BEERG Part of HRPA Global | The Brussels European Employee Relations Group

Newsletter

Special Preview Issue Jan 6, 2022

In this special 2022 preview issue:

Tom Hayes writes....

2022 arrived quietly, under the cover of another Covid surge. Back in January 2020 a vague rumour began to circulate about a new SARS outbreak in China. How quickly that rumour became reality and how quickly the outbreak of what we now called Covid has changed the world.

While for now Covid overshadows everything else, life still goes on. One thing we can say with certainty is that there will be plenty on the European employment and labour law agenda to grab the attention of BEERG/HR Policy Global member companies in the year ahead. Covid or not, laws will still be made.

Not only are there several major pieces of legislation working their way through the Brussels system, but the new government in Germany will be the harbinger of change, while an overhaul of key Spanish labour laws is being finalised. Who knows what changes the French elections will bring?

In the UK will we begin to see a divergence in laws from those of the EU as Brexit enters its second full year? Will the Irish government finally admit that its EWC legislation must be updated, possibly as a

result of EU Commission pressure[1]? What will happen to the "rule of law" in countries such as Poland and Hungary?

What will the new, aggressive workplace strategy of the recently elected general secretary of Unite in the UK mean in practice? Will she succeed, where many have failed, in creating transnational coalitions in major multinational companies to build "union power"?

How will Covid continue to impact the world of work? Will the switch to hybrid working become a permanent feature of the landscape? What other changes to working practices will the continuing pandemic necessitate? Will there ever be a day when we wake up and the pandemic is no more? If not, how do we adjust? (here)

In this Newsletter Special we look briefly at the issues we think will dominate the year ahead. We will be reporting on these each week in our BEERG Newsletter, which will circulate exclusively to BEERG and HR Policy member companies.

Not only will we be reporting on developments, we will also be commenting on them as well in our own inimitable way.

Tom Hayes

Proposed Directive on an adequate minimum wage

This Directive does not seek to impose a uniform minimum wage across the European Union. That would be impossible given the widely different GDP and income levels between different member states. For example, currently the minimum wage per month is €2,202 in Luxembourg compared to €515 in Romania and €332 in Bulgaria.

What the Directive would do is to ensure that each EU member states has an **adequate** minimum wage, whether fixed through law or collective bargaining. How you define "adequate" is obviously critical and will be the subject of intense negotiations between the Council of Ministers and the EU Parliament. The original draft from the Commission suggested a figure of 60% of median wages.

What will be of most concern to member companies is the language in the Directive that would impose an obligation on member states to take action where collective bargaining coverage fell below 70% of the workforce. The Parliament want to push that figure up to 80% and require detailed plans from member states on how they were going to hit that target. For its part, the Council favours a less prescriptive approach, with member states facilitating collective bargaining, but not imposing it as the Parliament appears to want.

The French have the presidency of the EU Council for the first six months of 2022 and can be expected to push hard for negotiations to be closed out before the presidential election in April. A Directive on European minimum wages would be a nice win for President Macron, allowing him to say that he was *"delivering social Europe."*

"We have to prove to our citizens that the Union is able to guarantee fundamental rights, in particular, the right to be able to live from your work," a French representative is quoted as saying during the Council meeting which signed off on the negotiating mandate for talks with the Parliament.

[1] We have just published a separate BEERG Perspectives paper on EWCs

Gender Pay Transparency

In March 2021, the European Commission presented a proposal on pay transparency to ensure that women and men in the EU get equal pay for equal work. The proposal sets out pay transparency measures, such as pay information for job seekers, a right to know the pay levels for workers doing the same work, as well as gender pay gap reporting obligations for big companies.

The proposed Directive would strengthen the ability of workers to pursue pay entitlement claims and to allow them to go to court where necessary. Employers will not be allowed to ask job seekers for their pay history, and they will have to provide pay related anonymised data upon employee request. Employees will also have the right to compensation where pay discrimination is shown to exist.

