Flash Reports on Labour Law
June 2019
Summary and country reports

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Executive Summary

1 National level developments

In June 2019, important developments in labour law took place in several Member States and European Economic Area (EEA) countries (see Table 1). Legislative initiatives and case law focused specifically on the following issues:

Posting of workers

In Belgium, the Court of Cassation decided that an employer cannot lawfully place its permanent employees at the disposal of a user undertaking, even in case of agreement between the employer and the employee, if there is no compliance with the conditions laid down in Article 32 of the Temporary Employment Law. This Article allows for a derogation of Article 31 (which prohibits placing permanent employees at the disposal of a user undertaking). In Denmark, the Eastern High Court issued a ruling asserting that the Danish regulation granting general public access to information on posted workers submitted to the registration system exceeds the necessary requirements to fulfil the system’s purpose, and is thus not in line with the EU acquis. In France, the new Decree No. 2019-555 introduces several new aspects regarding the regulations on posting of workers in France, such as the possibility to temporarily prohibit the provision of services in the event of non-payment of administrative fines, compliance of the principal to pay these fines, control measures for the labour inspectorate, etc. In the Netherlands, a draft legislative bill to transpose Directive (EU) 2018/957 was presented, enhancing the rights of posted workers after 12 or 18 months of employment and regulating their allowances. Furthermore, more collective agreements will fall within the scope of the law (and thus some of the terms and conditions posted workers are entitled to), including collective agreements that are not universally binding.

Minimum wage

In Estonia, the Estonian Transport and Road Workers Trade Union has initiated negotiations on the new monthly minimum wage for the transport sector. The union is demanding a monthly minimum wage of EUR 1 200 in the transport sector. It is currently set at EUR 945. In Germany, the Federal Cabinet approved a bill proposed by the Federal Minister of Labour to improve the remuneration of nursing staff. The draft provides for trade unions and employers to negotiate a collective agreement on the basis of the law on posting of workers. The aim is for future minimum wages to be differentiated according to auxiliary and skilled workers and to remove the East/West differences. The Federal Government would be able to declare this agreement generally binding for the entire sector by ordinance. If no collective agreement can be concluded, the draft law provides for the establishment of a permanent commission which would determine the working conditions of nursing staff. In Ireland, as a result of the successful constitutional challenge to the country’s sectoral wage setting mechanism in McGowan v Labour Court [2013] IESC 21, the legislature enacted the Industrial Relations (Amendment) Act 2015, providing for the issuance of sectoral employment orders, the terms of which are to apply to every worker of the class, type or group in the economic sector to which the order applies. Two sectoral employment orders have been issued, namely for the construction sector and the electrical contracting sector, providing for pay raises.

Fixed-term employment

In Spain, the Supreme Court ruled that workers with a temporary replacement contract are not entitled to severance pay when their contract expires, confirming the findings of the CJEU in Montero Mateos. In Italy, Decree Law No. 59 of 28 June 2019 provides a combination of (contingent and temporary) grounds for public opera houses and concert halls foundations to conclude fixed-term
contracts with a maximum duration (48 months) for the fixed-term relationship with the same worker for the same tasks. In Latvia, the Constitutional Court found that the rule providing that only fixed-term contracts, each with a duration of six years, can be concluded with academic staff (professors and associate professors) of higher education establishments is not in conformity with the Constitution, considering that it restricts the right provided in Article 106 of the Constitution to choose one’s employment and profession according to one’s qualifications and skills, taking into account the right to academic freedom. This could put an end to the incompatibility of this regulation with Directive 1999/70/EC.

Transfers of undertakings

In Austria, the Supreme Court issued two judgments on transfers of undertakings involving temporary agency workers. The Court decided that employees who are integrated in the transferor’s business but have a contractual relationship with a third party and not with the transferor, are not, in principle, transferred when an undertaking is transferred to the transferee. In the Netherlands, a consultation on a draft bill on transfers of undertakings in case of bankruptcy has been launched. It intends to provide a statutory basis for the pre-pack method in order to improve the legal certainty on this issue. In Norway, the Court of Appeal has ruled in a case on a transfer of undertaking of cleaners from the Norwegian Armed Forces to a private company. The Court stated that these workers were to keep the rights acquired while working for the transferor to a higher notice period as well as some pension rights. They were not, however, found to be entitled to their previous early retirement scheme.

2 Implications of CJEU or EFTA Court rulings and ECHR

Several cases decided by the CJEU in May 2019 have been analysed by the national experts in their May and June Flash Reports. The executive summary of May 2019 focused on CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure. This summary includes the main inputs of the national experts for C-494/17, C-509/17, C-55/18, C-194/18 and C-486/18

Fixed-term work

CJEU case C-494/17, 08 May 2019, Rossato

The majority of experts report that in a situation like the one dealt with in Rossato, the abuse of fixed-term contracts would result in the conversion of an invalid fixed-term employment relationship into one of indefinite duration. In some countries, this means that the employee has no right to any further financial compensation. This is the case in Austria, Belgium, Croatia, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal and Slovenia. The conversion of a fixed-term employment contract into one of indefinite duration is also the norm in Czech Republic, Germany, Hungary (where the use of fixed-term contracts in education is fairly limited), Estonia, Iceland, Liechtenstein and Norway, although the right to financial compensation is not mentioned. In Spain, an invalid fixed-term contract would also be converted into an open-ended employment relationship, but the worker is also entitled to severance pay of 12 days as a result of the termination of her fixed-term contract. In Ireland, fixed-term employees have the option between either reinstatement or compensation. In Bulgaria, employment relationships with teachers in high schools are established for an indefinite term and, therefore, a situation like the one that arose in Rossato would not be possible. This seems to also be the case in Greece, where such contracts are based on an administrative procedure in accordance with the Constitution. In Denmark, compensation is the usual consequence of abuse of fixed-term contracts, and only in very few cases are fixed-term contracts converted into contracts of indefinite duration, i.e. situations like the one dealt with in Rossato are rare, with
compensation limited to the wages due during the notice period. In the Netherlands, there is no specific provision restricting the possibility of fixed-term employees invoking an ‘abuse of rights’. In Romania, there is no express provision in labour legislation stipulating the conversion of a fourth fixed-term contract into one of indefinite duration, and no compensation is provided for the employee who has been hired on a fixed-term contract beyond the legal limit. A fourth fixed-term employment contract results in partial invalidity, and only in terms of duration. In other words, the contract remains valid, but the duration clause is deemed void and replaced with the general rule that the contract was concluded for an indefinite period.

Transfers of Undertakings

CJEU case C-194/18, 8 May 2019, Dodić and CJEU case C-509/17, 16 May 2019, Plessers

Case C-194/18 involved a transfer of financial assets of the clients of one company that ceded its activity to another. The CJEU declared that under circumstances such as those in the case, a transfer of undertaking may exist if it is determined that a transfer of clients has occurred. Some experts report that a situation like the one dealt with in the Plessers case has not yet been addressed by the national courts and the CJEU’s decision may influence future case law. This is the case in Austria, Lithuania, Malta, Norway, Portugal and Italy. In other countries, existing national legislation and/or case law would lead to similar findings as in C-194/18, and the ruling is therefore expected to have only minor implications, for example in Bulgaria, Czech Republic, Denmark, Estonia, Germany and Greece or at least it is not excluded that the national courts would reach the same conclusion that a transfer of an undertaking exists under those circumstances, like in Iceland, Poland, Liechtenstein and Slovakia.

In case C-509/17, the CJEU interpreted the exemption of Article 5 (1) of Directive 2001/23/EC narrowly, precluding national legislation which, in the event of the transfer of an undertaking in the context of proceedings for legal restructuring by transfer under judicial supervision applied with a view to maintaining all or part of the transferor or its activity, entitles the transferee to select the employees which it wishes to keep on. This may challenge existing legislation in countries like Austria or Estonia, where provisions on transfers of undertakings do not apply in case of restructuring proceedings without the transferor’s own administration or bankruptcy proceedings. The same applies in Belgium, where the CJEU decision has immediate and serious consequences for Belgian legislation on legal restructuring procedures related to transfers under judicial authority and will have to be adapted accordingly. This is also the case in Luxembourg, where insolvency law closely follows the Belgian model. In the Netherlands, the ruling is relevant for the draft legislative bill on transfers of undertakings in case of bankruptcy, since the envisaged law includes a possibility that is quite similar to the Belgian law under scrutiny in this particular case. Slovakia may face a similar situation, because according to Article 31 paragraph 9 of the Labour Code, the provisions on the transfer of rights and obligations arising from the employment relationship shall not apply to an employer whom a court has declared insolvent. On the contrary, national legislation seems to be in line with the CJEU decision or will have no implications in Bulgaria, Czech Republic, Denmark, Finland, France, Germany, Greece, Iceland, Liechtenstein, Norway, Poland, Portugal, Romania, Spain, Sweden and UK.

