



Flash Reports on Labour Law July 2018

Summary and country reports

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Executive Summary

1 National level developments

In July 2018, important developments in labour law took place in many Member States and European Economic Area (EEA) countries (see Table 1). Legislative initiatives and case law focused specifically on the following issues:

- Working time
- Pay
- Fixed-term work.

Working Time

In **Austria**, the government intends to significantly enhance working time flexibility. The proposed amendments passed both the National and the Federal Assembly on 05 July 2018. The bill was originally scheduled to enter into force on 01 January 2019, but will now come into force on 01 September 2018. The new legislation considerably extends working time limits for all workers, without the conditions previously necessary for such maximisation, lowers the limits on overtime work and extends limitations on rest periods to some sectors. In **Bulgaria**, a new Decree on amendments and supplements of the Ordinance on Working Time, Rest Periods and Leaves has modified the rules on the calculation of working time, increasing the number of working days in the calendar, with the daily working time being defined in the employment contract. In **Estonia**, a new proposal aims to open the possibility for employers and employees to agree on working times within certain periods. At present, this is not possible, but according to the proposal, working time would also be possible if agreed within certain time limits (e.g. 25-35 hours within a 7-day period). In **France**, the Labour Division of the Court of Cassation has ruled that a dismissal is justified if the employee failed to transmit the necessary documents to the employer to ensure that the weekly permissible maximum working hours were being respected since, under French legislation, employees with several jobs are subject to the same weekly maximum

working hours as employees who have only one job.

Pay

In **Austria**, the Supreme Court has ruled that when a company that assigns workers (in this case freelance) to another company assumes duties that correspond to an employer's duties, including the duty to pay wages, it thereby assumes the obligations and risks of the employer and it is deemed that its activity is the assignment of temporary agency workers and not only placement services. In the **Czech Republic**, the Senate has approved a new draft act that amends the calculation of compensation for loss of earnings after a period of incapacity for work following an occupational accident or the development of a vocational disease. The draft act establishes that the fictional earnings for the period after the occupational accident or the development of a vocational disease should be the same amount as the minimum wage at the time of entry into evidence of the employee as a job seeker. In **Germany**, the Federal Labour Court considered null and void the provisions of a collective agreement providing that the holiday pay of a worker who went on holiday after a reduction of her weekly working hours was determined to be in line with her reduced working time. The Court held that these provisions amounted to indirect discrimination of part-time workers. In the **United Kingdom**, the Employment Appeal Tribunal has ruled that provisions of the NHS Terms and Conditions of Service require that any overtime pay earned in the three months prior to an NHS employee taking annual leave should be included in the calculation of holiday pay. This should include both non-guaranteed and voluntary overtime pay.

Fixed-term work

In **Cyprus**, a new law regulates the transfer of employees who had initially concluded fixed-term contracts with the now disbanded Foundation of Culture, and eventually signed contracts of indefinite duration with the Ministry of Finance. The

law provided that permanent employees retained their level of salary immediately prior to their transfer to the Ministry and were placed at the appropriate pay scales. The law aims to implement the requirements of Directive 1999/70/EC on Fixed-term Employees. In the **Czech Republic**, the Supreme Court has ruled that a temporary incapacity for work of an employee due to high-risk pregnancy cannot be considered a continuation of work performance, which is the necessary condition for an automatic conversion of a fixed-term employment relationship into one of indefinite duration once the former expires. In **France**, the Labour Division of the Court of Cassation has ruled that the conclusion of a fixed-term contract has no effect on when a contract of indefinite duration is executed. The conclusion of a fixed-term contract did not automatically terminate the current contract of indefinite duration, which continued without being considered to have been transformed by the parties' will. Consequently, the employee cannot claim requalification of the fixed-term contract once it has ended (which has no effect) into a contract of indefinite duration, and, therefore, cannot claim the requalification provided for in the French Labour Code. In **Italy**, the new Law Decree on 'Urgent measures for the dignity of workers and companies' has modified fixed-term work regulations. It limits the maximum duration of fixed-term contracts (thus reducing the maximum), establishes the obligation of written contracts (if the contract's duration exceeds 12 days), limits the possibilities for extension and succession of fixed-term contracts, increases the indemnity to be paid in case of unjustified dismissal and increases the lump-sum contribution due by the employer in case of conclusion of invalid fixed-term employment contracts.

2 Implications of CJEU and EFTA-Court rulings

Case C-60/17, *Somoza Hermo and Ilunión Seguridad*

In case C-60/17, *Somoza Hermo and Ilunión Seguridad*, the CJEU has ruled that Article 1(1) of Council Directive

2001/23/EC must be interpreted as meaning that the Directive applies to situations in which a contracting entity has terminated the contract for the provision of services relating to the security of buildings concluded with one undertaking and has, for the purposes of the provision of those services, concluded a new contract with another undertaking, which takes on, pursuant to a collective agreement, the majority in terms of their number and skills, of the staff whom the first undertaking had assigned to perform those services, in so far as the operation is accompanied by the transfer of an economic entity between the two undertakings concerned.

In **Latvia**, Article 118 of the Labour Law establishes that there is no joint liability for the transferor and transferee in a transfer of undertaking. After the transfer, only the transferee remains liable for compliance with the obligations arising from employment contracts and collective agreements. According to Article 118(4), the transferee has no right to modify the collective agreement by introducing less favourable provisions in the first year from the transfer. Therefore, Latvia does not include an option to provide for joint liability. In **Portugal**, although some sectors that have intensive manpower have collective bargaining agreements that impose the assumption of the workforce by the contractor (e.g. cleaning and facility services), the ruling could be relevant for other sectors where a special provision on collective bargaining agreements imposing the maintenance of the workforce by the new owner or manager of the economic unit is absent. In **Spain**, according to Spanish Supreme Court case law, the legal rules on transfers of undertaking do not apply when only a succession of subcontractors occurs and there is no transfer of material resources, except in the case of 'succession of staff'. The traditional concept of transfers of undertakings required the transfer of tangible assets. The 'succession of staff' for labour-reliant activities is new, and was not included in the wording of the Directive, nor in the transposition of the Directive into the Spanish legal system. It is a creation of the CJEU, and Spanish

courts have needed some time to adapt. In **Sweden**, the Swedish legislation explicitly states that in a transfer of undertakings, obligations emerging under the first employment relationship should be subject to joint and several liability shared between the initial and the subsequent employer as long as it concerns the obligation towards the employee. The final distribution of liability between the two employers is not subject to any explicit regulation, but must be settled on the basis of the ordinary principles of contract law.

Case C- 96/17, *Vernaza Ayovi*

According to the CJEU ruling in case C-96/17, *Vernaza ayovi*, clause 4(1) of the framework agreement on fixed-term work annexed to Council Directive 1999/70/EC must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, according to which, when the disciplinary dismissal of a permanent worker in the service of a public authority is declared wrongful, the worker in question must be reinstated, whereas, in the same situation, a worker employed under a temporary contract or a temporary contract of indefinite duration performing the same duties as that permanent worker need not be reinstated, but instead may receive compensation.

In **Latvia**, the ruling will not have much impact, since Labour Law does not envisage different remedies for permanent and fixed-term employees, i.e. if a dismissal of a fixed-term employee was unlawful, she is entitled to reinstatement. It follows that under Latvian law, there is no difference in treatment between those two groups of employees with regard to remedies in case of unlawful dismissal.

In **Spain**, an irregular (abusive) fixed-term contract, as a general rule, results in its conversion into a permanent contract of employment. This is not an easy rule to apply in public administration, because access to permanent jobs in public employment requires completing a selection process which must respect the principles of equality, merit and ability. Thus, the abusive use of fixed-term

contracts in public administrations does not lead to a conversion into a permanent contract. Instead, the Supreme Court has created the designation 'indefinite but not permanent worker' or 'non-permanent employment contract of indefinite duration' (*trabajador indefinido no fijo de plantilla*, in Spanish). This means that the irregular fixed-term contract does not end on the originally scheduled date, but when the job is covered by a permanent worker (a career civil servant). As a consequence, the initial worker could hold this temporary job for years, but this is not a type of contract and there is no legal regulation, nor registration, because it is a type of relationship that only exists when a court declares that a fixed-term contract involving a public administration is irregular. This difference is not contrary to the principles of equality and non-discrimination, because permanent workers got their job after completing a selection procedure in accordance with the principles of equality and recognition of merit and competence. This ruling accepts this configuration, so it will not have an impact on the Spanish legal system.

Table 1. Main developments (excluding implications of CJEU or EFTA-Court rulings)

Topic	Countries
Working time	AT, BG, EE, FR
Pay	AT, CZ, DE, UK
Fixed-term work	CY, CZ, FR, IT
Dismissal law	BE, DE, NL
Third-country nationals	BG, HR, LT
Training	FR, LU, RO
Posting of workers	LI, LT, SE
Temporary agency work	AT, IT
Employment policies	ES,RO
Representativeness of social partners	HR, FR
Transfer of undertakings	CY, HU
Minimum wage	DE, IE
Maritime employment	LU, PT
Social dialogue	PL
Collective dismissal	BE
Paternity leave	ES
Maternity leave	BG
Register of social partners	BG
Health and safety	HR
New forms of employment	EE
Profit-sharing	FR
Work councils	FR
Information and consultation	DE
Concept of employee	DE
Subcontracting	EL
Undeclared work	EL
Asylum seekers	IE
State aids	IT
Brexit	UK

Austria

Summary

(I) The current coalition government has passed significant amendments to the Working Time Act (*Arbeitszeitgesetz, AZG*) and the Rest Period Act (*Arbeitsruhegesetz, ARG*). The government aims to increase the maximum daily and weekly working time limits, and to remove limits on overtime, both for establishments with and without work council representation.

(II) A decision of the Supreme Court deals with the legal qualification of pay rolling in the context of temporary agency work.

1 National Legislation

1.1 Working time

As laid out in previous Flash Reports (see also December 2017 and June 2018 Flash Reports), the government intends to significantly enhance working time flexibility, leading to nationwide criticism (e.g. protest demonstration in Vienna on 30 June 2018 with around 100 000 participants). The proposed amendments (see Flash Report June 2018) passed both the National and the Federal Assembly on 05 July 2018, with some minor amendments and clarifications. The bill was initially scheduled to enter into force on 01 January 2019, but will now come into force on 01 September 2018.

1.1.1 Maximisation of working hours

Austrian law on working time provided for maximum working hours: the maximum daily working time was ten hours; the maximum weekly working time was 50 hours.

Exceeding these limits (e.g. a 12-hour working day, and a 60-hour work week) was possible in certain cases and based on agreement of the social partners (collective bargaining agreements - CBAs and/or works council agreement). In certain situations, the lack of a works council (and hence, the impossibility of consent in the form of a works council agreement) could be offset by the worker's individual consent and the agreement of an occupational health care provider. In addition, the labour inspectorate could agree to working time beyond these limits.

Now, the maximum daily working time is generally 12 (and not ten) hours, the maximum weekly working time is 60 (no longer 50) hours. The average weekly working hours may not exceed an average of 48 hours within a period of 17 weeks. If an agreement on flexi-time exists, 12-hour workdays (without overtime bonuses) are only possible if compensatory time can be taken in full days. If an employee works 12 hours following a request of the employer (and not because the worker freely chooses to work longer hours), these hours are considered overtime, and generate surcharges.

The new legislation extends the working time limits for all workers considerably, without the requirement for the existence of the previous conditions for such a maximisation of working hours. The agreement of the social partners and/or the labour inspectorate's consent are not necessary for a 12-hour working day/60-hour work week, thus limiting their influence.

As workers will keep their entitlement to a daily rest period of eleven hours (Article 3 of Directive 2003/88/EC), and as weekly working time may not exceed an average of 48 hours within a 17-week period, the amendment is in conformity with EU law.

1.1.2 Lower limits on overtime work

Austrian working time law formerly provided several limits on overtime: generally, no more than five hours of overtime were possible per week. In addition to this rule, a worker could work an additional 60 hours of overtime per year. The maximum hours of overtime per week was ten hours. This regulation thus capped overtime work at 320 hours per year. The law permitted more overtime work in specific situations, with the consent of the social partners or the approval of an occupational health physician (see above).

The new law has removed these limits, the only limit on working time that remains is the limit provided for in the Directive on Working Time 2003/88/EC, i.e. a maximum of 48 hours on average within a 17-week period.

The new law allows 20 hours of overtime work per week (five '12-hour days'/ 60-hour weeks). As the only limit to working time is now 48 hours on average within a 17-week period, working 416 hours of overtime per year is now legally possible. The influence of the social partners has been limited. As the average working time for each seven-day period, including overtime, may not exceed 48 hours within a reference period that does not exceed four months (Article 6 of Directive 2003/88/EC), the amendment is in conformity with EU law.

1.1.3 Refusal to perform overtime work

Austrian working time law allows employers to request employees to work overtime only if the overtime lies within the boundaries of the law (see above), and if no interests of the worker are worthy of consideration (e.g. care obligations) or stand in the way (§ 6 Abs 2 AZG).

The new law does not amend refusal to perform overtime, but introduces a new right to refuse working an 11th and 12th hour: the worker is entitled to refuse working the 11th and 12th hour without having to give any reason. Workers may not be disadvantaged or discriminated against because of such refusal and may challenge a termination in court, which is based on their refusal to perform overtime work (the 11th/12th hour).

This right to refusal was less pronounced in the proposal presented to Parliament, and has now been strengthened and clarified following public criticism. Now, the intent of the law is that overtime in the 11th and 12th hour of work should be possible on a 'voluntary basis' only, and a right to refuse to work the 11th and 12th hour has been included without having to give any reason for such refusal. This amendment is in conformity with Directive 2003/88/EC, and even allows an opting out from the 48-hour limit on an individual basis (Article 22).

1.1.4 Amendment of the Exceptions to the Act on Working Time/Act on Rest Periods

The Austrian Working Time Act listed a number of workers to whom it did not apply (§ 1 Abs 2 AZG). One of the most prominent exceptions was that of managing executives, or more precisely, 'executive employees' (*leitende Angestellte*, § 1 Abs 2 Z 9 AZG and § 1 Abs 2 ARG). Executive employees were defined as employees who have been assigned key management tasks on their own responsibility. Family workers are not currently included in the list of exceptions.

The law has amended this exception and replaced the wording with that of Directive 2003/88/EC to describe managing executives or other persons with autonomous decision-taking powers. They, and family workers, are now exempt from the Acts if the



duration of working time is not measured and/or predetermined or can be determined by themselves on account of the specific characteristics of their activity.

1.1.5 Limitations to daily rest period

Austrian law on rest periods asserted that in the tourism and hospitality industries, the applicable CBA may reduce the rest period from eleven to eight hours for full time kitchen staff/waiters in seasonal establishments, if certain conditions were met.

The amended law now allows the reduction of rest periods in the tourism and hospitality sector by law. The reduction is now not limited to seasonal establishments, but applies to all establishments, if the working hours provide a three-hour minimum break within two 'shifts', and the reduction in rest time is compensated within a four-week period/at the end of the season.

The amendment is in conformity with Directive 2003/88/EC, as Article 17 para 3 lit. d allows for deviations from Article 3 of the Directive by law, when there is a foreseeable surge in activity, particularly in tourism. Moreover, Article 17 para 4 lit. d also allows deviations in case of activities involving periods of work divided over the day. The law now allows for such deviations without the involvement of the social partners.

1.1.6 Work on weekends/weekly rest periods

Austrian law on rest periods permitted work on weekends in very specific sectors only, most of them being listed in a regulation issued by the Minister of Labour and Social Affairs (*Arbeitsruhegesetz-Verordnung*), and only for the number of workers absolutely necessary (§ 2 (2) ARG).

The amended law now allows that in case of temporary need, exceptions from the prohibition of work on weekends and on public holidays may be agreed for four weekends in the year or public holidays based on works council agreements. In case no works council has been installed at the employer, such written agreement is possible between the employer and the worker directly.

Workers covered by such an individual agreement have the right to refuse working on weekends without having to provide any reason for their refusal. They may not be disadvantaged or discriminated against based on this refusal and may challenge a termination that was based on their refusal in court.

This amendment is in conformity with Directive 2003/88/EC, as workers remain entitled to weekly rest periods during the week.

1.1.7 Summary

The new law does not exceed the limits of Directive on Working Time 2003/88/EC. Yet it introduces a significant change of the Austrian tradition of regulating working time: deviations from the general maximum working hours and minimum rest periods were possible in the past, but required prior agreement of the social partners (via CBAs, or works council agreements), and/or the involvement of the labour inspectorate.

Now, these extensions no longer require involvement of the social partners, the labour inspectorate or occupational health physicians. The 12-hour working day and the 60-hour work week are now provided for in the Working Time Act itself, and as such are open to the individual agreement between the employer and the worker. Collective agreements and works council agreements may limit the maximum working time in favour of the worker. Yet, to workers who fall under CBAs that do not have lower working time limits than stipulated in the new law or who do not fall under a CBA (2 percent of the workforce), or do not have a(n active) works council representation, the new law fully applies. The new law shifts agreements on working time from the collective level to the individual level.

Sources:

The new law is available [here](#).

An overview of the legislative process can be found [here](#).

Some press releases are provided in the following links:

[Die Presse, 25 June 2018](#): Regierung: ‚Der 8-Stunden-Tag bleibt, Flexibilität kommt‘.

