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RECENT CASES

COMMENTARY

The Status of European Works Councils in UK Law Post-Brexit: A Commentary on *EasyJet PLC v EasyJet European Works Council* and *Olsten (UK) Holdings Limited v Adecco Group European Works Council*

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1. INTRODUCTION

The European Works Council (EWC) Directive, first adopted in 1994 and amended in 2009, establishes a common legal framework, overseen by the Court of Justice of the European Union (CJEU), for the provision of information to and consultation with employees at a transnational, European level.[1] The Directive aims to ensure that employees are involved whenever significant decisions are taken in another Member State that may affect their employment or working conditions, and responds to the practical problem that in companies operating across borders, business decisions are frequently made abroad with no involvement of affected employees or their representatives. Article 2 of the Directive requires medium and large-scale multinational enterprises, which are 'Community-scale undertakings

[1] Directive 94/45/EC originally adopted in 1994 and recast in 2009 (2009/38/EC). The original Directive was negotiated during the UK's opt-out from the Social Policy Agreement. It was extended to the UK by Directive 97/74/EC.

or groups of undertakings', to set up either transnational information and consultation bodies in the form of EWCs or, alternatively, information and consultation procedures (ICPs).[2] Responsibility for establishing an EWC or ICP rests with the central management of the Community-scale undertaking.[3] The central management or the central management's representative agent has to be situated in the EU.[4] Overall, the EWC Directive establishes a complex procedural regime to set up EWCs which has resulted in the establishment, as of January 2024, of approximately 1,000 EWCs across the EU covering approximately 10 million workers and one-third of the workforce which falls within the Directive's scope.[5] It is generally recognised that EWCs fall short of European-level policy-makers' original intention that they would mitigate the 'fundamental asymmetry'[6] between the economic and social elements of European integration by promoting an interdependence between management and employee representatives based on regular meetings. EWCs remain 'relatively immature bodies'[7] compared to national systems of worker representation. Although EWCs have generally enhanced the level of communication between management and employees, the focus remains on the provision by management of information to, rather than on consultation with, EWCs; they are often not involved in the decision-making itself and the quality of information provided varies. Meaningful consultation does not always, therefore, take place.[8]

The Directive was transposed into UK law by the Transnational Information and Consultation of Employees Regulations 1999[9] (TICER),

[2] A 'Community-scale undertaking' designates an 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' has at least 1,000 employees within the Member States; at least two group undertakings in different Member States; and at least 150 employees in each of at least two Member States.

[3] Article 5.

[4] Article 4.

[5] For up-to-date figures see the ETUI EWC Database, https://www.ewcdb.eu/agreements?f%5B0%5D=agreement_in_force%3A1 date last accessed 8 August 2024.

[6] Fritz W Scharpf, 'The European Social Model: Coping with the Challenges of Diversity' (2002) 40(4) JCMS 645, 665.

[7] Stan De Spiegelaere, Romuald Jagodziński and Jeremy Waddington, *European Works Councils: Contested and Still in the Making* (Brussels: ETUI, 2022), 15.

[8] See further Jeremy Waddington, 'What do Representatives Think of the Practices of European Works Councils? Views from Six Countries' (2003) 9(3) *EJIR* 303; Jeremy Waddington, 'European Works Councils: The Challenge for Labour' (2011) 42(6) *IRJ* 508 and Mark Hall and Paul Marginson, *Developments in European Works Councils* (Dublin: European Foundation for the Improvement of Living and Working Conditions, 2004).

[9] SI 1999/3323 amended by SI 2010/1088.

the provisions of which largely mirrored those contained in the Directive.[10] EWCs sit uncomfortably alongside the UK's traditional model of single-channel representation through recognised trade unions and uptake of the provisions has been low.[11] Nonetheless, participation in EWCs—alongside other forms of employee involvement at the enterprise level introduced by the EU[12]—presented British trade unions and employees with opportunities to experience different systems of employee representation and to enhance worker voice at a time when collective bargaining was in decline. Brexit had a major impact on these EU-derived employment laws, particularly on TICER which was amended with effect from 31 December 2020. The European Trade Union Institute estimated that about 15% of all EWCs would be directly affected by Brexit because they were based on UK national law or had their headquarters in the UK but that a wider impact may be felt by the 70% of EWCs which have UK representatives.[13]