Key measures in the proposed Directive include:

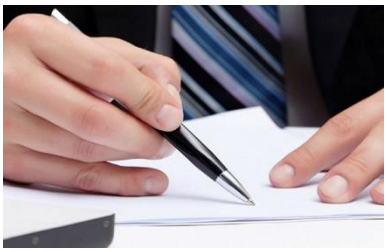
- Pay transparency for job-seekers – Employers will have to provide information about the initial pay level or its range in the job vacancy notice or before the job interview. Employers will not be allowed to ask prospective workers about their pay history.
- Right to information for employees – Workers will have the right to request information from their employer on their individual pay level and on the average pay levels, broken down by sex, for categories of workers doing the same work or work of equal value.
- Reporting on gender pay gap – Employers with at least 250 employees must publish information on the pay gap between female and male workers in their organisation. For internal purposes, they should also provide information on the pay gap between female and male employees by categories of workers doing the same work or work of equal value.
- Joint pay assessment – Where pay reporting reveals a gender pay gap of at least 5% and when the employer cannot justify the gap on objective gender-neutral factors, employers will have to carry out a pay assessment, in cooperation with workers' representatives.
- Compensation for workers – workers who suffered gender pay discrimination can get compensation, including full recovery of back pay and related bonuses or payments in kind.
- Burden of proof on employer – it will be by default for the employer, not the worker, to prove that there was no discrimination in relation to pay.
- Sanctions to include fines – Member States should establish specific penalties for infringements of the equal pay rule, including a minimum level of fines.
- Equality bodies and workers' representatives may act in legal or administrative proceedings on behalf of workers as well as lead on collective claims on equal pay.

The amount of data that this Directive will require employers to generate should not be underestimated. If and when the Directive is adopted, employers should start looking at what will need to be done even though there will be a two-year transposition period before it becomes national law.

Of concern to many employers will be the role assigned to “employees’ representatives” in either seeking information or in the “joint pay assessment.” How is the term “employees’ representatives” to be defined? How “representative” must these “employees’ representatives” be? Could one employee alone ask a union of which they are a member to act on their behalf? Some of these issues will be dealt with in national transpositions, but the employer community would do well to be conscious of them as Brussels discusses the legislation.

The Directive is still under discussion in both the Council and the Parliament.

Draft Guidelines on Competition Law and Collective Agreements for the Solo Self-Employed



The proposed Guidelines, which are currently under public consultation, were published as part of a wider package on the employment status of platform economy workers *(see next item).* The Guidelines, however, go beyond the platform economy, and, potentially, could apply to any solo self-employed worker. So, not only would it take in the "independent contractors" working for Uber, Deliveroo, Glovo and the rest, but also self-employed contractors working for, say, large IT companies.

The problem that the Commission faces in trying to ensure that the solo self-employed can bargain collectively can be stated simply. Collective bargaining, resulting in collective agreements, was and is designed to apply to workers in an employment relationship with an employer. Acting collectively compensated for the lack of bargaining power on the part of the individual worker. On his or her own, an employed worker can take what is on offer or quit. Collective organisation gives them the leverage of the strike. An employed worker works for one employer at a time, though they can always have a second job, but the working hours do not overlap.

The solo self-employed worker is not employed but works for clients. They may have more than one client at a time. They could work on several projects for different clients during the course of the day. For instance, how many riders are working for several food delivery companies at the same time? Solo self-employed workers are in competition with one another for business in a way that workers in the same employment are not

A simple question: if solo self-employed workers were organised collectively could they go on strike? Who would be the target of the strike? How do you draw the line between a strike over pay for the self-employed and price fixing?

Rather than try to square the circle of the solo self-employed and collective bargaining, the Commission would be better focusing on correctly identifying the status of workers and proposing criteria to eliminate false and bogus self-employment. Let employed workers organise and bargaining collective if they so wish and if their employer is prepared to engage in such bargaining.

Leave solo self-employed workers to be self-employed and compete for business in the market.

Employment Status of Platform Economy Workers

The proposed Directive is designed to ensure that people working through digital labour platforms ("the gig economy") have the legal employment status that corresponds to their actual work arrangements, irrespective of what any written contract between individuals and the platform employer might say.

Once in force, the Directive will provide a list of control criteria to determine whether the platform is an "employer". If the platform meets at least two of those five criteria, it is legally presumed to be an employer. The people working through them would therefore have access to the labour and social rights that come with the status of "worker."

For those being reclassified as workers, this means the right to a minimum wage (where it exists), collective bargaining, working time and health protection, the right to paid leave or improved access to protection against work accidents, unemployment, and sickness benefits, as well as contributory old-age

pensions. Platforms will have the right to contest or "rebut" this classification, with the burden of proving that there is no employment relationship resting on them.

Defining platform economy workers as "employees" in in line with the majority of court decisions that have been taken in various European countries over the past few years.

The Directive also wants to increase transparency in the use of algorithms by digital labour platforms, ensure human monitoring on their respect of working conditions and gives the right to contest automated decisions. These new rights will be granted to both workers and genuine self-employed.

