BEERG HRPA HR POLICY ASSOCIATION HR POLICY GLOBAL

Newsletter

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GDPR: Commission confirms EU-US Data Privacy Framework adequacy

Derek Mooney ***writes****:* On Monday, 10 July 2023, the EU Commission adopted its long-awaited adequacy decision on the recently negotiated EU-U.S. Data Privacy Framework (DPF). The adequacy decision will have immediate effect, giving a lawful basis for trans-Atlantic data transfers from data transfers which certify compliance with the DPF principles. For more information on the Adequacy Decision and the DPF principles see this EU Commission webpage.

They say the third time is lucky… so, we hope this third attempt to implement a robust and sustainable system for transatlantic data flows to the US, works. The two previous attempts *Safe Harbour and Privacy Shield* were struck down by the ECJ/CJEU. First, we had the "Schrems I" decision which scuppered on Safe Harbour in 2015, followed soon by the 2020 ECJ/CJEU "Schrems II" decisions which invalidated the EU-US Privacy Shield.

The EU Commission believes that EU-U.S. Data Privacy Framework and the DPF principles which underpin it, address the concerns raised in the 2020 Court decisions, saying:

> *"The European Commission's adequacy decision concludes that the United States ensures an adequate level of protection, compared to that of the EU, for personal data transferred from the EU to US companies participating in the EU-US Data Privacy Framework…*
>
> *…The adequacy decision follows the US's signature of an executive order which introduced new binding safeguards to address the points raised by [the] Court of Justice of the European Union in its Schrems II decision of July 2020.*
>
> *Notably, the new obligations were geared to ensure that data can be accessed by US intelligence agencies only to the extent of what is necessary and proportionate and to establish an independent and impartial redress mechanism to handle and resolve complaints from Europeans concerning the collection of their data for national security purposes."*

The question now is, will the EU-U.S. Data Privacy Framework result in a Schrems III invalidation?

Privacy activists, particularly Max Schrems and his NOYB privacy group, think it will and are already set for an ECJ/CJEU challenge. Responding to the Commission announcement Schrems stated:

> *"NOYB has prepared various procedural options to bring the new deal back before the CJEU (Court of Justice of the EU)… We expect the new system to be implemented by the first companies within the next months, which will open the path towards a challenge by a person whose data is transferred under the new instrument. It is not unlikely that a challenge would reach the CJEU by the end of 2023 or beginning of 2024."*

While the history of this battle suggests that a third invalidation is possible, it seems improbable. Circumstances have changed. Even in the three years since Schrems II. You have the implications of Russian invasion of Ukraine and the critical importance to the trans-Atlantic data economy of AI and other cloud technologies require robust cross-border data flows.

The EU Commission's briefings suggest that it has learned a lot from its past defeats and that it is confident that it can address the EU court's concerns. If it has, then all that remains for the privacy activists is their extreme and absolutist demand that the US abandon all security and intelligence gathering activity- a reckless position post the Russian invasion.

The EU Adequacy Decision also raises questions about the long running Meta vs Irish DPC case. Some observers believe the new framework supersedes the DPC's transfer ban, though the Irish Independent newspaper reports that Meta will still appeal the DPC's ruling due to the size of the fine.

Might we be at the end of an almost decade long saga over EU/US data transfers? We certainly hope so - and that trans-atlantic companies can benefit from durable and robust data transfer systems that protect user data with minimal bureaucracy.

