BEERG HRPA HR POLICY ASSOCIATION HR POLICY GLOBAL

Newsletter

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In this week's issue:

EWCs: easyJet must operate 2 EWCs

Last week, the UK's Court of Appeal (CoA) decided in *easyJet* - here – that UK law requires that it operate two EWCs, one based in Germany under EU law, and a second based in the UK under UK law.

The Court did not offer any suggestions as to how the company is expected to oblige EU Member States to cooperate with the establishment of a UK-based EWC as the writ of UK law stops at the English Channel. But then, the words "rational" and "Brexit" do not fit in the same sentence. How can the law of a "third country" impose obligations on EU Member States?

The Court very diplomatically agreed that the UK legislation is a bit of a nonsense – "*Mr Stilitz KC on behalf of the company more than once described the amended regulations as "possibly not the best thought through piece of legislation". I agree with those observations*" (para 13). Which is a polite way of saying that this legislation is nuts.

It also recognised that the idea of having two EWCs is problematic – "*I accept that practical difficulties may arise from the existence of two EWCs operated by the same undertaking*" (para 23). This is something of an understatement. It also recognised that the basis for the EAT's decision was wrong (para 13).

Nonetheless, with yet a third different basis after refusing to follow either the CAC or the EAT, the CoA has said that companies like easyJet do still need to run UK EWCs in parallel to their EU ones.

BEERG COMMENT

We will look at this decision in greater detail in next week's issue. It is a decision that will be of concern to any company that is headquartered in the UK and now has an EWC based under EU law. Whether it will have any consequences for non-UK companies that once had their EWCs in the UK remains to be seen. Clearly, the UK law is an attempt to avoid one of the consequences of Brexit which deprives UK employees of the right to be represented on EWCs. Passing a law is one thing. Enforcing it is another.

We have scheduled a discussion on this for our September Network Meeting in Brussels. We will also be looking at it in greater detail at our new EWC training program in Sitges in October.

GDPR: Irish data authority at the eye of several brewing storms

Derek Mooney ***writes:*** Last Tuesday (July 4th) the EU Commission published its proposed new regulation on GDPR enforcement. (Links: Press statement / Proposal for a Regulation). The purpose of this regulation, according to the Commission, is to: *"…streamline cooperation between data protection authorities (DPAs) when enforcing GDPR in cross-border cases".* This is the regulation we anticipated in this March 2023 article.

The new regulation sets procedural rules for the DPAs when investigating GDPR breach claims affecting individuals across more than one EU member state. The new regulation keeps the "lead Data Protection Authority" concept but requires that DPA to send a 'summary of key issues' to their counterparts *concerned*. This *"summary"* will identify the main elements of the investigation and the lead DPA's views on the case, but its true purpose is to invite other DPAs to *"provide their views".*

In our opinion the Commission has produced an *activist DPA charter* by weakening the one-stop-shop principle which underpins GDPR. It moves the European Data Protection Board (EDPB) from its original GDPR envisioned role of facilitating dialogue between national authorities and exchanges of information, to become the supra-national tool of its more activist members. Overseeing and instructing less activist national authorities to do more and fine bigger. This is the "mission creep" and "overreach" we warned of in our *Jan 2022 BEERG article*.

By acceding to the EPDB's request for new "procedural rules" the Commission has effectively decided that GDPR's primary purpose is to enable authorities to fine multinationals, particularly US ones, millions of Euros and its ancillary function is the protection of EU citizens' personal data.

It is difficult not to see this Regulation as privacy activist's revenge on the less confrontational style of the Irish DPA, the Data Protection Commission (DPC). They view the Irish DPC as too pragmatic and too slow in dealing with complaints.

The DPC is the *bête noire* for privacy activists and crusaders as it oversees the European home to many of the major American social media and tech giants. Activists want these companies to be fined early and fined often. So, if Ireland's DPC won't do it, they are happy to dismantle GDPR's one-stop-shop model and centralise things at the European level. This proposed regulation is a major step in that direction.