Although the Directive was adopted 30 years ago and TICER is 25 years old, there has not been extensive litigation.[14] It was not until 2023—after Brexit!—that the Court of Appeal (CA) had an opportunity to decide its first and, a month later, its second case on EWCs. In *EasyJet*, the main issue was whether EWCs could continue to exist in the UK post-Brexit. In *Adecco*, the CA had to consider the definition of one of the key terms of TICER, namely what constitutes a 'transnational' issue. Both cases raise important issues for the future operation of EWCs in the UK post-Brexit. It is therefore worthwhile to consider them together within the context of the Brexit amendments to TICER. This note is structured as follows. Section 2 explains the amendments made to TICER because of Brexit. Sections 3 and 4 summarise the facts and decisions in *EasyJet* and *Adecco*. Section 5 discusses the cases' broader significance for the future operation of EWCs in the UK post-Brexit. Section 6 concludes.

[10] For an overview see Zoe Adams, Catherine Barnard, Simon Deakin and Sarah Fraser Butlin, *Deakin and Morris' Labour Law*, 7th edn (Oxford: Hart, 2021), from 7.44 onwards.

[11] Adams et al., *Deakin and Morris' Labour Law*, 7.53. On the single-channel model see Ruth Dukes, 'Voluntarism and the Single Channel: The Development of Single Channel Worker Representation in the UK' (2008) 24(1) *IJCLLIR* 87.

[12] See the Information and Consultation Directive 2002/14/EC and the Directives on Employee Involvement in the European Company 2001/86/EC and the European Co-operative Society 2003/72/EC.

[13] Stan De Spiegelaere and Romuald Jagodziński, 'Are European Works Councils Ready for Brexit? An inside look' *ETUI Policy Brief* No 6/2020.

[14] For an overview of the CJEU case law on EWCs see Teun Jaspers, Frans Pennings and Saskia Peters, *European Labour Law*, 2nd edn (Cambridge: Intersentia, 2024), chapter 9.

2. THE CONTEXT: BREXIT

The UK's withdrawal from the EU on 31 January 2020 and the end of the transition period on 31 December 2020 raised a number of questions about the continued operation of, and law applicable to, UK-based EWCs, and the status of UK employees within existing EWCs.[15] Unlike other EU-derived employment laws which could become part of retained EU law and continue to operate in the UK regardless of the country's EU membership (such as eg, the Working Time Directive and Regulations), EWCs are inherently cross-border and are dependent for their functioning on transnational co-operation between states within the common legal framework established by the Directive and overseen by the CJEU. The UK government's insistence that the UK would no longer be subject to the jurisdiction of the CJEU post-Brexit meant that the legal framework governing EWCs had to be amended.

In a notice to stakeholders published in April 2020, the European Commission clarified inter alia that the UK, post-Brexit and in the absence of an EU-UK deal to the contrary, would no longer be included in the calculations regarding the employee thresholds that determine whether a company falls within the scope of the EWC Directive; and that UK representatives would be considered as third-country representatives in EWCs. UK employees could continue to participate in an EWC but only if the agreement establishing it provides for that.[16] The Commission notice also clarified that companies whose central management or representative agent was situated in the UK pre-Brexit would need to nominate another representative agent (and thus law governing the EWC) in the EU. In relation to the latter, failure to nominate a new representative agent would mean that the responsibility for the operation of an existing EWC would transfer to a default representative agent located in the EU Member State employing the greatest number of employees. This aims to ensure the enforceability of EU employee rights and the continued oversight of the CJEU.

[15] European Commission, *Notice to Stakeholders—Withdrawal of the United Kingdom and EU Rules on European Works Councils*, 21 April 2020 REV3, https://commission.europa.eu/document/download/115fd95f-ae4f-459d-9cc1-7f755e4b489c_en?filename=transnational_workers_council_en.pdf date last accessed 8 August 2024.

[16] This means that existing agreements which make reference only to member states of the EU/EEA would no longer apply to the UK post-Brexit. See further the EAT decision in *HSBC EWC and HSBC Continental Europe* EWC/38/2021 (although this case is being appealed to the EAT at time of writing).

