EU Report: An Analysis of EU Laws in the Pipeline

By Tom Hayes, BEERG Executive Director

Introduction:

As we have noted in previous commentaries and in BEERG newsletters, you need to go back to the days when Jacques Delors was EU Commission President to find a labour and employment law agenda as packed full of initiatives as the current EU agenda.

As we write, national governments are finally transposing the Work-Life Balance, Transparent Working Conditions, and Whistleblowing Directives into national law.

By our count, there are 10 new pieces of employment or labour law legislation currently under active EU consideration, or being demanded by legislators, that would be of major significance for the business community. These include (grouped according to timeline):

Group A – Done Deals

i. *Adequate Minimum Wage and Collective Bargaining*
ii. *Gender Balance on Company Boards*

Group B – Going Through Legislative Process

iii. *Gender Pay Transparency*
iv. *The Status of Platform Economy Workers*
v. *Platform and Solo Self-Employed Workers and Collective Bargaining*
vi. *Supply Chain Due Diligence*
vii. *A Ban on Goods Produced with Forced Labour*
viii. *AI governance*

Group C – Calls For Further Legislation

ix. *Further Demands for a Revision of the EWC Directive*
x. *Calls for Laws on Remote Work and the Right to Disconnect*

These legislative initiatives do not include the playing out of current EU laws already on the statute book. For example, as we write this paper, word came through of a major decision from the German Federal Labour Court that employers are obliged to fully record details of working time.

This is in line with a 2019 decision of the Court of Justice of the European Union (CJEU) which has been largely ignored because of the Covid emergency. As most employers – and unions and works councils – know, in today's world it is practically impossible to record working time as was done in the past. The growth in flexible work practices and, more importantly, WFH and other forms of remote work make tradition time recording problematic. Can you put a timeclock in every house or remote location from which employees will work? Not every hour of remote work is necessarily spent in front of a computer screen so "computer time" does not necessarily equate to working time.

The German decision could well see a reopening of discussions about the need to modernise the Working Time Directive, long overdue.

The German decision is also a reminder that the CJEU can hand down judgements at any time that have immediate far-reaching effects.

The UK is no longer part of the EU. The developments reported in these pages will not, therefore, directly impact the UK. However, the EU/UK Trade and Cooperative Agreement envisages an employment law "level-playing field" between the parties so that they do not seek to undercut one another. The new Truss government has signalled that it may very well seek to do just that and build the imagined low tax/low regulation "Singapore-upon-Thames" long dreamed of by the most hard-line Brexiteers.

All of this plays out against the most difficult economic background in many years, a result of the Russian invasion of Ukraine, which contributes greatly to levels of inflation not seen since the 1970s, pushing unions to demand matching wage increases.

Challenging times indeed.

GROUP A: DONE DEALS

i. Adequate Minimum Wage and Collective Bargaining

This Directive is now a "done deal" and is going through the final formalities of adoption. It will become EU law between now and the end of the year, meaning it will need to be transposed into national law before the end of 2024.

- It mandates that EU Members States will have to verify the adequacy of statutory minimum wages taking into account purchasing power and the cost of living
- Member states will be required to promote collective bargaining and countries with collective bargaining coverage below 80% will be required to produce an action plan to support collective bargaining
- A requirement for companies receiving public procurement contracts to respect the right to organise and collective bargaining in line with ILO Conventions 87 and 98.

Business will be most focused on how governments deal with the requirement to promote collective bargaining and to ensure that it hits the 80% threshold. We have previously written that we think this is an impossible ask as, in the absence of a sudden upsurge in union membership which seems highly unlikely, mechanisms would have to be created by governments to oblige unions and

employers to negotiate terms and conditions to be imposed on workers who do not wish to be union members.

Member companies will want to follow developments closely in individual countries, especially those in which union density in particularly low, and sectoral bargaining is absent.

This is something we will track over the coming years.

STATUS: Will become national law in late 2024

ii. Gender Balance on Company Boards

Earlier this year, after nearly 10 years of stalemate, the EU Council and the Parliament reached an agreement to increase the presence of women on corporate boards.