The DPC does not always help its own case, with recent EU parliament committee appearances being perceived as overly defensive. Though there has been six-fold increase in the DPC's annual funding since 2015 and it now employs over 200 staff (target is 258 staff by end of 2023) there is still the fallacious depiction that it operates out of some rural office over a grocery store.

Back in Ireland the DPC has clout within government. Last week the Irish Parliament approved an amendment to the Irish Data Protection Act (via a Courts BILL) that would allow the DPC to label information in investigations as 'confidential' See Irish Independent story. The Minister informed parliamentarians that it was the DPC which requested the amendment, and the Irish government agreed.

The move unleashed a political row in parliament as the amendment was produced at the last minute and provoked a storm of protest from data privacy activists from Max Schrems to the Irish Council for Civil Liberties to Amnesty International. The Minister insisted that the amendment was "quite limited in scope" and is intended to protect the data (often commercially sensitive) it acquires when investigating.

Several opposition members complained that they were being answered with *"…a script that says it will be all right as it [the amendment] has come from the DPC".* The point could be made in response that many of the opposition members' arguments came verbatim from scripts from the above-mentioned groups and organisations. What we saw was the Irish Parliament turned into a theatre for a proxy war of words between the DPC and the activists… a war that did not reflect well on either party.

The key point to note here is that the Irish Justice department listens to the DPC – this will be most important when the Irish government comes to give its views on the Commission's proposed new regulation. It is to be hoped that that Irish government will strongly oppose this centralised overreach and see it as an abuse of the core EU principle of subsidiarity (maximum independence for a lower authority in relation to a higher one).

MEANWHILE, there were two other significant GDPR developments this week. On Tuesday, the European Court of Justice (ECJ/CJEU) ruled that EU antitrust authorities are entitled to check on companies compliance with GDPR (Press release HERE). The case concerned an German antitrust agency which had ordered Meta to stop collecting users' data without consent after finding in 2019 that Facebook played a "dominant" role on the social network market and would thus be subject to "special antitrust obligations." See Reuters / DW for more details.

Also on Tuesday, Ireland's Commercial Court agreed to the US government joining as an *amicus curiae* party to proceedings by Meta over the DPC's decision that Meta must suspend the transfer and storage of user data from Europe to the US. See Independent.ie story

Future Work: A roundup of the latest news

The team at Claeys & Engels write: As a result of the COVID measures, many employees were suddenly no longer able to work at their employer's premises and were obliged to work from home. To avoid that cross-border workers had to change their social security regime if they work 25 % in their residence state, the European authorities applied 'no impact' social security measures which come to an end today 30 June 2023.

However, the Administrative Commission has adopted a new Framework Agreement which will enter into force on 1 July 2023. Upon certain conditions cross-border workers will be able to telework up to 49.99 % in their residence state while remaining subject to the social security regime of the Member State where their employer's registered seat is located. ***Read the full comment HERE.***

The UK government has confirmed that remote working has had no impact on departmental productivity, despite previous criticism from senior ministers. The former prime minister, Boris Johnson, had claimed that

Whitehall staff were *"eating cheese and making coffee"* while working from home. However, ministers from the home office, foreign office, and the departments for education and health have now said that remote working has had no negative effects. Mark Serwotka, the general secretary of the PCS union, which represents civil servants, said: *"Perhaps Boris Johnson and Jacob Rees-Mogg, both of whom accused homeworkers of being lazy, should apologise for their slurs and accept they have lost the homeworking argument once and for all."*

Citigroup has warned employees that they will face consequences if they do not comply with the company's policies for office attendance. While most employees are following the rules for hybrid work, the bank is focusing on those with persistent, unexplained absences. Managers will consider compliance with the rules when rating performance and crafting pay packages. Citigroup is widely seen as one of the most flexible financial firms when it comes to hybrid work arrangements. The bank is considering tracking staffers' building-entry data to better understand office-attendance trends, and is discussing a proposal with its employee-engagement forum in the UK that would allow it to track individual staffers' office attendance on a monthly basis. Reports may then be shared with managers as appropriate to prompt further discussion.

