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REV3 – replaces the notice (REV2)
dated 13 March 2019

NOTICE TO STAKEHOLDERS

WITHDRAWAL OF THE UNITED KINGDOM AND EU RULES ON EUROPEAN WORKS COUNCILS

Since 1 February 2020, the United Kingdom has withdrawn from the European Union and has become a ‘third country’.¹ The Withdrawal Agreement² provides for a transition period ending on 31 December 2020.³ Until that date, EU law in its entirety applies to and in the United Kingdom.⁴

During the transition period, the EU and the United Kingdom will negotiate an agreement on a new partnership, providing notably for a free trade area. However, it is not certain whether such an agreement will be concluded and will enter into force at the end of the transition period. In any event, such an agreement would create a relationship which in terms of market access conditions will be very different from the United Kingdom’s participation in the internal market,⁵ in the EU Customs Union, and in the VAT and excise duty area.

Moreover, after the end of the transition period the United Kingdom will be a third country as regards the implementation and application of EU law in the EU Member States.

Therefore, all interested parties, and especially economic operators, are reminded of the legal situation after the end of the transition period.

¹ A third country is a country not member of the EU.

² Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ L 29, 31.1.2020, p. 7 (“Withdrawal Agreement”).

³ The transition period may, before 1 July 2020, be extended once for up to 1 or 2 years (Article 132(1) of the Withdrawal Agreement). The UK government has so far ruled out such an extension.

⁴ Subject to certain exceptions provided for in Article 127 of the Withdrawal Agreement, none of which is relevant in the context of this notice.

⁵ In particular, a free trade agreement does not provide for internal market concepts (in the area of goods and services) such as mutual recognition, the “country of origin principle”, and harmonisation. Nor does a free trade agreement remove customs formalities and controls, including those concerning the origin of goods and their input, as well as prohibitions and restrictions for imports and exports.

Advice to stakeholders:

Companies within the scope of Directive 2009/38/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees,⁶ who have employees in the United Kingdom are in particular advised to assess the consequences of the end of the transition period in view of this notice.

Please note:

This notice does not address EU company law, and in particular the consequences of the withdrawal of the UK as regards European company law forms.

For these aspects, other notices are in preparation or have been published.⁷

After the end of the transition period, the rules in the field of information and consultation of workers at transnational level set out in Directive 2009/38/EC will no longer apply to the United Kingdom. This has in particular the following consequences:

1. THRESHOLDS FOR APPLYING DIRECTIVE 2009/38/EC

Directive 2009/38/EC sets out the conditions for setting up European Works Councils as well as their functioning and potential dissolution. In particular, Article 2 of Directive 2009/38/EC defines as a “Community-scale undertaking” any undertaking with at least 1 000 employees within the Member States and at least 150 employees in each of at least two Member States. A “Community-scale group of undertakings” designates a group of undertakings with the following characteristics:

- at least 1 000 employees within the Member States,
- at least two group undertakings in different Member States,

and

- at least one group undertaking with at least 150 employees in one Member State and at least one other group undertaking with at least 150 employees in another Member State

After the end of the transition period, for the purpose of determining whether there is a Community-scale undertaking or a Community-scale group of undertakings to which Directive 2009/38/EC applies, the United Kingdom will no longer be counted

⁶ Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (OJ L 122, 16.5.2009, p. 28).

⁷ https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/future-partnership/preparing-end-transition-period_en

as a Member State and employees in the United Kingdom will no longer count as employees within the Member States.

As a consequence, should the relevant thresholds no longer be met at the end of the transition period, a European Works Council, even if already established, will no longer be subject to the rights and obligations stemming from the application of Directive 2009/38/EC. That works council may continue to function under the relevant national law.

The end of the transition period may also impact the duty on the part of the central management to initiate negotiations for the establishment of a European Works Council or an information and consultation procedure which presupposes a written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States (Article 5(1) of Directive 2009/38/EC).

2. PARTICIPATION OF EMPLOYEES OF A UK UNDERTAKING IN EUROPEAN WORKS COUNCILS

While, after the end of the transition period, participation of employees of a UK undertaking does not count as a participation of employees of an undertaking in the Member States (see above), Directive 2009/38/EC allows for the participation of representatives from third countries in European Works Councils.⁸ Therefore, representatives from the United Kingdom will be able to take part in European Works Councils, where the relevant agreement referred to in Article 6 of Directive 2009/38/EC so provides.

3. LOCATION REQUIREMENTS FOR CENTRAL MANAGEMENT/CENTRAL MANAGEMENT'S REPRESENTATIVE

According to Article 4(1) and (2) of Directive 2009/38/EC, the central management or the central management's representative agent have to be situated in the EU. Therefore, after the end of the transition period, for those European Works Councils for which the thresholds in Article 2 of Directive 2009/38/EC continue to be met within the Union, but which have their central management or their representative agent in the United Kingdom, either the role of central management will have to be transferred to a Member State or the central management will have to designate a new representative agent in a Member State. If the central management fails to take one of these steps before the end of the transition period, as of that date, the role of 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.

⁸ See Article 1(6) read in conjunction with Article 6(2)(a) of Directive 2009/38/EC.

4. APPLICABLE LAW TO THE AGREEMENT REFERRED TO IN ARTICLE 6 OF DIRECTIVE 2009/38/EC

After the end of the transition period, the law of the Member State where the central management or the ‘deemed central management’ or the central management’s representative agent are situated will be relevant so as to ensure that the rights of employees under Directive 2009/38/EC remain enforceable within the EU.

While it is thus not necessary to amend agreements referring to the legislation of the United Kingdom, it is highly recommended to amend such agreements and stipulate explicitly the law of a Member State for the sake of clarity and legal certainty (see below, section 6 of this notice).

5. OTHER ASPECTS

The end of the transition period may also be decisive for:

- the law applicable in order to determine whether an undertaking is “a controlling undertaking” (Article 3 of Directive 2009/38/EC);
- the members of the special negotiating body to be elected or appointed in proportion to the number of employees employed in each Member State by the Community-scale undertaking or Community-scale group of undertakings, by allocating in respect of each Member State one seat per portion of employees employed in that Member State amounting to 10 %, or a fraction thereof, of the number of employees employed in all the Member States taken together (Article 5(2)(b) of Directive 2009/38/EC).

6. AGREEMENTS IN ACCORDANCE WITH ARTICLE 6 OF DIRECTIVE 2009/38/EC

According to Article 6 of Directive 2009/38/EC, the setting up and functioning of European Works Councils rely on an agreement negotiated at central management level by the social partners.

The end of the transition period may lead to a significant change of the structure of a ‘Community-scale undertaking’ or a ‘Community-scale group of undertakings’ in the sense of this provision as well as impact the functioning of established European Works Council. Ongoing negotiations on such agreements may have to consider the consequences mentioned before. For existing agreements, there may be a need to introduce changes in order to take the above-mentioned consequences into account. Article 13 of Directive 2009/38/EC provides for a procedure for amending the agreement, in the absence of adaptation provisions established by the agreements in force.

The website of the Commission on labour law (<http://ec.europa.eu/social/main.jsp?catId=157>) provides general information concerning the field of information and consultation of workers at transnational level. These pages will be updated with further information, where necessary.

European Commission
Directorate-General Employment, Social Affairs and Inclusion