Working Time

CJEU case C-55/18, 14 May 2019, CCOO

In this decision, the CJEU ruled that the Working Time Directive 2003/88/EC read in the light of Article 31(2) CFR and Directive 89/391/EEC must be interpreted
as precluding a law of a Member State that, according to the interpretation given to it in national case law, does not require employers to establish a system enabling the recording of each worker’s daily working time. It seems that this ruling will have important implications for a number of countries.

In **Austria**, although a general obligation exists to record working time, some aspects, such as the fact that this obligation can be borne by the employee, may be problematic. The ruling may also have an important impact in **Belgium**, where no a general obligation exists to implement a working time recording system, similarly to other countries such as **Denmark, Greece or Malta**. In **Czech Republic**, the obligation to record working time only applies partially.

Another group of countries reported that the judgment may require the adoption of improved systems and mechanisms to comply with the obligation of recording working time or to ensure that recording is implemented in practice. This may be the case in **Estonia** and **Liechtenstein**. Finally, some countries, like **Finland, France, Norway, Poland, Portugal** and **Romania**, reported that their national regulation is in line with the CJEU decision. In **Spain**, the law was recently amended and now meets the requirements of the CJEU case law. In **Sweden**, the judgment will likely require the introduction of changes to the Swedish Working Time Act to cover the entire labour market, also outside the range of collective agreements.

**Parental Leave**

*CJEU case C-486/18, 08 May 2019, Praxair MRC*

In this case, the CJEU stated that a national provision according to which a worker employed full time and for an indefinite duration is dismissed at the time he is on part-time parental leave, is entitled to compensation for dismissal and redeployment leave allowance, which are determined, at least in part, on the basis of the reduced salary the employee received at the time of dismissal, is not in line with the framework agreement on parental leave as well as with Article 157 TFEU.

As this is a French case, it directly challenges the regulation applicable in **France**, because it is considered to be indirectly discriminatory. This case may also have some implications for **Denmark, Finland, Italy** and **Poland**, since not all workers are entitled to full pay during parental leave and instead receive parental leave benefits.

The Austrian expert reported that the case is not applicable in **Austria**, which has a very different system that can be defined as contribution-oriented. In **Bulgaria**, the system of compensation in the event of dismissal seems to differ as well. No provisions such as the one repealed in C-486/16 are found in a number of countries, including **Czech Republic, Germany, Liechtenstein** or **Norway**, meaning that their national laws are in line with EU law.
Table 1. Main developments (excluding implications of CJEU or EFTA-Court rulings)

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Austria

Summary

No legislation of relevance for EU labour law was passed in May. Three decisions of the Austrian Supreme Court that are of interest from an EU labour law perspective have been published. They deal with transfers of undertaking and the mobility of workers.

This Flash Report includes impact assessments of the rulings in cases CJEU C-194/18, C-486/18, C-55/18 and C-509/17.

1 National Legislation

Although there is currently some legislative action due to fact that an interim expert government has been established until new elections are held in September 2019, no legislation that is of relevance for EU labour law has been formally proposed yet. It is likely that new legislation on the enforceable right for fathers to short-term parental leave after the birth of the child (so-called 'daddy month'), which is now subject to an agreement with the employer. The details are not yet clear as the negotiations between the parties in Parliament are still ongoing.

2 Court Rulings

2.1 Transfer of undertaking

Supreme Court, 9 ObA 32/19z, 15 May 2019; Supreme Court, 9 ObA 50/19x, 15 May 2019

In cases 9 ObA 32/19z and 9 ObA 50/19x, the plaintiffs, agency workers, tried to construe a transfer of a business in case of the transfer of a user undertaking referring to the decision of the CJEU in case C-242/09, 21 October 2010, Albron. The court pointed out that this ruling only refers to an atypical form of temporary agency work. Austrian case law and doctrine generally acknowledge that employees who are integrated into the transferor's undertaking but have a contractual relationship with a third party rather than with the transferor do not, in principle, transfer when the transferor's undertaking is transferred. Temporary agency workers are not usually transferred when an automatic change of employer takes place, unless the temporary work agency itself is transferred. The CJEU's decision in the Albron case dealt with an 'atypical case' of permanent intra-group agency work. If, on the other hand, the assignment is not permanent (within or outside a group), the CJEU does not apply Directive 2008/104/EC. The transfer of the user's undertaking then does not affect the temporary agency workers assigned to work there.

In the first case (9 ObA 32/19z), the plaintiff had only been assigned to work for the transferor for approximately half of the undertaking's existence, it could therefore not be claimed that he had been permanently seconded to the transferor. In addition, the plaintiff had also worked directly for the temporary work agency for three months in between assignments. The plaintiff's involvement in the transferor's activities was not comparable with the special circumstances present in the Albron case; the fact that the plaintiff was required to continuously report back to the temporary work agency during the assignment and that the transferor's activities were only of a temporary nature (until the end of the contract or new tender).

In the second case (9 ObA 50/19x), the assignment lasted for more than four years. The Supreme Court pointed out, however, that the CJEU had based its decision in the
Albron case not only on the long duration of the agency worker’s assignment with the ‘non-contractual’ employer. The second (special) circumstance was that within the Dutch Heineken International group, all staff were employed by a single group company which had acted as the central employer and had seconded staff to various companies within the Heineken group. Heineken Nederlands, whose activities had been transferred by contract to another company called Albron, did not have a single employee. In the present case, however, the transferor directly employed a large number of employees who were transferred to the transferee. The special circumstances of the Albron case were therefore also not present in the second case.

The Supreme Court therefore decided in favour of the defendant in both cases and refused to request a preliminary ruling from the CJEU as it considered the situation to be an acte éclaire.

The Supreme Court followed the line of ruling that was initiated with an earlier fairly lengthy decision 9 Ob A 19/18m, which was covered in the June 2018 Flash Report. The decision was also well received in the Austrian literature (Schindler, JAS 2019, 30). It interprets the CJEU’s Albron decision accurately, emphasising that it only concerns special assignment cases within a group of companies and only if those assignment are of a permanent nature. The present decision built on the Supreme Court’s previous decision and applied the criteria developed in that case. In the first case, the assignment was not of a permanent nature, in the second case, there was no group of companies and the user undertaking did in fact have other employees, i.e. the facts of the cases did not coincide with those of the Albron case.

2.2 Paid leave and years of service

Supreme Court, 8 ObA 19/19f, 29 April 2019

According to §§ 2 and 3 Annual Leave Act, the leave entitlement after 25 years of service is six weeks if the period of service was completed with the same employer. If the employee worked for various (domestic or foreign) employers, the maximum total credit period pursuant to § 3 (3) Annual Leave Act is five years. The question therefore arises whether the differing regulations for periods of service with the same employer, on the one hand, and with different employers, on the other, constitutes indirect discrimination under Art 45 TFEU in conjunction with Art 7 (1) of Regulation 492/2011/EU or a restriction under Art 45 TFEU. If this is affirmed, the question of justification arises as well.

Within the scope of appeal proceedings, the Supreme Court referred a corresponding question to the CJEU for a preliminary ruling and suspended the appeal proceedings until the CJEU’s decision. In its judgment in case C-437/17, 13 March 2019, Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach GmbH, the CJEU answered the question as follows:

“Article 45 TFEU and Article 7(1) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which, for the purposes of determining whether a worker with 25 years of professional experience is entitled to an increase in his paid annual leave from five to six weeks, the years of service completed with one or more employers prior to the start of the worker’s period of service with his current employer account for only a maximum of five years of professional experience, even if their actual number is more than five.”
Based on the ruling of the CJEU, the Austrian Supreme Court assumed that the limitation of the crediting of prior periods of service from other EU states to five years is compatible with EU law and rejected the claim in decision 8 ObA 19/19f.