[Die Presse, 21 June 2018](#): ‚Konzernkanzler Kurz, Arbeiterverräter Strache‘: SPÖ-Protest gegen Arbeitszeitgesetz.

2 Court Rulings

2.1 Pay rolling and agency work

Supreme Court, No. 8 ObA 51/17h, 29 May 2018

A person was under a contract as a freelancer with a company (C1) that assigned her to work for another company (C2). She worked in an office provided by C2, which also provided all other means of work. The results only benefited C2, which also selected the persons to work for it and told C1 when to terminate the contracts with freelancers. The person then claimed to be bogusly self-employed and was in fact working under an employment contract with C1. The set-up ought to be qualified as agency work and C2 was the user undertaking to which she was posted. She claimed holiday pay, compensation for unused holidays and compensation for the notice period to be observed in case of existence of an employment contract from C1 (the temporary work agency).

The labour courts of the first and second instance rejected the worker's claim, arguing that this was a case of 'pay rolling' that did not qualify as agency work. C1 only acted as a clearinghouse for the wages and did not fulfil any other employer functions. It could therefore only be considered as providing placement services but not as a temporary work agency.

The Supreme Court [did not follow this argument](#) but considered the case at hand to be temporary agency work. It referred to § 2 of the Act on Furthering the Labour Market ([Arbeitsmarktförderungsgesetz, AMFG](#)), which defines the demarcation between temporary agency work and placement services as follows (unofficial translation by the author):

"§ 2 –(1) Placement services within the meaning of this federal law is any activity aimed at bringing together jobseekers with employers to establish employment relationships, or with clients (intermediaries) to establish homeworking relationships in the sense of the Home Working Act 1960, Federal Law Gazette No. 105 / 1961, unless this activity is only occasionally exercised and is free of charge or on a case-by-case basis.

...

(4) The activity referred to in para (1) shall also apply to the assignment of workers to third parties, provided that the temporary work agency does not carry the duties of the employer."

The Supreme Court then argued that C1 has carried out some important employer duties, namely the duty to pay wages. This is one of the central contractual obligations of the employer under the employment contract. If the temporary work agency commits itself to paying wages to the employee in its own name, then it assumes the obligations and risks of the employer and it is deemed that its activities are the assignment of temporary agency workers and not only placement services within the meaning of § 2 (4) AMFG. Who, in the end, bears the economic costs of the wages or who refunds them is irrelevant with regard to who is to be considered the employer. The Court stressed that the legal opinion of the lower courts would in no way be compatible with the protective purpose of the Act on Temporary Agency Work. The courts can therefore not refuse a worker, who does not typically have any insights into the contractual relationship between the contractor and the employer, the right to sue the party to her written contract, arguing that he/she works as a temporary agency worker.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Belgium

Summary

(I) According to the Belgian Constitutional Court, health and safety advisors in companies who enjoy specific legal protection against dismissal may be dismissed in the context of collective redundancies.

(II) In a ruling of 05 July 2018, the Belgian Constitutional Court ruled that the Law of 29 July 1991 on the formal motivation of administrative acts does not violate Articles 10 and 11 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, in the interpretation that this law does not apply to the dismissal of workers with a civil service employment contract.

(III) The Federal Government concluded a political agreement on the 2019 budget on 24 July 2018, but also on several other important issues, including a 'labour deal' which includes various social security measures. The aim is to increase the employment rate and overcome the shortage on the labour market.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Collective redundancies

Constitutional Court, No. 73/2018, 07 June 2018

Articles 10 and 11 of the Belgian Constitution prohibit the legislator from discriminating in law. However, the principle of equality and non-discrimination does not exclude a difference in treatment between certain categories of persons, in so far as the difference is based on an objective criterion and is reasonably justifiable. The principle of equal treatment and non-discrimination has been infringed where it is established that there is no reasonable relationship of proportionality between the means and purpose for which they are intended.

Companies with at least 20 employees must have a separate health and safety advisor. The employer can only terminate the employment contract with the health and safety advisor or remove her from her duties for reasons external to her independence or if she is found incompetent to carry out her duties and in so far as the employer complies with the procedures laid down in the Law of 20 December 2002 on the protection of the health and safety advisors. Such advisors enjoy an exceptional and special protection against dismissal under Belgian labour law.

In its judgment, the Constitutional Court had to answer two preliminary questions put forward by the Court of Cassation concerning the conflict between the difference in protection in the event of termination of the employment contract of a health and safety advisor in an undertaking ('prevention advisor') in the context of a collective redundancy and an individual dismissal. Article 4, para 3 of the Law of 20 December 2002 on the protection of health and safety advisors excludes the application of the protection against dismissal provided for in this Act for health and safety advisors who have been dismissed in the event of a collective dismissal. In addition, the question was asked whether Article 4, para 3 of the Law of 20 December 2002 on the protection of health and safety advisors violates Articles 10 and 11 of the Constitution in that it excludes the application of these protection procedures with regard to any prevention advisor in the aforementioned case of collective redundancies, without making a distinction according

to whether or not the employer remains obliged to have a health and safety advisor at her disposal after the collective redundancies, depending on whether or not she employs at least 20 or, on the contrary, less than 20 employees at that time.

The Constitutional Court first and foremost referred to the parliamentary preparation of the Law of 20 December 2002, which shows that its aim is *"to provide the health and safety advisors with protection enabling them to carry out their duties in complete independence from the employer and the employees"*. In order to carry out this task in the best possible way, the health and safety advisors should, inter alia, be granted appropriate legal protection, in particular special protection against termination of their employment relationship. About the legislator's intention to remove the protection against dismissal of the health and safety advisor in the event of collective redundancies, the parliamentary preparation indicates that the dismissal is due to the company's poor economic situation. According to the Court, this economic context constitutes an objective criterion for the difference in treatment of health and safety advisors. According to the Court, the exception created to the application of the dismissal protection scheme of health and safety advisors is also relevant. The reason for the dismissal of the prevention adviser is not related to the way in which she has carried out her duties, since collective redundancies take place, by definition, for one or more reasons not related to the person of the worker. The independence of the health and safety adviser is therefore not compromised.

According to the Court, in order to determine whether an employer could use collective redundancies to terminate the employment relationship with a health and safety adviser on grounds relating to her independence, the competent court must carry out a review, at the request of the health and safety and safety adviser, of the reality of the grounds for dismissal, on the basis of the submitted facts of the case. Such a review is sufficient to ensure the proportionality of the legal provision at issue. This is not a case of discrimination.

The second question referred to the Court for a preliminary ruling was also answered in the negative (no discrimination was found), since the fact that the position of a prevention adviser was maintained within the undertaking following collective redundancies because the employee threshold of 20 employees had been reached does not constitute a breach of the principle of equal treatment.

2.2 Dismissal

Constitutional Court judgment, No. 84/2018, 05 July 2018

The question of the possible application of the law of 29 July 1991 on the formal motivation of administrative acts to the dismissal of contractual agents with an employment contract in the public sector has been the subject of fierce jurisprudential and doctrinal controversy for several years.

Based on a judgment of 12 October 2015, the Court of Cassation ruled that the Law on Formal Motivation did not apply to the dismissal of a contract agent. The Council of State followed this position.

In the present case of the Constitutional Court, the Court was asked by the Labour Court of Liège to give a preliminary ruling on whether failure to apply the Law of 29 July 1991 to the dismissal of a contract agent constitutes discrimination in relation to the situation of statutory agents, who benefit from the application of that law.

It can be recalled that the Constitutional Court recently ruled on the existence of discrimination between statutory agents and contract agents concerning the application of the principle of prior hearing *'Audi alteram partem'*. On that occasion, the Constitutional Court considered that it was discriminatory to not apply that principle to the dismissal of contract agents, which is tantamount to departing from the previous

case law of the Court of Cassation and the Council of State and advocating the application of the principle of a hearing prior to the dismissal of contract agents .

The Constitutional Court considered that the Law of 29 July 1991, in the interpretation of the Court of Cassation and the Council of State according to which it does not apply to the dismissal of civil service contract agents, does not violate Articles 10 and 11 of the Constitution, combined with Article 6 of the European Convention on Human Rights.

As it did in its decisions on the application of the principle of prior hearing, the Court recalled first that contract staff are in principle not comparable to statutory staff, but that they may find themselves in a comparable situation in relation to a specific question of law.

Contrary to what it considered regarding the principle of prior hearing, the Court deemed that the statutory agent who is the subject of a decision to terminate the statutory link and the contractual agent dismissed are not in a comparable situation as regards the application of the Law of 29 July 1991. The Court decided as follows. The statutory servant's job security is based on the fact that termination of service may only take place on the grounds expressly listed in her staff regulations. The permanent nature of employment is thus a substantial characteristic of the statutory function. The result is an obligation for the authority terminating a statutory relationship to properly identify the reason for dismissal provided for in the staff regulations and a right for the statutory agent to bring an action for annulment before the Council of State. Since the appeal must be lodged within 60 days, that official must promptly know the reasons for the public authority's decision. On the other hand, contract staff engaged under an employment contract are subject to the rules applicable to the employment contract, according to which any party to the contract may unilaterally terminate it for freely chosen reasons. The contractual worker has a period of one year after the termination of the contract to lodge an appeal with the labour court. This period allows her to ask the employer for the reasons for her dismissal.

Beyond the question of the application of the Law of 29 July 1991 on the formal motivation of administrative acts, it should also be recalled that the public sector is still waiting for the introduction of a system of protection against 'patently unreasonable' dismissals. The private sector has set an example with the introduction of Collective Bargaining Agreement (CBA) No. 109 concluded in the National Labour Council on 12 February 2014, which also addresses the issue of formal motivation by providing formal motivation upon request from the employee. By means of Article 38 of the Law of 26 December 2013 on the single employee statute, the legislator had announced the introduction of a regulation 'similar' to CBA No. 109 in the public sector. However, the legislature has remained silent. Such a regime does not yet exist in the public sector.

The Constitutional Court has previously emphasised that by its judgment No. 101/2016 of 30 June 2016 "*pending the intervention of the legislator, the rights of all employees in the public sector in the event of manifestly unfair dismissal should be safeguarded by the courts, in accordance with general contract law, without discrimination and, where appropriate, on the basis of CBA No 109*" with some kind of analogical application.

For the Constitutional Court, it is therefore not discriminatory to not apply the Law of 29 July 1991 to the dismissal of a contractual employee.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

After several hours of negotiations, the Federal Government reached a political agreement on the 2019 budget on 24 July 2018, but also on a number of other important issues, including a 'labour deal' which includes various social security measures. The aim is to increase the employment rate and overcome the shortage on the labour market. The political agreement involves framework measures, which need to still be included in legislation before they can be applied effectively.

This so-called 'labour deal' comprises 28 measures and is mainly aimed at job creation and the filling in of bottleneck occupations. However, not all measures are new, but were already known.

An overview follows.

The system of unemployment benefits with an allowance paid by the employer: tightening of the system

Within the regulation framework of the general system of unemployment benefits with an allowance paid by the employer (*Stelsel van Werkloosheid met Bedrijfstoeslag*, SWT), regulation based on Collective Bargaining Agreement No. 17 concluded in 1974 in the National Labour Council, the career condition will be raised from 40 years to 41 years, as from 01 January 2019.

For this system of unemployment benefits in the case of restructuring of the enterprise allowing an earlier entry into this system, the age shall be increased to 59 years from 01 January 2019 and to 60 years from 01 January 2020. In addition, if the system is applied in case of restructuring, it is also provided that as from 01 January 2019, undertakings will be required to bear the cost of training amounting to at least EUR 3 600 for each employee entering the unemployment system to undergo training in the occupations or professions facing a bottleneck.

Degressivity of unemployment benefits

The 'labour deal' does not provide for any reduction in unemployment benefits over time, but there will be an adjustment in the rate of reduction of unemployment benefits. As of next year (2019), an unemployed person will receive a higher benefit in the first six months.

The benefit is now capped at 65 percent of the last salary, albeit at a certain maximum.

These first six months will be followed by a more rapid reduction in unemployment benefits, which should encourage job seekers to intensify their search for work.

Time credit

The age condition for being able to take out end-of-career time credits with benefits will be increased from 01 January 2019 to 60 years instead of the currently 55 years.

The justified time credit for attending an approved training course will be extended from 01 January 2019 from 36 months to 48 months in the case of training in a profession facing a bottleneck.

Evolution of wages

In the context of forward-looking wage development, a specific agenda is being developed to ensure that the evolution of wages is no longer linked to age or seniority, but to competence and productivity.

Outplacement in case of medical 'force majeure'

Employees whose employment contract ends due to medical force majeure will also be able to claim outplacement or equivalent guidance for a new job through sectoral funds.

Expansion of the fiscal regime for overtime for sectors with bottleneck professions



Sectors that are strongly affected by bottlenecks could increase the number of overtime hours that entitle them to tax reductions from 130 to 184.

Early registration with the Public Employment Service

Employees who are dismissed without notice must now register with their regional employment service within one month of the notice of dismissal. Employers may also have to play a role in this by including this obligation in the dismissal letter.

Individual right to 'soft runways' for older employees

The aim of soft landing jobs is to keep the last years of the employee's career 'liveable and feasible'. For example, they can work 4/5 on a voluntary basis, take on a function with fewer responsibilities or, for example, be excluded from having to work at night or in a shift system. The entry into force of the measure requires a sectoral collective bargaining agreement, which in practice sometimes has a restraining effect on its entry into force.

The 'labour agreement' therefore provides that an individual right will be granted to the employee concerned to request a soft landing runway, provided that no sectoral collective labour agreement has been concluded by 01 January 2019 in the sector to which she belongs.

Start-up jobs, reduction of labour cost

The file on starter jobs will also be discussed again. This measure should, in principle, have entered into force on 01 July 2018, but a discussion on the modalities led to a delay. The political labour deal reaffirms the wish to encourage the recruitment of young workers by reducing the cost of labour for the employer from 18 percent to 6 percent, but does not affect the employee's net salary.

Stimulate training of workers

Certain incentives are provided to encourage employers to invest in the long-term training of workers.

Incapacity benefits after the age of 65

At present, employees who continue to work after the age of 65 are not entitled to benefits in the sickness insurance scheme if they fall ill. The labour agreement provides that the right to disability benefits may be granted for a maximum period of 6 months to employees who continue to work after reaching the age of 65.

Encouraging training after dismissal

When an employee is dismissed, she must give notice or receive severance pay. Soon, the dismissed employee will be able to request a maximum of one-third of her severance pay to be spent on training. In that case, she may benefit from tax and parafiscal advantages. To be able to follow this training, the duration of the notice period could also be shortened in consultation with the employer.

Mobility budget

The commitments in the context of the development of a mobility budget (in addition to the existing mobility allowance scheme – 'cash for cars') were also included in the labour deal without, however, including any additional modalities or formalities in this respect.

Focus on filling in the professions of bottleneck

Various measures will be taken to improve and speed up the filling of bottleneck occupations, including



- A flat-rate tax exemption for new premiums granted by the regions to job seekers who complete a training or apprenticeship in order to gain access to a bottleneck job;
- Unemployed people in training to fill a bottleneck job would no longer see their benefits decrease over time;
- The justified time credit for attending an approved training course will be extended from 01 January 2019 from 36 months to 48 months in the case of training in a bottleneck profession;
- Closer monitoring and activation via the regional employment services of employees in the system of unemployment benefits with an allowance paid by the employer who can fill in a bottleneck job.
- An outplacement bonus to redirect redundant workers towards a bottleneck profession;
- A (para)tax incentive to use severance pay to follow training in occupations in which there are bottlenecks;
- Time credit for training is increased from 36 months to 48 months in the case of training for a high-risk job.

Bulgaria

Summary

Only few developments took place in Bulgarian labour legislation in July 2018. They concern labour mobility, the calculation of working time, maternity leave and the recording of trade unions and employers' organisations.

1 National Legislation

1.1 Working time

Decree [No. 131 of 05 July 2018](#) of the Council of Ministers on amendments and supplements of the Ordinance on Working Time, Rest Periods and Leave (State Gazette No. 58 of 13 July 2018) amended rules on the calculation of working time. The average working time shall be calculated as the number of working days in the calendar, with the daily average defined in the employment contract.

1.2 Third-country nationals

The Decree of the Council of Ministers [No. 129 of 05 July 2018](#) amended and supplemented the Regulations for Implementation of Aliens in the Republic of Bulgaria Act (State Gazette No. 57 of 10 July 2018). The new provisions amend the procedure and documents for becoming entitled to residence in Bulgaria. A special less complex regime has been established for academics and aliens of Bulgarian origin.

1.3 Maternity leave

Decree [No. 131 of 05 July 2018](#) of the Council of Ministers for amendments and supplements of the Ordinance on Working Time, Rest Periods and Leave (State Gazette No. 58 of 13 July 2018) amends the rules on maternity leave – the necessary documents, procedure, termination, etc.

1.4 Register of social partners

The Law on Amendments and Supplements to the Labour Code (State Gazette No. 59 of 17 July 2018) has modified Article 49. It requires trade unions and employers' organisations to register in a special register to acquire the status of a legal person upon the procedure provided for in the Code of Civil Procedure. It lists data that must be recorded. Before the amendments, these organisations were recorded in the general register of non-profit organisations.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

Nothing to report.