In the UK, in the context of the preparations for a potential no-deal Brexit, TICER was amended by the Employment Rights (Amendment) (EU Exit) Regulations 2019[17] to ensure that 'the enforcement framework, rights and protections for employee representatives in the UK EWCs continue to be available, as far as possible'.[18] The aim of the amendments appeared to be to 'freeze' TICER for UK-based EWCs established prior to Brexit[19] by requiring any undertakings that had an existing EWC under UK law on 'exit day' to continue to apply the UK regulations to the operation of that EWC, and for the enforcement framework for any disputes that may arise to continue to operate. The provisions relating to the establishment of new EWCs, including the right for employees to request specific information on the size and structure of the workforce and the employer's use of agency workers across the EU and EEA, were repealed.[20]

The practical effect of the UK's amendments and the European Commission notice is that no new EWC can be established in the UK after 31 December 2020 and UK employees are disregarded when determining whether an undertaking is a Community-scale undertaking for the purposes of the EWC Directive. For existing EWCs, UK employees can continue to be represented on an EWC operating under the laws of an EU member state as long as the EWC agreement provides for it. There is, however, no legal obligation to continue to apply the EWC agreement to UK employees. The response from companies to these amendments has been mixed. While several companies have introduced provisions allowing UK representatives to continue to be members of existing EWCs, other agreements have excluded UK representatives.[21]

Any undertaking that had an existing EWC under UK law and remained Community-scale post-Brexit had to assign the role of central management

[17] SI 2019/535.

[18] Explanatory Memorandum to the Employment Rights (Amendment) (EU Exit) Regulations 2019 at 7.4 referring specifically to a no-deal scenario.

[19] See the EWC Academy Update in January 2021 at www.ewc-academy.eu date last accessed 8 August 2024.

[20] The Regulations also repealed the right of UK employees to request information on numbers of employees employed across an undertaking and on the structure of undertakings This right had previously been used to organise employees across Europe. See *Haines and others and British Council* EWC/7/2012 or *Agyemang-Prempeh and Facilicom Services Group* EWC/14/2016. For a general overview of TICER and the amendments, see *Harvey on Industrial Relations and Employment Law* (London: Butterworths, 2021).

[21] See further De Spiegelaere and Jagodziński, 'Are European Works Councils Ready for Brexit?'

to an alternative Member State.[22] That means, in effect, that only a small subset of UK-based EWCs continued to operate in the UK under the amended provisions in TICER, namely those whose central management was located outside both the UK and the EU but where the largest EEA-based entity of an employer located outside the EEA continued to be based in the UK (and so the existing EWC could continue to operate under TICER); and to legacy EWCs where central management had been moved, post-Brexit, to an EU Member State without the explicit dissolution of the UK-based EWC.[23] In *EasyJet*, the question arose whether such a UK-based legacy EWC could continue to exist at all given the way in which TICER was amended.

3. *EASYJET PLC V EASYJET EUROPEAN WORKS COUNCIL* [2023] EWCA CIV 756

The facts of the case are relatively straightforward. In May 2020, EasyJet announced plans to reduce staff numbers in at least two countries within the European Economic Area by up to 30%. Due to its size, EasyJet operated an EWC for the provision of information and consultation about transnational matters affecting its employees across the EU and the EEA. Central management of the group, prior to Brexit, had been situated in the UK and the applicable law to the EWC pre-Brexit was therefore English law. In line with the Commission's Notice, EasyJet had appointed its German branch as its representative agent for the purposes of the EWC Directive from 31 December 2020 and the company had an operational EWC in Germany.

On 30 June 2020, EasyJet began collective redundancy consultations with trade unions in the UK. The UK-based EWC sought to communicate with EasyJet about the process of and the timescale for redundancy consultations. This communication, between September and December 2020, was largely one-way which resulted in a complaint made by the EWC to the Central Arbitration Committee (CAC) on 15 March 2021. In response, EasyJet challenged the jurisdiction of the CAC on the basis that the existing

[22] On the practical implications of moving an EWC see further *HSBC European Works Council and HSBC Continental Europe No. 1 and No. 2* (EWC/38/2021, 22 June and 11 August 2021) and *Adecco Group European Works Council and Adecco Group (2)* (EWC/34/2020, 15 February 2021).