3 Implications of CJEU rulings and ECHR rulings

3.1 Parental leave

*CJEU case C-486/18, 08 May 2019, Praxair MRC*

In the present case, the CJEU stated that a national provision that stipulates that if a full-time worker, who is employed for an indefinite duration, is dismissed while he is on part-time parental leave, the compensation for dismissal and the redeployment leave allowance to be paid to that worker is to be determined at least in part on the basis of the reduced salary he was receiving at the time of dismissal, is not in line with the framework agreement on parental leave as well as with Article 157 TFEU.

In Austria, no comparable payment schemes such as the redeployment leave allowance in France exist, as Austrian law does not entitle the employee to redeployment leave. The French compensation payment for dismissal reminds of the former system of severance pay (Abfertigung) in Austria applicable to employment relationships entered into before 01 January 2003. If the employee has been continuously employed for three or more years with the employer, she is entitled to severance pay in the event of termination with notice by the employer or in the event of termination of the contract by the employee with cause or by termination agreement. The amount due to the employee depends on the length of time the employee has been employed by the employer and is calculated as a multiple of the salary of her last month of employment. In case of parental leave, a special provision ensures that the amount is not negatively affected by the reduction in working hours (and the resulting reduction in pay). § 23a (4a) of the Act on White Collar Workers (Angestelltengesetz), which also applies to blue collar workers, provides (unofficial translation by the author):

“If the employment relationship is terminated during a part-time employment relationship in accordance with the Act on Protection of Mothers (Mutterschutzgesetz) or the Act on Fathers’ Leave (Väterkarenzgesetz) as a result of termination with notice by the employer, summary dismissal without any fault of the employee, justified resignation or mutual agreement, the employee’s previous regular working hours shall be taken as the basis to determine the amount of severance pay (para. 1).”

The ‘new’ severance pay scheme that is applicable to employment relationships entered into after 31 December 2002 takes a different approach. It eliminates the past achievement-oriented severance pay scheme and establishes a contribution-oriented scheme, in which the financing of severance pay is drawn from monthly contributions by the employer. They contribute 1.53 per cent of the employees’ monthly salary to funds specifically established for this purpose. These contributions are invested by the funds and the capital as well as profits gained are paid to the employee at the end of the employment relationship. In the former severance pay scheme, contributions must have been paid for a minimum of three years and the employment relationship may not have been terminated by the employee by notice, he may not have resigned prematurely without cause or be summarily dismissed. Unlike in the former scheme, the contributions are no longer forfeited, they remain in the fund (so called ‘backpack principle’) and can only be taken out if the above mentioned requirements are met at a later point.

The pay-out of this scheme cannot be considered ‘a right derived from the employment relationship, which the worker is entitled to claim from the employer’ (paragraph 61 of the judgment), as the employer has met all her obligations by paying the required...
contributions and the obligation to pay out the ‘new’ severance pay is carried by the
fund. Clause 2.6 of the framework agreement therefore does not apply to such
payments and the Austrian legal situation seems to be in line with EU law.

3.2 Transfer of undertaking

*CJEU case C-194/18, 08 May 2019, Dodič*

In this ruling, the CJEU evaluated a given constellation in the light of 2001/23/EC. Article
1 (1) must be interpreted as meaning that the transfer of financial instruments and
other assets of the clients of the first undertaking to a second undertaking following
cessation of the first undertaking’s activity under a contract the conclusion of which is
required by national legislation, even though the first undertaking's clients remain free
not to entrust the management of their stock market securities to the second
undertaking, may constitute a transfer of undertaking or of part thereof if it is
established that a transfer of clients has taken place, that being a matter for the
referring court to determine. In that context, the number of clients actually transferred,
even if very high, is not in itself decisive for classification as a ‘transfer’, and the fact
that the first undertaking cooperates with the second one as a dependent stock
exchange intermediary is, in principle, irrelevant.

To our knowledge, no published decisions of Austrian courts exist that treat similar
circumstances of potential transfers of undertakings. It is to be expected that the courts
will—as has been the case in the past—align their jurisprudence to the rulings of the
CJEU.

3.3 Working time

*CJEU case C-55/18, 14 May 2019, CCOO*

In this very important decision, the CJEU ruled that the Working Time Directive
2003/88/EC, read in the light of Article 31(2) CFR and Directive 89/391/EEC, must be
interpreted as precluding a law that, according to its interpretation in national case law,
does not require employers to establish a system that records each employee’s daily
working hours. In paragraph 62, the CJEU explicitly states that the introduction of an
objective, reliable and accessible system that records each employee’s daily working
hours is necessary for the protection and health of workers and to ensure the
effectiveness of the Working Time Directive.

The Austrian Working Time Act (Arbeitszeitgesetz) provides for a general obligation of
employers to record working time. § 26 (1) reads as follows (unofficial translation by the
author):

"The employer shall keep records of the hours worked at the place of business in
order to monitor compliance with the matters regulated in this Federal Act. The
start and duration of an averaging period shall be recorded."

The Administrative Court (91/19/0146, 24 July 1991) interpreted that not only the
amount of hours worked must be registered, but also the start and end time of work,
as well as any breaks as compliance with the provision to provide a daily in-work break
of at least 30 minutes as well as a daily rest period of at least 11 hours cannot otherwise
be monitored. The general provision is therefore in line with the CJEU’s ruling.

The two provisions of the Austrian Working Time Act concerning the recording of working
time seem problematic: on the one hand, § 26 (3) Working Time Act provides: "Only
records of the duration of daily working time are to be kept for employees who are to a
large extent able to determine their own working time and place of work or who
predominantly perform their work from home." As this does not allow the monitoring
of daily rest periods or of in-work rest breaks, this provision seems to be in breach of the CCOO ruling.

On the other hand, this opens the possibility for the employee to record her own working time. It is doubtful whether this can be considered an ‘objective, reliable and accessible system’ (para. 62 of the CCOO ruling) as the CJEU highlights the ‘worker’s position of weakness’ on two occasions. According to para. 45, "it must be observed that, on account of that position of weakness, a worker may be dissuaded from explicitly claiming his rights vis-à-vis his employer where, in particular, doing so may expose him to measures taken by the employer likely to affect the employment relationship in a manner detrimental to that worker”, and para. 55, “it must be emphasised that, taking into account the worker’s position of weakness in the employment relationship, witness evidence cannot be regarded, in itself, as an effective source of evidence capable of guaranteeing actual compliance with the rights at issue, since workers are liable to prove reluctant to give evidence against their employer owing to a fear of measures being taken by the latter which might affect the employment relationship to their detriment”. Taking into account these statements, the shift of responsibility to the worker to record his own working time may lead to workers refraining from recording certain hours, especially overtime, when they know that it might affect their employment relationship to their detriment, as employers do not want these times to be recorded, as they breach the limits of maximum daily or weekly working time or employers do not want to pay for them.

3.4 Transfer of undertaking

CJEU case C-509/17, 16 May 2019, Plessers

In this ruling, the CJEU narrowly interpreted the exemption of Article 5 (1) of Directive 2001/23/EC which states "where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practitioner authorised by a competent public authority)". It must be interpreted as precluding national legislation such as that at issue in Belgium, which, in the event of a transfer of undertaking that has taken place in the context of proceedings for judicial restructuring under judicial supervision applied with a view to maintaining all or parts of the transferor or its activity, entitles the transferee to choose the employees it wishes to retain.

The Austrian Act on Adaption of Contractual Employment Law (Arbeitsvertragsrechtsanpassungsgesetz) provides that the provisions on transfers of undertakings do not apply ‘in case of reorganisation proceedings without the transferor’s own administration or bankruptcy proceedings’ (§ 3 (2)). Reorganisation proceedings may either pursue the liquidation or the sale and continuation of the undertaking. It is very doubtful that the latter case is in line with Directive 2001/23/EC; in the literature (Reissner, in ZellKomm³ (2018) § 3 AVRAG Rz 23), scepticism has been expressed whether this is actually an insolvency proceeding which entails the liquidation of assets. The present ruling supports this opinion and it is therefore likely that the Austrian exemption exceeds the leeway granted by the Directive to Member States.