4 Other relevant information

Nothing to report.

Croatia

Summary

- (I) The Commission for the Determination of Representativeness has issued two important decisions on the representativeness of social partners.
- (II) Some amendments on the status and work of third-country nationals have been published.
- (III) Some regulations implementing Directive 2013/59/Euratom have been issued.

1 National Legislation

1.1 Amendment to the regulations on the status and work of third-country nationals in the Republic of Croatia

An amendment to the regulations on the status and work of third-country nationals in the Republic of Croatia has been published [in Official Gazette No. 61/2018](#). The initial text of the regulations was published in Official Gazette No. 52/2012, followed by the amendments published in Official Gazette Nos. 81/2013, 38/2015 and 100/2017.

Among others, it regulates in detail what should be taken into account when determining whether there is an interest on behalf of the Republic of Croatia to issue a work permit for a service provider of a foreign employer (Article 27(2)).

1.2 Regulations on the health conditions of workers and persons training for work in areas of exposure

The head of the State Institute for Radiological and Nuclear Safety, together with the Minister of Health and the head of the Croatian Institute for Health Protection and Safety at Work, has issued regulations on the health conditions of workers and persons training for work in areas of exposure. The regulation is available [in Official Gazette No. 66/2018](#).

It implements Council Directive 2013/59/Euratom of 05 December 2013, establishing basic safety standards for protection against risks arising from exposure to ionising radiation, and repealing Directives 89/618/Euratom, 90/641/Euratom, 96/29/Euratom, 97/43/Euratom and 2003/122/Euratom in Croatian law. Among others, it lays down the health conditions of workers prior to the commencement of work in areas of exposure to ionising radiation, the frequency of medical examinations, and the content, method and deadlines for storing data of such examinations.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

Nothing to report.



4 Other relevant information

4.1 Representativeness of umbrella trade unions' and employers' associations on national level

The Commission for the Determination of Representativeness has passed two decisions: first, a decision on the representativeness of three umbrella trade union associations for participation in tripartite bodies at the national level, and one on the representativeness of a single umbrella employers' association for participation in tripartite bodies at the national level. Both decisions have been published in Official Gazette No. 59/2018, they can be found [here](#) and [here](#). It has been established that the following umbrella trade union associations are considered representative: Independent Croatian Trade Unions (*Nezavisni hrvatski sindikati*), Union of Autonomous Trade Unions of Croatia (*Savez samostalnih sindikata Hrvatske*) and Association of Croatian Trade Unions (*Matica hrvatskih sindikata*). On the other hand, on the employer's side, it has been established that the Croatian Employers' Association is considered representative for participation in tripartite bodies at the national level.

Cyprus

Summary

A new law regulates the transfer of employees who had initially concluded fixed-term contracts with the now disbanded Foundation of Culture and eventually signed contracts of indefinite duration with the Ministry of Finance.

1 National Legislation

1.1 Transfer of employees

The new law 57(I)/2018 (Law on Transfer of Staff of the Foundation of Culture to the Ministry of Finance Law of 2018), regulates the transfer of employees who had initially concluded fixed-term contracts with the now disbanded Foundation of Culture but eventually signed contracts of indefinite duration with the Ministry of Finance.

There has been a longstanding dispute about the rights of fixed-term workers in the public sector (central or local government or other public bodies) and in institutions and foundations that operate under private law and are owned by the state. Many of these workers work in the public sector but their rights are regulated in private law. There have been a number of cases before the courts, the Supreme Court (see Supreme Court of Cyprus, Appeal jurisdiction, Civil appeal No. 60/2010, 14 October 2014, [Christina Laouta v The Republic of Cyprus through the Attorney General](#)), and the Labour Disputes Court.

In one case (Nicosia Labour Disputes Court, case No. 338/2012, 30 June 2015, *Maria Syrими V Cyprus Republic*) the Labour Disputes Court decided that the contract of a research assistant in the Statistics Services, who had been employed under successive fixed-term contracts since 2007, had automatically converted into a contract of indefinite duration based on the Cypriot law transposing the Fixed-term Work Directive, which in Cyprus is regulated in the Law on Fixed-term Employment (FT Law, Law 98(I)2003, 25 July 2003). In 2011, an amendment (amendment 26(I)/2011) to the public service law introduced 'employees with contracts of indefinite duration' as a distinct category. In 2016, another amendment was introduced to regulate fixed-term and permanent employment in the public service (Cyprus, Law regulating the employment of fixed-term and permanent employees in the public service of 2016, No. 70(I)/2016 of 28 April 2016).

The 2016 amendment provides that the hiring of fixed-term employees is possible under certain circumstances (Art 4.2 of the Law regulating the employment of fixed-term and permanent employees in the public service of 2016).

Some problems, however, remain. As public sector employees, who have concluded a temporary/ fixed-term contract, are still not treated equally as permanent public sector employees as regards certain benefits such as sick leave provisions, access to pension plans which are only available to permanent public employees, and the promotion to 'permanent public servant posts'. In fact, even following the adoption of provisions designed to meet the requirements of the Framework Agreement, discrimination continues to exist with regard to the three aforementioned issues. It was expected that the Law on the Appointment of Temporary Employees in the Public Service (Law 108(I)/95) would regulate these issues. Stakeholders disagree on how to deal with the above three issues. The Labour Disputes Court in the case *Panayides* (Civil Appeal 132/2009, 19 July 2012, *Panayides v Attorney General of the Republic of Cyprus*) ruled that employees with fixed-term contracts, whose employment contracts had been converted into contracts of indefinite duration, cannot benefit from the same pension rights as permanent full-time public servants because the permanent full-time public



servant is not an appropriate comparator of permanent employees, as this is not the intention of the FT Law. The purpose of the Law is to allow for equal treatment between employees under a fixed-term contract and under a contract of indefinite duration and to prevent abuse through successive fixed-term contracts.

Law 57/(I)2018 provided that following the dissolution of the Foundation, four permanent employees employed by the Foundation had been transferred to the Ministry of Finance and continued to be employed as permanent employees. The law provided that employees of indefinite duration retained the salary level they earned immediately prior to their transfer to the Ministry and were placed at the appropriate pay scales. They were redeployed to these pay scales in proportion to their benefits in line with the regulation that governs the adjustment of salary of an official whose position is upgraded. Moreover, the employees had the right to refuse the transfer—just like any permanent employee—before being transferred to the Ministry and within two weeks from the notification of the terms of service of the new post, in writing. In such a case, the employment relationship of the employee is deemed terminated (in accordance with the provisions of the Employment Termination Act 1967 to 2016). The law will be implemented from 01 January 2019.

The law aims to implement the requirements of Directive 1999/70/EC on Fixed-term employees (Prohibition of Less Favourable Treatment) of 2003, which was purported to be transposed by the law on Fixed-term Employment. The law entered into force one year prior to EU accession, explicitly stipulating its purpose to harmonise Cypriot law with the Directive (Law 70(I)2002 (07 June 2002) amending the Law on Termination of Employment, published in Cyprus Official Gazette 3610 on 07 June 2002 effective 01 January 2003).

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Czech Republic

Summary

- (I) A draft Act on Compensation for Loss of Earnings after Termination of Incapacity for Work is expected to enter into force soon.
- (II) The Supreme Court has ruled on the conversion of fixed-term employment relationships into ones of indefinite duration.

1 National Legislation

The newly (6/2018) appointed Minister of Labour and Social Affairs had to step down due to a political scandal and a new Minister was appointed on 30 July 2018. Only few developments have taken place this month.

1.1 Compensation for loss of earnings after termination for incapacity for work

A [Draft Act](#) amending Act No. 262/2006 Coll., the Labour Code, as amended, and other related acts, has already been approved by the Senate and is expected to be published before long.

The aim of the amendment is to refine the calculation of compensation for loss of earnings after a period of incapacity for work following an occupational accident or the development of a vocational disease has ended. So far, this compensation could be calculated in several possible ways, which resulted in inequalities between beneficiaries of different insurance companies. However, the issue only concerned those to whom the compensation was not paid before they entered into the register of job seekers maintained by the Employment Office.

The Draft Act thus precisely defines that the fictional earnings for the period after an occupational accident or the development of a vocational disease should be the same amount as the minimum wage at the time of entry into evidence of job seekers (not the present minimum wage).

2 Court Rulings

2.1 Fixed-term employment contracts

The Supreme Court of the Czech Republic has ruled that a temporary incapacity for work of an employee due to high-risk pregnancy cannot be considered a continuation of work performance, which is the necessary condition for the automatic conversion of a fixed-term employment relationship into one of an indefinite duration once the former expires. The decision was issued on 20 November 2017 under file No. 21 Cdo. 4683/2017 and was later upheld by the decision of the Constitutional Court issued on 09 May 2018 under file No. IV.ÚS 584/18.

The fixed-term employment contract of the claimant was supposed to expire on 31 October 2014. One day prior to the expiry, the claimant notified her employer of her temporary incapacity for work due to her high-risk pregnancy and expressed her wish to continue the employment relationship. As far as the employer was concerned, however, the employment relationship terminated on 31 October 2014 due to the expiry of the fixed-term contract.



The question put before the Supreme Court was whether the period of temporary incapacity for work due to the employee's high-risk pregnancy could be considered a continuation of work performance as stated in the Labour Code and whether the above-mentioned actions of the employer could be regarded as contrary to the principles of morality.

The claimant argued that for the purposes of the calculation of maternal allowance, the period of temporary incapacity for work should be considered fictional performance of work. It ought to thus be similarly regarded as fictional work performance for the purposes of Section 65(2) of the Labour Code.

Section 65(2) of the Labour Code states that "*Where, after expiry of the agreed term [Section 48(2)], the employee continues to perform work and the employer is aware of it, this employment relationship shall be deemed to change into an employment relationship of indefinite duration.*"

The Supreme Court ruled that in order to apply the above-mentioned Section of the Labour Code, an employee must objectively continue to perform work. The argument that the health insurance regulation considers temporary incapacity for work to be fictional performance of work was deemed irrelevant by the Supreme Court. According to the Labour Code, work performance derives from an obligation of the employer to assign work to the employee and the corresponding obligation of the employee to actually perform such work. Temporary incapacity for work when the employment relationship is suspended and the employer is no longer obligated to assign work to his/her employee does not meet this condition. The logic behind the Labour Code is not the same as that behind the health insurance regulations, which deal with the payment of allowances by the state at a time of illness when the employee is not assigned work and paid his/her salary by the employer. These two areas of the law should therefore not be confused.

The Supreme Court also rejected the argument that the termination of the employment relationship connected with the claimant's pregnancy was contrary to the principles of morality, and that it should be regarded as abuse of a right. Consistent with its previous findings, the Supreme Court held that actions directed at the fulfilment of a legal obligation cannot be considered an abuse of one's right, provided that the damage is accidental (in other words, that it is not the primary reason for such an action). In the case in question, the damage was secondary to the aim presumed by the law, namely the termination of a fixed-term employment contract due to expiry.

In conclusion, the termination of the claimant's employment relationship was valid. This decision was upheld by the Constitutional Court on 09 May 2018 when it rejected the constitutional complaint (although for procedural reasons) and the decision of the Supreme Court is thus final.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Estonia

Summary

The Ministry of Social Affairs has proposed amendments to the Employment Contracts Act to create a better legal framework for new and flexible forms of employment.

1 National Legislation

1.1 Planned amendments to the Employment Contracts Act

The Ministry of Social Affairs has [issued proposals](#) for amendments to the Employment Contracts ACT (ECA) to make employment relationships more flexible and to introduce more possibilities to regulate new forms of employment. From the proposed amendments, three in particular deserve attention: flexible working time, more opportunities for fixed-term contracts, occupational health and safety rules and more responsibilities for employees.

The proposal opens the possibility for the employer and employee to agree on working times within certain periods. At present, the ECA does not include this possibility. The working time must currently be agreed as a clear number of working hours to be performed by the employee. According to the proposal, working time can also be performed within certain time limits (e.g. 25-35 hours within a 7-day period).

The proposal also provides for more possibilities to conclude fixed-term contracts. It would then be possible to decrease the maximum duration of fixed-term employment contracts from five to three years. During this maximum period, the conclusion and extension of the employment contract would be less complicated.

It is quite difficult for the employer to observe the fulfilment of occupational health and safety regulation in case of telework or home working. Therefore, the responsibility for occupational health and safety regulations must be shifted towards the employee. The proposal envisages the employer providing the employee with training about the possible risks connected with the telework.

The proposal also addresses other aspects of the employment contract. The proposal has been forwarded to the social partners and the discussion will continue in autumn.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

France

Summary

(I) The draft laws on the growth and transformation of companies and on the freedom to choose one's professional future will introduce several reforms in French labour law.

(II) Case law on fixed-term work, working time and information and consultation of employees has been published.

1 National Legislation

1.1 Draft law related to the growth and transformation of companies

1.1.1 Employee participation in profits

Special social contributions

The [draft law](#) on the growth and transformation of companies provides that companies employing less than 50 employees can benefit from a total exemption of special social contributions on the amounts resulting from profit-sharing plans, incentive plans and the employer's contribution to employees' savings plans.

It also provides that companies employing between 50 and 250 employees do not have to pay the special social contributions on the amounts connected with incentive plans.

Profit-sharing plans: procedure to count the threshold of 50 employees

Under French legislation, companies employing more than 50 employees during the last three years over a 12-month period, consecutive or not, must implement a profit-sharing plan (French Labour Code, [Article R. 3322-1](#)).

Article 55 of the draft law postulates that companies employing more than 50 employees must implement a profit-sharing plan the first year following a period of 5 consecutive years of employment. The number of employees will be determined based on the modalities of calculation provided by the French Social Security Code and no longer by the French Labour Code.

Profit-sharing and incentive plans at the sector level

The draft law encourages sectors to implement profit-sharing and incentive plans that small companies can apply directly.

Sectors have until 31 December 2019 to negotiate a profit-sharing or incentive plans that suit small companies employing less than 50 employees. In the absence of negotiations before 31 December 2018, they will take place in the 15 days following the request for negotiations of a trade union.

1.1.2 Retirement savings plans

Collective retirement savings plan

Under French legislation, a company or intercompany savings plan was necessary to implement a collective retirement savings plan. To facilitate the use of collective retirement savings plans, the draft law has removed this condition.

The draft law also generalises the manager-guided funds to all retirement savings plans.



Generalization of the portability of pension rights and tax deduction of voluntary payments

The draft law creates a new right for investors: their pension rights can be transferred from a retirement savings plan to another, even if these differ. The transfer is free for funds held over at least 5 years. If this is not the case, the transfer fees may not exceed 3 percent of the outstanding amount.

The possibility to deduce the voluntary payments from income tax has also been generalised for all retirement savings plans.

1.1.3 Staff threshold

The rules on calculating the total staff number would be those provided by the French Social Security Code. The staff taken into account is the employer's annual staff which corresponds to the average of the number of employed individuals during the months of the previous calendar year.

This new calculation would be applicable to the transport contribution, the employment of disabled persons, job review and the apprentice contribution.

The government would implement the staff threshold at three levels: 11, 50 and 250 employees.

These measures will be voted on during the 4th trimester of 2018.

1.2 Draft law related to freedom to choose one's professional future

1.2.1 Simplification of vocational training measures

Under French legislation, vocational training measures are provided [in Article L. 6313-1 to L. 6313-14](#) of the French Labour Code. These articles have been modified by the [draft law](#) which provides 4 types of vocational training measures:

- Training measures;
- Skills assessment;
- Measures to validate the acquired professional experience;
- Apprenticeship measures.

1.2.2 New definition of vocational training measures

Vocational training measures represent a learning curve, allowing employees to achieve their professional goals. Vocational training measures can be fully or partially carried out remotely and can also be completed in a work situation.

Vocational training measures comprise four goals:

- Give individuals who do not have professional qualifications or an employment contract the possibility to have access to the labour market under the best possible conditions;
- Encourage the adaptation of workers to their jobs and to participate in the development of their skills as well as in the acquisition of a higher qualification;
- Reduce the risks resulting from inadequate qualification;
- Encourage job mobility.

1.2.3 The transformation of vocational training plans into skills development plans

The access of employees to vocational training measures will be ensured through a skills development plan.

The employer will still have to ensure the adaptation of the employee to her job. However, the companies will no longer have to implement their plans by distinguishing between job adaptation measures and skills development measures.

A new distinction between mandatory vocational trainings (during working time, maintenance of wage) and the other trainings will be introduced.

1.2.4 Modification of job reviews

Employees will continue to be entitled to job reviews that are to take place every two years with the aim of discussing the employee's career opportunities. Every six years, a document on the employee's career path will denote whether the employee benefited from at least one vocational training measure, acquired professional experience or focused on her career development.

The draft law provides that this document will also allow determining whether the employee benefited from a proposal made by her employer to contribute to her personal vocational training account of at least half of her acquired rights.

If an employee in a company with at least 50 employees did not undergo a job review and did not benefit from at least two measures during her six years of employment, the employer will have to contribute to the employee's personal vocational training account.

2 Court Rulings

2.1 Fixed-term work

Labour Division (Chambre sociale) of the Court of Cassation, No. 17-17.342, 27 June 2018

This [case](#) dealt with an employee who had concluded a contract of indefinite duration. She worked 78 hours per month. On 04 November 2004, she concluded a fixed-term contract with the same employer based on an increase in activity for 35 hours of work per week. This fixed-term contract was supposed to terminate on 30 April 2005.