[23] These are those EWCs whose central management is located outside both the UK and the EU but where the largest EEA-based entity of an employer located outside the EEA is based in the UK; and potentially those EWCs where the representative agent is situated in the UK. For a discussion see *Harvey on Industrial Relations and Employment Law*, paras 605.11–605.13.

EWC in the UK had ceased to exist at the end of the transition period in line with the amendments to TICER.

The difficulty in the case arose from the apparent inconsistency between the amended Regulations 4 and 5 of TICER. Amended regulation 4(1) states that TICER would continue to apply to an EWC 'only where, in accordance with regulation 5, the central management is situated in the United Kingdom'. Regulation 5 had originally contained the duty of central management to create the appropriate conditions for setting up EWCs. This duty was removed by the 2019 Regulations but at the same time regulation 5(1)(a) which had referred to situations in which central management was 'situated' in the UK was also deleted. Regulations 5(1)(b) and 5(1)(c), which referred to situations in which central management was 'deemed' to be situated in the UK, remained in amended TICER. Both parties agreed that this had the effect that no new EWCs could be established in the UK after 31 December 2020, but the question remained whether EasyJet's existing, pre-Brexit, UK-based EWC could continue to operate post-Brexit under amended TICER. In practice, this would mean that EasyJet would be required to operate two EWCs—one in the EU subject to the Directive and one in the UK subject to amended TICER.

EasyJet argued that amended TICER would only apply where central management was deemed to be in the UK but not in cases where central management was (as in the present case), in fact, in the UK.

The CAC, while recognising the poor drafting of the amendments, disagreed. It determined that it did have jurisdiction, and that the EWC continued to exist and was therefore able to make a complaint. This decision was upheld by the Employment Appeal Tribunal on the basis that it had to give the 'natural and ordinary' meaning to the words in the regulations and that EasyJet's interpretation of the provisions did not accord with common sense.[24] The Court of Appeal also dismissed EasyJet's appeal.

Davis LJ, who gave the leading judgment, agreed that the TICER amendments could have been drafted better (describing them as 'possibly not the best thought through piece of legislation'[25]) and that regulation 4, in particular, was opaque. Yet considering amended TICER as a whole and the accompanying Explanatory Memorandum (which stated inter alia that '[p]rovisions relevant to existing EWCs, which can continue to operate, are maintained'[26]), he concluded that the government's intention was clear that

[24] At [12].
[25] At [13].
[26] Paragraph 7.5 of the Explanatory Memorandum to the Employment Rights (Amendment) (EU Exit) Regulations 2019.

existing EWCs, established prior to 31 December 2020, should continue to operate thereafter.[27] The aim of the amendments was to ensure continuity and legal certainty.[28] Davis LJ 'rejected the proposition that the amendment of regulation 5(1) … had a more profound effect'.[29] The original regulation 5(1) which contained the duty to establish new EWCs had to be deleted because no new EWCs could be set up in a non-EU Member State, but this did not mean that existing EWCs should be removed from the scope of TICER. The outcome, therefore, is that 'existing EWCs continue to be within the ambit of TICER. There is no other sensible conclusion'.[30]

The practical effect of the Court of Appeal's judgment is that EasyJet is indeed required to operate two EWCs: one in Germany and one in the UK. UK-based EWCs will continue to be subject to the CAC's jurisdiction. Suggestions by EasyJet that running two EWCs was 'wholly unworkable'[31] were dismissed by Davis LJ as being 'far from insuperable'. Moreover, 'the practical difficulties created by the existence of two EWCs must be set against the protection of employees in the UK via the existing EWC'.[32] The complaint was withdrawn by EasyJet in February 2024.

The decision in *EasyJet* raises questions about how to run two EWCs whose members are subject to different jurisdictions and legal obligations. Some of these difficulties have become apparent as a result of the second CA case on EWCs—*Adecco*—handed down a month after *EasyJet*.[33]

4. *OLSTEN (UK) HOLDINGS LIMITED V ADECCO GROUP EUROPEAN WORKS COUNCIL* [2023] EWCA CIV 883

The main question raised by *Adecco* was what constituted a 'transnational issue' for the purposes of the provision of information and consultation within the scope of an EWC agreement. The information to be provided to an EWC and the subsequent consultation are limited by the EWC Directive

[27] At [24] Davis LJ states that he considers the provisions of TICER (as amended) to 'require the existing EWC to continue in existence'.