We came across this interesting article on how the move to remote work might incentivise employers to cut full-time, permanent jobs and switch to part-time/contract work instead. If a job can be done at distance, then it is rational for employers to look at how that job can be done in the most cost-effective way. Forget remote working from Miami, how about Mumbai or Manila?

The *Economist* suggests that a spate of recent studies show that working from the office is more productive than remote or hybrid work. Could it be that managers have not yet come to grips with how to get the best out of hybrid work? That they continue to apply old, office-based techniques that do not work in dispersed work environments? Ordering people back to the office 5-days a week is simply not going to fly when workers have seen how remote work promotes a better work life balance.

Though that contention is disputed in this article from the *Guardian* which sees office work as a social activity which people miss out on when they work remotely.

EU: Minimum Wage Directive

Press reports from Sweden say that the country's centre-right government has applied to the Court of Justice of the European Union (CJEU) to join with Denmark in seeking to have the recently adopted Adequate Minimum Wage Directive annulled on the grounds that it is incompatible with the European Treaties. The Treaties, at Article 153:5 say: "The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs." It seems that the argument of the Danish government is that the Directive runs counter to this exclusion.

In both Denmark and Sweden the setting of pay rates is the exclusive preserve of employers and unions through collective bargaining. Not only the governments but also the social partners in both countries fear that the Minimum Wage Directive could undermine this model in the long term.

Were the CJEU to strike down the Directive it would mean that the obligation on governments to take measures to ensure 80% collective bargaining coverage would also be annulled.

Platform Workers: What's in play?

As we reported in last week's issue, the Council of Minsters has agreed its position on the proposed Directive on the Employment Status of Platform Workers. However, the agreed position is based on a fragile truce between ministers and was only adopted to allow negotiations on the issue to open with the Parliament and the Commission.

Colin Lecky of Lewis Silkin has written a useful piece on what was agreed among ministers. Normally, in what are known as trialogue negotiations between the Council, the Parliament, and the Commission the Council has a position that all Member States are signed up to. That is not the case with this Directive, with countries such as Spain and Belgium wanting a clearer statement that platform workers should be presumed to be employees, unless the platforms can prove otherwise. This is also the position of the Parliament.

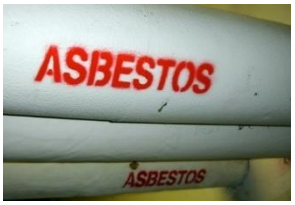
We expect that what will emerge from the trialogue negotiations is likely to be closer to the position of the Parliament than that of the Council, given the split in the Council. But it could also mean that the negotiations will deadlock, and progress will be put on hold until after next year's European Parliament elections and the appointment of a new EU Commission.

Belgium: Delhaize disputes rumbles on

In Belgium, the dispute in the supermarket chain, Delhaize, rumbles on with no conclusion in sight. Last March, Delhaize announced that it was to franchise the 128 supermarkets it directly owned, a move which would impact some 9,000 employees. The unions objected vehemently, saying that this was "social dumping" which would result in a worsening of pay and conditions. They demanded the cancellation of the plan, a demand which highlighted the question of who decides the structure of a business, the management, or the unions. Management refused to withdraw the plan which resulted in some store closures when workers walked out. Management then sought injunctions to prevent unions blocking access to the stores and to a major distribution centre on the outskirts of Brussels.

Management is pushing ahead with the franchising of the stores and has offered guarantees, on top of those already applicable on the basis of the transfer of undertaking legislation which in itself would already guarantee the terms and conditions of those transferred. The unions are now pushing for the negotiation of a "social plan" which would see workers who did not wish to transfer to the independent franchises able to leave the business with substantial compensation. So far, the company is resisting this demand.