That contract had been concluded while the contract of indefinite duration continued.

The contract of indefinite duration continued until 2013. In 2013, the employer entered liquidation proceedings and dismissed the employee for economic reasons.

The employee claimed requalification of her fixed-term contract into one of indefinite duration, which would make her eligible for an allowance.

The Court of Cassation refused to grant the employee this allowance. The Court argued that the conclusion of a fixed-term contract has no effect on when a contract of indefinite duration is executed. This solution is consistent with the Court of Cassation's previous court law.

The Court argued that the conclusion of a fixed-term contract did not automatically terminate the current contract of indefinite duration, which continued without being considered as having been transformed by the parties' will (see Labour Division (Chambre sociale) of the Court of Cassation, [N°06-46.330](#), 25 March 2009).

In the ruling of 27 June 2018, the Court stated that the employee cannot claim requalification of the fixed-term contract (which has no effect) into a contract of

indefinite duration, and consequently, can therefore not claim the requalification provided in Article L. 1245-2 of the French Labour Code:

«Mais attendu, d'abord, qu'ayant énoncé, à bon droit, que la signature d'un contrat de travail à durée déterminée est sans effet lorsqu'un contrat de travail à durée indéterminée est toujours en cours d'exécution et relevé que la salariée et son employeur avaient signé le 25 mars 2002 un contrat de travail à durée indéterminée à compter du 1^{er} avril 2002 qui n'avait fait l'objet d'aucune rupture, la cour d'appel en a exactement déduit que les parties étaient liées jusqu'à la liquidation judiciaire de l'entreprise par ce contrat de travail à durée indéterminée, que le contrat de travail à durée déterminée signé le 4 novembre 2004 était sans effet et que la salariée n'était pas fondée en sa demande de requalification, faisant ressortir qu'elle ne pouvait prétendre à l'indemnité de requalification prévue à l'article L. 1245-2 du code du travail ; »

2.2 Working time

Labour Division (Chambre sociale) of the Court of Cassation, No. 16-21.811, 20 June 2018

In the present [case](#), the employer concluded a full-time contract of indefinite duration with an employee. The employee was also employed as cleaning staff for another company, but did not inform her employer about her other job.

The employer wanted to know how many hours of work the employee worked for the other company to determine whether the employee was exceeding the weekly maximum hours of work permitted by law.

The employer asked the employee twice to transmit her other employment contract and pay slips, but the employee refused to transmit them to her employer.

The employer consequently dismissed the employee on the grounds of gross misconduct, since she worked 12 hours in her second job, which meant she exceeded the permissible weekly maximum working hours.

Under French legislation, employees with several jobs are subject to the same weekly maximum working hours as employees who have only one job. They cannot be employed beyond 48 hours per week in total (French Labour Code, [Article L. 3121-20](#)) or 44 hours on average over 12 consecutive weeks (French Labour Code, [Article L. 3121-22](#)).

The unlawful performance of working hours at various jobs is considered illegal work (French Labour Code, [Article L. 8211-1, 5°](#)). As a consequence, the employer must ensure that the employee's total working hours do not exceed the maximum permissible working hours.

The Court of Cassation argued that the dismissal of the employee in this case for gross misconduct was justified. Since she had refused to transmit her employment contract and pay slips to her employer, the employee did not allow her employer to ensure that the weekly permissible maximum working hours were being respected.

«Mais attendu que la cour d'appel a retenu qu'en refusant de communiquer son contrat de travail et ses bulletins de paie, la salariée, qui avait faussement déclaré lors de son embauche qu'elle n'était pas liée à un autre employeur, n'avait pas permis à l'employeur de vérifier que la durée hebdomadaire maximale de travail n'était pas habituellement dépassée;

[...]

Mais attendu que la cour d'appel, qui a relevé qu'il était constant que le contrat de travail conclu avec la société GSF Orion n'avait pas été rompu, la salariée soutenant même dans son courrier du 16 septembre 2013 que le maintien de cet emploi constituait une sécurité pour elle et que le refus de communiquer son contrat de travail et ses bulletins de paie ne permettait pas à l'employeur de remplir son obligation de s'assurer que la durée hebdomadaire maximale de travail n'était pas habituellement dépassée a fait ressortir que la salariée avait commis une faute rendant impossible son maintien dans l'entreprise et justifié ainsi légalement sa décision; »

This ruling is consistent with previous case law of the French Court of Cassation. It stated that dismissals for gross misconduct were justified if the employee had failed to transmit the necessary documents to the employer to ensure that the weekly permissible maximum working hours were being respected (see Labour Division (Chambre sociale) of the Court of Cassation, [No. 09-40.923](#), 19 May 2010).

2.3 Information and consultation of employees

Constitutional Council, No. 2018-720, 13 July 2018

The balanced representation of women and men, implemented by [Law No.2015-994 of 17 August 2015](#) and provided in Articles [L. 2314-7](#) and [L. 2324-10](#) of the French Labour Code, encourages representation consistent with the electoral colleges in the context of professional elections. The employer cannot organise partial elections if a lack of staff representatives results from the annulment of the elections of candidates based on disregard of balanced representation of women and men.

This rule was provided for in the ratification act of the Macron Ordinance of 22 September 2017 on the Social and Economic Committee, and the Constitutional Council on 21 March 2018, considered that this provision did not respect the Constitution (see Constitutional Council, [No. 2018-761](#), 21 March 2018).

However, the rule was still applicable to the works council and staff representatives' partial elections. In fact, many works council and staff representatives' mandates run until 31 December 2019 (deadline to implement the Social and Economic Committee). The Constitutional Council was asked in this [case](#) to determine whether the prohibition to organise partial elections when the lack of staff representatives results from the annulment of the elections of candidates based on disregard of balanced representation of women and men in respect of the Constitution.

The Constitutional Council stated that the legislator's will was to prevent the employer from organising new professional elections while trade unions establish the candidates' list, and encourage trade unions to respect the balanced representation of women and men among staff representatives and the works council.

The Constitutional Council considered that the violation of the principle of workers' participation, guaranteed by the eighth paragraph of the Constitution of the 1946 [preamble](#), was disproportionate. The provisions may, in fact, lead to several vacant seats in the representative trade unions for many years, including when an electoral college is no longer represented and where the number of titular members was reduced by half or more. These provisions can harm the normal functioning of these institutions.

The second paragraph of Article L. 2314-7 of the French Labour Code and the first paragraph of Article L. 2324-10 of the French Labour Code, in their formulations resulting from Law No. 2015-994 of 17 August 2015 are contrary to the Constitution and have been repealed.

«8. Aux termes du huitième alinéa du Préambule de la Constitution du 27 octobre 1946: «Tout travailleur participe, par l'intermédiaire de ses délégués, à la

détermination collective des conditions de travail ainsi qu'à la gestion des entreprises ». L'article 34 de la Constitution range dans le domaine de la loi la détermination des principes fondamentaux du droit du travail. Ainsi, c'est au législateur qu'il revient de déterminer, dans le respect du principe énoncé au huitième alinéa du Préambule, les conditions et garanties de sa mise en œuvre et, en particulier, les modalités selon lesquelles la représentation des travailleurs est assurée dans l'entreprise.

9. Selon le troisième alinéa de l'article L. 2314-25 du code du travail, la constatation par le juge, après l'élection des délégués du personnel, de la méconnaissance, par une liste de candidats à cette élection, des prescriptions imposant à chaque liste de comporter un nombre de femmes et d'hommes proportionnel à leur part respective au sein du collège électoral entraîne l'annulation de l'élection « d'un nombre d'élus du sexe surreprésenté égal au nombre de candidats du sexe surreprésenté en surnombre sur la liste de candidats au regard de la part de femmes et d'hommes que celle-ci devait respecter. Le juge annule l'élection des derniers élus du sexe surreprésenté en suivant l'ordre inverse de la liste des candidats ». Selon le dernier alinéa du même article, la constatation par le juge, après l'élection, de la méconnaissance par une liste des prescriptions imposant l'alternance d'un candidat de chaque sexe entraîne l'annulation de l'élection des élus dont le positionnement sur la liste de candidats ne respecte pas ces prescriptions. Les troisième et dernier alinéas de l'article L. 2324-23 du code du travail donnent au juge le même pouvoir d'annulation, pour les mêmes motifs, pour l'élection des représentants du personnel au comité d'entreprise.

10. Dans ces différents cas, les dispositions contestées des articles L. 2314-7 et L. 2324-10 du code du travail dispensent l'employeur d'organiser des élections partielles visant à pourvoir les sièges devenus vacants à la suite de l'annulation de l'élection de délégués du personnel ou de membres du comité d'entreprise, quelle que soit la durée des mandats restant à courir.

11. En adoptant les dispositions contestées, le législateur a entendu, d'une part, éviter que l'employeur soit contraint d'organiser de nouvelles élections professionnelles alors que l'établissement des listes de candidats relève des organisations syndicales et, d'autre part, inciter ces dernières à respecter les règles contribuant à la représentation équilibrée des femmes et des hommes parmi les délégués du personnel et au sein du comité d'entreprise.

12. Toutefois, les dispositions contestées peuvent aboutir à ce que plusieurs sièges demeurent vacants dans ces institutions représentatives du personnel, pour une période pouvant durer plusieurs années, y compris dans les cas où un collège électoral n'y est plus représenté et où le nombre des élus titulaires a été réduit de moitié ou plus. Ces dispositions peuvent ainsi conduire à ce que le fonctionnement normal de ces institutions soit affecté dans des conditions remettant en cause le principe de participation des travailleurs.

13. Par conséquent, même si les dispositions contestées visent à garantir, parmi les membres élus, une représentation équilibrée des femmes et des hommes, l'atteinte portée par le législateur au principe de participation des travailleurs est manifestement disproportionnée. Par suite, sans qu'il soit besoin d'examiner les autres griefs, les dispositions contestées doivent être déclarées contraires à la Constitution»

2.4 Trade union representativeness

Labour Division (Chambre sociale) of the Court of Cassatio, No.17-20.710n, 04 July 2018

The relevant facts of the [case](#) are as follows: a national confederation obtained 19.08 percent in the company's professional elections in 2012. Thus, it was representative and could appoint union representatives in the company.

Then, a trade union created in 2014 (after the elections) joined this confederation. The confederation no longer had any union representatives in the company, so the trade union that joined appointed two union representatives in 2016.

To be considered representative, trade unions must obtain at least 10 percent of the votes cast in the first round of the last professional elections (French Labour Code, [Article L. 2122-1](#)). The representativeness remains during the electoral cycle. In principle, a trade union cannot become representative or lose its representativeness between two elections (see Labour Division (Chambre sociale) of the Court of Cassation, 13 February 2013, [No. 12-18.098](#)).

The Court of Cassation annulled the appointment of the two union representatives. It stated that the trade union had not participated in the last professional elections and could not be representative in the company. The fact that the trade union joined a representative confederation has no effect. Representativeness must be acquired during elections and cannot be modified until the next professional elections. The trade union could thus not appoint union representatives.

«Mais attendu que la représentativité des organisations syndicales est établie pour toute la durée du cycle électoral;

Et attendu qu'ayant constaté que le syndicat CGT NAM n'avait pas participé aux dernières élections professionnelles, le tribunal d'instance en a déduit à bon droit que, n'étant pas représentatif au sein de l'UES NGAM, ce syndicat ne pouvait procéder à des désignations de délégués syndicaux ; »

2.5 Dismissal of a workers' representative

Council of State, No.397059 and No.410904, 04 July 2018

In the first [case](#), an employer wanted to dismiss a staff representative, who was also a member of the works council. During a meeting of the works council, the vote on this dismissal was taken by a show of hands, unanimously against the disciplinary sanction. As [Article R. 2421-9](#) of the French Labour Code provides that the works council's opinion is confidential, the validity of the opinion was challenged.

In the second [case](#), an elected member of the single staff delegation was convened on 22 March 2013 to a preliminary meeting concerning her dismissal for gross misconduct. She was questioned that afternoon by the single staff delegation functioning as the works council. The elected member claimed that she had not been given sufficient time to prepare for her hearing with the works council, as she had not been informed of the misconduct before her preliminary hearing.

In the first case, the Council of State stated that the violation of the secret vote did not influence the validity of the works council's consultation on the dismissal plans. The judge must determine whether the vote was likely to distort the works council's consultation. If all the votes are unanimously unfavourable, each member's vote is known.

« 3. Considérant qu'il résulte des dispositions, alors applicables, de l'article L. 2421-3 du code du travail que : " tout licenciement envisagé par l'employeur d'un délégué du personnel ou d'un membre élu du comité d'entreprise, d'un représentant syndical au comité d'entreprise ou d'un représentant des salariés au comité d'hygiène de sécurité et des conditions de travail est obligatoirement

soumis au comité d'entreprise, qui donne un avis sur le projet de licenciement " ; qu'aux termes du premier alinéa de l'article R. 2421-9 du même code : " l'avis du comité d'entreprise est exprimé au scrutin secret après audition de l'intéressé " ; que, saisie par l'employeur d'une demande d'autorisation de licenciement d'un salarié protégé auquel s'appliquent ces dispositions, il appartient à l'administration de s'assurer que la procédure de consultation du comité d'entreprise a été régulière ; qu'elle ne peut légalement accorder l'autorisation demandée que si le comité d'entreprise a été mis à même d'émettre son avis en toute connaissance de cause, dans des conditions qui ne sont pas susceptibles d'avoir faussé sa consultation ;

4. Considérant qu'il ressort des termes mêmes de l'arrêt attaqué que, pour juger que la consultation du comité d'entreprise de l'association des Cités du secours catholique sur le licenciement de M. A... B... avait été irrégulière, la cour administrative d'appel s'est fondée sur ce que l'avis du comité d'entreprise avait été exprimé en procédant, au cours de sa séance du 25 février 2013, à un vote à main levée, en méconnaissance de l'obligation de vote au scrutin secret fixée par l'article R. 2421-9 du code du travail ; qu'il résulte de ce qui a été dit au point 3 qu'en statuant ainsi, sans rechercher si le vice affectant la tenue de ce vote avait été, en l'espèce, compte tenu notamment du caractère unanimement défavorable de l'avis émis par le comité d'entreprise, susceptible de fausser sa consultation, la cour administrative d'appel a entaché son arrêt d'une erreur de droit ; »

In the second case, the Council of State indicated that the judge must determine whether the short time for the single staff representative's preparation for the hearing was likely to prevent the works council from giving its opinion knowingly or likely to distort its consultation. If the works council knowingly gave its opinion based on all the necessary information about the elected member, then the dismissal is lawful.

«3. Considérant qu'il résulte des dispositions, alors applicables, de l'article L. 2421-3 du code du travail que : " tout licenciement envisagé par l'employeur d'un délégué du personnel ou d'un membre élu du comité d'entreprise, d'un représentant syndical au comité d'entreprise ou d'un représentant des salariés au comité d'hygiène de sécurité et des conditions de travail est obligatoirement soumis au comité d'entreprise, qui donne un avis sur le projet de licenciement " ; qu'aux termes du premier alinéa de l'article R. 2421-9 du même code : " l'avis du comité d'entreprise est exprimé au scrutin secret après audition de l'intéressé " ; que, saisie par l'employeur d'une demande d'autorisation de licenciement d'un salarié protégé auquel s'appliquent ces dispositions, il appartient à l'administration de s'assurer que la procédure de consultation du comité d'entreprise a été régulière ; qu'elle ne peut légalement accorder l'autorisation demandée que si le comité d'entreprise a été mis à même d'émettre son avis en toute connaissance de cause, dans des conditions qui ne sont pas susceptibles d'avoir faussé sa consultation ;

4. Considérant qu'il ressort des termes de l'arrêt attaqué que, pour juger que la consultation du comité d'entreprise de la société Véron International sur le licenciement de Mme B... avait été irrégulière, la cour administrative d'appel s'est fondée sur ce que, Mme B... n'ayant eu connaissance des faits qui lui étaient reprochés que lors d'un entretien avec son employeur le 22 mars 2013 au matin, elle n'avait pas disposé d'un délai suffisant pour préparer utilement son audition devant le comité d'entreprise, l'après-midi du même jour ; qu'il résulte de ce qui a été dit au point 3 qu'en statuant ainsi, sans rechercher si la brièveté du délai dans lequel Mme B... avait préparé son audition avait été, en l'espèce, soit de nature à empêcher que le comité d'entreprise se prononce en toute connaissance de cause, soit de nature à faire regarder son avis, unanimement défavorable,



comme émis dans des conditions ayant faussé cette consultation, la cour administrative d'appel a entaché son arrêt d'une erreur de droit ;»

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Germany

Summary

(I) The Federal Government has adopted a draft law transposing Directive (EU) 2016/943.

(II) The Federal Labour Court held that holiday pay must fully reflect the hours worked before reducing the employee's working hours.

(III) If the employer dismisses the employee immediately after having been notified of her incapacity for work, it is up to the employer to comprehensibly refute the existence of a causal link.

(IV) A job as an 'au-pair' may justify employee status under European law and may thus lead to a subsequent claim to social security benefits.