[28] See the concurring judgment by Bean LJ at [29] citing para 1 of Part 2 of the Annex to the Explanatory Memorandum.

[29] At [17].

[30] At [20].

[31] At [23].

[32] At [23].

[33] Although *Adecco* was heard after Brexit, the parties agreed that TICER as it stood pre-Brexit applied in this case.

and TICER to transnational matters. Yet neither the Directive nor TICER originally provided for a definition of what may be considered 'transnational' beyond stating that these were matters which 'significantly affect workers' interests'. The 2009 Recast Directive sought to amend this and Article 1(4) EWC Directive now defines 'transnational issues' as those that 'concern the Community-scale undertaking or Community-scale group of undertakings as a whole, or at least two undertakings or establishments of the undertaking or group situated in two different Member States'. Recital 16 provides additional details:

> The transnational character of a matter should be determined by taking account of both the scope of its potential effects, and the level of management and representation that it involves. For this purpose, matters that concern the entire undertaking or group or at least two Member States are considered to be transnational. These include matters which, regardless of the number of Member States involved, are of importance for the European workforce in terms of the scope of their potential effects or which involve transfers of activities between Member States.

The Directive thus combines fairly vague quantitative criteria (the number of undertakings affected by an issue) and qualitative criteria (the effects of decisions going beyond borders). Regulation 2(4A) TICER, inserted in 2010, adopts the same definition as Article 1(4) of the Directive. Yet the question of when a matter is transnational continues to create uncertainty[34], as illustrated by the facts of *Adecco*.

In 2018, Adecco Group had agreed to an amended EWC Agreement, subject to English law, which provided that information and consultation between the Adecco Group and its EWC would be limited to transnational matters. The definition of 'transnational matters' in clause II of the Agreement covered matters that '[concern] or have potential effects at least on two undertakings of the Group situated in two different EEA countries [or] on the Community-scale group of undertakings as a whole'. Clause II.1 excluded 'Local Matters and Issues'—including day-to-day management, remuneration, compensation, benefits, rights, terms and conditions of employment, staffing levels of the single country and other issues of similar kind—from the remit of the EWC. Clause V.1.4 provided that

[34] See European Commission, *Evaluation of Directive 2009/28/EC*, SWD(2018) 187 final, from 23 onwards for a discussion of the challenges.

> Extraordinary meetings will be convened to provide Information and engage in Dialogue with the Steering Group on the following transnational Issues where exceptional circumstances or decisions arise:
>
> …
>
> b) in the event of collective redundancies which significantly affect existing Adecco Employees in each of at least two EEA countries in which Adecco has employees.

It was agreed that the EWC Agreement reflected the terms of the EWC Directive and TICER.

Between late 2019 and September 2020, Adecco subsidiaries in Sweden and Germany consulted on and implemented several rounds of collective redundancies.[35] Although relevant national procedures were followed, a request for an Extraordinary meeting by the EWC Steering Group about the redundancies in both countries (which they considered to be a transnational issue) was refused on the basis that the decisions on job losses were taken at a local level, there was no common cause or rationale for the redundancies in each individual country, and that the decision on the redundancies were not made centrally. The redundancies were therefore outwith the scope of the EWC Agreement and did not necessitate the convening of an Extraordinary Meeting. The EWC made a written complaint to the CAC in November 2020 that Adecco had failed to inform and consult the EWC about the collective redundancies which were within the scope of the EWC Agreement.

The CAC upheld the EWC's complaint finding that the collective redundancies were a transnational issue even though they were not 'proposed, approved or coordinated at central level or at any level beyond that of the individual country'.[36] The EAT agreed, reasoning that '[r]edundancies decided on in one EEA state are inherently likely to have an indirect or knock-on effect on employees in the same undertaking or group in another EEA state without the need to search for a common cause or decision'.[37] There does not need to be a clear link between two sets of redundancies for them to be considered a transnational matter within the meaning of clause II of the agreement. Moreover, collective redundancies were expressly included within the definition of a transnational issue by clause V.1.4(b) of

[35] Additional redundancies occurred in the Netherlands and Hungary but as these were subsequently considered outwith the jurisdiction of the court in this case they are not discussed further.

