BEERG | The Brussels European Employee Relations Group

Newsletter

No. 14 April 22, 2021

## *In this week's issue:*



## EWCs: 150 EWCs now based in Ireland?

*According to the latest newsletter from the union-side consultancy, "EWC Academy", (here):*

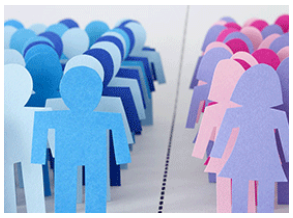

> *Prior to the Brexit, Ireland played only a minor role in the landscape of European works councils. A total of only eleven companies with headquarters in the Republic had so far established a European works council, along with another 36 non-Irish corporations which had established their EWC there long before Brexit. Now after Brexit, around 100 companies have followed suit, many from the USA, leaving the UK … As a consequence Ireland has moved up from 13th to third place in the EU, after Germany and France.*

The EWC academy figures suggest that there are now about 150 EWCs subject to Irish law. This number will be of interest to the relevant departments of the Irish government as they consider necessary changes to the *Transnational Information and Consultation Act, 1996,* especially the provisions which deal with the resolution of disputes that may arise between EWCs (and SNBs) and management.

The Labour Court and the Workplace Relations Commission will also be interested because if there is a pool of 150 or so companies with EWCs based on Irish law then it is inevitable that disputes are going to arise and, as the law stands, it is questionable if the Court and the WRC are equipped to deal with them.

*If you are aware of an EWC that has moved to Ireland, drop us an email.*

# US: House passes Paycheck Fairness Act



As the EU Council of Ministers and the EU Parliament begin examination of the Commission's proposal for a Directive (here) *"… to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms",* somewhat similar legislation is on the table in the US in the shape of the Paycheck Fairness Act.

*Greg Hoff of HR Policy Association writes about the latest US developments:* Rejecting the potential for a bipartisan approach, the House passed the Paycheck Fairness Act (H.R. 7), a gender pay equity bill that looks exclusively to increased litigation to address gender pay disparities. An alternative approach that would incentivize employers to self-correct those disparities was voted down.

**The Act passed the House by a vote of 217-210 largely along party lines.** Only one Republican voted for the measure, while no Democrats voted against. Absent a change to the filibuster rule, it is unlikely that the bill in its current form would garner the necessary 10 Republican votes for passage in the Senate.

**HR Policy** Association submitted a letter to Congress outlining its concerns with the Paycheck Fairness Act and advocating for Rep. Stefanik's alternative solution.

The PFA would restrict employer defences to gender pay discrimination lawsuits to such a degree as to make it nearly impossible to defend even lawful, widely accepted pay practices. The Act would also prohibit salary history inquiries and employer limits on employee discussions of wages, as well as mandate enhanced penalties for employer violations of the Equal Pay Act. Finally, the bill would increase class action litigation and create new pay, hiring, promotion and termination data reporting obligations for employers. For a comprehensive, in-depth breakdown of the bill, click here.

**Bipartisan agreement on the goals:** As noted by House Education and Labor Ranking Member Virginia Foxx (R-NC): "Republicans and Democrats both agree that pay discrimination is repugnant and illegal. I'll say it again and again—it's repugnant and illegal. Despite misguided claims from the other side, this underlying principle is not up for debate."

**Stefanik substitute:** Rep. Elise Stefanik (R-NY) offered a less litigious alternative—the Wage Equity Act (H.R. 2491)—as a substitute measure, incentivizing employers to take real steps towards eliminating the wage gap by providing a safe harbor against litigation for those employers that conduct internal audits of their pay practices and make reasonable progress towards eliminating unlawful differentials revealed by such audits. The amendment was rejected by a vote of 244-183. "The Wage Equity Act is a practical, 21st century solution to achieve equal pay for equal work once and for all by empowering businesses and employees to work together in pursuit of this common goal," said Rep. Stefanik.

**Outlook:** Large companies generally agree the solution to racial and gender pay disparities lies in increased representation in higher-paying jobs. In the meantime, most of them are taking steps to address unacceptable disparities within similar positions. Rather than expose them to litigation, these steps should be incentivized by liability protections for good faith efforts, as has been done in Massachusetts, Oregon, and Colorado. The fate of the Paycheck Fairness Act in the current Congress will likely be tied to the ability of members of Congress on both sides of the aisle to find a consensus that recognizes the commitment of most employers to eliminating the wage gap.