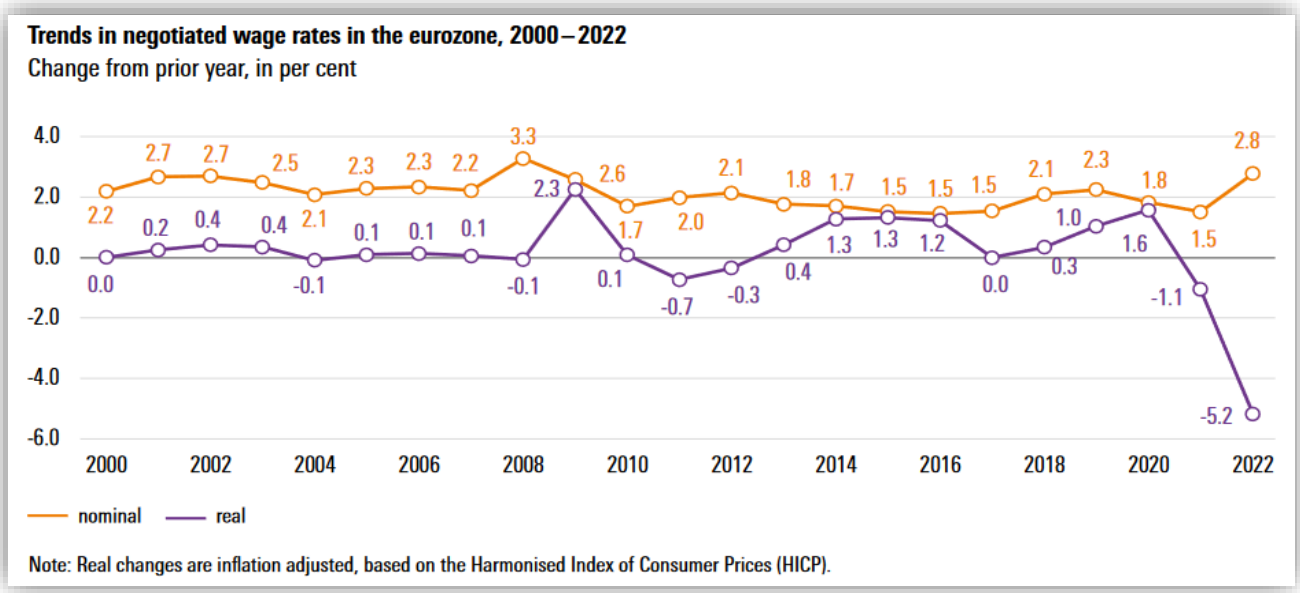
Collective Bargaining: Are excessive profits at fault for inflation?

Reacting to a blog post from the International Monetary Fund (IMF), Luc Triangle (photo), general secretary of IndustriALL Europe asks: "The IMF cannot be seen as a Trade Union Research Department. Correct? So, if the IMF comes to this proposal, what are the policymakers still waiting for to stop this *Greedflation*?" Triangle was reacting to comments on a blog post from the IMF which noted:

> *Rising corporate profits account for almost half the increase in Europe's inflation over the past two years as companies increased prices by more than spiking costs of imported energy. Now that workers are pushing for pay rises to recoup lost purchasing power, companies may have to accept a smaller profit share if inflation is to remain on track to reach the European Central Bank's 2% target in 2025, as projected in our most recent World Economic Outlook.*
>
> *As the Chart of the Week shows, the higher inflation so far mainly reflects higher profits and import prices, with profits accounting for 45% of price rises since the start of 2022. That's according to our new paper, which breaks down inflation, as measured by the consumption deflator, into labor costs, import costs, taxes, and profits. Import costs accounted for about 40% of inflation, while labor costs accounted for 25%. Taxes had a slightly deflationary impact.*

The blog post seems to suggest that it is profits, not wages, that are driving inflation. The same point is underscored in a report from WSI, the German union-affiliated research institute, on collective bargaining trends 2022/23. They suggest:

With real wages falling by 4.0 % in 2022, workers in the European Union suffered an unprecedented loss in purchasing power. The reason for this was the rapid increase in consumer prices, behind which nominal wage growth fell significantly. Meanwhile, inflation is no longer driven by energy import prices, but by domestic factors. The increased profit margins of companies are a major reason for persistent inflation. In this difficult environment, the trade unions are faced with the challenge of securing real wages — and companies have the responsibility of making their contribution to returning to the path of political stability by reducing excess profits.



The annual Eurofound review of minimum wages says that in the context of unprecedented inflation across Europe, which led to hefty increases in nominal wage rates in many countries, it was in many cases not enough to maintain workers' purchasing power.

Belgium: Timetable on 2024 social elections

Those of you with operations in Belgium with works councils will know that every four years "social elections" are held to elect the members of these councils. These elections must be run in accordance with a strict set of rules drafted by the government. For the 2024 elections the law says that they must be held in the period running from 13 to 26 May 2024. This means that the starting shot of the election procedure (day X-60) will take place in the period from 15 to 28 December 2023. Our colleagues in Claeys & Engels have publish a detailed guide to what is involved in the election process. It can be accessed HERE.