[36] At [52].

[37] At [55].

the Agreement. On appeal to the Court of Appeal, the main question was whether clause V.1.4(b) provided an exhaustive definition of a 'transnational matter' or whether there must be a transnational matter as defined by clause II before the requirement to convene an Extraordinary Meeting for certain cases of transnational matters under clause V.1.4(b) is triggered.

Lady Justice Simler, giving the lead judgment, disagreed with the approach taken by the EAT and held that the latter interpretation was correct. Clause II acted as a sort of gatekeeper meaning that it defines which matters are to be considered transnational. Clause V.I.4 then clarifies which of those transnational matters require an additional or extraordinary meeting. Whether something was considered transnational under clause II was to be:

> determined objectively, unaffected by the subjective views of either party. This is a question of substance not form. If in fact, and as a matter of substance, proposals to make redundancies in two countries are linked, no matter how or when they are presented, they should be regarded as a transnational matter triggering the relevant obligations. […] To engage the main information and consultation obligations under the Agreement, collective redundancy proposals affecting undertakings in two countries must therefore have a common link or nexus of some kind or there must be some way in which each proposal affects or has potential effects on undertakings in each of two different countries. If that link or nexus is not present, the matter is not transnational for these purposes.[38]

A 'common link or nexus of some kind' arises where issues concern the undertaking in more than one country or where these significantly affect existing employees in more than one country. Simler LJ disagreed with the EAT's view that it was '"inherently likely" that collective redundancies in one member state will have "indirect or knock-on effects" on employees in another member state'.[39] Collective redundancies as in the present case would only be considered transnational and therefore within the remit of the EWC if they had an effect beyond borders in substance and fact. This did not require central management to take the decision to impose collective redundancies, but it required the redundancies to at least concern each other or have effects beyond borders. It appeared, based on the evidence presented, that Adecco's decisions to make redundancies were national matters, not related to each other, and were linked purely by coincidence of timing. However, both Simler LJ and Dingemans LJ noted that Adecco's

[38] At [60]-[61].
[39] At [67].

case had evolved since the CAC's original decision. Thus, to determine whether the collective redundancies in Sweden and Germany had a common link or nexus and should therefore be considered 'transnational' and within the remit of the EWC required a finding of fact. The case was remitted to the CAC. Permission to appeal to the Supreme Court was refused on 24 January 2024.

5. ANALYSIS

The judgments in *EasyJet* and *Adecco* are significant for a number of reasons. Practically, the CA's decision in *EasyJet* that EWCs can continue to operate in the UK post-Brexit allows approximately 70 UK-based EWCs each having between 3 and 30 UK council members[40] to continue their work subject to amended TICER and preserves the rights of these members and, by extension the workforces of which they are part, to information and consultation on transnational issues. Given the limited workplace representation rights in the UK, this is important. In *HSBC EWC and HSBC Continental Europe*[41] — currently on appeal to the EAT — it will be clarified whether Davis LJ's purposive interpretation of TICER extends to protect UK council members who were explicitly excluded from an EWC (which had moved to Ireland) post-Brexit. Should the EAT support the EWC's appeal based on the precedent established in *EasyJet* then this would mean that HSBC would either need to (1) continue to operate two EWCs, (2) include its UK EWC members in its EU/EEA EWC or (3) formally abolish the UK-based EWC. Either option (1) or (2) would fulfil Davis LJ's requirement that employees in the UK are protected in line with the aims of TICER. How (3) is to be done is not, however, clear. TICER is silent on the matter so presumably the procedure for abolishing existing EWCs is to be determined by agreement between the parties concerned (if it is not already

[40] Figures cited in the Department for Business and Trade, *Consultation on clarifications to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and abolishing the legal framework for European Works Councils*, https://www.gov.uk/government/consultations/smarter-regulation-employment-law-reform/consultation-on-clarifications-to-the-transfer-of-undertakings-protection-of-employment-regulations-2006-tupe-and-abolishing-the-legal-framework-f#abolishing-the-legal-framework-for-european-works-councils-ewcs date last accessed 8 August 2024.