4 Other relevant information

Nothing to report.
Belgium

Summary

(I) The Law of 26 June 2019 implementing the draft inter-professional agreement 2019-2020 delays the legal date within which each joint committee must declare in a collective bargaining agreement that employees who are dismissed on notice, or who receive severance pay in lieu of a notice period, of at least 30 weeks, have the right to the so-called ‘redundancy package’, aiming to improve the employability of dismissed workers.


(III) Substantive civil law sanctions, including the sanction of joint and several liability, are applicable in the event of non-compliance with the legal conditions of the posting of an employee by an employer who, in addition to his regular activities, has placed one of his permanent employees at the disposal of a user undertaking for a limited period of time. The fact that the year in which the employee concerned was dismissed was an economically very unfavourable year for the employer, as a result of which none of the executives, not even after dismissal, received a bonus, can justify the decision of the Labour Court that the salary of the executive employee to be taken into account for the calculation of dismissal compensation in lieu of notice does not include a bonus.

(IV) To ensure the effectiveness of the rights provided for in the Working Time Directive and the EU Charter of Fundamental Rights, the Member States must require employers to set up an objective, reliable and accessible system enabling the recording of each employee’s daily working time.

(V) The Transfer of Undertakings Directive 2001/23/EC must be interpreted as precluding national legislation, such as that at issue in the Belgian proceedings, which, in the event of the transfer of an undertaking that has taken place in the context of proceedings for legal restructuring by transfer under judicial supervision, applied with a view to maintaining all or part of the transferor or its activity, entitles the transferee to choose the employees it wishes to keep on.

(VI) The government has resigned, leading to reduced legislative activity.

1 National Legislation

1.1 Dismissal

Article 39ter of the Law of 03 July 1978 on employment contracts, which was inserted by the Law on the Unified Status for Blue Collar Workers and White Collar Employees Regarding Dismissal of 26 December 2013, requires that each joint committee or subcommittee must declare, no later than 01 January 2019, in a collective bargaining agreement that employees with high seniority who are dismissed on notice, or receive severance pay in lieu of notice, of at least 30 weeks, the right to the so-called ‘redundancy package’.

The redundancy package must consist, on the one hand, of a period of notice or severance pay in lieu of notice of 2/3rd of the statutory redundancy package, and 1/3rd of the measures to improve the employability of the dismissed workers. However, under
no circumstances may the scheme be extended to have the effect that the notice period or compensation is less than 26 weeks.

The non-application of Article 39ter is subject to a certain financial penalty, which is specified in Article 38, § 3quaterdecies of the Law of 29 June 1981 on the general principles of social security for workers. This law regulates, among other things, the compulsory payment of social security contributions. The latter article provides for a special contribution payable by the employee at a rate of 1 per cent, and 3 per cent to be paid by the employer for employees who were dismissed and who fulfil all the conditions to be entitled to the ‘redundancy package’, which includes measures to increase the employee’s employability, but who nevertheless continues to perform her work during the period of notice or receives full severance pay in lieu of notice.

Since the measure provided in Article 39ter of the Employment Contracts Law has not yet been as successful as initially hoped due to sectoral collective bargaining agreements, the social partners have, in their inter-professional agreement 2019-2020 (see Belgian Flash Report 02/2019) agreed to draw up an inter-professional arrangement by 30 September 2019 with a view to finding an alternative solution for the use of part of the severance pay. For this reason, the date of 01 January 2019, which is provided for in Article 39ter Employment Contracts Law of 03 July 1978, was delayed to a new date (30 September 2019). The King has the power to determine, if appropriate, another date which may not, however, exceed 01 January 2021 (see the Memorandum of Understanding, Parliamentary Documents, Chamber of Representatives, 2018-2019, No 54-3712/001, p. 3-4).

Find more information in the Official Gazette here (Moniteur belge 17 June 2019).

1.2 Insolvency

A number of legal references have been adjusted as a result of the enactment of the Code of Economic Law which, in particular, provides for modified bankruptcy rules.

Subsequently, the term 'conditions for granting transitional allowances' has been amended. Transitional allowances are intended to compensate the loss of wages of the employee, which is caused by the interruption of the activity of the employee as a result of the bankruptcy of her employer, until the moment she is hired by the employer who took over the assets of the bankrupt undertaking.

This compensation allows an employee who does not engage in any professional activity during the period prior to joining the new company—also referred to as the transferee—to receive compensation that is equal or similar to the wages she would be entitled to at the time of the cessation of her former employer’s professional activities, also referred to as the transferor.

The award of such compensation is based, among other things, on the fulfilment of a double requirement:

- The acquisition of the assets must take place within six months following the bankruptcy;
- The takeover of the workers must take place within six months of the takeover of the assets.

The Public Closure Fund often has to wait until the end of these deadlines to determine whether the transition allowance is due or not. As a result, the Guarantee Fund can often not function in a timely manner as a guarantee. The European Committee of Social Rights has already indicated several times that the deadline applicable to make a decision in relation to this claim is too long, which is problematic in the light of Article 25 of the European Social Charter. In order to respond to these complaints and Opinion No. 2110 of the National Labour Council of 18 December 2018, the legislator decided to
reduce the time limits specified by law to obtain this transitional allowance. The period set for the acquisition of assets has essentially been reduced from six months to two months. The deadline for taking over the staff shall be reduced from six months to four months and shall be calculated from the date of acquisition of the assets.

Finally, the extension of the time limits in case of continuation of the activities by the curator-liquidator has been lifted. The law entered into force on 01 April 2019 (see Memorandum of Understanding, Parliamentary Documents, Chamber of Representatives, 2018-2019, No 54-3620/001, p. 3-4).

Find more information in the Official Gazette here.

2 Court Rulings

2.1 Posting of workers

Court de cassation 6 May 2019, no. S.17.0085.F

In accordance with Article 32 of the Temporary Employment Law of 24 July 1987, and by way of derogation from Article 31, an employer may, in addition to its normal activities, place its permanent employees at the disposal of a user undertaking for a limited period of time, if the employer obtained the prior consent of the Labour Inspectorate. The conditions and duration of the period of posting must be laid down in a document signed by the employer, the user undertaking and the employee. This document must be drawn up before the commencement of the posting. However, written consent of the employee is not required if tacit consent is common in the sector in which the employee is employed.

According to the Court of Cassation, it is clear from the wording that Article 32 of the Temporary Employment Law introduces a derogation from the principle of prohibition of posting in Article 31 and that if the aforementioned conditions for this deviation are not met, the posting is prohibited by Article 31, even if an employer performs this work outside its normal activities and during a limited period. The agreement by which an employee was hired to be placed at the disposal of a user undertaking contrary to the provision of Article 31 is null and void from the beginning of the performance of the work by the latter. Moreover, in this case, the user undertaking and the posted employee are considered, on the basis of a legal fiction, to be bound by an employment contract for an indefinite period from the beginning of the performance of work. Both the user undertaking and the person who unlawfully places employees at the user undertaking's disposal are in this case jointly and severally liable for the payment of social security contributions, wages, remuneration and benefits arising from this employment relationship. According to the Court, these civil law sanctions and the sanction of joint and several liability are therefore applicable in the event of non-compliance with the conditions set out in Article 32.

In addition, the Belgian Court de Cassation also had to decide whether a bonus that had not yet been awarded should be included in the salary for the calculation of dismissal compensation as referred to in Article 39, §1 of the Employment Contracts Law of 03 July 1978, on the basis of which severance pay in lieu of notice is calculated. Indeed, the employer in question had provided a clause in the employment contract for executives stating that a bonus granted in a previous year does not entitle the employee to a bonus in the following years. At the time of dismissal, the employer had not yet expressed an opinion on whether or not a bonus would be granted for the current year.

The Court de Cassation stated that it must be deduced from the facts of the case whether or not this bonus should be included in the employee's current salary. According to the Court, the fact that the year in which the employee concerned was dismissed was an economically very unfavourable year for the employer, as a result of which none of
the executives, not even following dismissal, received a bonus, justifies the decision of the Appeal Labour Court that the current salary to be taken into account for the calculation of severance pay does not include a bonus.