*On May 20th, BEERG will be hosting a webinar on the proposed EU Pay Transparency Directive in association with HR Policy and Ius Laboris. Details will be circulated to members in the coming week*

## Gig economy: Re-instate drivers sacked by automated process says court


An Amsterdam court has ordered Uber to cancel its decision to exclude five drivers from its App for alleged sharing of account details. Uber had alleged its systems had detected that two devices had attempted to log in to a driver's account minutes apart in two separate parts of London.

The five drivers, backed by the App Drivers & Couriers Union (ADCU) and the campaign group Worker Info Exchange, argued that they had been wrongly accused of fraudulent activity based on mistaken information from Uber's technology, and that the company had failed to provide the drivers with proper evidence to support the allegations.

In a judgment delivered last week, the district court of Amsterdam – where Uber's European headquarters is located – said the ride-hailing app should reinstate the five British drivers, and one Dutch driver, because the decisions had been "based solely on automated processing, including profiling". The court said Uber should pay a penalty of €5,000 (£4,300) for each day that it had failed to comply with the order to reinstate the drivers, which was made in February, up to a maximum of €50,000, as well as €100,474 in damages.

Uber said it was applying to have the judgment of the Amsterdam court set aside as it had not been aware of the case until last week and that correct procedure had not been followed. An Uber spokesperson said: "Uber only became aware of this default judgment last week, due to representatives for the ADCU not following proper legal procedure. With no knowledge of the case, the court handed down a default judgment in our absence, which was automatic and not considered."

***Read the full Guardian report*** here

## Brexit: EDPB opinion on proposed UK adequacy decision


The European Data Protection Board (EDPB) has now published its Opinion 14/2021 on the proposal by the European Commission to grant the UK a data adequacy decision, meaning that personal data could flow freely from the EU to the UK. The UK has already said that there are no barriers to data transfers from the UK to the EU.

It its opinion, the EDPB notes that as the UK was an EU member until early 2020, and then EU law continued to apply during the transition period which came to an end on December 31 last, UK data protection law is currently essentially equivalent to EU law. However, there is no guarantee that this will be the case in the future. The Board say:

> *The first challenge, a general one, relates to the monitoring of the evolution of the UK legal system on data protection as a whole. Indeed, the UK Government has indicated its intention to develop separate and independent policies in data protection with a possible will to diverge from EU data protection law. Such political declarations have not materialised yet in the UK legal framework. However, this possible future divergence might create risks for the maintenance of the level of protection provided to personal data transferred from the EU. Therefore, the European Commission is invited to closely monitor such evolutions from the entry into force of its adequacy decision and take necessary actions including by amending and/or suspending the decision if necessary.*

Second, the EDPB expresses concern over the possible onward transfer of data from the UK to countries which the UK considers "adequate", but the EU does not.

> *Although the EDPB notes the capacity of the UK, under its legal framework, to recognise territories as providing an adequate level of data protection in light of the UK data protection framework, the EDPB wishes to highlight that these territories might not benefit, to date, from an adequacy decision issued by the European Commission and ensure a level of protection "essentially equivalent" to that guaranteed in the EEA. This might lead to possible risks in the protection provided to personal data transferred from the EEA especially if, in the future, the UK data protection framework deviates from the EU acquis.*

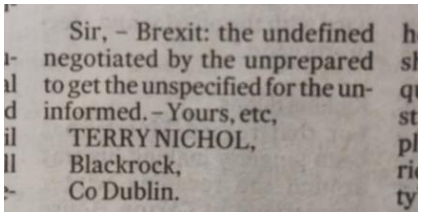
As expected, the UK's surveillance powers, especially the so-called *Investigatory Powers Act*, gave the Board cause for concern. While it noted that am Investigatory Powers Tribunal (IPT) had been established to hear complaints about the use of the Act, it calls for further clarity around bulk interceptions; safeguards around national security exemptions to overseas disclosure; and independent assessment and oversight of the use of automated processing tools.