[41] EWC/38/2021.

contained in the EWC agreement and/or if the agreement is not time limited) with the CAC having jurisdiction to hear any complaints.[42]

In determining the content and scope of post-Brexit UK labour law, the *EasyJet* case also has symbolic significance as it both preserves EU-derived employment rights and structures and entrenches them in UK law. The value of EU-derived employment rights had featured prominently in the run-up to the Brexit referendum[43] and their repeal or continuing protection was regularly debated before and after the exit negotiations.[44] Although the preservation of EU-derived employment laws in UK law as 'retained EU law' by the EU Withdrawal Act 2018 meant that Brexit had limited immediate consequences for the majority of UK labour law, the Government continued to pursue its aim of removing EU law from the statute books through the passage of the Retained EU Law Act 2023 which makes provision for significant changes to the current status, operation and content of retained EU law.[45] EWCs had not hitherto featured prominently in these debates as relevant legislation had already been amended pre-Brexit (as outlined in Section 2). The assumption presumably—given the low uptake of EWCs in the UK—was that UK-based EWCs would either relocate to the EU/EEA or cease operating. Yet, following *EasyJet*, we are left with UK-based EWCs existing in and subject only to UK law. As Davis LJ points out, '[t]he Directive no longer governs the operation of the existing EWC in the UK … which is governed by the provisions of TICER, i.e. English law. … the significance of the Directive falls away'.[46] One of the legacies of the UK's EU membership thus appears to be a dual channel of worker representation (even if only in a small number of companies).[47]

[42] See Regulations 17 and 21.

[43] See, for example, https://blog.oup.com/2016/04/brexit-and-employment-law-red-tape/ and https://www.theguardian.com/politics/2016/feb/25/workers-rights-are-on-the-line-in-eu-referendum-warns-tuc date last accessed 8 August 2024.

[44] See, most recently, the debates preceding the passage of the Retained EU Law Act 2023, https://bills.parliament.uk/bills/3340/publications date last accessed 8 August 2024.

[45] For an overview see the House of Commons Library Briefing on the Act, https://commonslibrary.parliament.uk/research-briefings/cbp-9841/ date last accessed 8 August 2024.

[46] *EasyJet* at [24].

[47] Although it may be that this legacy is short-lived. On 16 May 2024, the Department for Business and Trade launched a consultation on abolishing UK-based EWCs. See Consultation on clarifications to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and abolishing the legal framework for European Works Councils—GOV.UK (www.gov.uk) date last accessed 8 August 2024. Whether and how the results of the consultation will be acted upon following the 2024 General Election is unclear at time of writing.

The immediate challenge for the undertakings, workers and trade unions affected is to make sure that the two EWCs in the UK and the EU/EEA operate smoothly alongside each other bearing in mind that EWC members will now be subject to different jurisdictions and legal obligations. *Adecco* is important in this context as it provides guidance, by a UK court, on one of the key provisions of TICER which will be relevant for UK-based EWCs going forward. EWCs only have competence to inform and consult on transnational matters. Yet the definition of what constitutes a transnational matter has long been elusive notwithstanding the amendments made to the EWC Directive and TICER in 2009/2010 with the insertion of article 1(4)/reg 2(4A). Prior to *Adecco*, the CAC had generally adopted a broad approach to its interpretation of reg 2(4A) TICER. In *Haines v The British Council*[48], it clarified that transnational issues which 'concern' Community-scale undertakings means 'relates to' or 'is about' and need not involve any element of potential adverse effect on workers. In *Princes Group European Works Council and Jonathan Clegg v the Central Management of Princes Group*[49], this resulted in a proposal to close a factory in the UK and to transfer a small volume of production to Italy being considered a transnational matter which fell within the scope of the EWC agreement even though only the employees' interests in one country were affected to a considerable extent. The precedents on what constitutes a transnational matter have thus tended to err on the side of encouraging information and consultation where employee interests may be affected because of changes happening in other countries (in line with the general purpose of the EWC Directive and TICER as being to protect employees' interests). The focus has been on either the potential adverse effects of decisions and/or on the number of countries affected. This approach also underpinned the CAC and EAT's decisions in *Adecco*.