The judgment can be found here.

3 Implications of CJEU rulings and ECHR

3.1 Working time

*CJEU case C-55/18, 14 May 2019, CCOO*

The CJEU ruled that

"the Working Time Directive 2003/88 and the Safety and Health at Work Directive 89/391, read in the light of the Charter of Fundamental Rights of the European Union, preclude a national law that, according to the interpretation given to it in national case-law, does not require employers to set up a system enabling the duration of time worked each day by each worker to be measured. (…) In order to ensure the effectiveness of the rights provided for in the Working Time Directive and the Charter, the Member States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured. It is for the Member States to define the specific arrangements for implementing such a system, in particular the form that it must take, having regard, as necessary, to the particular characteristics of each sector of activity concerned, or the specific characteristics of certain undertakings concerning, inter alia, their size”.

The CJEU-ruling involves first and foremost a Spanish case, in which the CJEU assesses Spanish legislation on working time and its interpretation in Spain. The CJEU does not examine the Belgian legislation on working time in this case. Nonetheless, the ruling may have important consequences for Belgian labour law.

With regard to the recording of working time, Belgian labour law already contains a number of obligations. However, Belgian labour law does not provide for a general obligation to use a time recording system.

A time recording system is only mandatory for companies that use sliding work schedules (whereby a worker can choose when to start and stop working and when to take breaks). The Law of 05 March 2017 on Feasible and Flexible Work requires employers to establish a system of time recording in case of flexible work schedules.

A time recording system is also mandatory if a part-time worker performs work outside the planned part-time work schedule (and the employer does not use a written register in which deviations from the planned work schedule are recorded). The aforementioned Law of 05 March 2017 updated the previously existing obligations with regard to time monitoring for deviations from the regular part-time work schedules.

Apart from these cases, an employer only has the obligation to follow specific procedures in case of overtime work. For structural overtime work, is the employer has an obligation to include all hours to be worked, including overtime, in advance in timetables that must be laid down in the work regulations at company level. For unforeseeable overtime, there are various flanking measures, such as prior permission from or notification of the labour inspectorate and trade union representatives and publication of the adapted working arrangements, explicit prior agreement of the employee (voluntary overtime), the inclusion of certain information in social documents, etc. However, these procedures do not provide for any system to record deviations from work schedules. This means that even if the employer complies with the applicable procedures in case of overtime work, it must still be established how many hours the employee worked outside her
work schedule, when the employee actually started and stopped working, or took a rest period.

It remains to be seen whether Belgian labour law meets the minimum requirements of the Court of Justice’s ruling, which seems to be more demanding in terms of protection of workers’ rights.

The implications of this judgment for Belgian labour law need to be further investigated. It is possible to deduce from this judgment an additional obligation for each Belgian employer to install a time clock or other individual time recording system, but according to the Minister of Labour, this is not yet entirely clear.

If every Belgian employer has the obligation to install a time clock or other individual time recording system, the disadvantage for the employees will be that the employer will immediately be provided with a comprehensive monitoring system to check whether the employee is performing his work effectively.

A press release on the judgment can be found here.

### 3.2 Transfer of undertaking

_CJEU case C-509/17, 16 May 2019, Plessers_

The CJEU ruled:

“The Transfer of Undertakings Directive 2001/23, in particular Articles 3 to 5 thereof, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, in the event of the transfer of an undertaking which has taken place in the context of proceedings for judicial restructuring by transfer under judicial supervision applied with a view to maintaining all or part of the transferor or its activity, entitles the transferee to choose the employees which it wishes to keep on”.

One of the main points of the CJEU’s judgment on this Belgian case is that the judicial proceedings for legal restructuring cannot be regarded as being insolvency proceedings and do not fall under the scope of the exception of bankruptcy in Article 5 of the Directive. According to Article 5, the legal protection of workers in a transfer of the undertaking does not apply in case of bankruptcy proceedings (points 5, 41-49 of the CJEU judgment). In other words, the Belgian proceedings for legal restructuring are not bankruptcy proceedings or any similar proceedings with a view to the liquidation of the transferor’s assets. The continuity of the business lies at the core of legal reorganization by means of a transfer under judicial authority, which is not the case with bankruptcy proceedings. In addition, the legal representative appointed by the court ordering the transfer cannot be regarded as a ‘public authority’ as required in Article 5 of the Directive.

The transfer of an undertaking in the context of legal reorganisation by transfer under judicial authority is not governed in Belgium by Collective Bargaining Agreement (CBA) No. 32bis on the transfer of undertakings, but by the Law on the Continuity of Undertakings of 31 January 2009 and by CBA No. 102 concluded in the National Labour Council on 05 October 2011 (Article 12) concerning the preservation of employees’ rights in the event of a change of employer as a result of legal restructuring through a transfer under judicial authority.

In principle, the transferee must take over the rights and obligations arising from the existing employment contracts on the date of the transfer under judicial authority, but the prospective transferee is free to select the employees to be taken over. This choice must be motivated by technical, economic or organisational reasons and must be made without differentiations that are not permissible according to law.
The Preliminary Ruling concerned Articles 22, 60, 61 and 62 of the Belgian Law of 31 January 2009 on the Continuity of Undertakings. This law has been replaced by Book XX of the Economic Law Code, introduced by the Law of 11 August 2017 on the insolvency of enterprises. The corresponding articles now in force, which have the same contents, are XX.44, XX.85, XX.86 and XX.87 of the Economic Law Code.

It is clear that this important CJEU judgment has immediate and serious consequences for Belgian legislation on the legal restructuring procedure through a transfer under judicial authority and will have to be amended as the current legislation is in breach of Directive 2001/33.

4 Other relevant information

Nothing to report.
Bulgaria

Summary
A commentary of the most recent CJEU case law in the field of labour and social law is provided.

1 National Legislation
Nothing to report.

2 Court Rulings
Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Access to the profession of lawyer
CJEU case C-431/17, 07 May 2019, Monachos Eirinaios
This case does not have any implications for Bulgarian legislation. The legal status of practicing lawyers is regulated in the Bar Association Act. This act does not state that monks cannot be applicants for admission to the bar and to practice law.

3.2 Fixed-term work
CJEU case C-494/17, 08 May 2019, Rossato
The situation that was dealt with in case C-494/17 cannot arise in Bulgaria.

Fixed-term employment relationships of teachers are regulated in the Labour Code and in special laws – the Law for Higher Education, the Law for Development of Academic Staff in the Republic of Bulgaria, the Law for School- and Pre-school education. The rules apply equally to the public and private sectors.

The different types of fixed-term employment contracts are established in Article 68 (1) of the Labour Code. These are contracts concluded for a definite period which may not be longer than three years, unless otherwise provided by law or by an act of the Council of Ministers; for the completion of specific work; for the temporary replacement of a worker who is absent from work; for work in a position that will eventually be filled through a competitive examination; for a certain term of office, where such has been specified.

Fixed-term employment contracts for a definite duration (as in case-494/17) may be concluded for the performance of temporary, seasonal, or short-term work and activities, as well as with newly employed workers in an enterprise that has declared bankruptcy or has gone into liquidation. As an exception, an employment contract that terminates on a specific date (not less than one year) can be concluded for work and activities, which are not of a temporary, seasonal, or short-term nature. Such employment contracts can also be concluded for a shorter term upon the employee’s written request. In such cases, another fixed-term employment contract with the same employee for the same post can only be concluded one additional time for a period of at least one year. Any employment contract concluded in violation of these rules will be considered to have been concluded for an indefinite term (Article 68 (3—7 LC).
Employment relationships with teachers in high schools are established for an indefinite duration. Employment relationships with assistant professors are established for four years and only once.

There are no differences in the calculation of periods of service and other rights between employment contracts of indefinite duration and fixed-term contracts. Article 68 (2) LC sets forth that fixed-term employees have the same rights and obligations as employees who have concluded a permanent contract of employment.

3.3 Transfer of undertaking

*CJEU case C-509/17, 16 May 2019, Plessers*

The Bulgarian Labour Code (LC) in Article 123 (1—2) provides that the employment relationship with the worker shall not be terminated in the event of a change of employer as a result of:

- a merger due to acquisition of one enterprise by another;
- distribution of activities of one enterprise to two or more enterprises;
- transfer of a self-contained part of one enterprise to another;
- change of ownership of the enterprise or of a self-contained part thereof;
- ceding or transferring the activity from one enterprise to another, including the transfer of tangible assets.