The agreement is designed to ensure gender parity on boards of publicly listed companies in the EU.

The so-called "Women on Boards" Directive aims to introduce transparent recruitment procedures in companies, so that at least 40% of non-executive director posts or 33% of all director posts are occupied by the under-represented sex. Companies must comply with this target by 30 June 2026. In cases where candidates are equally qualified for a post, priority should go to the candidate of the under-represented sex.

Listed companies will be required to provide information to the competent authorities once a year about the gender representation on their boards and, if the objectives have not been met, how they plan to attain them. This information would be published on the company's website in an easily accessible manner.

Small and medium-sized enterprises with fewer than 250 employees are excluded from the scope of the Directive.

The law will include "effective, dissuasive and proportionate penalties" for companies that fail to comply with open and transparent appointment procedures, including fines and companies having their selection of board directors annulled by a judicial body if they breach the national provisions adopted pursuant to the Directive

STATUS: Will become national law in 2024

GROUP B: GOING THROUGH LEGISLATIVE PROCESS

iii. Gender Pay Transparency

This proposed Directive is designed to further erode the pay differential between men and women. The gender pay gap in the EU stands at around 14%; this means that women earn on average 14% less than men, per hour. The EU wants to decrease the gender pay gap by enforcing a high degree of transparency regarding pay within companies.

The Commission proposed that companies with more than 250 employees disclose information that makes it easier for those working for the same employer to compare salaries and expose any existing gender pay gap in their organisation.

If, based on the released information, a gender pay gap of at least 5% exists, employers, in cooperation with their workers' representatives, would have to conduct a joint pay assessment and develop a gender action plan. Employers would have to disclose the use of AI/algorithms in making pay decisions. Any pay differences must be based on objective criteria, not related to sex.

The Directive uses the deliberately wide term 'worker,' which includes gig economy and agency workers as well as employees and others.

'Pay' as defined by the Directive covers more than just basic salary. It will also include numerous other elements such as bonus and overtime, allowances, sick pay, and occupational pensions.

This Directive is still being discussed between the Council and the Parliament but as both are committed to it, it is just a matter of settling the details. For example, the Parliament want it to apply to any company with more than 50 employees, and to trigger corrective action plans is a pay gap of 2.5% exists.

STATUS: agreement is likely to be reached before the end of this year or early next year. National law in 2025.

iv. The Status of Platform Economy Workers

There can be little doubt that the creation and spectacular growth of the platform economy marks a major change in the way work is organised and poses significant questions around the nature of workplace contractual relations. Put simply, prior to the platform economy, there was a clear distinction between employees and the self-employed. Platforms fuzz that distinction and create a category of worker who are neither employee nor self-employed in the traditional sense. They appear to be highly controlled self-employed workers, without the security of employees or the full freedom of the self-employed. Decisions from courts across Europe have offered different answers to the question.

How then is the contractual status of such workers to be defined? Proposals from the European Commission lean in the direction of them being classified as employees if certain criteria are met. The European Parliament, and the trade unions, wants them clearly defined as employees unless platforms providers can clearly prove otherwise.

Platform providers want a "third category" to be created to define their workers, a category which captures their unique nature.

Some national governments see potential in the platform economy to bring people into the workforce who might otherwise be marginalised and are reluctant to bow to the call from the Parliament that such workers be defined as employees by default.

It will be some time before any form of consensus can be found on this matter.

STATUS: Negotiations on this are difficult but agreement will be reached within the next year, if not sooner. National law by 2025

v. Platform and Solo Self-Employed Workers and Collective Bargaining

EU competition law forbids collusion between undertakings because such collusion rig markets and hurt consumers. Until now, this doctrine has prevented the self-employed from coming together and bargaining collectively. A consultation paper from the Commission suggested that in the case of platform economy workers and other solo self-employed workers the law could be interpreted in the future in such a way as to allow these workers to organise and bargain collectively.

Outside of people who work for distinct platforms, Uber, Deliveroo, etc., where there is some evidence of union organising and a desire to bargain collectively, there does not appear to be much of a demand among the self-employed for collective negotiations.