BEERG COMMENT

*The EDPB's opinion underscores what we have previously called the UK's "data dilemma". It can have an EU data adequacy decision while it stays close to the GDPR and does not give adequacy decisions to countries to which the EU has not granted such a decision. But once it starts to deviate from the GDPR or starts to grant its own adequacy decisions, as government ministers have said it will (here), then the EU adequacy decision is put at risk. Further, the Board's concerns about the UK's Investigatory Powers Act, could form the basis of a legal challenge from privacy activists to a Commission decision to push ahead with an adequacy decision.*

*While we have concerns about what we see as the over-zealous implementation and enforcement of the GDPR by some supervisory authorities across the EU (see last week's newsletter) the law is as it is, and the issue of a UK data adequacy decision is far from settled.*

## Brexit: How not to conduct a negotiation


Sir, – Brexit: the undefined negotiated by the unprepared to get the unspecified for the uninformed. – Yours, etc,
TERRY NICHOL,
Blackrock,
Co Dublin.

Anyone who has ever done Negotiations 101 will read this interview with Sir Ivan Rodgers with horror. Sir Ivan was the British Permanent Representative to the EU at the time of the Brexit referendum. He subsequently resigned from his Brussels position and the civil service when the May government refused to listen to him about how the Brexit negotiations should have been handled. Some of May's team actively briefed against Rodgers, accusing him of being overly negative about the type of deal the UK could secure. As events have shown, Rodgers was right.

As you read the interview it becomes clear that the UK began the Brexit process with no clear objectives; before it had done any homework/ preparation; without putting together a team with the necessary expertise; thought through its options/alternatives; engaged with key stakeholders (which it never did); worked out appropriate procedures; or try to anticipate where the other party, the EU, would be coming from and how it would see things.

No wonder the Brexit negotiations became as difficult as they did, resulting in sub-optimal solutions.

BEERG PODCAST

*The latest BEERG Podcast (#23) has been produced to accompany this story. In it Tom Hayes reflects on what he has learned about developing negotiating skills*

*You can find the Podcast: HERE - also on Spotify / Google Podcasts / Apple Podcasts*

## Remote working: UK figures highlight trends

The UK's Office of National Statistics (ONS) released some interesting figures this week on remote working/working from home. According to the ONS, homeworkers had longer hours, higher pay and more managerial responsibility than those who continued travelling to offices in 2020. Almost one in 10 employees switched to homeworking last year, with the figures showing that 35.9 per cent of the employed population worked at least partly from home in 2020, up from 26.5 per cent in 2019.

Before 2020, people who worked mainly from home tended to be female and part-time. They were on average paid 6.8 per cent less than those who never worked from home, even after accounting for age, occupation and industry. They were also much less likely to receive a bonus, to have been promoted or to receive training. "The rewards for homeworking were typically less for those who exclusively worked from home," the ONS said, adding that this could mean they were less productive, but could also mean they were "overlooked . . . due to a lack of visibility" or had chosen flexibility above maximising their pay.

In the past year, the pay penalty for homeworking has vanished. People who mainly worked from home were paid 9.2 per cent more on average in 2020 than those who never did, and their working hours increased, even as working hours overall fell due to lockdowns. Of those employed as managers, directors and senior officials, more than half worked at least partly at home in 2020, compared with just one in 20 in occupations involving routine and largely manual tasks.

The ONS also published data showing how working patterns have changed as schools reopened and people became accustomed to working away from the office. At the start of the pandemic, homeworkers tended to stick to typical office hours, the ONS said, but by September they had become more likely to start and finish later. In both April and September, homeworkers took more breaks than other employees, but they were also likely to work more hours of unpaid overtime.

*Almost a quarter of workers in the UK hope to never return to the office, according to a survey by Deloitte, and are eager to see a permanent shift to working exclusively from home. The poll also found that the proportion of staff hoping never to work from home again was slightly higher at 28%, while 42% said they would like a hybrid model, working remotely for at least two days a week. The analysis also found that two-fifths of workers believe they are more efficient when working at home.*

## Ireland: Statutory leave entitlements

Following further changes to the various forms of family leave under Irish law, our colleagues at Matheson have compiled an overview table as an easy reference. The table includes recent changes on parent's leave, explained further below. It is attached to this newsletter as a supplement.

The *Family Leave and Miscellaneous Provisions Act 2021* (the "2021 Act") came into effect in April 2021. It makes the following enhancements to parent's leave:

- parent's leave has increased from two to five weeks; and

- the time frame within which parent's leave must be taken has been extended from one year to two years from the child's birth or placement with their adoptive family.