Dismissals are not permitted in cases of transfers. The reason behind the transfer is of no relevance. This means that transfers in the event of judicial proceedings in case of restructuring are included as well.

3.4 Working time

*CJEU case C-55/18, 14 May 2019, CCOO*

A situation like the one dealt with in case C-55/18 cannot arise in Bulgaria.

Working time is regulated by the Labour Code (LC). Interpretative decisions of the Supreme Court of Cassation may not contradict these provisions. Pursuant to Article 142 LC, working time shall be calculated in terms of working days on a daily basis. The employer may establish a calculation of working time on the basis of a longer reference period, e.g. one week, one month, or over another calendar period, which may not, however, be longer than six months. The maximum duration of a work shift based on a calculation of working time on a weekly or longer basis may be up to 12 hours, while the total duration of the work week may not exceed 56 hours, and for workers with reduced working time, it may be up to one hour beyond their reduced working time. The allocation of working time shall be established by the enterprise's work rules (Article 139 (1) LC). The work rules specify the start and end of the working day, the order of alternating shifts, rest periods, the recording of working time, the time of mandatory presence at the enterprise, under what circumstances variable working time can be agreed upon, breaks for workers involved in uninterrupted work processes and in enterprises, where uninterrupted work is performed and other issues relating to working time distribution and the organisation of work in the enterprise. These regulations define the procedure for recording working time in case of variable working time, e.g. when the employee works on days not initially agreed to or if the employee works on different days of the same work week to fulfil the number of her working hours (Article 4a of the Ordinance for Working Time, Rest and Leave). The employer has the obligation to record working time. Work performed on the order of, or with the knowledge of and without objection from the employer or the respective superior, by a worker beyond the initially
agreed working time shall be considered overtime work (Article 143 (1) LC). The employer is required to keep a special book to account for overtime work (Article 149 (1) LC).

3.5 Transfer of undertaking

CJEU case C-194/18, 08 May 2019, Dodič

A situation like the one dealt with in case C-194/18 is regulated in Article 123 (1) item 7 of the Labour Code (LC). The article states that the employment relationship with the worker does not terminate in the event of a change of employer as a result of ceding or transferring the activity from one enterprise to another, including the transfer of tangible assets. In that case, the rights and obligations of the transferor employer arising from the employment relationships that exist on the date of the transfer are transferred to the new transferee employer.

3.6 Parental leave

CJEU case C-486/18, 08 May 2019, Praxair MRC

Bulgarian labour legislation explicitly and exhaustively describes the grounds for dismissal in Articles 328 and 330 of the Labour Code (LC). Taking any type of leave, including parental leave, leave for training, etc. are not included in those articles. If a worker has commenced her leave (any type) initially agreed with the employer, the employer must mandatorily obtain advance permission from the labour inspectorate to dismiss that employee (Article 333 (1) item 4 LC).

Parental leave is unpaid.

There are no special rules on compensation for dismissal in cases like that dealt with in case C-486/18.

The amount of compensation depends on the ground for termination.

The general rule established in Article 228 LC is that the employee’s gross wages in the month preceding the date of termination is used as the basis for the calculation of compensation, or the employee’s last monthly gross wages, unless otherwise provided. This amount is applicable as long as no higher amount is provided for in an act of the Council of Ministers, in a collective agreement or in the employment contract.

The amount of compensation for unused paid annual leave is calculated on the basis of the worker’s average daily gross wage paid by the employer for the last calendar month preceding the commencement of the leave during which the worker has worked at least ten working days. Where the worker has not worked at least ten working days for the same employer during any month, his wages are determined on the basis of the basic and supplementary permanent wage agreed in the employment contract. This compensation is calculated on the day of termination of the employment relationship.

4 Other relevant information

Nothing to report.
Croatia

Summary
The Government of the Republic of Croatia has adopted the Amendment to Decision on annual quota for employment of aliens in 2019.

1 National Legislation
Nothing to report.

2 Court Rulings
Nothing to report.

3 Implications of CJEU Rulings and ECHR
Nothing to report.

4 Other relevant information
The Government of the Republic of Croatia has adopted the Amendment to the Decision on the Annual Quota for Employment of Aliens in 2019 (see Official Gazette No. 60/2019). It raises the annual quota of employment of aliens due to the lack of employees in construction and tourism; the number of work permits for seasonal workers in tourism has been increased.
Czech Republic

Summary

(I) A new draft introducing an specific new long-term residence for the purpose of seeking employment that amends the notification and registration duty as regards foreign employees has been introduced

(II) A new act introducing e-sick notes enabling employers an easier and faster way to verify the temporary unfitness to work of employees has been adopted

(III) Relevant CJEU case law on parental leave, transfer of undertakings, successive fixed-term employment contracts, access to the profession of lawyer and transfer of undertakings is analysed.

1 National Legislation

1.1 Third-country nationals

Draft Act amending Act No. 326/1999 Sb., on the Residence of Foreign Nationals in the Czech Republic and Related Acts has been approved by Parliament.

This Draft Act has been reported on in the April and May 2019 Flash Reports. Following approval of the Chamber of Deputies, this Draft Act was deliberated by the Senate, which approved some minor amendments to the Draft Act (related to how students will prove that they have sufficient resources to live in the Czech Republic) and return it to the Chamber of Deputies. The Chamber of Deputies has approved an amended version of this Draft Act (Senate version).

The Draft Act will be forwarded to the President for his signature. The effective date is set to the 15th day after its publication (with exceptions).

1.2 E-sick notes


After approval of the Chamber of Deputies, this Draft Act was deliberated in the Senate, which also approved this Draft Act. The President has already signed the Draft Act, which will be published in the Collection.

The effective date is set for 1 January 2020 (with exceptions).

2 Court Rulings

Nothing to report.
3  Implications of CJEU Rulings and ECHR

3.1 Parental leave

CJEU case C-486/18, 08 May 2019, Praxair MRC

The CJEU ruled that:

"Clause 2.6 of the framework agreement on parental leave concluded on 14 December 1995, which is annexed to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, as amended by Council Directive 97/75/EC of 15 December 1997, must be interpreted as precluding, where a worker employed full-time and for an indefinite duration is dismissed at the time he is on part-time parental leave, the compensation payment for dismissal and the redeployment leave allowance to be paid to that worker being determined at least in part on the basis of the reduced salary which he receives when the dismissal takes place".

National law does not explicitly provide for the possibility of part-time parental leave. Although it is not prohibited by labour law, part-time parental leave would be problematic in the context of social security law (as regards health and social insurance).

Regardless of the above, pursuant to Sec 67 of Act No. 262/2006 Coll. the Labour Code (the 'Labour Code'), compensation for dismissal (severance pay) is calculated on the basis of ‘average monthly earnings’. As a general rule, the employer determines the employee’s average monthly earnings from her gross salary in the relevant period and from the period of work performed in the relevant period (the previous calendar quarter) if the employee worked for at least 21 days within that period (i.e. the gross salary attained in the relevant period divided by the number of hours worked in that period) – Secs 353 and 354 of the Labour Code. If an employee worked less than 21 days during the relevant period (as would be the case when taking parental leave), ‘probable earnings’ would apply – the employer determines probable earnings from the gross salary attained by the employee from the beginning of the relevant period or from the gross salary the employee would have likely attained; in this respect, the customary amount of the individual components of the employee’s salary or public sector pay or of the salary of employees performing the same work or who perform work of the same value (Sec 355 of the Labour Code).

Consequently, the employee is protected against loss or reduction of his severance pay as required by the CJEU ruling.

This CJEU ruling has no implications on national law. No amendments of national law are necessary since national law seems to be in compliance with the findings of the CJEU.