(V) The Minimum Wage Commission recommends an increase in the statutory minimum wage. The Federal Government has decided on so-called 'key points of a strategy on Artificial Intelligence'.

1 National Legislation

On 18 July 2018, the Federal Government adopted a [draft law](#) transposing Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. The law (*Gesetz zur Umsetzung der Richtlinie (EU) 2016/943 zum Schutz von Geschäftsgeheimnissen vor rechtswidrigem Erwerb sowie rechtswidriger Nutzung und Offenlegung*) contains provisions for situations in which the acquisition, use or disclosure of trade secrets will not be deemed unlawful. This, for example, applies in cases in which the acquisition, use or disclosure of trade secrets serves the exercise of freedom of expression and information or the detection of wrongdoing and unlawful acts.

2 Court Rulings

2.1 Holiday pay

Federal Labour Court, No. 9 AZR 486/17, 20 March 2018 – on holiday pay

In the underlying [case](#), provisions of a collective agreement provided that the holiday pay of a worker who went on holiday after a reduction of her weekly working hours was determined to be in line with her reduced working time. The Court held that these provisions were null and void as they amounted to indirect discrimination of part-time workers.

In its judgment, the Court explicitly referred to the ruling of the CJEU in case C-486/08, 22 April 2010, *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, according to which Clause 4.2 of the framework agreement on part-time work, must be interpreted as precluding a national provision, under which, "*in the event of a change in the working hours of a worker, the amount of leave not yet taken is adjusted in such a way that a worker who reduces his working hours from full-time to part-time suffers a reduction in the right to paid annual leave he has accumulated but not been able to exercise while working full-time, or he can only take that leave with a reduced level of holiday pay*".

2.2 Dismissal of a sick worker

State Labour Berlin-Brandenburg, 10 Sa 1507/17, 01 March 2018 – on dismissal of sick worker

The [decision](#) concerned the lawfulness of a notice given by the employer immediately after receiving notification of the employee's incapacity for work. According to the Court, in such cases there is prima facie evidence (*Anscheinsbeweis*) that the dismissal is motivated by the notification of incapacity for work, meaning that it is up to the employer to comprehensibly refute the existence of such a causal link. Accordingly, it was held that the employee had a right to sickness pay under the Continuation of Remuneration Act (*Entgeltfortzahlungsgesetz*).

In principle, there is no right to sickness pay after the end of the employment relationship. However, according to section 8(1) of the Continuation of Remuneration Act, if the employer terminates the employment relationship on the grounds of incapacity, the right to sickness pay is not affected. For this provision to apply, it is sufficient if the decision to dismiss the employee was prompted by the employee's incapacity. The inability to work must not necessarily constitute the sole reason for the termination. However, the employer's decision to terminate the employment relationship must have been significantly influenced by the worker's incapacity for work. Though in principle the burden of proving such a causal link lies with the employee, the rules of prima facie evidence may considerably improve the employee's position. The judgment of the State Labour Court Berlin-Brandenburg is in line with earlier case law.

2.3 Concept of employee

Social Court Landshut, S 11 AS 624/16, 18 July 2018 – of employee status of an 'au-pair'

[According to the Social Court Landshut](#), a job as an 'au-pair' may justify employee status under European law and may thus lead to a subsequent claim to social security benefits. According to the Court, neither the limited amount of the allowance paid, nor the fact that the 'au-pair' only performs a few hours of work per week precluded her from being an employee within the meaning of Article 45 TFEU.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Minimum wage

On 03 July 2018, the Minimum Wage Commission (*Mindestlohn-Kommission*) issued its adjustment decision and presented the second report since the introduction of the general statutory minimum wage in Germany. The Commission recommends an increase in the minimum wage from the currently EUR 8.84 to EUR 9.19 from 01 January 2019 and to EUR 9.35 from 01 January 2020.

According to section 9 of the Minimum Wage Act (*Mindestlohn-Gesetz*), the Minimum Wage Commission issues a recommendation on adjustments to the level of statutory minimum wage every two years. Thereby, it assesses the appropriate level of minimum wage to contribute to adequate minimum protection of employees, to enable fair and efficient conditions of competition, and to ensure employment is not jeopardised. Outcomes of collective bargaining serve as a guide.



4.2 Key points of an AI strategy

On 18 July 2018, the Federal Government [decided](#) on so-called 'key points of a strategy on Artificial Intelligence' (*Eckpunkte der Bundesregierung für eine Strategie Künstliche Intelligenz*). Among other things, the government proposes a 'human-centric' approach to AI and calls for the 'development of an international and European framework for AI in the world of work involving the ILO and the OECD'.

Greece

Summary

New laws on subcontracting and undeclared work have been approved.

1 National Legislation

1.1 Subcontracting

For many years, just like in other countries, Greece has observed an increase in subcontracting as a way for firms to externalise work.

Specific rules apply to temporary work agencies with regard to joint and several liability of user undertakings. The temporary work agency and the user undertaking are jointly and severally liable towards temporary agency workers' salaries. They are also jointly liable towards social security agencies in terms of social security contributions (Article 24 of Law 4052/2012).

Public services that make use of public procurement for the provision of security or cleaning services should require tendering companies to report the number of workers to be employed, the number of working days and hours and the collective agreement regulating the working conditions of these employees. When a contractor hires a subcontractor, she shall inform the client thereof in writing (Article 68 of Law 3863/2010). The contractor and the subcontractor are jointly and severally liable towards workers as regards the payment of their salaries and their social security contributions.

Finally, special liability mechanisms exist as well, providing extended liability of the client or contractor on the health and safety of the employees, particularly in the construction and shipbuilding sectors (Articles 3-5 of Law 1396/1983).

Law 4554/18-7-2018 provides for joint and several liability of any natural or legal person who orders works/services that are the object of a contract within the framework of an entrepreneurial activity.

This person (client) is jointly responsible for the payment of the employee's salary, social security contributions and severance pay. This client's joint and several liability concerns employees employed by the contractor within the framework of the execution of their contract.

If the contractor does not fulfil these obligations, the client can be considered liable for the contractor's failure to observe the obligations. Therefore, the employee or the social security body can recover the outstanding amount from either the employer/contractor or the client.

This joint and several liability does not only apply to the contracting party, but to the chain as well. The client is also responsible for the subcontractor's obligations. Such liability applies to the entire chain.

The contractor shall inform the client about the engagement of a subcontractor. The contractor also has the obligation to send the client monthly receipts of payment of wages and of social security contributions.



1.2 Undeclared work

Undeclared work poses a major challenge in Greece as in many other countries. The fines imposed in case of undeclared work were substantially increased in 2013. According to the relevant Ministerial Decision, the fine for each undeclared employee is now EUR 10 550 (about 18 times the minimum wage). The intention behind this Ministerial Decision is to make undeclared work unprofitable for employers.

The new Law (Articles 5-7 of Law 4554//18-7-2018) reduces fines for undeclared labour provided that the employer—for at least some time—hires the worker who had not been registered with the authorities.

The fine is reduced by 30 percent if the employee is hired under a fixed-term contract for at least three months, by 50 percent in the event of conclusion of a fixed-term contract of at least 6 months, and by 70 percent in the event of a contract of at least one year.

During this period, the employer is not entitled to reduce the total number of staff.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Hungary

Summary

An important ruling on transfers of undertakings has been issued by the Supreme Court.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Transfer of undertakings

Supreme Court, Case Mfv.II/10.008/2018/3

The defendant (the employer) took over the public utilities and tools from 'X' Ltd. These public utilities are owned by the local government and the 'X' Ltd was previously the heating provider. The employees' employment continued with the new employer. The foundation for the continued employment was an Agreement of 15 July 1999. This Agreement was concluded between 'X' Ltd., the local government and the defendant. Under point 7 of the Agreement, it ceased when the Operational and Enterprise Contract ceased, which had also been concluded between 'X' Ltd., the local government and the defendant.

Under the Agreement, the employees were employed by the defendant as the successor. The Operational and Enterprise Contract was terminated without notice by the general assembly of the local government on 18 August 2015. According to the decision of the local government, the heating service is secured by a new 'Y' Ltd. Point 6 of this decision stated that the employees were employed by the new 'Y' Ltd.—as the successor—from the date following the cessation of the Operational and Enterprise Contract.

The new 'Y' Ltd. informed the employees (the plaintiffs in this case) on 25 August 2015 and the defendant on 24. August 2015 about the 'legal succession'. The new 'Y' Ltd. began its activity on 19 August 2018.

The defendant called the plaintiffs to certify the performance of work from 18 August to 31 August. However, the plaintiffs appealed to the Labour Court and requested payment of wage arrears from 01 August to 17 August. The defendant rejected the plaintiffs' claim. In addition, the defendant requested application of the legal consequences for unlawful resignation by the employees. The defendant claimed that the appropriate procedure between the defendant and the new 'Y' Ltd had not been followed. The defendant emphasised that the employment relationship had not been terminated by the employer. In its opinion, the employment relationship had been terminated by the plaintiffs but the employees had not been held accountable at the time of the termination of their employment relationship. The plaintiffs requested rejection of the defendant's claim.

The courts of first and second instance rejected the defendant's claim. The defendant reiterated the claim of unlawful termination of the employment relationship in its request for review. The defendant highlighted that no contract/agreement (legal transfer) had taken place between the defendant and the new 'Y' Ltd. Consequently, no change in the person (i.e. in the legal status) of the employer had occurred.

The *Kúria* (Supreme Court) decided that the request for review was unjustified. The *Kúria* referred to Act I of 2012 on the Labour Court (hereinafter: LC). Under Section 36

Sub 1 of the LC, the rights and obligations arising from the employment relationships that exist at the time of the transfer of an economic entity (organised grouping of material or other resources) by way of a legal transaction are transferred to the transferee employer. Section 299 point j of this Act serves the purpose of conformity with the following legislation of the Communities: Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employee rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. The *Kúria* stated in this context that all factual circumstances together must be taken into account. For this reason, it is necessary to analyse the so-called '*Spijkers criteria*', the similarity of employees' activity before and after the transfer, the transfer of the customer base related to the economic activity, etc. The *Kúria* highlighted that the existence of these criteria did not in itself establish the so-called legal succession in the labour law. In connection with this argument, the *Kúria* referred to the 6/2014 Principle Decision of the Labour Law (Mfv.I.10.156/2014.).

The *Kúria* decided that a transfer had taken place. It referred to Preamble 3 of Directive 2001/23/EC: "*It is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded*". The *Kúria* cited CJEU case C-463/09, 20 January 2011, *Clece*. On the basis of CJEU case C-466/07, 12 February 2009, *Klarenberg* and CJEU C-160/14, 09 September 2015, *Brito and others*, the *Kúria* stated that the obligation of continuous employment of employees is not a condition but also not a consequence of the transfer.

The *Kúria* also cited CJEU case C-151/09, 29 July 2010, *UGT-FSP*. In this case, "*the Court has previously ruled that the fact that the transfer results from unilateral decisions of public authorities rather than from an agreement does not render the directive inapplicable*" (Para. 25). For this reason it is not necessary the existence a contractual relationship between parties (CJEU cases C-200/16, 19 October 2017, *Securitas*; C-171/94, 07 March 1996 and C-172/94 *Merckx és Neuhuys*; and C-287/86, 17 December 1987, *Ny Molle Kro*).

The regulation of Act XXII of 1992 on the Labour Code (hereinafter: the former LC) was complicated and unclear. The rule was as follows:

"Transfer of Employment Contracts Upon Transfer of Undertaking

Section 85/A

(1) Transfer of employment contracts (hereinafter referred to as 'transfer of employment') shall mean:

a) when succession takes place by virtue of the relevant legislation, and

b) when an independent unit (such as a strategic business unit, plant, shop, division, workplace or any section of these) or the financial and other resources of the employer are transferred by agreement to an organisation or person falling within the scope of this Act for carrying on or for restarting operations if such transfer takes place within the framework of sale, exchange, lease, leasehold or capital contribution for a business association".

This text did not cover the content of the Directive. Case law has had the task to interpret the content of the Directive on the basis of CJEU decisions.

3 Implications of CJEU Rulings and ECHR

Nothing to report.



4 Other relevant information

Nothing to report.

Ireland

Summary

(I) The Minister for Justice and Equality has promulgated Regulations giving effect to Parliament and Council Directive 2013/33/EU (the Reception Conditions Directive).

(II) The Low Pay Commission recommends increase of 25 cent to national minimum hourly rate of pay.

1 National Legislation

1.1 Asylum seekers

The European Communities (Reception Conditions) Regulations 2018 ([S.I. No. 230 of 2018](#)) give effect to Parliament and Council Directive 2013/33/EU laying down standards for the reception of applicants for international protection. Their promulgation by the Minister for Justice and Equality followed the Supreme Court's decision in [NVH v Minister for Justice and Equality](#) [2017] IESC 35, that the bar on asylum seekers from working was unconstitutional. Asylum seekers will now have access to the labour market nine months from the date when their protection application was lodged, if they have yet to receive a first instance decision from the International Protection Office and if they have co-operated with the process. Permission will be granted by the Minister for Justice and Equality to eligible applicants for six months and will be renewable until a final decision on their application. Eligible applicants will have access to all sectors of employment with the exception of the civil and public service (including the police and the Defence Forces).

2 Court Rulings

2.1 Fixed-term work

Labour Court, FTD 185, 18 July 2018, Donegal County Council v Sheridan

The Labour Court has once again had to address the apparent conflict between the language used in section 9 of the [Protection of Employees \(Fixed-Term Work\) Act 2003](#) and that used in clause 5 of the framework agreement annexed to Directive 99/70/EC. Section 9 is directed at preventing the unlimited use of 'continuous' fixed-term contracts whereas clause 5 combats the abuse of 'successive' fixed-term contracts. In [Donegal County Council v Sheridan](#) FTD 185, the Labour Court resolved the conflict by construing section 9 so as to produce the result envisaged by the Directive and ruled that, notwithstanding breaks in the claimant's service, his employment had been continuous and that he had become entitled to a contract of indefinite duration.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Minimum wage

The Low Pay Commission in its [fourth Report](#) (LPC No 9 (2018)) has unanimously recommended that the national minimum hourly rate of pay be increased by 25 percent



to EUR 9.80. The recommendation has been accepted by the Government and will come into effect on 01 January 2019. Amongst the factors influencing the Commission to recommend a 25 percent increase in the national minimum hourly rate of pay were that economic predictions indicate that Ireland will reach close to full employment in 2019; inflation remains low; average hourly earnings increased across most sectors in 2017; and research indicated that previous minimum wage increases had little effect on employment.

Italy

Summary

The Law Decree of 12 July 2018, No. 78 on 'Urgent measures for the dignity of workers and companies' will introduce reforms consisting in measures to fight precariousness at work.

1 National Legislation

1.1 Precariousness at work

The Law Decree of 12 July 2018, No. 78 on 'Urgent measures for the dignity of workers and companies' was published in the Italian Official Journal No. 161/18 on 13 July 2018, coming into force the following day. The Law Decree is under discussion in the Italian Parliament, the implementation planned, if need be with amendments, to take place within 60 days.

Section I refers to working conditions containing measures aimed at fighting precariousness at work. Section II contains measures to countervail delocalisation and the safeguard of employment levels by revoking (with restitution) state assistance in case of relocation within a five-year period from the allocation of the benefit. Referring to state assistance, these provisions fall outside the scope of Labour Law. The focus is therefore on Section I.

Section I - Measures to fight precariousness

Article 1: Modifications to the regulation of fixed-term contracts

Legislative Decree No. 81 of 2015 has been modified as follows:

Article 19 (Agreement on the term and its maximum duration):

- Paragraph 1 is substituted by the following

"1. The term of an employment contract cannot exceed 12 [formerly 36] months. The contract may have a longer duration, in any case not exceeding 24 months, only if at least one of the following conditions is fulfilled:

 - a) temporary and objective conditions, not linked to the employer's ordinary activity, or the need to substitute other workers;*
 - b) needs linked to a temporary, relevant and not foreseeable increase of the employer's ordinary activity";*
- Paragraph 2 is modified as follows:

"2. If not otherwise provided by collective agreements signed at company level, by a workers' representative body (RSA or RSU) or at branch level, by the comparatively most representative trade unions, the maximum term of fixed-term contracts concluded between the same employer and the same worker (including fixed-term agency work missions) for assignments at the same level falling within the same category may not exceed 24 [formerly 36] months. In case the 24 [formerly 36] month limit is exceeded by a single or by a succession of contracts or agency work missions, the employment relationship is

transformed (by judge order) into an open-ended one from the day on which the 24 [formerly 36] month limit has been exceeded."

- Paragraph 4 is substituted by the following:

"4. With the exception of employment relationships that do not exceed 12 days, the term of the employment relationship is null and void if not provided in writing. A copy of the written statement of the term must be delivered to the worker within 5 days from the commencement of work. In case of successive fixed-term contracts, the written statement shall specify the relevant needs, as referred to in Para. 1 upon which the contract has been concluded; in case of extension, such a specification is needed only if the overall duration exceeds 12 months."