They will also begin to set a template for information and consultations rights around algorithms generally so it will be important that the employer community pays attention to what is being proposed. If "experts" are to be involved on the employee/employees' representatives' side, then there should be some language in the Directive around what constitutes an "expert." Especially given the commercial sensitive of information relating to algorithms. The uniqueness of their algorithm is what gives many platform companies their competitive advantage.

The proposed Directive should also bring more transparency around platforms by clarifying existing obligations on platform employers to declare work to national authorities and by requiring platforms to make key information about their activities and the people who work through them available to national authorities.

Supply Chain Due Diligence

There is no web link to EU proposals on supply chain due diligence because, for the moment at any rate, there are none. A proposal on legislation was promised for last June or July, then moved to December, and now further postponed until sometime in 2022.

This is not surprising. What is under consideration is complex and far-reaching. For a start, how do you define a company's supply chain? How far does it stretch? Does it also include the supply chains of suppliers? How far down supply chains do obligations go?

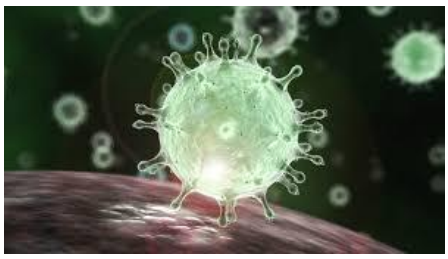
For example, is a company in France responsible for a supplier to a supplier in Poland of whom it may not even be aware? If a company in Mexico supplies canteen services to a company that supplies auto parts to a company in Germany is the German company responsible for monitoring the working conditions of the canteen workers? Is there an obligation on the German company to ensure that the tortilla is being prepared and served in accordance with labour and human rights?

Second, for what is the lead company to be responsible? Labour rights, human rights, environmental standards, health, and safety? Judged by what criteria? It is all too easy to reference global standards like ILO Conventions, the OECD Guidelines for Multinationals, or the UN's principles on business and human rights ("The Ruggie Principles") but these do not necessarily have standing in national laws. Are working conditions in Vietnam to be judged by Swedish standards, for instance, or Vietnamese standards?

Who is to have legal standing to take action against a company in cases of alleged breaches? The representatives of victims of the alleged breach? Trade unions from the company's homeland? Other trade unions? NGOs with no connection with the company other than as self-appointed moral watchdogs? Of course, where a company has done wrong access to justice and remedies must be available for those wronged. But care needs to be taken in deciding on appropriate procedures less companies be hit with a wave of frivolous and vexatious claims that take time and resources to defend.

Writing such a law will not be easy. But we already know that.

Covid and Remote Working



As I was writing this paper a note from Bloomberg popped up on my screen with the headline "WFH for life." Not even a question mark. An assumed fact. Working From Home/télétravail is here to stay.

The piece began:

> *Remember tech campuses? Where the free food was bountiful and gourmet?? Where offices were furnished with nap pods and ping pong tables? Neither can anyone else.*

It went on to note:

> *Most big tech companies pushed back their return-to-office dates multiple times this year, most recently in response to the omicron variant. Earlier this month, Alphabet Inc.'s Google told employees it would wait until the new year to assess when it will require them to return to campus.*
>
> *Later in the month, Apple Inc. also postponed its deadline for employees to return to the office to a "date yet to be determined." And Lyft Inc. said its employees won't have to come back to the office for all of 2022.*

As I write at year-end, European governments are again mandating employees to work from home where possible. The French business newspaper *Les Echos* reports that employers who refuse to allow télétravail will be fined by the labour inspectorate. The Welsh government will also fine those who do not work from home.

Over the past two years, WFH/télétravail has been done on an ad-hoc basis, with scant regard for the normal rules that apply to workplaces. This is likely to change in 2022 as legislators focus how to regulate WFH to ensure compliance with health and safety, working time, data protection and privacy laws. The "right to disconnect" will become increasingly important.

But it is well to keep in mind WFH/télétravail can only ever apply to part of the workforce, predominantly those who work with their "heads." It will never apply to those who work with their "hands," who need to be at their place of work if the job is to be done. Of course, there is overlap. Medical professionals work with both their heads and hands. Hospitals cannot be run remotely.

Care will need to be taken that a new "workplace divide" between "heads" and "hands" does not emerge.

For those who do need to be at the workplace other issues will present themselves. Will staff need to be vaccinated to work? What happens if some employees refuse vaccination? Do data laws even allow us to ask? What measures will be in place for visitors to facilities? How do we rewrite business travel policies to minimise risk?