3.2 Transfer of undertaking

CJEU case C-194/18, 08 May 2019, Dodič

The CJEU ruled that:

"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 the transfer, to a second undertaking, of financial instruments and other assets of the clients of a first undertaking, following the cessation of the first undertaking’s activity, under a contract the conclusion of which is required by national legislation, even though the first undertaking’s clients remain free not to entrust the management of their stock market securities to the second undertaking, may constitute a
transfer of an undertaking or of part of an undertaking if it is established that there was a transfer of clients, that being a matter for the referring court to determine. In that context, the number of clients actually transferred, even if very high, is not, in itself, decisive as regards classification as a ‘transfer’ and the fact that the first undertaking cooperates with the second undertaking as a dependent stock-exchange intermediary, is, in principle, irrelevant”.

Pursuant to Sec 338 et seq. of the Labour Code,

“the rights and obligations arising from labour relations may only be transferred in cases laid down by law. Where activities, or part thereof, or tasks, or part thereof, are transferred from one employer (transferor) to another employer (transferee), the rights and obligations arising from labour relations are transferred to the full extent to the new employer (transferee)”.

National provisions on the transfer of undertakings have been extensively interpreted and applied by national courts in accordance with EU legislation and the CJEU’s case law.

This CJEU ruling has no implications for national law. No amendments of national law are necessary, since national law seems to be in line with the findings of the CJEU.

CJEU case C-509/17, 16 May 2019, Plessers

CJEU ruled that

"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, in particular Articles 3 to 5 thereof, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, in the event of the transfer of an undertaking which has taken place in the context of proceedings for judicial restructuring by transfer under judicial supervision applied with a view to maintaining all or part of the transferor or its activity, entitles the transferee to choose the employees which it wishes to keep on”.

The transfer of an undertaking within the meaning of Directive 2001/23/EC does not in itself constitute grounds for dismissal by the transferor or the transferee. The transferee cannot then be entitled to choose the employees it wishes to keep and those it plans to terminate.

National law provides that the rights and obligations under an employment law relationship are automatically fully transferred to the new employer, the transferor (§ 338 et seq. of the Labour Code) in case of a transfer of undertaking. The employment of the transferred employees is thus secured – they cannot be dismissed in connection with the transfer, either before or after the transfer.

The termination of employment can only be based on grounds that are exhaustively enumerated by law (Sec 52 of the Labour Code); the transfer does not in itself constitute grounds for termination of employment.

This ruling has no implications for national law. No amendments of national law are necessary.
3.3  Fixed-term work

*CJEU case C-494/17, 08 May 2019, Rossato*

The CJEU ruled that:

"Clause 5(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, is to be interpreted as not precluding legislation which, as applied by the national supreme courts, precludes any entitlement to financial compensation on account of the misuse of successive fixed-term employment contracts for public-sector teachers whose employment relationship has been converted from a fixed-term relationship into one of indefinite duration, with limited retroactive effect, if such conversion is neither uncertain nor unpredictable or fortuitous and the limited account taken of the period of service completed under those successive fixed-term employment contracts constitutes a measure that is proportionate for the purpose of punishing that misuse, which is a matter for the national court to determine".

Czech national legislation does not explicitly mention or exclude the possibility of entitlement of the employee to financial compensation due to misuse of successive fixed-term employment contracts by the employer. The employer's obligation to compensate damages in such cases is conceivable.

To prevent abuse of successive fixed-term employment contracts or relationships (and to fulfil its obligations under EU law), Czech national law sets a maximum duration for fixed-term employment contracts (three years) and a maximum number of renewals of such contracts (they can be renewed twice). Fixed-term contracts can also be renewed based on objective (operational) reasons.

If fixed-term contracts are concluded contrary to these conditions and if the employee notifies the employer of this fact before the end of his assignment, the fixed-term employment relationship is automatically transformed into an employment relationship of indefinite duration.

The CJEU ruling, therefore, has no implications for national legislation.

3.4  Access to the profession of lawyer

*CJEU case C-431/17, 07 May 2019, Monachos Eirinaios*

CJEU ruled that:

"Article 3(2) of Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained must be interpreted as precluding national legislation which, on account of the incompatibility under that legislation between the status of monk and practice of the profession of lawyer, prohibits a lawyer who has the status of monk, and who is registered as a lawyer with the competent authority of the home Member State, from registering with the competent authority of the host Member State in order to practise there under his home-country professional title".

Member States, therefore, cannot add further (new) registration conditions to those already set out in Article 3(2) of Directive 98/5.
Under Czech national law, nationals of another Member State wishing to practice law is required to register and present to the relevant authority a certificate corroborating her registration with the competent authority in her home Member State, to obtain insurance for the purpose of practicing the profession, and to pay the registration fee – the same applies to Czech nationals (see Sec 35l et seq. of Act No. 85/1996 Coll. on the Legal Profession). This is in accordance with EU legislation.

Based on the above, the CJEU ruling has no implications for national legislation.

This CJEU ruling has no implications for national law. No amendments of national law are necessary.

### 3.5 Working time

**CJEU case C-55/18, 14 May 2019, CCOO**

CJEU ruled that:

“Articles 3, 5 and 6 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, read in the light of Article 31(2) of the Charter of Fundamental Rights of the European Union, and Article 4(1), Article 11(3) and Article 16(3) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, must be interpreted as precluding a law of a Member State that, according to the interpretation given to it in national case-law, does not require employers to set up a system enabling the duration of time worked each day by each worker to be measured”.

Member States, therefore, must require employers to set up an objective, reliable, and accessible system that can record the duration of each employee’s daily working time to ensure the effectiveness of the rights provided for in Directive 2003/88 and of the fundamental right enshrined in Article 31(2) of the Charter.

Under Czech national law, the employer must retain records of every individual employee’s working hours, overtime work, night work and on-call work. The employer must also give any employee who requests it access to his working hour records and to make notes of it (Sec 96 of the Labour Code).

There are, however, several exceptions to this general rule:

- Apart from (regular) employment contracts, there are two types of agreements for work performed outside the employment relationship (Sec 74 et seq. of the Labour Code): First, the Agreement on Work Performance (AWP). AWPs may be concluded for a maximum of 300 hours of work per calendar year. Second, the Agreement on Work Activity (AWA). Work performed based on an AWA may not exceed 20 hours per week within a relevant period.

  In both of the above described types of contract, the employer is not required to schedule workers’ working hours and to record their working time, which proves problematic with regard to achieving the aims of Directive 2003/88/EC.

- Another exception is the recording of working hours of academic workers, which was reported in the February 2019 Flash Report. Employers only have the obligation to schedule and record certain parts of academic workers’ working time. Other parts of working time (including scientific, research, development, innovation, artistic and other similar activities) are scheduled by academic workers themselves (Sec 70a et seq. of the Act No. 111/1998 Coll. on Higher Education). New provisions do not address how this part of working time is to be recorded. This is precisely the situation criticized by the CJEU and the Czech
Republic has no effective means to control compliance with the Directive’s provisions (with the right to limit maximum working time and minimum rest periods) with respect to academic workers.

The CJEU ruling in case C-55/18 has implications for national law in Czech Republic. Employers do not always have the obligation to record the duration of each employee’s daily working time (e.g. in specific areas of dependent work – work performed based on the types of agreement described above and certain work performed by academic workers). Amendments of national law may be necessary.

4 Other relevant information

Nothing to report.
Denmark

Summary

(I) The Danish Courts have found that the requirement that posting entities register information, and in particular the element that certain information is made accessible by the general public, goes beyond what is necessary for the purpose of ensuring salary- and working conditions and a safe working environment for the posted workers.

(II) An analysis of relevant CJEU law on fixed-term work, parental leave, transfer of undertakings and working time is provided.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Posting of workers

Eastern High Court, V.L.S.-1077-15, 15 May 2019

A Polish company, BIC Electronics, did not submit correct and timely information to the Danish RUT registry about the number of posted workers, etc.

The Polish company was fined for breaching the duty to register, cf. the Posting of Workers Act section 10a (1) No. 1, cf. section 10c cf. section 7a(1) and (5).

BIC Electronics questioned the fine’s lawfulness and raised the question of the lawfulness of the obligation to submit information to the Danish RUT registry in accordance with section 7a (1) and section 7c (1), claiming that it is an unjustified restriction to the free movement of services enshrined in Article 56 (1) TFEU.