EU: Deal agreed to cut asbestos limits



The European Parliament and the Council of Ministers reached agreement on June 27 on the update of the EU Directive on asbestos at work, lowering asbestos limits ten times and setting new measurement methods. The Council and EU parliament reached a provisional agreement to update the EU directive on asbestos, a carcinogenic mineral found in many old constructions, reducing the current asbestos limits and setting ways to measure exposure levels in line

with the latest technological developments. Once the agreement is formally adopted following the legal and linguistic revision, member states will have two years to introduce the new maximum exposure levels and six years to introduce new measuring methods. **See here for a fuller account.**

Germany: Can a member of a works council be a DPO?

Tomislav Santon *of Kliemt.HR Lawyers writes:* Back in 2011, a German court ruled that works council membership did not necessarily preclude serving as data protection officer. The same court, after referring the question to the European Court of Justice, has now changed tack, ruling that the two offices are incompatible.

Under the German Data Protection Act, employers with more than 20 employees which conduct automated processing of personal data must appoint a data protection officer ('DPO'). These conditions are easily satisfied in many companies due to the use of IT systems in areas like HR, marketing, and sales. In SMEs, however, there may not be many suitable candidates for the DPO position. Members of works councils are therefore often considered for the role. In a recent ruling (not yet been published in full), the German Federal Labour Court ('BAG') has decided that the chair of the works council is not eligible to serve as DPO. **You can read the full article here.**

Ireland: Pay Transparency

For those of you with operations in Ireland, this article from our colleagues in Matheson looks at what the recently adopted Pay Transparency Directive will mean for employers.

One thing we would add is that the implications of the obligations to inform and consult with employees' representatives on pay transparency issues, and their potential involvement in joint pay assessment where there are gender pay gaps of more than 5% that cannot be justified on non-gender grounds, should not be underestimated. Especially as these obligations will be kicking in as new, domestic Irish laws on "meaningful engagement" with trade unions in certain circumstances will also be coming into force. All of which means that the issue of "employee voice" in the workplace will be coming into sharper focus.

France: "HR Killer" sentenced to life in prison

A man dubbed the "HR killer" has been sentenced to life imprisonment in France for fatally shooting three women he accused of ruining his career. Gabriel Fortin, 48, received the maximum sentence for murder and attempted murder. The first killing occurred in January 2021, followed by two more within days. Fortin's victims included HR managers and a benefits director. The gunman was linked to the final murder through the number plate of his car. During the trial, Fortin claimed to be a victim of conspiracies and mental health issues, but prosecutors presented evidence of his premeditation. The lawyer for one of the victims' families described the crime as Fortin's response to his life's failures. here

OECD: Guidelines updated

Earlier this year, the OECD updated its Guidelines for Multinational Businesses, to take account of recent developments in both business practice and the law, including anticipating the EU's corporate due diligence proposals.

A comprehensive outline of the updates can be found in this article.

EWC: Some findings from a review of 120 agreements

Dr. Gerlind Wisskirchen from CMS Hasche Sigle outlined to our Sitges Network Meeting her findings from an analysis of some 120 EWC agreements and current trends.

- **Brexit**: Since Brexit, we have noticed a significant increase of EWCs in Ireland. This is based on the fact that the UK is now considered a third country and therefore EWCs must be relocated from the UK. Companies must decide on whether or not UK employees can still nominate EWC members. Companies tend to shy away from excluding UK members completely and therefore choose another approach: Allow UK members to attend meetings, but without voting rights.

- **Size of EWC**: The EWC's size can be restricted either by thresholds, by maximum number of delegates per country or by maximum size of EWC. Most agreements have some kind of restricting provisions (some 60%). A threshold of 50 employees per country before they are entitled to EWC representation and a maximum size of the EWC are recommended, as this limits the costs of the EWC and ensures a well-functioning body. In more recent agreements, this is becoming the standard.

- **Translation**: Especially newer EWC agreements determine English as the binding language (overall some 40%). In our experience, one of the main cost factors of EWCs are translation costs. That explains, why companies try to agree on a binding language. In return, the employee representatives are offered English courses. Ultimately, this also serves to promote good interaction within the EWC.