While the Commission may decide that competition law is no longer a barrier to collective bargaining, it does appear that in reality this is a solution in search of a problem.

STATUS: This is not a new law as such, simply a new approach on the part of the Commission to interpreting existing law. Expect a final statement from the Commission sometime within the coming months.

vi. Supply Chain Due Diligence

On 23 February 2022, the Commission adopted a proposal for a Directive on corporate sustainability due diligence. The aim of this Directive is to foster "sustainable and responsible corporate behaviour" and to embed human rights and environmental considerations in companies' operations and corporate governance. The new rules seek to ensure that businesses address adverse impacts of their actions, including in their value chains inside and outside Europe.

This Directive establishes a **corporate due diligence duty**. The core elements of this duty are identifying, bringing to an end, preventing, mitigating, and accounting for negative human rights and environmental impacts in the company's own operations, their subsidiaries and their value chains. In addition, certain large companies need to have a plan to ensure that their business strategy is compatible with limiting global warming to 1.5 °C in line with the Paris Agreement. Directors are incentivised to contribute to sustainability and climate change mitigation goals.

The Directive also introduces **duties for the directors** of the EU companies covered. These duties include setting up and overseeing the implementation of the due diligence processes and integrating due diligence into the corporate strategy. In addition, when fulfilling their duty to act in the best interest of the company, directors must take into account the human rights, climate change and environmental consequences of their decisions.

In scope:

Large EU limited liability companies:

- Group 1: +/- 9,400 companies - 500+ employees and net EUR 150 million+ turnover worldwide.
- Group 2: +/- 3,400 companies in high-impact sectors. - 250+ employees and net €40+ million turnover worldwide, and operating in defined high impact sectors, e.g., textiles,

agriculture, extraction of minerals. For this group, the rules start to apply two years later than for group 1.

Non–EU companies: +/- 2,600 companies in Group 1 and +/- 1,400 in Group 2

#Third country companies active in the EU with turnover threshold aligned with Group 1 and 2, generated in the EU.

The rules on corporate sustainability due diligence will be enforced through:

- Administrative supervision: Member States will designate an authority to supervise and impose effective, proportionate, and dissuasive sanctions, including fines and compliance orders. At European level, the Commission will set up a European Network of Supervisory Authorities that will bring together representatives of the national bodies to ensure a coordinated approach.

- Civil liability: Member States will ensure that victims get compensation for damages resulting from the failure to comply with the obligations of the new proposals.

The rules of directors' duties are enforced through existing Member States' laws. The Directive does not include an additional enforcement regime in case directors do not comply with their obligations under this Directive.

This Directive is still very much under consideration. It is problematic from a number of perspectives, two in particular.

First, how "wide and deep" will the due diligence obligation run? For example, Danone is a major supplier to many French, and other, supermarkets. Will all of them have to audit Danone to ensure, for example, that the ingredients in its yogurts have been ethically sourced? Are we not in danger of creating an enormous obligation on multiple companies to continually audit one another?

How far down the supply chain do companies have to go? To stay with the Danone example. How does Carrefour, for instance, ensure that the farmer that supplied the milk only used environmentally friendly fertiliser to grow the grass on which the cow fed? Clearly, where the chocolate in the chocolate yogurt came from will have to be checked out.

In other words, what are the reasonable limits of due diligence obligations?

Second, who will have legal standing to pursue claims against companies over alleged human rights violations? Those who feel they have been injured or will standing also be given to trade unions and self-appointed NGOs? Is there not a risk that alleged human rights violations will be used to pursue multiple agendas? For example, could VW unions use the proposed new law in support of union organising drives at VW plant in Chattanooga in the US? We run the risk of opening a legal Pandora's box in this regard.