Parent's leave is available for any child born or adopted on or after 1 November 2019. The five weeks of parent's leave may be taken in one block or as separate weeks. The 2021 Act does not place an obligation on employers to pay employees or to top up payments while availing of the leave, however, a State benefit is paid for the duration of the leave. Importantly, the changes apply retrospectively therefore parents who have taken two weeks' parent's leave prior to the enactment of the 2021 Act, will now have an entitlement to an additional three weeks.

In addition to increasing the parent's leave entitlements, the 2021 Act amends the Adoptive Leave Acts 1995 and 2005 (the "**Acts**") to allow all adopting couples a choice as to which parent may avail of adoptive leave. This includes male same-sex couples who were previously precluded due to an anomaly in Irish law. Statutory paternity leave (and the accompanying state benefit) will also be made available to the parent who is not availing of adoptive leave.

## GDPR: One-stop-shop dealt another blow?


***Derek Mooney** writes:* Over the past few months we have highlighted the creeping erosion of the one-stop-shop principle by various activist data protection authorities. The latest move involves the Hamburg DPA which is pursuing Facebook over WhatsApp-to-Facebook data transfers, see articles in Fortune and on Lexology Pro.

While Facebook has its European headquarters in Dublin, and thus comes under the aegis of the Irish Data Protection Commission, the Hamburg DPA is using the fact that Facebook has its local German office in Hamburg together with the GDPR's urgency procedure clause to intervene and "protect the rights and freedoms of German users". It says it is concerned that the planned changes would allow WhatsApp to *"expand data transfers with Facebook for marketing purposes and direct advertising."*

The Irish DPC already raised the change in T&Cs with Facebook and issued its draft decision back in January, which it shared discussed with other EU DPAs. The Irish DPC concluded that WhatsApp's T&C updates would not involve any change to data-sharing practices either in the European Region or the rest of the world. Now we have the Hamburg DPA second guessing the Irish DPC and saying that it will block their application in Germany. Where now for the one-stop-shop?

Not that the undermining of the Irish DPC is coming from DPAs alone. Last Thursday the French minister for Digital & Communications, Cédric O, tweeted (in French):

> *"Inquiry finally launched by the Irish DPC on the Facebook data leak. Let's hope they respond to the unacceptable situation, which has affected millions of French citizens. If not, we will have to draw some conclusions about the European data protection framework."*

His veiled threat to further tighten EU data privacy rules and his insinuation that Ireland is less than willing to tackle data breaches received Irish media attention and echoes comments made by the European Parliament, which recently passed a report entitled: *Commission evaluation report on the implementation of the General Data Protection Regulation two years after its application (2020/2717(RSP))*

The report contains a section (observation #20) that singles out the Irish and Luxemburg data protection authorities for targeted and criticism, saying that the Parliament:

> *"…; is particularly concerned that the Irish data protection authority generally closes most cases* ***with a settlement instead of a sanction*** *and that cases referred to Ireland in 2018 have not even reached the stage of a draft decision pursuant to Article 60(3) of the GDPR; calls on these DPAs to speed up their ongoing investigations into major cases in order to show EU citizens that data protection is an enforceable right in the EU; points out that the success of the 'one-stop shop-mechanism' is contingent on the time and effort that DPAs can dedicate to the handling of and cooperation on individual cross-border cases in the EDPB, and that the lack of political will and resources has immediate consequences on the extent to which this mechanism can function properly" (Bold emphasis is BEERG's).*

This observation further confirms the deep concerns previously expressed here by BEERG that too many in the EU, at both political and bureaucratic levels, are focussed on solidifying a blame and fine culture rather than working to fix problems and see destroying the one stop-shop principle as a prerequisite to achieving this. While these folks may proclaim strong vocal support for 'one-stop shop-mechanism', their actions show that they are firmly set on causing its erosion.

## Germany: Works Council Modernization Act - Reform in the Wrong Place

*Gerlind Wisskirchen of CMS-HS writes:* The "Betriebsrätemodernisi-erungsgesetz" (Works Council Modernization Act) is intended to make it easier to establish works councils and strengthen their rights. Though the Betriebsrätestärkungsgesetz (Works Council Strengthening Act) was not even discussed in the Cabinet a few weeks ago due to CDU reservations, it is now being helped to a breakthrough by political horse-trading.