Article 21 (*Extensions and successive fixed-term contracts*)

- A new paragraph has been added:

"01. A successive fixed-term contract can only be concluded if one of the conditions provided under Para 1 is fulfilled. A fixed-term contract can be freely extended within its first 12 months of duration. Thereafter, it can only be extended if one of the conditions provided under Para 1 is fulfilled. As for seasonal activities, successive fixed-term contracts or the extension of existing ones can also be agreed if the conditions provided under Para 1 are not fulfilled";

- Paragraph 1 has been modified as follows:

"1. A term which does not already exceed the 24 [formerly 36] month period, can be extended with the worker's consent for a maximum of 4 [formerly 5] times up to the limit of 24 [formerly 36] months. If the number of extensions exceeds 4, the fixed-term contract will be deemed to be one of indefinite duration".

In relation with Article 28 (*Limitation period and protection*)

- Paragraph 1 has been modified as follows:

"1. Any worker who wants to sue the employer because of violations of the regulation on fixed-term contracts shall notify him or her in writing within 180 [formerly 120] days from the termination of each contract. Within 180 days from the written communication to the employer, the worker shall lodge the claim before court."

Further directly applicable provisions establish that these modifications will apply to fixed-term contracts concluded after the entry into force of Law Decree No. 78/2018. They will also apply to successive fixed-term contracts and to extensions of ongoing fixed-term contracts. The mentioned modifications shall not apply to public administrations.

Article 2: *Modifications to the regulation of temporary agency work*

Article 34 (*Regulation of employment relationships*) Legislative Decree No. 81/2015 has been modified as follows:

- *"2. In case of fixed-term hiring, the employment relationship between the temporary work agency and the temporary agency worker is regulated according to Section III [fixed-term work], with the exclusion of Article 23 [calculation of the percentage of fixed-term workers in the undertaking] and 24 [priorities in hiring]"*.



Article 3: *Indemnity to be paid in case of unjustified dismissal and increase of the contribution due in case of use of fixed-term contract*

Article 3(1) of Legislative Decree No. 23 of 2015 has been modified as follows:

- *"If the just cause or the subjective or economic reasons alleged by the employer to dismiss the worker is found to be ungrounded, the judge shall declare the termination of the employment relationship from the date of dismissal invalid and will order the employer to pay compensation in the amount of 2 months of the last wage, occasional grants and reimbursements excluded, for each year of work. In any case, the total amount of compensation shall not be lower than 6 [formerly 4] months and cannot exceed 36 [formerly 24] months of wage (occasional grants and reimbursements excluded). No social security contribution on these sums is due.*
2. The lump-sum contribution due by the employer in case of use of invalid fixed-term employment contract, already set in Article 2 Para. 28 Act No. 92/2012, at 1.4 percent of the social insurance contributions for the relevant wage, is increased by 0.5 percent [1.9 percent in total] for each successive invalid fixed-term contract for temporary agency work with the same worker."

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Latvia

Summary

The decisions of the CJEU in cases C-60/17, 96/17 and C-338/17 have no direct implications on Latvian law. Latvian law is generally more favourable than the national laws discussed in cases 96/17 and 338/17. However, Latvian law does not envisage joint liability of a transferor and transferee and the definition of the concepts related to transfers of undertakings is too concise to ensure effective application in practice.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Joint liability in transfers of undertakings

CJEU case C-60/17, 11 July 2018, Somoza Hermo and Iluni3n Seguridad

It follows from Article 118 of the [Labour Law](#) that there is no joint liability for the transferor and transferee in a transfer of undertaking. After the transfer, only the transferee remains liable for compliance with the obligations arising from employment contracts and collective agreements. According to Article 118(4), the transferee has no right to modify the collective agreement by introducing less favourable provisions with a year from the transfer. Therefore, Latvia does not include an option to provide for joint liability.

With regard to the concept of ‘undertaking’ and ‘transfer of an undertaking’, Labour Law is very broad – it stipulates such concepts in a very general manner, without more detailed explanations on what is to be understood, for example, as ‘independent economic unit’ or how retention of identity of a business should be assessed. Such regulations are most likely not very effective for the enforcement of the respective rights, taking into account only several cases brought before a court on the basis of the rights deriving from Directive 2001/23/EC.

3.2 Dismissal of fixed-term workers

CJEU case 96/17, 25 July 2018, Vernaza Ayovi

Latvian Labour Law does not envisage different remedies for permanent and fixed-term employees, i.e. if a dismissal of a fixed-term employee was unlawful, she is entitled to reinstatement (Article 124). It follows that under Latvian law, there is no difference in treatment between those two groups of employees with regard to the remedies in case of unlawful dismissal.



3.3 Insolvency

CJEU case C-338/17, 25 July 2018, Guigo

It follows from Articles 3 and 5 of the [Law on the Protection of Employees in the Event of Insolvency of the Employer](#) that, in principle, all employees who were employed with the insolvent employer in the preceding 12 months are entitled to payments arising from the employment relationship. In addition, the guarantee institution is required to provide payments to workers who have terminated their employment relationship with an insolvent employer earlier than 12 months before a decision of a court on the employer's insolvency is made, under the condition the employee brought a claim before a national court and a court decision has been published ordering such payments (Article 5(2)). Latvian law is more favourable than required by Directive 2008/94/EC.

4 Other relevant information

Nothing to report.

Liechtenstein

Summary

The Liechtenstein government plans to amend the Posting of Workers Act and the Act on the Execution and Legal Assurance Procedure. The main purpose of the amendment is to implement Directive 2014/67/EU. One of the main concerns is to facilitate the fight against bogus posting and bogus self-employment. In order to achieve this goal, central terms in the law on posting are defined more clearly. Furthermore, the possibilities for asserting wage claims against an employer's client are improved. Finally, the amendment aims to ensure close cooperation between Liechtenstein and the other EEA Member States. The consultation process is currently under way.

1 National Legislation

1.1 Posting of workers

Background information

To adequately enforce the protection of workers engaged in cross-border services, it was decided at EU level to leave the European law on the posting of workers unchanged in substance, but to enable this law to be enforced as effectively as possible. This is why the Enforcement Directive (Directive 2014/67/EU) was created. Liechtenstein has now created a draft for the amendment of laws to implement this directive.

Summary of the major points

Four central points should be mentioned:

- One of the main concerns is to facilitate the fight against bogus posting and bogus self-employment. In order to achieve this goal, central terms in the law on posting are defined more clearly.
- Posted employees are given more precisely defined opportunities to assert their wage claims against their employer's client under certain circumstances. Care is taken to ensure that the liability rules are non-discriminatory. The foreign contractor may not be disadvantaged compared to a Liechtenstein contractor.
- The amendment aims to ensure close cooperation between Liechtenstein and the other EEA Member States. This, in particular, includes a rapid exchange of information, which is primarily intended to determine the facts of the case. Furthermore, it also includes the obligation to notify and enforce foreign decisions in the field of the law on the posting of workers. For example, if a Liechtenstein company has infringed the law on the posting of workers abroad and does not pay the imposed fine, Liechtenstein is required to collect the fine from its domestic company. Conversely, Liechtenstein can demand the same from the foreign authorities.
- In addition to the implementation of Directive 2014/67/EU, the amendment will also be used to better formulate some existing provisions or introduce additional ones based on experience in enforcement.



The changes are to be made in the following acts:

- [Posting of Workers Act](#) (*Gesetz über die Entsendung von Arbeitnehmern, Entsendegesetz*, LR 823.21);
- [Act on the Execution and Legal Assurance Procedure](#) (*Gesetz über das Exekutions- und Rechtssicherungsverfahren, Exekutionsordnung*, EO, LR 281.0).

The source for the explanations provided can be found [here](#).

Stage of the adoption process and next steps

The Liechtenstein government has submitted a [draft law](#) with an accompanying report, which was sent for consultation. The consultation will last until 10 October 2018, after which the government will evaluate the comments received and submit a report and motion to Parliament.

Link to relevant EU Directives/policy/thematic key words

The regulation draft is related to Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers within the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation')

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Lithuania

Summary

(I) The Lithuanian Administrative Courts have identified the posting of third-country temporary workers and refuses to grant multiply entry visa, whereas such a visa may be issued if the third country company is posting permanent workers to provide services in Lithuania.

(II) A proposal to amend legislation according to the findings of the Matzak case will be discussed in the Tripartite Council.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Posting of workers

The Lithuanian Higher Administrative Court (Case No eA-4360-438/2018 of 30 May 2018) upheld the decision of the lower administrative court to support the decision of the Migration Department to refuse the granting of national Schengen visas (D) to posted Ukrainian employees. The group of Ukrainian workers were just recently recruited by the Ukrainian company, which concluded a contract with a Lithuanian company to provide services related to the production of furniture. The Ukrainian employees were not granted Lithuanian visas on the grounds that their posting *de facto* did not meet the criteria defined in Article 58 No. 12 of the Law on Aliens (State Gazette, 2004, No. 73-2539). The courts thus established important facts, such as:

- the Ukrainian workers had been exclusively recruited for work in Lithuania and did not have permanent employment with the Ukrainian company;
- the Ukrainian company's main activities were related to recruitment services and not furniture production;
- the Lithuanian company's main activities were basically related to the intermediation and supply of various types of workers to other Lithuanian companies and not furniture production.

The courts determined that the Ukrainian workers actually worked as furniture specialists for other Lithuanian companies, and therefore neither worked for the Lithuanian nor for the Ukrainian company, which had both entered into contracts of transnational provision of services. The courts decided that the actual aim of the posting was the provision of services of temporary workers and not furniture production and related services.

The temporary posting of permanent workers from third countries to provide services in accordance with service contracts is allowed under the Law on Aliens, but the posting of temporary workers is a different case - the courts clearly distinguish between those two types of postings and formulated the guidelines for authorities and lower courts based on this distinction.



3 Implications of CJEU rulings and ECHR

3.1 Working time

The Tripartite Council received a proposal from one of the Members of Parliament to consider changes to the Labour Code 2016. One of the proposals from the MP contains rules on 'difficult' implementations of the CJEU ruling in the case C-518/15, 21 February 2018, *Matzak*. It is proposed to implement the main principle of the judgment by modifying the rules on standby time at home (Article 118 (4) of the Labour Code) –all types of standby time at home (regardless of the sector, type of activity or the scope of the employee's obligation) shall be regarded as working time. The proposal will be discussed in the Tripartite Council. The Ministry remains silent on how it intends to implement the judgment.

4 Other relevant information

Nothing to report.

Luxembourg

Summary

- (I) A law ratifying ILO Convention No. 169 has been adopted.
- (II) Government amendments adopt a more restrictive position concerning the bill on traineeships.
- (III) In the context of the ILO Maritime Labour Convention (MLC), a new bill has completely redrafted maritime labour legislation.

1 National Legislation

1.1 Ratification of ILO Convention No. 169

The law ratifying the ILO Convention No. 169, Indigenous and Tribal Peoples Convention (*Loi du 8 avril 2018 portant ratification de la Convention n° 169 de l'Organisation internationale du Travail relative aux peuples indigènes et tribaux*) has been approved. This ratification is of mainly symbolic value; it is not likely to have an important impact for Luxembourg (see also May 2018 Flash Report). It has no direct impact on labour law.

1.2 Maritime employment contract

The national legislation on maritime administration (*Projet de loi n° 7329 portant modification de la loi du 9 novembre 1990 ayant pour objet la création d'un registre public maritime luxembourgeois*), including the rules on maritime employment contracts, dates back to 1990 and has never been substantially amended. In the context of the adoption and ratification of the 2006 ILO Maritime Labour Convention (MLC) and the corresponding European directives (especially Directive 2009/13/EC), it was decided to completely redraft the legislation on maritime employment relationships.

The text is the result of discussions with social partners and its purpose is to comply with international and European law, and to respect the principle that maritime labour law should only differ from national legislation if the specificity of the maritime sector requires it.

The first Title deals with individual and collective employment relationships.

The structure of Chapter 1 on the minimum requirements is strongly inspired by the MLC Convention (minimum age, medical certificate, training and qualifications, recruitment and placement). The violation of any of these requirements is sanctioned by criminal fines and even imprisonment.

Chapter 2 on the employment contract is strongly inspired by the national Labour Code, and many texts have been copy-pasted. A written contract must be established at the time the seafarer commences work. International and national legislation must be available, parts of it in English. Any modification of the contract must be fixed in writing. Civil liability is limited to cases of voluntary acts or gross negligence.

Differences from standard labour law concern, for example, the trial period, which is limited to 6 months for officers and 2 months for other employees.

Unlike national labour law, which strongly restricts the use of fixed-term employment, there is no such restriction in the maritime sector. However, other limitations for fixed-term contracts have been copied from the Labour Code, especially the maximum of two renewals, the obligation to observe a period of 2/3 of the duration of the previous

contract before entering a new fixed-term contract, and the principle of equal treatment. Other provisions deal with repatriation, financial guarantees and abandonment of seafarers (civil and criminal consequences).

The rules on termination of the contract are also partially inspired by the Labour Code, including the possibility to ask for the grounds for dismissal, entitlement to severance pay (*indemnité de départ*) and entitlement to damages in case of unfair dismissal.

Chapter 3 is very short and deals with collective employment relationships, mainly by referring to the legislation on collective agreements in the Labour Code.

The second title deals with employment conditions, especially working time, work plans and public holidays. Paid annual leave is fixed to a minimum of 3 days per month. For parental leave (*congé parental*), the law refers to the very favourable regime of the Labour Code, with the exception of part-time schemes.

The following chapters on wages, accommodation, food and catering are closely inspired by the international framework.

1.3 Pending bills

1.3.1 Digitalisation of social elections

As regards Bill No. 7290 on the digitalisation of social elections (see also May 2018 Flash Report), the State Council has issued its opinion and made only minor formal observations. The final parliamentary report has been drafted and no substantial changes were made to the initial bill. This law can thus be expected to pass quickly; it will, however, only apply as of February 2019 until the upcoming social elections.

1.3.2 Traineeship

Bill No. 7265, implementing a legal framework for traineeships (*contrat de stage*, see also February 2018 Flash Report) was subject to much criticism. Trade unions and the employees' professional chamber (*Chambre des salaires*), in particular, argued that there was a risk of abuse, because employment relationships could be disguised as traineeships. Therefore, government amendments have been introduced to restrict the use of traineeships:

- In the initial bill, it was possible to enter a traineeship within 12 months after school/university enrolment. This possibility is eliminated, so traineeships can only be offered to persons enrolled in an educational institution. The reason is that after their studies, persons should be hired either under a fixed-term or open-ended contract or make use of one of the numerous employment insertion measures. Traineeships should not become an additional contractual step to access the labour market;
- In the initial bill, traineeships with the same employer were limited to 12 months over a 24-month period. The amendment reduces this limit to 6 months;
- Furthermore, the contract should indicate the conditions and procedure for terminations of the contract;
- The initial bill stated that the number of traineeships is limited to 10 percent of total staff. The amendments clarify that for companies with 10 employees or less, the limit is thus one trainee.



2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Netherlands

Summary

(I) A bill was adopted concerning measures for transition payments (a form of dismissal payment) in case of dismissal for economic reasons or for long-term incapacity.

(II) Inspection finds that the new dismissal law has adverse effects on employees.

1 National Legislation

1.1 Transition payment in case of dismissal due to economic circumstances

A new [bill](#) establishes several measures for transition payments in case of dismissal for economic reasons or for long-term incapacity.

Background information, rationale, political and historical context

This bill intends to address the employers' concerns about the high costs they incur in connection with long-term incapacity for work of employees and the transition payment they must pay on dismissal for economic reasons.

Summary of the major points without in extenso reproducing the draft bill/labour code

To this end, a compensation scheme for employers of employees with long-term incapacity has been introduced. Employers still have to pay compensation (transition award, *transitievergoeding*) upon dismissal of an employee with long-term incapacity, but they will be reimbursed by the Public Employment Institution (*Uitvoeringsinstituut Werknemersverzekeringen*, UWV), responsible for social security benefits. Furthermore, in case of dismissal for economic reasons, no transition payment will be due if provisions are made in a collective labour agreement (*Collectieve Arbeids Overeenkomst*, CAO), which aim to limit unemployment and/or provide reasonable compensation. The requirement that the compensation offered under the collective agreement needs to be equivalent to the statutory *transitievergoeding* will be abolished. Therefore, the leeway granted to social partners to deviate from the standard statutory provisions has been extended.

Timeframe: stage of the adoption process, next steps

UWV still has to adopt its system to be able to execute the new rules. The Act will enter into force on 01 April 2020, but compensation can be claimed by employers retroactively up to 01 July 2015, the date the *transitievergoeding* was introduced.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

Nothing to report.



4 Other relevant information

4.1 Inspection finds the new dismissal law to have adverse effects on employees

The inspection of the Ministry of Social Affairs and Employment, SZW Inspectorate, has concluded that employees are rarely listened to in dismissal proceedings before the Public Employment Institution (UWV). UWV, which is also responsible for the payment of certain social security benefits, does not or barely checks the information provided by the employer seeking (permission for) terminations of the employment contract.

The Inspectorate furthermore concluded that enforcement of the statutory provision prescribing re-employment if a suitable vacancy becomes available with the employer in the first six months after the dismissal leaves a lot to be desired. According to the Inspectorate's research, nearly one-third of the dismissed employees report that their former employer had vacancies within six months from their dismissal that resembled their old jobs. They were not offered re-instatement. The Inspectorate sees this as a confirmation of the risk that employees with a permanent contract will be replaced by cheaper flex workers.

Source:

A press release on this issue can be found [here](#).

