



## EWC- should I stay or should I go?

By **Paul Quain** - 31 October 2019

### Is moving to Ireland the answer?

Possibly. But it depends on what the UK decides to do and the UK has not yet decided! Trying to predict when and how and maybe if the UK is going to leave the EU would challenge the prophetic abilities of Nostradamus. The UK has kept the argument going for over three and a half years and now is going to try to resolve it by having a general election, in which Brexit will not be the only issue!

So what effect will Brexit have on European Works Councils in the UK? Well this depends on what type of Brexit, but one particular issue companies are facing is whether to relocate their EWCs outside the UK in the event of a no-deal Brexit.

Not only will no new EWCs be able to be established in the UK after a no-deal Brexit, but UK- or non-EU-based businesses that chose the UK as the home of their EWCs via the appointment of a “representative agent” will need to relocate. Many companies are pro-actively appointing representative agents in states other than the UK to protect their position, with Ireland a popular choice (as an English speaking common law jurisdiction). In the event of a deal (which for the moment perhaps looks more likely than no deal), it is possible that such a drastic step would not be necessary, but it depends on the nature of that deal. Under the current deal which is acceptable to the UK government and the EU (although not approved by parliament in the UK) the issue should not arise until December 2020. That deal could of course change, or may never be implemented.

### In the event of a no-deal Brexit the government has said that it will amend legislation so that:

- No new requests to set up an EWC or Information and Consultation procedure can be made.
- Provisions relevant to the ongoing operation of existing EWCs will remain in force.
- Requests for information or to establish EWCs or Information and Consultation procedures made, but not completed before Exit day will be allowed to complete.

The government notice tells companies and unions to review their “arrangement” although there is no guidance on what you should actually do!

**The EU have flagged up the following points in a no deal scenario:**

- The UK will no longer be counted as a member state and employees in the UK will no longer count as employees within the member states, for the purpose of determining whether there is a Community-scale undertaking or a Community-scale group of undertakings to which Directive applies. This is important in relation to meeting the 1000 employees in Europe threshold.
- If, as a result of the UK's withdrawal, the relevant thresholds are no longer met in a particular case, a works council that is already established will no longer be subject to the EWC Directive, but may still continue to function.
- The EWC Directive allows for representatives from "third countries" (which the UK will become after Exit day) so representatives from the UK can take part in an EWC where a relevant agreement so provides.
- There may be an impact on the duty of the central management to initiate negotiations for the establishment of an EWC, or an information and consultation procedure, which presupposes a written request from at least 100 employees or their representatives in at least two undertakings or establishments in at least two different member states.
- Where central management of an EWC is in the UK, it will need to be transferred to another member state. If none is selected, this is deemed to be the member state with the greatest number of employees.
- Where UK law applied to the EWC, the law of a remaining member state will automatically be applied instead. While not necessary from a legal standpoint, it is advisable to amend agreements to specify which member state's law will apply in future.
- The UK's withdrawal may affect the law applicable in order to determine whether an undertaking is a "controlling undertaking".

The EC's notice suggested that agreements negotiated at company level to set up EWCs will need to take the above into account and that existing agreements may need to be amended in light of the above.

It appears that about half of companies with EWCs in the UK are waiting to see what happens whilst just under half are taking proactive steps in moving.

It is hoped that in the next few months we will get more clarity on the likely timetable of changes and we will update you as soon as the fog (or at least some of it) clears!