STATUS: Because of the complexities involved, negotiations on this will be long and difficult. It will be well into 2023 before we can say with any degree of certainty when this will become law.

vii. A Ban on Goods Produced with Forced Labour

On the heels of the proposed Corporate Due Diligence Directive, the European Commissioned has now proposed draft rules which would prohibit the placement of products made with forced labour on the European market. The new rules would:

- Outlaw products made with forced labour from being placed on the EU market or exported, no matter whether they were made within the EU or elsewhere. *[*nods at EU's WTO obligations*]*
- Use the ILO's definition of forced labour: *"All work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily"*
- Be enforced by member-state customs authorities, who will carry out investigations based on information collated by the EU and external submissions from civil society organisations.
- Where forced labour is uncovered, require customs authorities to intervene to and withdraw products from free circulation within the EU and prevent export. Businesses would then be required to dispose of the products.
- Empower member-states to penalise non-compliant companies.
- Require member-states to recognise each other's decisions.
- Include a non-cooperation clause, allowing authorities to take decisions based on best available evidence, in the event companies and non-EU countries refuse to cooperate.
- Unlike the corporate sustainability and supply chain due diligence proposal, which applies solely to larger companies, cover SMEs.
- Come into effect 24 months after the rules are placed on the statute books, meaning it would apply from 2025 at the earliest.

STATUS: This has just been published but is supported across the political spectrum and unlikely to run into serious opposition. We see it quickly becoming law, probably sometime in early 2023

viii. AI governance

Artificial Intelligence (AI) is defined by Google "as the theory and development of computer systems able to perform tasks normally requiring human intelligence, such as visual perception, speech recognition, decision-making, and translation between languages." AI plays an increasing role in human resource decision making, in interview processes, promotions, compensation awards, development opportunities, and terminations.

It can involve the use of, for instance, CV scanners, auto-marked non-verbal reasoning tests, work allocation software using details of an individual's location or activity levels or capability, monitoring performance or conduct. The EU places the use of AI in human resource decision making in a "high risk" category, meaning its use must be subject to human oversight and employees' representatives must be informed and consulted about its use.

In April 2021, the Commission presented its AI Package, including:

- its Communication on fostering a European approach to artificial intelligence;
- an update of the Coordinated Plan on Artificial Intelligence (with EU Member States);
- its proposal for a regulation laying down harmonised rules on AI (AI Act) and relevant Impact assessment.

More recently, media reports say that the EU plans to publish an AI Liability Directive which would provide "in a very targeted and proportionate manner alleviations of the burden of proof through the use of disclosure and rebuttable presumptions." The reports suggest that

> *"… a potential claimant may request the providers of a high-risk system to disclose the information the provider will have to keep as part of its obligations under the AI Act. The AI regulation mandates the retention of documentation for ten years after an AI system has been placed on the market. The information requested would entail the datasets used to develop the AI system, technical documentation, logs, the quality management system, and any corrective actions."*

How this will play out in the labour relations arena remains to be seen, and we will need to see the text of the proposed Directive, but it is easy to see how unions, works councils, and employees' representatives will make copious use of such provisions.

In the future, HR departments will need to considerable capabilities to deal with such matters.

STATUS: This is well on the way to becoming law. Final agreement will probably be reached in 2023. What is being proposed is a Regulation, not a Directive. Regulation take force across the EU from the date of their adoption. They do not have to be transposed into national law. The GDPR is an example of a regulation. So, this come be in force before the end of 2023.

GROUP C: CALLS FOR FURTHER LEGISLATION

ix. Further Demands for a Revision of the EWC Directive

We wrote about this recently in BEERG Newsletter No 28 and previously in a BEERG Perspective. The core demand of the unions, as articulated in the Radtke Report, drafted by the German Christian Democrat MEP, Denis Radtke, is that EWCs should be able to go to court, funded by the employer, to ask for injunctions to stop management implement decisions when the EWC believes it has not been properly informed and consulted.

The problem with this demand is that is that it is asking the legislators to give the courts power to block management when EWCs "believe" that they have not been "properly" informed and consulted. Even if they have been informed and consulted, they can still ask for an injunction is they believe they have not been "properly" informed and consulted. But what does "properly" informed and consulted mean? How do you define "properly"? If management informs an EWC of a proposed decision, gives them relevant information, and meets with them to discuss the matter, and asks for their opinion, is that not properly "informing and consulting"?