One last point. If WFH/télétravail becomes embedded, then the question will be asked: how remote is remote? For example, see this from the *Financial Times* on remote workers in Turkey signing up with US start-ups.

Companies would be well advised to think through the long-term consequences of moving from "physical organisations" to "virtual organisations," from a "geographically focused" to a "geographically dispersed" model. Otherwise, they will be blindsided by unintended consequences.

GDPR - the issue of application over reach

While 2021 2021 saw a continuation of the gradual move to erode the one-stop-shop principle that underpins GDPR, it also saw some potentially encouraging developments. Two in particular stand out: the first is the commentary on "application overreach" from European Court of Justice Advocate General Michal Bobek. It was made in the course of an opinion at Para 65 of this case opinion). Here is the quote

> *I suspect that either the Court, or for that matter the EU legislature, might be obliged to revisit the scope of the GDPR one day. The current approach is gradually transforming the GDPR into one of the most de facto disregarded legislative frameworks under EU law. That state of affairs is not necessarily intentional.* ***It is rather the natural by-product of the GDPR's application overreach****, which in turn leads to a number of individuals being simply in blissful ignorance of the fact that their activities are also subject to the GDPR.*

Not that Mr Bobek is alone in spotting this overreach. 2021 was a record year for GDPR fines, with more fines issued in the first ten months of 2021 than in all of 2020 including some possible nine figure fines. Meanwhile the average cost of a data breach rose from €3.4 million to €3.8 million in 2021, according to IBM's latest annual research.

2021 also saw a detailed and critical re-appraisal of GDPR's operation from German MEP Axel Voss (CDU-EPP), one of the MEPs who served as a shadow rapporteur when the regulation was going through the European Parliament. He expanded on these concerns in a BEERG Byte discussion with Tom Hayes last April.

Voss is critical of how some data regulators focus on a restrictive enforcement approach that meant enforcing the rules on low-level GDPR compliance, as opposed to focusing on the real issues of data protection in a modern data driven world.

A note of caution, however. No one is anticipating any legislative changes soon, with Wojciech Wiewiorowski, the European Data Protection Supervisor telling a recent online conference that: *"There is no possibility of any changes being made to the GDPR until 2025, when the terms of the current European Commission and European Parliament will have ended. There is no political will to act before then to change any part of it."*

This brings us to the second development, which is related to the first and hangs on some recent Court decisions, particularly in Germany. Some regional German courts have overturned data breach fines imposed by data protection authorities on the grounds that the authority had failed to satisfy a requirement of German law that fines may not be imposed on an entity unless the offence can be attributed to a legal representative of the entity and can also be demonstrably linked to an intentional or negligent act of management.

Last February the Berlin District Court overturned a €14.5 million fine imposed by the Berlin data protection authority. It should be noted that some other regional courts have taken a different approach. Last October the German Federal Ministry of the Interior (BMI) appeared to back the legal interpretation offered by the Berlin court saying in a report on the operation of the data protection laws, that direct corporate liability does not correspond to the will of the German legislature.

As we commented almost a year ago: it is highly likely that this issue will probably end up in the European Court of Justice… queued up behind a range of other key GDPR complexities, but the key point remains: should every GDPR breach constitute an offence? Shouldn't an offence result from a deliberate or actual misconduct before fines are imposed, and shouldn't the authorities need to prove actual misconduct?

Brexit

We are just a year into Brexit, with many of the effects being cloaked by the Covid impact on the economy. But it is already clear. Brexit is having a negative effect. As the *Economist* notes:

> *Growth has been sluggish and ejection from the single market has, as expected, harmed the country's prospects: government forecasters put the long- run hit to productivity at around 4%.*

When you put new barriers to trade in place, trade becomes more difficult. Some industries, such as hospitality, are finding it more difficult to fill vacancies than previously. The ending of Free Movement has not helped. Because of Covid restrictions over the past year, we still do not know how travel to do business in Europe will be impacted.