Secretary of Labor Hubertus Heil (SPD) announced his success with comments that leave no room for doubt on where he stands. Speaking in Berlin last week, he said:

> *"We want there to be more works councils in Germany again. Employees should be encouraged to set up such bodies. The law is a clear message to employers who want to prevent works councils from being set up. I say this especially in view of some U.S. corporations that trample co-determination rights underfoot. Anyone who tries to prevent works council elections, harass works councils or obstruct their work has me as a staunch opponent."*

The declared goal of the tenacious Labor Minister Heil, in close cooperation with the unions, is to make it easier to establish and elect works councils.

In presenting the draft, the ministry relies on figures from the trade union-affiliated Institute for Employment Research. According to these figures, 9% of establishments with works council capacity in western Germany and 10% of establishments with works council capacity in eastern Germany still have a works council, a decline of 3% and 1% respectively in 23 years. Around 41% of employees in western Germany and 36% in eastern Germany are represented by works councils. A number of new regulations are intended to counter this trend.

Extension of the simplified election procedure: The so-called simplified election procedure is already mandatory in companies with up to 50 employees. It is now to be extended to companies with up to 100 employees. Previously, it could be carried out voluntarily in companies with up to 100 employees by agreement with the employer. In the future, this will be possible in companies with up to 200 employees.

It is doubtful whether the goal of increasing the number of works councils will be achieved. The so-called simplified election procedure is characterized primarily by shortened deadlines and not by any real

simplification. It remains a complex procedure. The reason for the relatively low number of works councils is more likely to be found in the fact that in the smaller companies, communication takes place directly between employer and employee without an intermediary works council.

**Extension of protection against dismissal in the event of the establishment of works councils:** There are also plans to extend the protection against dismissal that already exists for employees who call for a works council election and to introduce special protection against dismissal for so-called precursor initiators of such an election for the first time. The explanatory memorandum to the bill states that, according to a recent survey of full-time trade unionists (2019), obstruction occurred in 1.6% of the companies surveyed and attempts at obstruction occurred in 15.6% of first-time elections. Doubts about the statistical relevance of at least the first figure are stirring.

To date, the first three employees on the invitation to vote are not subject to ordinary dismissal. In the future, this protection against dismissal is to be extended to the first six employees on the list. Further, an unlimited number of pre-initiators of the election are not to be subject to ordinary dismissal for a maximum of three months after submitting a publicly certified declaration that they wish to establish a works council.

However, the protection against dismissal does not apply to terminations for operational reasons, presumably to counter the practical problem of an unlimited number of employees becoming involved in preparing for the election in the event of an already announced staff reduction. In the case of extraordinary terminations of both groups, the prior consent of the works council or the labor court must be obtained.

**Right to home office through the back door?** After Labor Minister Heil failed last year with a general right to home office working (working from home) especially with the Chancellor, now comes the watered-down version: the works council has a right of co-determination in the "design of mobile work performed by means of information and communication technology." The criticism of this provision in brief:

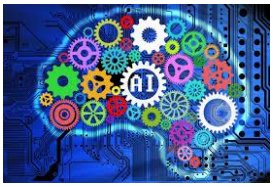
- Definitional weaknesses and demarcation problems (example: lawyer with paper file only vs. lawyer with e-file and laptop).
- There are already numerous co-determination rights of the works council in mobile work: which gap is to be filled? The explanatory memorandum to the law itself speaks only of a catch-all provision. This is just political marketing in view of the upcoming federal elections.
- Last but not least: even though the draft law does not tire of emphasizing that the employer decides on the "whether" of mobile working, i.e. the works council has no right of initiative, the new regulation creates pressure and expectations among every workforce. Six months ago, the German government still rejected the right to home office on the grounds that it would be too much of a burden on the economy.

**Unfortunately, only insufficient attempts at digitization:** According to the draft, it will be possible in future to hold partial meetings by video and telephone conference in exceptional cases. However, face-to-face meetings are to remain the rule. Due to the pandemic however, much more is currently possible because of the temporarily inserted § 129 Works Constitution Act.

Currently, almost all meetings can be held virtually. A regular possibility of virtual participation, secured in the law, would promote gender equality and help to reduce disadvantages due to disability. In particular, it is difficult for many part-time employee representatives, who are very often women in many industries, to participate in supra-local meetings. A positive aspect is that in future it will be possible to conclude works agreements using a qualified electronic signature.