By introducing the need for an objective, factual link between two matters, or in the way that a single matter affects undertakings in each of two states, the CA in *Adecco* has added an extra requirement to what constitutes a transnational matter. The difficulty that arises with this approach is that it is hard to show an objective link between matters proposed in different countries potentially by different management bodies at different times *before* significant decisions are taken (which is when information and consultation with the EWC is most valuable from an employee perspective).

[48] EWC/7/2012, 22 April 2013.
[49] EWC/21/2019, 17 January 2020.

A general requirement for an objective, factual link may thus give central management opposed to engagement with EWCs scope for avoidance tactics, particularly in business structures where decisions are taken by management in different countries rather than centrally; where decisions are taken sequentially; or where the confidentiality provisions in TICER and the Directive are invoked to prevent the sharing of business information in a timely fashion.[50] Looking, for example, at the facts in *Adecco,* it is impossible to establish a factual nexus, based on the information provided, between the different redundancies in a timely manner which would have allowed meaningful information and consultation with the EWC. The link between matters often only becomes apparent after decisions have been taken especially if they are not all taken at the same time. To require an objective assessment may ultimately open the door to more litigation to determine whether a matter is transnational and therefore should fall within the competence of the EWC. Given the amount of time that litigation takes, a decision in favour of information and consultation will, in all likelihood, be too late to impact any decision-making. The judgment in *Adecco* is based on the interpretation of a particular EWC agreement and its application to the facts by the CAC may shed some light on what constitutes an objective link but, as it stands, it is not encouraging of the meaningful information and consultation of employees to help anticipate and manage workplace changes which the legislation sought to achieve.

6. CONCLUSION

The EWC Directive and TICER have had limited effect in the UK and uptake has been relatively low. EWCs sit uneasily within the UK's workplace representation system. Brexit posed a particular challenge as EWCs are inherently cross-border and depend, for their effective operation, on transnational co-operation. The amendments to TICER, alongside the Commission notice, left UK-based EWC members in limbo. Although not opposed to continued UK employee participation in existing EWCs, the European Commission notice actively preserved only the rights of EU/EEA EWC members while the UK government's amendments were not clear in their intention. The CA in *EasyJet* has provided clarity in that regard and

[50] See European Commission, *Evaluation of Directive 2009/28/EC*, from 27 onwards for a discussion of the challenges.

the decision that existing UK-based EWCs continue to exist post-Brexit is to be welcomed as preserving the rights to information and consultation of those employees affected. However, UK-based EWCs face several practical difficulties in their operation which have been compounded by the decision in *Adecco*. Seen against the backdrop of a potential revision of the EWC Directive which may introduce a presumption of transnationality in a broad range of cases[51], the decision in *Adecco* may result in UK-based EWCs's competence being more limited than that of its EU/EEA counterparts in the same group of undertakings. Any divergence in this regard will increase the practical difficulties for UK-based EWCs seeking to fulfil their purpose under the legislation.

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[51] In January 2024, the European Commission proposed a revision of the Directive which will inter alia clarify the definition of transnational matters and when EWCs must be informed and consulted. To that end, the Commission has proposed the revision of Article 1(4) EWC Directive to introduce a presumption of transnationality in cases where measures considered by management can reasonably be expected to affect workers in more than one Member State, but also cases where such measures can reasonably be expected to affect workers in only one Member State and the consequences of those measures can reasonably be expected to affect workers in at least one other Member State. The aim of the revision is to both enhance legal certainty and encourage genuine dialogue between central management and EWCs in a way that enables workers' representatives to express their opinions prior to the adoption of a decision. Any revision of the Directive will not need to be implemented in the UK and will not affect UK-based EWC agreements. While courts may have regard to the revised Directive in future cases, they do not have to take it into account. See section 6 of the EU Withdrawal Act 2023 and *Tower Bridge GP Ltd v HMRC* [2022] EWCA Civ 998 (18 July 2022), where the Court of Appeal observed that it may have regard to post-transition EU case law, but it is not bound by it.