EWCs why would all these arguments be necessary? The matter would be open and shut.*

**#2. If your EWC/SE used to be governed by UK law: A new governing law now applies:**

As of 1 January 2021, in accordance with guidance from the European Commission[[4]](#footnote-4) , those EWCs that previously had their central management (or designated representative agent) located in the UK will be transferred to another Member State of the Europe Union.

*This statement means that the unions accept the advice given in the EU Commission’s note to stakeholders on April, 2020, is still valid and that EWC cannot now legally be based in the UK, contrary to assertions that have been made by some unions in the UK and union-side consultants.*

In the event that central management had not designated the new EU Member State where their representative agent will be located as from 1 January 2021, in accordance with guidance from the European Commission, the role will be assumed by the Member State with the largest number of employees:

*As of that date [i.e. the end of the transition period on 31 December 2020], the role of the representative agent will be automatically transferred to the establishment or group undertaking employing the greatest number of employees in a Member State, which will become the ‘deemed central management’ pursuant to Article 4(3) of Directive 2009/38/EC. Source: European Commission*

*This simply states the law as it is.*

Unless specified otherwise in the EWC Agreement, the law governing the EWC Agreement is that of the EU Member State where the central management (or representative agent) is located.

If and how the TICE Regulation, which is now part of UK domestic law, interferes in the future of EWCs which were formerly based under UK law, remains to be clarified.

*In our view, TICER can have no effect on EWCs which were once based under UK law but have now properly transferred to an EU Member States in order to remain compliant with EU law. How can the laws of a non-EU “third country” have any effect on an internal EU body such as an EWC?*

*UK law may allow for the creation of “UK EWCs” but such bodies are unlikely to be able to function in any meaningful way as EU law simply won’t recognise them. For example, there is no mechanism in any EU country to elect or appoint representatives to a “UK EWC” or any obligation on local managements to release their employees to attend its meetings.*

*In our view, EU Member State governments are also most unlikely to choose to change their local laws to recognise “UK EWCs” as this would involve their companies having to engage with two, parallel EWCs, an unnecessary “Brexit burden” on EU businesses.*

**#3. Put Brexit on your EWC/SE agenda: Anticipate change in company strategy and businesses**

Securing the future of jobs of all European workers will be key, as multinational companies might revise their strategies in light of the consequences that Brexit could have on integrated production networks, supply chains and internal trade with the EU. The European Trade Union Federations strongly recommend putting Brexit as a recurring item on the agenda of your EWC/SE meetings, asking management to provide early information and to conduct consultation on the following:

* *Forecast of the possible impact of Brexit on the financial and economic situation, including debt capacity;*
* *Forecast of the possible impact of Brexit on the development of productions and sales, all along the supply chain, in all countries;*
* *Forecast of the possible impact of Brexit on trade and in particular on the import costs of raw materials;*
* *Current situation and forecast of the possible impact of Brexit on employment in all countries and especially the UK;*
* *Forecast of the possible impact of Brexit on investment plans in all countries;*
* *Possible transfers of production, divestments, cutbacks and closures resulting from Brexit*
* *Possible relocation of the European headquarters (from or to the UK).*

It is crucial to request to be informed of and consulted on any envisaged countermeasures.

*Again, these are union aspirations, nothing more.*

**#4. Have a look at the number of employees per country!**

In some instances, the mere existence of the EWC might be called into question, as a consequence of the UK leaving the EU. Should the UK headcount no longer be taken into account, some multinational companies will fall below the threshold for establishing an EWC (at least 1,000 employees in the EU/EEA; in at least two undertakings in two different countries with at least 150 employees each). Uncertainty prevails as to the concrete consequences this may have.

In order to pre-empt possible issues, the European Trade Union Federations recommend that each EWC reviews the distribution of the headcount per country and assess whether there is a risk of falling below the minimum threshold, should the UK headcount be excluded.

Should that be the case, the EWC Chair and/or Coordinator is/are requested to immediately inform the secretariat of their respective European Trade Union Federation (see contact details below) to discuss a possible course of action on a case-by-case basis.

*An inevitable consequence of Brexit.*

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| ***Disclaimer:*** *BEERG Perspective notes are not legal advice and should not be read as such. They are intended to highlight issues which BEERG member companies need to be aware.* |

1. *The trade and cooperation agreement between the European Union and the United Kingdom is available* [*online*](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2020.444.01.0014.01.ENG) *in all EU languages. Following ratifications by the European Council and the UK Government, the Trade and Cooperation Agreement came into provisional application on 1 January 2021. Full application is dependent on the ratification of the European Parliament – which is currently foreseen for March 2021 at the latest.* [↑](#footnote-ref-1)
2. *The* [*European Union (Withdrawal) Act 2018.*](http://www.legislation.gov.uk/ukpga/2018/16/contents/enacted/data.htm) [↑](#footnote-ref-2)
3. See the latest version of the TICE regulation as amended by [The Employment Rights (Amendment) (EU Exit) Regulations 2019](https://www.legislation.gov.uk/uksi/2019/535/contents/made). [↑](#footnote-ref-3)
4. See the [European Commission’s preparedness notice on EWCs](https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/transnational_workers_council_en_0.pdf) published in April 2020. [↑](#footnote-ref-4)