Poland

Summary

(I) The amendment to the Law on the Social Dialogue Council has been signed by the President and will take effect soon.

(II) The draft of the amendment to the law on minimum wage for civil law contractors has been submitted to Parliament.

1 National Legislation

1.1 Law on the Social Dialogue Council

On 19 July 2018, the President signed the [amendment](#) to the [Law of 24 July 2015](#) on the Social Dialogue Council (Journal of Laws 2015, item 1240). The Social Dialogue Council commenced its activities in September 2015 and replaced the previous Tripartite Commission for Social Dialogue that had been regarded as ineffective. According to Article 87 of the Law, within 24 months after the Law has entered into force, the Social Dialogue Council should evaluate the application of the Law and submit to the President recommendations for improvement of the Council's functioning. This amendment is the result of this requirement.

The amendment provides for the following changes:

- It broadens the competences of the Council of Social Dialogue. The competences will range from presenting the opinion on the State's Multiple Year Finance Programme, as well as the government's strategies, programmes or other documents concerning social issues;
- As regards the functioning of the Council, introduction of the possibility of postal voting by employees and employers and the taking of decisions by post, as well as the use of electronic communication;
- It introduces the Council's new competence to consult the Presidents of the Sejm and the Senate (i.e. the chambers of Parliament of Poland) on the possibility to present information on key issues that fall within the scope of the Council's activities;
- It introduces the Council's new competence to submit to the Minister of Finance the motion to issue a generally binding interpretation on the application of taxation law;
- It introduces the participation of the Main Chief of National Labour Inspectorate in the Council's meeting, with an advisory vote;
- It clarifies the competences of Voivodship's (i.e. regional) Council of Social Dialogue (possibility of postal voting, clarifying rules on financing expert opinions and business trips connected with the Council's activities).

The amendment will take effect in 30 days after its publication in the Journal of Laws, which can be expected in the weeks to come.

The information on legislative process can be found [here](#).

The evaluation of the draft was discussed in the February 2018 Flash Report (point 1.1).

1.2 Minimum wage for civil law contractors

On 05 July, the [draft of the amendment](#) to the [Law of 10 October 2002](#) on minimum wage for work (consolidated text, Journal of Laws 2017, item 847) was submitted to Parliament. It should be recalled that since 01 January 2017, the minimum wage refers not only to employees, but also to several groups of civil law contractors (see also April 2017 Flash Report, point 1.1 with further references). Minimum wage for civil law contractors is calculated on an hourly basis and should be paid at least once a month. For information on 2018, see also January Flash Report, point 1.1.

The proposal refers to cases of civil law contractors. According to the proposed new Article 8a item 6, in case of civil law contracts that have been concluded for a period of more than one month, the minimum wage calculated on an hourly basis should be paid at least once a month, and remuneration that exceeds this level should be paid on the dates agreed by the parties. In other words, parties will be free to determine the terms and regularity of payment of this part of the remuneration that is higher than the minimum statutory wage.

The basic aim of the amendment that took effect on 01 January 2017 was to protect civil law contractors against abuse. Therefore, if they earn minimum statutory wage, it should be at least paid on a monthly basis. However, some civil law contractors earn more than just the statutory minimum wage, or for whom civil law contracts constitute an additional source of income (e.g. alongside their employment contract). So far, it has not been clear whether such civil law contractors should receive remuneration once a month or whether the parties could stipulate longer intervals. The amendment clarifies this issue. It expressly provides that with regard to higher wages, the parties are free to determine the schedule of payment. In fact, the proposal suggests a change does not change the scheme of protection of civil law contractors, but is important from a practical point of view.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Portugal

Summary

(I) Directive 2015/1794/EU of the European Parliament and of the Council of 06 October 2015 has been transposed in Portugal.

(II) A CJEU ruling on transfers of undertaking could have an impact in Portugal.

1 National Legislation

1.1 Seafarers

[Law No. 29/2018](#) of 16 of July has transposed Directive Directive 2015/1794/EU of the European Parliament and of the Council of 06 October 2015, amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers. This law introduces a second amendment to Law No. 15/97 of 31 May, which establishes the legal regime applicable to the employment contract for work provided on board fishing vessels, and the first amendment to Law No. 146/2015 of 09 September, which regulates the activity of seafarers on board ships flying the Portuguese flag, as well as the responsibilities of the Portuguese State as a flag State or port. The transposition is in line with the Directive.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Transfer of undertakings

CJEU case C-60/17, 11 July 2018, Somoza Hermo and Ilusión Seguridad

According to this case,

"Article 1(1) of Directive 2001/23 must be interpreted as meaning that that directive applies to a situation in which a contracting entity has terminated the contract for the provision of services relating to the security of buildings concluded with one undertaking and has, for the purposes of the provision of those services, concluded a new contract with another undertaking, which takes on, pursuant to a collective agreement, the majority, in terms of their number and skills, of the staff whom the first undertaking had assigned to the performance of those services, in so far as the operation is accompanied by the transfer of an economic entity between the two undertakings concerned."

In Portugal, some sectors that have intensive manpower have collective bargaining agreements that impose the assumption of the workforce by the contractor (e.g. cleaning and facility services). This ruling could also be relevant in the absence of any special provision on collective bargaining agreements imposing the maintenance of the workforce by the new owner or manager of the economic unit.



4 Other relevant information

[Draft Law No. 136/XIII](#) on labour law reform is still being discussed in the Portuguese Parliament.

Romania

Summary

(I) A law on the fusion of all types of value tickets has been adopted as salary benefits that are exempt from taxes and contributions.

(II) New employment incentives have been introduced providing for tax incentives to hire interns, vulnerable categories of unemployed persons or disadvantaged young people, and regulations on the recruitment of civil servants have been modified.

(III) The processing of personal data in work-related relationships is governed by a new national law adopted in the context of Regulation (EU) 2016/679.

1 National Legislation

1.1 Employment benefits: value tickets

[Law No. 165/2018](#) on the granting of value tickets, published in the Official Gazette of Romania No. 599 of 13 July 2018, regulates the provision to employees of so-called 'value tickets': meal vouchers, gift vouchers, nursery tickets, cultural vouchers and holiday vouchers. The law will enter into force on 01 January 2019.

Employers, together with trade union organisations or, where no trade union is established, with employee representatives, shall jointly determine the categories of value tickets to be given to employees, their frequency and their value, where appropriate, the issuing unit and the method of delivery, on paper and/or in electronic format.

While value tickets had to date been regulated in Romanian legislation, albeit by separate legal acts, cultural vouchers are a novelty. They are value tickets granted to employees, monthly or occasionally, to pay for the value of cultural goods and services (subscriptions or tickets to shows, concerts, cinema screenings, museums, festivals, fairs and exhibitions, etc.).

For the employer, value tickets are deductible from corporate tax, and are excluded from the calculation of rights and obligations in relation to the salary both for the employer and employee.

1.2 Internship Law

[Law No. 176/2018](#) on internships, published in the Romanian Official Gazette 626 of 19 July 2018, regulates this contractual form for the first time. Unlike the apprenticeship or traineeship contract, the contract of internship is not an employment contract. Under the internship agreement, which is concluded for a maximum of six months, an intern aims to further develop professionally and carries out a specific activity for and under the authority of a host organisation. The latter, in turn, undertakes to provide an internship allowance and all the conditions required for the completion of the internship programme.

Interns, who are not employees, receive at least 50 percent of the gross national minimum wage. Internships are limited to 40 hours per week, with no possibility of overtime; harmful or dangerous activities are excluded. The vocational training of interns is carried out under the guidance of a mentor who also carries out the evaluation.

If the host organisation hires the intern at the end of the internship programme and keeps her for 2 years, it will receive a 'job promotion premium'.

1.3 Employment of unemployed persons, of people with difficulties finding employment and of disadvantaged young people

[Government Emergency Ordinance No. 60/2018](#), published in the Official Gazette of Romania No. 577 of 09 July 2018, has modified Unemployment Law No. 76/2002, the Law of Apprenticeship No. 279/2005 and Law No. 335/2013 on the stimulation of the employment of trainees.

The new regulations provide for tax incentives and incentives to hire unemployed persons and graduates, as well as for the conclusion of employment contracts with persons that have difficulties finding work, i.e. unemployed persons aged 45 and older, unemployed persons who are single parents, long-term unemployed or NEET youth, and young people at risk of social marginalisation.

[Law No. 189/2018](#) on the integration of disadvantaged young people in public institutions at the local level was published in the Official Gazette of Romania No. 639 of 23 July 2018. The disadvantaged young person is defined as a person between the ages of 16 and 26, who lacks work experience or has work experience of up to 12 months and who:

- is or has been in the child protection system;
- has one or more dependent children;
- is covered by the probation service;
- is in the course of carrying out a non-custodial educational measure.

Disadvantaged young people are employed by concluding an individual fixed-term employment contract of at least 24 months. Public institutions are required to allocate 5 percent of the existing and budgeted positions for contract staff to disadvantaged young people, otherwise will be liable to an administrative fine.

1.4 Recruitment of public servants

The regulations on the recruitment of civil servants were modified by [Law No. 156/2018](#) to amend and complete Law No. 188/1999 on the Statute of Civil Servants, published in the Official Gazette of Romania, No. 554 of 03 July 2018.

Civil servants, who are not employees but are appointed to public positions on the basis of an administrative act may be hired and promoted under more stringent conditions on seniority in professions and in studies than before.

Provisions allowing the rapid promotion in a civil service position have been abrogated and the conditions for keeping retired civil servants in activity and prolonging the service relationship of the retired were updated.

1.5 National law on protection data

[Law No. 190/2018](#) implementing measures for Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data was adopted and published in the Official Gazette No. 651 of 26 July 2018. Article 5 of the new Law regulates the processing of personal data in the context of employment relationships. According to this text, where electronic monitoring and/or video surveillance systems are used in the work place, the processing of personal data of employees is only permitted if:



- the legitimate interests pursued by the employer are duly justified and prevail over the interests or rights and freedoms of the data subjects;
- the employer has made the obligatory, complete and explicit notification of the employees;
- the employer consulted the trade union or, where appropriate, the representatives of the employees before the introduction of the monitoring systems;
- other less intrusive forms and ways to achieve the goal pursued by the employer have not previously proved their effectiveness; and
- the length of time personal data are stored is proportional to the purpose of the processing, but not more than 30 days, except in cases expressly governed by law or in duly justified cases.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Spain

Summary

There have been no significant developments this month. A motion of censure has led to a change in the government, although it is difficult for the new government to gain sufficient support in Parliament to proceed with labour reforms. Budget Law, approved by the former government, modifies paternity leave and extends its duration to five weeks.

1 National Legislation

1.1 Paternity leave

Paternity leave, which differs from maternity leave, was introduced in Spain in 2007 with an initial duration of two weeks, and which has progressively been extended to four weeks. [Law 6/2018](#) increases the duration of paternity leave to a total of five weeks, amending Article 48.7 of the Labour Code. This paternity leave is extended by two additional days for each child born or adopted, if there is more than one simultaneously.

Paternity leave must be taken successively, but Law 6/2018 provides for the possibility that the fifth week (the new one) can be taken separately at any other time within a period of nine months, if there is an agreement between the worker and the employer. The objective is to equate paternity and maternity leave and to contribute to real equality between men and women. This is to some degree related to Council Directive 2010/18/EU of 08 March 2010, implementing the revised Framework Agreement, and with Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation.

1.2 Union rights

Law 4/1986, of 08 January, on the assignment of the use of public buildings to union and business organisations, has been modified by Law 6/2018. This law regulates the transfer to these organisations (especially the most representative ones) of the buildings and premises from the trade union regime prior to the 1978 Constitution and belonging to the State Heritage, according to the social importance of their functions.

Given the age of such buildings, the need for eviction of those who occupied them due to loss of living conditions or needs for reform has been considered in many cases. In these circumstances, Law 6/2018 authorises the Ministry of Labour to lease these properties and temporarily assign them to the organisations affected by these situations.

1.3 Unemployment benefits

[Royal Decree 950/2018](#) modifies the legal regime of unemployment benefits in relation to the calculation of contribution days necessary for entitlement to those benefits. Specifically, from this moment on, all days the worker has been registered with social security shall be counted, regardless of whether the employee worked all or part of the days of the total period or if she worked full time or part time.

The CJEU states in its case C-98/15, 09 November 2017, *Espadas Recio* that Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in social security matters must be interpreted as precluding legislation of a Member State which, in the case of 'vertical' part-time work, excludes days not worked from the calculation of days for which contributions have been paid, and therefore reduces the unemployment benefit payment period, when it is established that the majority of vertical part-time workers are women who are adversely affected by such legislation. This Royal Decree modifies Spanish law to adapt to this ruling. Spanish law seems now to be fully consistent with EU law.

1.4 Employment

The public administrations (State and Autonomous Communities) usually issue a publication annually on jobs pending coverage. Therefore, it is not a novelty, but a procedure that is repeated every year. On this occasion, a supplementary offer has been made for the stabilisation of staff who provide services for public administrations on an interim or temporary basis. The regulation can be found [here](#).

Apparently, the objective is to reduce the excess of temporary employment in Spanish public administrations to comply with the recommendations of the European Union and avoid the condemnatory sentences of the CJEU, which have been frequent in recent years.

1.5 Quality of employment

The new Government of Spain has published a [Plan](#) to develop various measures in the field of employment and the labour market to increase the opportunities of finding a job, to avoid fraud in temporary hiring and to improve the conditions of employment. The Plan is based on a diagnosis that highlights the high rate of temporary employment registered in Spain, the deficient conditions in which part-time work is sometimes carried out, the existence of false self-employed workers in certain types of jobs, the wage gap between permanent and temporary workers, the gender wage gap, the difficulties young people face to enter the labour market and the high accident rates.

The Plan includes up to 75 measures that, above all, reinforce the status of the Labour and Social Security Inspectorate, of the control systems and of the collaboration between the public administrations involved. It also includes information and awareness campaigns, training actions and the improvement of technical advice tools for workers and companies, especially small and medium-sized ones.

2 Court Rulings

2.1 Collective dismissal

Supreme Court, No. 2604/2018, 14 June 2018

Based on an agreement that put an end to the strike, the undertaking and the workers' representatives agreed to the termination of a certain number of employment contracts with the right to severance pay, as well as a procedure to occupy workers not affected by that measure.

The number of terminations of contracts agreed upon exceeded the threshold established by the collective dismissal rules. The Supreme Court states in its [ruling](#) that these terminations of employment contracts are null and void, because a collective agreement cannot disregard the legal rules in this field, which are imperative for collective bargaining as they not only serve the interests of the parties but also the interests of the general public. Thus, the termination of the contracts should have respected the rules on collective dismissals.

2.2 Period of leave due to risk associated with nursing

Supreme Court ruling, No. 2651/2018, 26 June 2018

A worker in a mobile health care unit for emergency situations, who every six days had to work a full day (24 hours) and who was still nursing her baby, requested leave and the respective social security benefits for risks during nursing. The undertaking had certified the existence of risk for the employee who was nursing and stated that it could not offer the employee another job compatible with her situation. Social security denied her the benefits because specific risks for nursing had not been adequately proven, since the undertaking had not conducted a proper evaluation.

The Supreme Court traditionally argued that the application of rules on risks during nursing required a specific assessment of the risks to determine the nature, degree and duration of the exposure, and that the burden of proof in that regard corresponded jointly to the company and the worker. The CJEU case C-531/15, 19 October 2017, *Otero Ramos* resulted in a change of criteria. The Supreme Court now claims that it is contrary to the principle of equality and non-discrimination to deny the worker the possibility to prove the existence of risks when no specific evaluation of such risks exists. In this case, the worker was exposed to chemical and biological agents due to the nature of her work, and she could therefore not be excluded from protection simply because no risk evaluation had been conducted.

This [ruling](#) reiterates that shift work and night work are not, as a general rule, risk factors, because they are not listed for this purpose in the Spanish regulations on the prevention of occupational hazards, but adds that this general guideline should be deemed an exception when an incompatibility of nursing with the type of work arises and it cannot be alleviated with the extraction of milk and its proper conservation to provide it to the baby at a later time. The Supreme Court states that the influence of working time on the effectiveness of nursing and the quality and quantity of breastfeeding the child should be taken into account.

3 Implications of CJEU rulings and ECHR

3.1 Transfer of undertakings

CJEU case C-60/2017, 11 July 2018, Somoza Hermo und Iluni3n Seguridad.

According to the CJEU's ruling in case C-60/17, 11 July 2018, *Somoza Hermo*, Article 1(1) of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, must be interpreted as meaning that that directive applies to situations in which a contracting

entity has terminated the contract for the provision of services relating to the security of buildings concluded with one undertaking and has, for the purposes of the provision of those services, concluded a new contract with another undertaking, which takes on, pursuant to a collective agreement, the majority in terms of their number and skills, of the staff whom the first undertaking had assigned to the performance of those services, in so far as the operation is accompanied by the transfer of an economic entity between the two undertakings concerned.