**Financial burden for experts of AI:** There are also plans to require works councils to consult an expert on artificial intelligence if the works council has to assess AI as part of its duties. This is to take place

permanently and without a necessity test, meaning a heavy financial burden for companies. Such an expert would be required, for example, even for the introduction of the simplest word processing software, especially if a permanent expert is used. In the draft, a daily rate of around €800 is set for the expert under the heading "Compliance costs for business". At the same time, it is assumed they will only be necessary for one day per year. Both assumptions are completely unrealistic and, moreover, are not limited to rights of the works council under Section 87 I Works Constitution Act.




Nor is it apparent why there should be any deviation from the established principle that the works council must give priority to internal expertise.

Lack of hoped-for clarifications in data protection law: The employer is now to become the responsible party under GDPR and the Federal Data Protection Act. The high liability risks associated with high fines must thus be borne by the company. Unfortunately, the bill also fails to clarify the role of the data protection officer in relation to the works council, which has long been a matter of dispute, e.g., what control options he has vis-à-vis the works council. For this purpose, it is also not sufficient to state that the works council must comply with data protection regulations.

Conclusion: The Works Constitution Act is to be amended in many places, but unfortunately not in those areas where there is the most urgent need for reform: e.g. the concept of the establishment, new forms of employee representation (e.g. across companies or in a matrix structure) as well as the completely overpowering importance of the right of co-determination according to § 87 I 1 No. 6 Works Constitution Act for every update/new release of any software. The financial burdens that this will place on companies will ultimately come at the worst possible time.

*You can find the original German version here: Neues Betriebsrätemodernisierungsgesetz – Reform an der falschen Stelle (cmshs-bloggt.de)*

## BEERG Bytes: The latest BEERG Podcast on negotiating


You can find the latest **BEERG Byte** Podcast (#23) on your favourite Podcast platform. It features Tom Hayes talking about the critical importance of negotiation and stems from the recent Ivan Rodgers interview (see story above on Page 4). You can find it via the Anchor FM link above or search for "BEERG Bytes" via your favourite Podcast search engine such as Spotify or Google or use the links below.

The videocast of our recent BEERG meeting on Covid vaccinations as workplaces return is still available to view on the BEERG website: HERE. It is password protected. BEERG members can access a password HERE.

As always, BEERG Bytes and BEERG Podcasts are available online at www.beerg.com/beergbytes. You can access our **BEERG Bytes Podcasts at:** Spotify / Google Podcasts / Apple Podcasts / Anchor RSS

# THE BEERG AGENDA:

## BEERG/HR Policy/Ius Laboris event on pay transparency directive - 16H (CET) May 20th

At 16:00H (CET) on May 20th BEERG/HR Policy, in association with Ius Laboris, will host an online event to discuss the European Commission's recently published proposal for a Directive *"…to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms".*

.The event will explore how businesses might feed into the European legislative process to make the Directive as workable as possible. Any company which has more than 250 employees will be within scope. Key features of the proposed directive include:

- *Pay transparency for job-seekers*
- *Right to information for employees*
- *Reporting on gender pay gap*
- *Joint pay assessment*
- *Compensation for workers*
- *Burden of proof on employer*
- *Sanctions to include fines*
- *Equality bodies workers' representatives*

***Details of the event, including joining instructions, will be circulated shortly.*** *BEERG will be offering in-house presentations and training packages to assist companies identify issues they will face with this legislation.*

## BEERG/HR Policy "Return to Work" Survey Report

Last week we launched the results of the HR Policy/BEERG "Return to Work Survey Report". You can download a copy HERE. The survey - based on 135 responses from BEERG and HR Policy members – provides important insights into how multinational employers will deal with the "return to work". It finds:

- *The majority of respondents have yet to set a return-to-work date.*
- *Virtually all respondents (91%) plan to utilize a hybrid work environment upon return.*
- *Just under 80% of companies will NOT require vaccination to return to the office.*

HR Policy plans to host a webinar on the results and individual company approaches in early May, which will be open to BEERG members. We will circulate details when they are available.

## NB: BEERG meetings & events will be online-only up to September 2021

*In early September we will consult members and revisit this position in the light of the vaccination programme roll-out across Europe and the US, and national and individual company travel advice.*

## *TBC BEERG 2021 Dates for your Diary:*

| Date | Event | Venue |
|---|---|---|
| TBA | BEERG Members' Network Meeting [Oct] | *TBC* |
| TBA | BEERG Training Programme [Oct] | *TBC* |