In what circumstances can you travel freely. In what circumstances will visas be required? Data transfers between Europe and the EU, currently facilitated by an EU adequacy decision, could be open to legal challenge at any time, especially if the EU decided to change its own data rules. (*Read more on the impact of Brexit on the services sector*)

As the earlier part of this paper shows, there is a wide-ranging European employment law agenda currently being pursued. Will the UK keep pace with these laws, or will we see a drifting apart? What would such drift mean for the Trade and Cooperation Agreement (TCS) if the EU decided that the UK's failure to keep pace was undermining the level-playing field conditions in the TCA? How will UK labour law evolve outside the EU? (*For a useful overview of where we are with Brexit see HERE*)

We have also produced a new BEERG Brexit Blog looking back at how the British government handled Brexit, based on Gavin Barwell's recent book – Barwell was Prime Minister Theresa may's Chief of Staff)

Wrapping it up

So, a charged year ahead with a lot on the agenda. Not to mention what might suddenly come out of the Court of Justice of the European Union (CJEU) which upends our existing understanding of some law or other.

The BEERG Newsletter will be back next week reporting on these and other issues. They will also be on the agenda for BEERG meetings throughout 2022.

For now, a Happy New Year to all.

BEERG Bytes: Archive online and in Podcast

You can check our 2021 archive of BEERG Bytes at: www.beerg.com/beergbytes or listen to it them as Podcasts via your favourite Podcast search engine by searching for *"BEERG Bytes".*

You will find all episodes in video and audio/podcast formats via our webpage and: Spotify / Google Podcasts / Apple Podcasts / Anchor RSS

THE BEERG AGENDA:

Lewis Silkin/ BEERG Webinar – UK Union Rights and Human Rights: Lessons for Employers Heading into 2022 — 5:00PM (UK) Jan 13, (1800H CET)

2021 saw a series of landmark decisions by the UK courts in cases (e.g. Kostal, Mercer, Ryanair and CordantSecurity) brought on the basis that Art 11 of the ECHR says that trade union rights are human rights. This webinar will deal with key lessons for employers from such cases and provide an update on proposals for a new EU collective bargaining directive.

Register Here

BEERG/HRPA Global Members' Meeting: — Pullman Hotel, Brussels March 9 & 10

DUE TO UNCERTAINTY OVER THE PREVAILING COVID RESTRICTIONS WE HAVE RESCHEDULED THIS EVENT FOR ONE MONTH LATER THAN PLANNED so the next BEERG Network Meeting will be on March 9 & 10 at the Pullman Hotel, Gare Midi, Brussels. It is open to BEERG members, HR Policy Global members. Click link on right to ***book a place at the meeting*** The original draft agenda is HERE.

Book MARCH Meeting

BEERG Training: "Managing European ER in Post-Covid Times" — Hotel Estela, Sitges, Spain April 5 - 8

We are pleased to present the draft program for our April 2022 BEERG/HRPA Global training program: **Managing European Employee Relations In Post-Covid Times.** The goal is to familiarise attendees with the architecture of EU-level employee relations and issues of current concern. The program also does a deep dive into European Works Councils (EWCs) Program fee etc are included in the brochure – use link on the left to book your place

Book April Training

BEERG/CMS Labor Relations Workshop - CMS office: — Frankfurt, May 25, 2022 @1000H

The **RESCHEDULED** annual CMS/BEERG Global Labor Relations Seminar will be on **Wed, May 25th 18, 2022, from** 10am to 4pm, at a face to face meeting the CMS office at Neue Mainzer Str. 2-4, 60311 Frankfurt. There is no cost to attend. Email if you wish to attend.

EMAIL Tom Hayes

**BEERG/HR Policy Global Members can register online for these events using their account. Members who get the "No Tickets Available for Purchase" message should contact Derek.*

BEERG/HRPA Global 2022 Dates for your Diary:

Date	Event	Booking Links	Venue
March 9/10	***BEERG Members' Network Meeting***	Book MARCH Meeting	*Hotel Pullman, Gare du Midi, Place Victor Horta 1, 1060 Brussels*
April 5 - 8	***BEERG Training:*** *"Managing European Employee Relations in Post-Covid Times"*	Book April Training	*Hotel Estela, Port d'Aiguadolc, Sitges, Barcelona, Spain*
May 25	***BEERG/CMS Labor*** Relations Workshop		*CMS,Neue Mainzer Str. 2-4, 60311 Frankfurt, Germany*
Jun 15 - 17	***BEERG Members' Annual Network Summit***	Book June Summit	*Hotel Estela, Port d'Aiguadolc, Sitges, Barcelona, Spain*
Sept 29/30	***BEERG Members' Network Meeting***		*Paris, France Venue TBC (suggestions welcome)*
Oct 18 - 21	***BEERG Training:*** *"Managing European Employee Relations in Post-Covid Times"*		*Hotel Estela, Port d'Aiguadolc, Sitges, Barcelona, Spain*