France: Expert needs employer permission

Flichy Grangé AVOCATS

Our colleagues in Flichy Grangé report on an interesting decision by Cour de cassation, France's highest court in these matters, which dismissed a demand by an expert to a works council to interview 25 employees over 5 to 6 days, for an hour and a half each. The court said that the employees in question could only be interviewed with the agreement of the employer and of the employees themselves. The expert had wanted to talk to the

employees about the company's social policies and how they saw working condition. The demand by the expert to interview the employees could not be unilaterally imposed by either the works council (CSE) or by the expert. ***The Flichy Grangé report on the case can be read, in French, HERE.***

While obviously a decision by a French court on a matter involving a local French works council is precisely that, a local decision, nonetheless it seems to us to be a useful precedent to be able to use in EWC discussion about the use of experts. In recent years we have seen experts argue that EWCs have a unilateral right to use their services without any need for prior employer permission. Indeed, this is the argument that was used in the recent *Verizon* case which was decided by the Irish Workplace Relations Commission (WRC) and is now being appealed to the Labour Court. The fact that in France, the home of the concept of the "expert," the highest court has held that employer permission can be required will be seen as helpful when confronted by expert "mission creep" demands from EWCs.

General: Some articles of interest

- This is a useful review of decisions by Spanish courts on issues arising from working from home.
- A detailed analysis of working from home trends over recent years by Stanford professor, Nick Bloom, and others, *The Evolution of Working from Home,* can be read here.
- This paper from two OECD experts looks at "*Promising practices, likely pitfalls: What works in national pay gap reporting systems*".
- In this article from Social Europe Gerard Rinse Oosterwijk, a digital-policy analyst at the Foundation for European Progressive Studies, looks at how the AI Act and the Directive on Platform Workers, once agreed, may impact on the workplace.
- Also in an article in Social Europe acting International Trade Union Federation (ITUC) general secretary, Luc Triangle says that " … attacks on workers' rights are on the rise—in no region of the world can they be taken for granted any longer."
- When it comes to AI, the *Wall Street Journal reports* that a new law in New York City, known as NYC 144, will regulate the use of automation and artificial intelligence in hiring and promotion decisions. Employers will be required to audit certain software tools annually for potential race and gender bias and publish the results on their websites.
- Bloomberg reports that over thirty European Union lawmakers have signed a document that would ultimately ensure access to co-working spaces, prohibit tracking workers' computers at home and protect them from having to send or respond to emails outside of working hours.

EWCs: in the UK post-Brexit

***David Hopper** and the **Lewis Silkin LLP** team write:* As reported in last week's BEERG newsletter, the Court of Appeal in London ruled on 30 June in the case of *easyJet*. It decided that, irrespective of Brexit and changes made to the UK's legislation on European Works Councils in anticipation of it, easyJet must continue to operate a European Works Council governed by UK law.

This article summarises the key implications of this decision for UK employers and the wider state of play in the UK following this decision.

No new UK law EWCs: With effect from the end of the UK's Brexit transition period at the end of 2020, the UK's legislation on EWCs was significantly updated. This has meant that UK employers can no longer be required to provide information on whether they fall with the scope of the EWC Directive based on their size and distribution of employees between European countries. It has also meant that UK employers can no longer be required to establish a new UK law EWC.

Although the legal changes included some transitional provisions for these kinds of requests if they had been made before the end of 2020, these sensible changes have brought welcome certainty for most UK employers.

UK members of EU law EWCs Despite Brexit, the UK left in place numerous legal provisions concerning UK members of EWCs. These mean that there is certainty over how UK members of EWCs are to be elected, their employment law protections from detriment and dismissal, and their confidentiality obligations.

Although it might seem odd for the UK to retain such legal provisions, this policy choice is in fact welcome. Many EWCs operating under an agreement governed by the laws of a member state of the EU provide for non-EU countries' employees to be represented on the EWC, such as employees in Switzerland and the UK. These agreements also often refer to the election or appointment of all members of the EWC 'in accordance with national laws and practices'. In such circumstances, the continued existence of UK laws on UK members of EWCs is welcome.

UK EWCs already existing before Brexit

1. Central management situated in the UK The decision in *easyJet*, which is not being further appealed to the Supreme Court, provides some, even if unwelcome, certainty, for businesses whose central management is situated in the UK.