What is really in play here is a demand, implicit if not explicit, that management should negotiate with EWCs on "exceptional circumstances" and should only be able to move ahead when an agreement has been reached. No agreement, injunctions.

This is a formula for industrial paralysis. We know from many years of experiences with EWCs that they will never agree to management proposals to close facilities, cut jobs, or transfer production. They will always argue that there are other alternatives. If given the ability to block such actions through court injunctions, they will rationally do so. Once injunctions are imposed, on what basis can they be lifted?

You cannot base laws on hurt feelings, which is what Radtke is proposing. The EWC was informed and consulted but it was not "properly" informed and consulted because management did not accept their proposals and they fell hurt.

Companies need to make it clear to their national legislators, and to their MEPs, through their national and industrial employers' associations that when Radtke is proposing is completely unacceptable and would be damaging in the extreme.

STATUS: This is an own initiative report from the German Christian democrat MEP, Denis Radtke. It is currently under consideration by the Employment and Social Affairs Committee. It will vote on it in October. Assuming it is passed, it will then go to a vote in the full Parliament in December.

If adopted, it then gets sent to the EU Commission which has three months in which to respond. Were the Commission to accept that the Directive needs to be updated it would have to start work on the proposed legislation. Once it has responded to the Parliament, the Commission has no further deadlines to meet in this regard.

Once the Commission decided on what it might propose by way of legislation, it would then have to consult with the social partners because it is employment legislation. This would certainly take up most of 2023, running into 2024. At the point, matters are likely to be suspended as 2024 will see the appointment of a new EU Commission and European Parliament elections. It would be 2025 at the earliest before any changes to the Directive would be finalised. This means it would not become national law until 2027.

x. Laws on Remote Work and the Right to Disconnect

Covid has upended many established ways of thinking about the organisation of intellectual work. Almost overnight in 2020, businesses needed to find ways of allowing millions of employees to work from home (WFH) as governments locked-down economies to contain the virus. "Zoom" became shorthand for meeting digitally. Laptop work became long-distance work.

There is no going back. Workers who now know otherwise will not accept being forced back into 5-day commutes just so bosses can feel good, local coffee shops can sell over-priced coffee, and office buildings continue to generate rental incomes and hold their capital values.

That battle is lost.

During the "Covid emergency" laws were ignored. Now that remote/hybrid work is becoming the new normal, the law will come calling again. And will want to make up for lost time. Questions will be asked if "home offices" meet health and safety standards, respect data privacy rules, conform to working time regulations, among others. How does management answer such questions is, say, 60,000 people are working remotely part of the week?

The European social partners have agreed to open negotiations between them on this issue.

In all of this we should not forget what Rick Warters and I call the "hands," those who need to be "on hand" to do their jobs. Not only does this apply to those who work in industries such as hospitality, manufacturing, and personal services, sometimes wrongly seen as "low pay sectors," but it also applies to doctors, nurses, airline pilots, train drivers and many other high-skill workers.

If remote work improves the work life balance of the "lap-toppers" then what measures must we take to improve that of the "hands"?

STATUS: The social partners, BusinessEurope and the ETUC, will begin negotiation in early October and have nine months in which to reach an agreement. If an agreement is reached, the social partners can ask the EU Commission that it be made legal binding by way of a Directive. Assuming agreement is reached, and it is made law, it would probably be early 2025 before it came into force.

Final comments

As we said at the start of this paper, it is a very long time since the EU had such a crowded labour and employment law agenda. But then, labour and employment law does not drive the agenda. The agenda is driven by events in the workplace as technological and organisational change disrupt old ways of working and create new paradigms that challenge previous assumptions about how things should be done and arranged. The law simply runs to catch up.

European law has a lot to catch up with. It is running fast.

Sept 26, 2022

Disclaimer: *The opinions offered in this BEERG Perspective commentary represent the author's views alone. Neither does the information provided constitute legal advice. Readers should contact their lawyers to obtain advice with respect to specific issues, queries, or disputes.*