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Brexit Law – your business, the EU and the way ahead

Possible hard Brexit: Prepare to rehome your UK EWC

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It is possible that the UK will leave the EU without a deal on 12 April – a so-called "hard Brexit" – if the Government is unable to gain Parliamentary support for its withdrawal agreement or another solution. In light of recent EU guidance, you should take preparatory steps to rehome any UK law-governed EWC, if and when a hard Brexit is confirmed, in order for it to operate validly post-Brexit.

What is the issue?

In an updated Withdrawal Notice, the European Commission confirms that, as a matter of EU law, an EWC's central management or its representative agent must be situated in the EU. If situated in the UK, companies must designate new representative agents to assume this role from exit day. Otherwise, the establishment or group undertaking with the most employees in a Member State will become the "deemed central management", and the EWC agreement will be governed by that country's law.

As a result, it is clear that, in the event of a hard Brexit, UK EWCs must be rehomed in a remaining EU Member State in order to remain valid for EU law purposes. This is at odds with finalised UK regulations (The Employment Rights (Amendment)(EU Exit) Regulations 2019) that are intended to amend UK EWC legislation on a hard Brexit. The Regulations preserve parts of the UK legislation for EWCs whose central management is situated in the UK (ie whose representative agents or deemed central management are in the UK), suggesting that companies could keep their EWCs in the UK. It is likely that the regulations will now have to be amended to reflect the EU law position.

What steps should you take?

Article 6 agreements

If you have a UK law-governed "Article 6" agreement (an arrangement concluded post-15 December 1999) and a hard Brexit is confirmed, you should take the following pre-emptive steps before exit day to address this risk:

- Appoint a representative agent in an EU Member State of your choice where you have a legal presence and select that country's law as the governing law for your EWC, both to take effect from exit day. This will ensure that a valid structure and governing law is in place and will prevent the "highest headcount" rule being applied and an unwanted choice of law being imposed. The EU advice is clear that your choice of Member State fixes the governing law (so that choosing UK law, or a different governing law, is not an option).
- A range of factors will influence which Member State you choose but, first and foremost, the choice should make sense based on your business, where you have a critical mass of employees and employee relations. Conversely, opting for a location where you have no or few employees could be perceived negatively. Other relevant factors will include which countries have a "light-touch" employment law and EWC regime (ie take a minimalist approach to implementing and enforcing the EWC Directive) and which take a strict approach. Cultural fit and familiarity will also be key. For a UK-headquartered company, Ireland might offer the benefits of a shared language, similar industrial relations framework and common law system as well as practical benefits such as accessibility, but consider nevertheless whether it is the right choice alongside other factors.
- Amend the terms of your EWC agreement so that it is clear, and check if any process needs to be followed to make these changes. Check local rules in the chosen Member State to ensure that your EWC agreement will be locally compliant or how it might need to be adapted (although if a similarly light-touch EWC regime to the UK's is chosen, few amendments should be necessary).

Article 13 agreements

If you have a UK law-governed "Article 13" (or "Article 3") agreement (an arrangement concluded by 15 December 1999), this is largely exempt from the EWC legislation and so you do not have to do anything as such. However, as the EU guidance has flagged, Brexit may trigger a significant structural change requiring Article 13 agreements to be amended. It is therefore prudent for you to consider the factors above (without making any change yet) in case the status of your Article 13 agreement is challenged (on account of no longer meeting the qualifying conditions) or changes, or in case it has to be renegotiated.

General risk assessment

Brexit could impact your EWC arrangement in other ways, for example by affecting employee thresholds, the mandate of UK representatives, or by triggering structural change provisions or a duty to inform and consult the EWC. We recommend that, if you have not yet done so, you conduct a review of your arrangement (whether it is governed by UK law or not), to identify any unintended consequences or action needed.

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