Despite the Court of Appeal noting that the UK's legal framework on EWCs is "*possibly not the best thought through piece of legislation*", it is now clear that central managements situated in the UK must continue to operate an EWC under UK law, irrespective of whether their corporate group also operates an EWC under the laws of an EU member state.

Echoing the earlier decision of the Employment Appeal Tribunal, the Court of Appeal recognised that its decision would give rise to 'practical difficulties' for both employers and employees alike by requiring the operation of two EWCs. For example, the different bodies may have different memberships (as UK employees might only be represented on the UK EWC) and different remits (as a project affecting Germany and the UK will only be transnational for the UK EWC).

Employees who sit on both bodies could also find themselves under contradictory obligations in terms of reporting back. For example, an individual could be under a legal obligation not to report back information that is considered confidential under Irish law, with a breach of that obligation being punishable by imprisonment, and yet under an entirely contradictory obligation to report back that same information under UK law or else be in breach of a court order declaring that the information is not confidential. Neither the Employment Appeal Tribunal nor the Court of Appeal has given any guidance on how to deal with these practical issues.

Initially, the Central Arbitration Committee did suggest that the duplication arising from operating two EWCs could be resolved by way of an agreement between all of the parties. However, this overlooks the requirement under EU law that an EWC must operate under the laws of an EU member state, and the prohibition under UK law on contracting out of the UK's legal framework. No formal merger of the two EWCs is therefore possible.

The Court of Appeal's decision and prohibition on contracting out also appear problematic for HSBC, which is currently awaiting a court hearing on its post-Brexit relocation from the UK to Ireland having operated on the basis of an agreement (unlike easyJet which operated on the basis of the default subsidiary requirements), on which we will provide an update in due course.

2. Central management situated outside of the UK Many businesses whose central management is situated outside of the UK, such as in the United States, operated their EWC under UK law up until the end of the Brexit transition period, on the basis that the EWC was run by a UK representative agent. A question therefore arises as to whether these businesses must also continue to operate two EWCs.

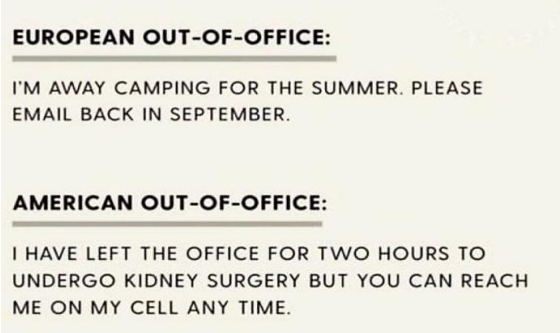
The Court of Appeal's decision in *easyJet* was based on easyJet being a business whose central management is situated in the UK. Importantly, nothing in the decision suggests that a business that was responsible for operating an EWC on the basis of it being a representative agent must continue to operate an EWC under UK law if its status as a representative agent has been terminated. However, this issue is also currently before the courts and, again, we will provide an update in due course.

Final comments: Off the back of the Court of Appeal's decision, UK based central managements are now placed in the difficult position of having to operate two EWC. There is also no end in sight to this situation as, at least until just a few months ago, the UK Government's position is that there is no issue with the state of the law and so it proposes to retain it in its current form despite otherwise seeking to take advantage of "Brexit freedoms". There is also no guarantee that it will respond in any way in light of the Court of Appeal's criticism of the current legal situation.

In practice, UK businesses might now seek to come to practical accommodations with their EWCs, to achieve a de facto merger of them despite a formal merger of them not being possible. However, businesses that adopt this approach will still face the prospect of being sued in two different countries' courts over the same circumstances with potentially different outcomes.

The risk of divergence will also only increase if the European Union ultimately adopts the proposals detailed in the 'Radtke Report'. All that seems certain, therefore, is that British businesses will face yet further difficulties for years ahead as a result of a Brexit.

…And finally: Some out-of-office notice options?



As the summer holidays approach, we thought we would bring these two alternative "out-of-office" notice options to your attention…

…depending on which side of the Atlantic you're based.

Speaking of holidays, there will be two more issues of this issue before we take our own summer break for the month of August.

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 open from July 19*

**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, please 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 July 19*		*Hotel Estela, Sitges, Barcelona, Spain*