According to Spanish Supreme Court case law, the legal rules on transfers of undertaking (Article 44 of the Labour Code, which transpose Directive 2001/23/EC) do not apply when only a succession of subcontractors occurs and there is no transfer of material resources, except in the case of 'succession of staff' (according to the doctrine of the CJEU). In case of outsourcing, the collective agreement may force—and they usually do so because it is somehow traditional in certain sectors—the subrogation of the new contractor on the employment contracts of the previous contractor. The Supreme Court affirms that the collective agreement can establish different obligations and responsibilities from those arising from Article 44 of the Labour Code, because this is not a case of a transfer of undertakings and Directive 2001/23/EC does not apply. The collective agreement creates and regulates this subrogation. The Supreme Court insists that this doctrine is fully consistent with CJEU case law.

According to CJEU case law,

"in certain labour-intensive sectors, a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity, such an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to that task. In those circumstances, the new employer takes over an organised body of assets enabling him to carry on the activities or certain activities of the transferor undertaking on a regular basis".

This is not an easy rule to apply and could lead to different results, because the CJEU states that

"the degree of importance to be attached to each criterion for determining whether or not there has been a transfer within the meaning of Directive 2001/23 will necessarily vary according to the activity carried on, or indeed according to the production or operating methods employed in the relevant undertaking, business or part of a business".

Therefore, the very concept of 'transfer' is unclear, because there are no guidelines, nor any solid criteria. There is no exhaustive list of 'certain labour-intensive sectors' and it is not known who is competent to identify them before a conflict arises. The 'degree of importance' of the criterion can be different among these sectors, but they are very vague and general indications. The margin for interpretation is very broad and the Spanish courts and the Court of Justice reach different conclusions.

It should be noted that the traditional concept of transfers of undertakings required the transfer of tangible assets. The 'succession of staff' regarding labour-reliant activities is new, and was not included in the wording of the Directive, nor in the transposition of the Directive into the Spanish system (Article 44 of the Labour Code). It is a creation of the CJEU, and Spanish courts have needed some time to adapt.

However, the succession of staff decided by a collective agreement is not always a transfer of undertakings. The CJEU requires considering 'all the facts characterising the transaction in question' and the staff is one of those facts. If the activity is not labour-reliant, the succession of staff decided by a collective agreement does not fall into the concept of transfer of undertakings, so the Directive does not apply to it, nor does Article 44 of the Labour Code. The rules of this situation, even those involving the

responsibilities of the undertakings, should be governed by the collective agreement itself.

3.2 Fixed-term workers

CJEU case C-96/17, 25 July 2018, Vernaza Ayovi.

According to the CJEU's ruling in case C-96/17, 25 July 2018, *Vernaza Ayovi*, clause 4(1) of the framework agreement on fixed-term work concluded on 18 March 1999, which is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, according to which, when the disciplinary dismissal of a permanent worker in the service of a public authority is declared wrongful, the worker in question must be reinstated, whereas, in the same situation, a worker employed under a temporary contract or a temporary contract of indefinite duration performing the same duties as that permanent worker need not be reinstated but instead may receive compensation.

In Spain, an irregular (abusive) fixed-term contract, as a general rule, results in its conversion into a permanent one. This is not an easy rule to apply in public administration, because access to a permanent job in public employment requires completing a selection process which must respect the principles of equality, merit and ability. Thus, the abusive use of fixed-term contracts in public administrations does not lead to a conversion into a permanent contract. Instead, the Supreme Court has created a figure called 'indefinite but not permanent worker' or 'non-permanent employment contract of indefinite duration' ('*trabajador indefinido no fijo de plantilla*,'). This means that the irregular fixed-term contract does not end on the originally scheduled date, but when the job is covered by a permanent worker (a career civil servant). As a consequence, the initial worker could be in this temporary job for years, but this is not a type of contract and there is no legal regulation, nor registration, because it is a kind of relationship which only exists when a court declares that a fixed-term contract involving a public administration is irregular. This situation cannot arise when the employer is a private undertaking, because an invalid fixed-term contract is transformed into a permanent one in that case. Those 'indefinite but not permanent workers' are a category on their own between fixed-term contracts and permanent ones, but under the Framework Agreement, they have to be considered fixed-term contracts. They are similar to interim contracts, but without a fixed date of termination, the worker could spend years in this situation. There have also been problems regarding severance pay at the end of such contracts.

The Basic Statute of Public Employees recognises the right of permanent workers in public administrations, who have unfairly dismissed, to choose between compensation and reinstatement. This right cannot be invoked by indefinite non-permanent workers, because they are not permanent workers, but temporary ones. This difference is not contrary to the principles of equality and non-discrimination, because permanent workers got the job after completing a selection procedure in accordance with the principles of equality and recognition of merit and competence. This ruling accepts this configuration, so it will not have an impact on the Spanish system.

4 Other relevant information

4.1 Unemployment

Unemployment dropped again in July (27 141 people). The total number of unemployed continued at its lowest levels in the last nine years, standing at 3 135 021 unemployed.



4.2 Collective bargaining

On 05 July 2018, the most representative trade union and business organisations in Spain signed the [IV Agreement for Employment and Collective Bargaining](#) for the period 2018-2020. The Labour Code gives such types of agreements the role to structure collective bargaining activity.

As in previous versions, one key aspect of the 2018 Agreement is wages, because they must increase by 2 percent each year, and an additional 1 percent depending on productivity and other indicators. The minimum wage established by collective agreement over these years should reach EUR 14 000.

This 2018 Agreement also expresses the willingness of the parties to keep collective agreements in force during the period of review or renegotiation, to avoid the entry into play of the legal provision that establishes a one-year deadline as the limit of ultra-activity. The objective is to avoid gaps in coverage.

Finally, the Agreement suggests the launching of a process of social dialogue with the government to deal with issues such as the regulation of working conditions in contractor companies, the adaptation of working time as an alternative to collective dismissals, vocational training, absenteeism and equal pay between men and women. It also suggests the convenience of a legal reform that allows collective agreements to empower the employer to terminate the employment contract when the worker reaches the age of retirement.

Sweden

Summary

(I) The Swedish government has initiated a public enquiry with instructions to propose legislative measures for the transposition of the recent Directive (EU) 2018/957. The enquiry shall present the written report in May 2019.

(II) The CJEU has ruled in a case on a transfer of undertaking and has examined the concept of undertaking, but has also concluded that it is for the national courts to decide on the issue of conflicting national provisions and collective agreements.

1 National Legislation

1.1 Posting of workers

The Swedish Social Democrat-Green government initiated a public enquiry with the purpose of [proposing legislation](#) for the transposition of Directive (EU) 2018/957 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (Posting of Workers Directive). The government has asked the public in the enquiry to submit proposals on the general transposition of Directive (EU) 2018/957, but also points out that the mission does not include any limitations to the right to strike or amendments to the overarching way in which the original Posting of Workers Directive has been transposed into Swedish law. The enquiry shall, in particular, address the following key issues:

- Examine what, and draft such legislative changes that have to be implemented in order to transpose the 2018 Directive regulation on the right to wage and other changes to the nucleus of rights in Art. 3.1 of the Posting of Workers Directive;
- Examine whether the current Swedish provisions on posted agency workers' rights are coherent with those in the 2018 Directive;
- Evaluate whether it is possible and relevant to extend the protection for posted agency workers;
- Examine whether the other provisions on agency work in the 2018 Directive prompt new legislation;
- Examine what provisions in Swedish law should be guaranteed during long-term postings (more than 12 months) and evaluate what legislative measures need to be taken to transpose the new provisions on long-term posting;
- Examine how a system can be implemented for motivated requests about extensions of the posting period;
- Examine what legislative measures are required to transpose the provisions on access to information;
- Examine whether the provisions on cooperation between different authorities prompt legislative measures;
- Examine whether the current Swedish provisions meet the requirements of the new directive regarding control and enforcement;
- Analyse whether the current legislation on sanctions reflect the requirements in Art. 3.1 para 6 as modified in the new Directive;
- Propose draft legislation for any legislative measures that are necessary based on the enquiry.

The enquiry shall present a written report by 31 May 2019.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Transfer of undertakings

CJEU case C-60/17, 11 July 2018, Somoza Hermo v. Ilunión Seguridad

The CJEU ruled in a case on a transfer of undertaking and Directive 2001/23/EC, Articles 1.1 and 3.1. A security company, providing security services to a museum, lost a bid to another service provider. It was agreed under the collective agreement applicable in the security service sector that the museum's security guards would be transferred to the new security services provider. The applicant, Angel Somoza Hermo, filed a claim before the Spanish courts for payments of outstanding remuneration and social benefits from his initial employer, arguing that the Transfer of Undertaking Directive, Article 3.1 allows for the application of joint and several liability for both the initial as well as the new employer for the outstanding payments.

The CJEU, answering the first of the two questions, found that Article 1.1 of the Directive must be interpreted as meaning that the Directive applies to the situation described in the case. The Court did, however, conclude that it had no jurisdiction to answer the second question, since it concerned the examination of the 'consistency of a provision of a collective agreement with a provision of national law'. This question was, in the eyes of the CJEU, for the domestic court to decide.

The Swedish transposition of the Directive (primarily in the Employment Protection Act, para 6 b) is in line with the Court's ruling. The application of the scope of the transfer of undertaking would very likely have been similar to the one presented by the Court. The Swedish legislation explicitly states that obligations emerging under the first employment relationship should be subject to joint and several liability shared between the initial and the subsequent employer (para 6 b) – as long as it concerns the obligation towards the employee. The final distribution of liability between the two employers is not subject to any explicit regulation, but must be settled on the basis of the ordinary principles of contract law.

Source:

The Swedish Employment Protection Act (1982:80) can be found [here](#).

4 Other relevant information

Nothing to report.

United Kingdom

Summary

(I) The Employment Appeal Tribunal has issued a ruling on the calculation of holiday pay in relation with overtime.

(II) Some aspects of the EU Withdrawal Act are analysed.

(III) The number of applications has risen since the abolition of the fees for access to Tribunals.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Paid annual leave

Employment Appeal Tribunal, UKEAT/0235/17, 16 April 2018, Mr N Flowers and Others v East of England Ambulance Trust

In the [case UKEAT/0235/17](#), *Flowers and others v East of England Ambulance Trust*, the Employment Appeal Tribunal (EAT) ruled that provisions of the NHS Terms and Conditions of Service (Agenda for Change) required that any overtime pay earned in the three months prior to an NHS employee taking annual leave should be included in the calculation of holiday pay. This should include both non-guaranteed and voluntary overtime pay. The EAT upheld the first instance judge's views:

- the right to paid annual leave is a particularly important principle of EU social law from which there can be no derogation;
- the overarching principle is that normal remuneration must be maintained in respect of the period of annual leave guaranteed by Article 7. Thus the payments in that period must correspond to the normal remuneration received while working;
- the purpose of this requirement is to ensure that a worker does not, by taking leave, suffer a financial disadvantage, which is liable to deter her from exercising that right;
- payments in respect of overtime—whether that be compulsory, non-guaranteed, or voluntary—constitute remuneration; or a payment to count as 'normal' remuneration, it must have been paid over a sufficient period of time. This will be a question of fact and degree. Items which are not usually paid or are exceptional do not count. Items that are usually paid and regular across time may do so;
- the structure of a worker's remuneration cannot detract from the right to maintenance of normal remuneration;
- one decisive criterion or test for determining whether a particular component of pay is part of normal remuneration is where there is an 'intrinsic link' between the payment and the performance of tasks that the worker is required to carry out his or her contract of employment;
- however, that is not the only decisive criterion or test. What matters is the overarching principle and its object.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Brexit

Future relationship

Following the meeting at Chequers, the government published its White Paper on the [future relationship](#) between the UK and the EU. It is a long and complex document which focuses mainly on trade and specifically on the Prime Minister's facilitated customs arrangement. The UK's proposal would "incorporate binding provisions related to open and fair competition, with a common rulebook for state aid, cooperative arrangements on competition, and reciprocal commitments to maintain current high standards through non-regression provisions in other areas, such as environmental and employment rules. The UK has already made strong domestic commitments to maintaining high standards". Later the paper talks of the UK "committing to high levels of social and employment protections through a non-regression requirement for domestic labour standards".

Withdrawal Agreement Implementation Bill

The EU (Withdrawal) Act 2018 has received Royal Assent. It repeals the European Communities Act (ECA), which set out the basic rules of how EU law applies in the UK. But it is not quite as dead as Brexiters might like to think. This is because there is going to be a status quo transition (if the proposed withdrawal agreement is agreed and ratified), which means that the principles of direct effect (enforceability of EU rights in the UK courts) and supremacy of EU law will continue to apply during that period. The UK will also have to implement EU legislation and respect judgments of the Court of Justice at this time (planned to run until the end of 2020, and longer as regards acquired rights of EU27 citizens in the UK).

Sections 2(1) - 2(4) ECA 1972 set out those basic rules of direct effect, supremacy and jurisdiction of the Court of Justice. It was always clear that at least these sections or their equivalents would have to be turned back on by the Withdrawal Agreement Implementation Bill ([WAIB](#)), the planned law to give effect to the UK's obligations under the Article 50 withdrawal agreement (if it is agreed). The government had to choose whether to use:

- the same language of the ECA 1972, with the advantages of clarity and certainty, but suggesting to some Brexiters that we have not 'left'; or
- different language to the ECA 1972, with the disadvantages of lack of clarity and certainty, but suggesting to Brexiters that we have 'left'.

It looks like the UK has opted for the former, according to the White Paper. The ECA will be turned off by the EU Withdrawal Act 2018 but, according to the recently published White Paper, there will be transitional provisions in the WAIB ensuring that the key provisions of the ECA continue to apply during transition according to the recent government paper on the planned future Bill.

On exit day (29 March 2019), the EU (Withdrawal) Act 2018 will repeal the ECA. It will be necessary, however, to ensure that EU law continues to apply in the UK during the implementation period. This will be achieved by way of a transitional provision, in which the Bill will amend the EU (Withdrawal) Act 2018 so that the effect of the ECA is saved



for the time-limited implementation period. Exit day, as defined in the EU (Withdrawal) Act 2018, will remain 29 March 2019.

The compromise is that the UK will legally have left the EU, both under domestic law and the law of the EU; but it will still apply EU law in the way it applied it before, under both domestic law and the Article 50 withdrawal agreement. All this depends on the withdrawal agreement that will be agreed in the first place and then approved by both the UK Parliament and the European Parliament.

Future of immigration law

The [Home Affairs Select Committee](#) produced an important report on the future of UK-EU migration policy. It concluded:

- There has been no attempt by the government to build consensus on future migration policy despite the fact that the issue was subject to heated, divisive and at times misleading debate during the referendum campaign in 2016. This, we believe, is regrettable. An opportunity to help business and employers plan, and a crucial moment to rebuild confidence in the migration system, has so far been missed;
- After the referendum debates, we called upon the government to instigate debates and policy processes to challenge misinformation, and to build trust, support and credibility. Our report, *Immigration policy: basis for building consensus*, noted that following the referendum, the UK had the opportunity to reset the immigration debate. Migration is an important part of the UK's economic, social and cultural history—and will go on being so, including in future migration between the UK and the European Union. It is a serious disappointment that the government has made no attempt so far to build consensus, nor to consult with the public about the decisions that must be made and the trade-offs our country faces as it negotiates a new relationship with the European Union. We warn in this report that immigration policy decisions now risk being caught up in a rushed and highly politicised debate in the run-up to a vote on the Withdrawal Agreement;
- In this interim report, we consider the limited statements made by the government so far about future migration policy, and we set out for Parliament the range of options for EU/EEA migration during the transition period and beyond that witnesses and other contributors have put to us;
- We are waiting for the Migration Advisory Committee's (MAC) report in the autumn before making further recommendations, and we recognise that the government ideally should not make final decisions on the majority of immigration policy in advance of the MAC report. However, we believe it is right to set the options out for Parliament and the public at this stage to inform the debate. We have also considered the potential trade-offs on immigration and trade relationships;
- Broadly, our Report looks at three sets of policy options. First, within the EU and during transition, there are further measures that could be taken, in particular on registration, enforcement, skills and labour market reform. As witnesses noted, the UK has opted not to take up measures which are possible;
- Second, within an EFTA-style arrangement with close or full participation in the single market, we highlight a range of further measures that might be possible—especially in a bespoke negotiated agreement. These include 'emergency brake' provisions, controls on access to the UK labour market, and further measures which build on the negotiation carried out by the previous Prime Minister. We conclude that there are a series of options for significant immigration reform that should be explored;



- Third, within an association agreement or free trade agreement, the options in part depend on how close such an agreement is. While any agreement itself may not cover many 'labour mobility' measures, the government will still need to make decisions about long-term migration, including for work, family and study;
- Overall, we heard considerable evidence that refusing to discuss reciprocal immigration arrangements in the future partnership would make it much harder to get a close economic partnership with the EU. The need for a good economic deal, the fact that the EU is our closest neighbour and trading partner, and the shared economic, social and cultural bonds that exist between the UK and the EU mean that mobility of people will remain important;
- The proximity geographically, economically and socially between the UK and the EU, and the need for a good overall deal, supports a distinct arrangement for EU migration in the future, linked to our economic relationship—with specific policies and models to be debated in the months ahead.

4.2 Access to Tribunals

The effect of the introduction of fees for access to Employment Tribunals and their abolition following the Supreme Court's ruling in case *R (on the application of Unison) v Lord Chancellor* of 26 Jul 2017, has frequently been reported on (see also January 2018 Flash Report). The number of applications has risen since the abolition of the fees and that there has been fee remissions. However, 80 percent of these have not been refunded.

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