- **Virtual Meetings**: Newer EWC agreements more and more explicitly provide for virtual meetings (some 30%). In our experience, more and more meetings with the select committee are being held virtually (especially in recent years). Since the EWC's mode of operation can be largely agreed, such a contractual regulation is permissible and seen in newer agreements.

- **Transnational matters**: Some 30 % of the analysed EWC agreements explicitly regulate the definition of transnational matters. The question of what transnational is affects the EWC's information rights. In practice, the question of what the EWC must be informed about arises again and again. A closure of a plant in a single country? Probably not. But what if this closure also affects a plant in another country? Maybe yes. It is advisable to regulate this more precisely – e.g., by means of thresholds. If interim injunctions by the EWC in the event of infringement of its information rights were indeed to be regulated by law in the future (see Radtke report), then we believe that such a provision will be essential.

Overall, we have found that a lot of EWC agreements are outdated or at least not "state of the art". For this reason, it is important that companies pay close attention to what is happening with the proposals for a

further review of the EWC Directive. Expect a second-round consultation of the social partners shortly. We advise companies to look at their agreements now and see what improvements can be made.

However, it is not necessary to act in haste: the European legislative process will probably take several months or even years - first it is up to the European Commission to draw up a draft law amending the Directive with the involvement of the social partners, which then has to be approved by the EP and the EU Council of Ministers. And only then must any amendments to the EWC Directive be implemented in the national EWC Acts - this can also take time.

BEERG/HR Policy Global will shortly be conducting a major survey among member companies on how EWCs are working in practice today.

The results of the survey will feed into our training program on EWCs "European Works Councils – All Change" to be held in Sitges, Barcelona next October.

BEERG Agenda

Note that BEERG events are 'in person' unless listed as a webinar

London Lunchtime Network Event — *Sept 21, at Oracle offices, London, U.K.*

HR Policy Global is pleased to announce a Greater-London Area Networking and Lunch event on September 21, 2023. The event runs from 12PM to 3PM, to include a light lunch and presentations on UK HR and Labour Law updates. This event is generously hosted by Oracle Corporation, at their 1, South Place, London HQ, **Places at the event will be limited to 30 people - so sign up soon!**	*London Network Event*

BEERG Members' Network Meeting — *Pullman Hotel, Gare du Midi Brussels Sept 27/28*

Attendance at the September HR Policy Global/ BEERG Network Meeting in Brussels is open to all members. Click link on right to book your place at the meeting. Guest speakers at the September meeting will include: • *Stefaan De Rynck, former EU Brexit Negotiator* • *Delphine Rudelli, Director General of CEEMET* • *Tristan d'Avezac, future of work and non-standard forms of work, expert* Dinner guest speaker to be announced soon. Draft meeting agenda and hotel accommodation booking form will be available next week.	*Book Sept Meeting*

BEERG Training: European Works Councils - All Change — *Hotel Estela, Barcelona, Oct 11-13*

To make sure you are best prepared for the coming changes we have created a new EWC-focused program that presents a comprehensive stock taker of where we are now and how EWC management is set to develop. To get your EWC management team ahead of the curve check out our Draft Prospectus **and/or** email tom.hayes@beerg.com	***Booking link will be available from July*

**BEERG/HR Policy Global Members can self-register for these events via the links above. If you get a "No Tickets Available for Purchase" message make sure you are logged in – if the issue persists contact Derek.*

Upcoming BEERG Dates for your Diary:

Date	Event	Booking Links	Venue
Sept 21st	***London Networking Event*** *- Lunch + Roundtable Discussion at Oracle London Office*	*Book London Network Event*	*Oracle, The Helicon 1 South Place, London EC2M 2RB, GB*
Sept 27 & 28	***BEERG Members Meeting*** We will circulate the full agenda for this meeting very soon	*Book Sept Meeting*	*Brussels, Belgium*
Oct 11 - 13	***BEERG Training:*** *" European Works Councils - All Change" *Booking link available from next week*		*Hotel Estela, Sitges, Barcelona, Spain*