The parties agreed that the requirement to submit such information in accordance with the Posting of Worker’s Act section 7a (1) and section 7c (1) is a restriction of the free movement of services in Article 56(1) TFEU. The parties further agreed that the purpose of the restrictions was to protect workers’ rights, to adhere to social legislation and fight fraud, which are crucial public interests. Finally, the parties agreed that the arrangement was suitable for ensuring that Danish authorities and the social partners were provided the necessary means to ensure that foreign companies posting workers to Denmark were applying Danish pay and working conditions.

The question was whether the duty to register, and in particular providing public access to some of the information registered (specifically, the place of delivery of services) exceeded the necessary requirements to ensure equal conditions for posted workers.

Duty to register: the requirement to register in the (former) Posting of Workers Act did not exceed the necessary requirements to ensure equal conditions for posted workers. The information matches the information Member States may request from posting entities according to the Enforcement Directive 2014/67. The (then) requirement that the information had to be lodged no later than eight days after a change in the conditions also did not exceed the necessary requirements.

Public access to information: according to the (then) section 7c(1), the public could have access to information about the posting entity’s name, business address and contact information, place of delivery of services, a contact person in Denmark and the posting
entity’s sector code. Furthermore, information on whether the company was involved in current activities in Denmark was also publicly accessible.

The provision was provided by the amendment to the Posting of Workers Act in 2010, on the expansion of duties of posting entities and of the service recipient to cooperate in ensuring that the registration is completed. The purpose of granting public access was explained in the preliminary works; the purpose was to give the social partners the possibility to ensure that the posted workers enjoy Danish pay and working conditions. Before 2010, the (then) section 5c did not specify the place of delivery of services as information that had to be publicly available. The amendment of 2010 stipulated that this information was to be made publicly accessible to improve the social partners’ possibility to contact the foreign service provider with a view to ensuring that the posted workers’ salaries and working conditions are equal to those of Danish workers. At the same time, the requirements for the contact person were strengthened, and access to information on whether the service provider had current activities in Denmark was made available.

The reason for granting other parties aside from the social partners access to such information was not further explained in the preliminary works, including the information about the place of delivery of services. In an explanatory letter to the Public Prosecutor, the Ministry of Employment in November 2014 stated that the reason to include this information was to ensure the efficient enforcement of the provisions, for the Working Environment Authority to be informed about the place of delivery of services, which inter alia can be obtained by receiving notifications from private and public persons that have been notified by the RUT registry that the registration of works has not been completed. Likewise, an explanatory letter from the Ministry of Justice in March 2018 stated that it cannot be excluded that access for the general public to such information may be of significance, i.e. that the authorities and social partners could be notified by citizens of any breaches of Danish legislation. With a view to the special construction of the Danish labour market, in which only the social partners can negotiate and control the wages on the labour market, the social partners must be granted access to the information, which was not contrived by the claimant of this case.

The question was whether the requirement to make this information publicly available (and in particular the service providers’ competitors) exceeds the necessary requirements to fulfil the provisions’ purposes.

Competitors may use information about the place of the foreign entity’s delivery of services to carry out market monitoring and competitor analyses, as the information makes it possible to identify a foreign service provider’s customer relationships and projects. Furthermore, the information available from the RUT registry can be automatically collected with a subscription, and the information can be easily stored and processed by a service provider’s competitors. The publication of the information may also be problematic for certain customers.

The disadvantage public access to the place of delivery of services brings to the service provider must be measured against its purpose, which was to improve the possibility of social partners to ensure that the salary and working conditions of the posted workers are equal to those of Danish workers. General public access according to the High Court exceeds the necessary requirements to achieve its purpose, and cannot be based on the argument that it is necessary because notifications by the general public about breaches of Danish law may be of significance for public authorities and the social partners may be of significance. Such notifications can be submitted by citizens even if they do not have public access to the information about the foreign entity’s place of delivery of services.

The Polish service provider was released from the duty to pay the fines.
The posting of workers and the monitoring and control of breaches of Danish law by posting entities is a key concern in Denmark. The ruling, in this sense, is important as it finds that the Danish requirements for posting entities exceed the necessary requirements. This is regrettable, as the registration system is crucial for monitoring and controlling the posting entities. It is necessary to ensure that the posted workers are provided appropriate salary and working conditions, which is necessary to ensure that competition with national service providers is fair. Additionally, registration ensures that the authorities can provide a safe working environment for any worker in Denmark at any work place.

On the other hand, the breach of freedom to conduct business only applies to public access to information about the foreign entity’s place of delivery of services. The ruling does not focus on the most crucial grounds for registration, but on a less important measure of registration. As already mentioned, citizens can notify the public authorities in any case, if they become aware of breaches at work places of Danish or foreign service providers.

3 Implications of CJEU Rulings and ECHR

3.1 Fixed-term work

*CJEU case C-494/17, 08 May 2019, Rossato*

This ruling concerned the consequences of misuse of fixed-term employment contracts, in particular the conversion of fixed-term employment contracts into contracts of indefinite duration and in this respect, the question of the point in time at which a contract of indefinite duration has retroactive effect.

This ruling will not have any implications for Danish law, as the consequence of the misuse of fixed-term contracts according to the Act on Fixed-term Work is not a conversion of the contract into one of indefinite duration but a fine for breaching the protection of workers.

Only if the fixed-term employee can prove an employer’s deliberate abuse of fixed-term contracts with view to undermining or avoiding long notice periods will the employer be ordered by the court to convert the contract into one of indefinite duration. This consequence has, however, become very rare since the implementation and application of the legal framework established in the Act on Fixed-term Work, and only in exceptional cases is the employee successful in proving deliberate abuse with the result of obtaining a permanent employment contract.

Even if a fixed-term employee can prove deliberate abuse, the question regarding retroactive effect of the contract of indefinite duration. Danish law provides the right of fixed-term workers who are dismissed to their wages during the notice period of (typically) three months, and in some cases compensation for unreasonable dismissal—also found in the Salaried Workers Act—if the dismissal was unreasonable based on the circumstances relating to the employee or the employer.

3.2 Parental leave

*CJEU case C-486/18, 08 May 2019, Praxair MRC*

This ruling concerned the calculation of wages during the notice period of a worker who was dismissed during part-time parental leave.

The CJEU ruled that as the dismissal did not concern the parental leave per se, but the worker’s full-time (permanent) employment relationship, the calculation of wages during the notice period should be based on the worker’s full-time (permanent) employment relationship.
The ruling may be of relevance for Danish law. Not all workers are entitled to full pay during parental leave and instead obtain parental leave benefits.

Only one ruling on this aspect has been issued by the Supreme Court on 26 November 2014, case No. 248/2012, U 2015.649 H. It concerned the specific situation of the employer’s bankruptcy during the employee’s parental leave, and the employee’s demand for the payment of outstanding wages during the notice period from the Worker’s Guarantee Fond (LG). According to the Salaried Employees’ Act, salaried employees have the right to receive half of their salary during the four weeks prior to the expected date of delivery of the child and for 14 weeks after the birth of the child. The employer receives reimbursement of an amount equal to the parental leave allowance from the local municipality during the 4-week/14-week leave (or the employee receives an additional allowance from the local municipality if half of her salary is not at least the same amount as the full-time benefits). During the remaining parental leave, the employee does not receive her salary but instead receives an allowance from the local municipality. The employment relationship in this case was terminated by the employee because the employer had not paid her wages while she was still working. The request for damages from the LG to pay her full wages for the period of work and during her notice period of more than three months, i.e. into her parental leave during which she was not being paid by the employer (with deductions for her parental leave allowance received from the local municipality) was suspended. The Supreme Court ruled that neither the CJEU ruling in the Meerts case C-116/08, nor the framework directive on parental leave could result in a situation in which the employee was entitled to have her regular salary refunded by the LG for the notice period during her parental leave period. Furthermore, this was not a matter of unequal treatment, as the employee was on unpaid parental leave at the time she terminated the employment relationship and was therefore not in a comparable situation as a salaried employee, who was working at the time of termination. The LG was not required to pay the employee an additional salary during her notice period during her unsalaried parental leave period.

The Supreme Court ruling followed the line of High Court rulings and of the Equal Treatment Board, which dealt with the right to full wages during the notice period of a dismissed employee during parental leave, during which no right to salaries exists. The Supreme Court resolved this by stating that there was no duty to pay the employee’s full wages during the notice period, if the employee was on unpaid parental leave.

This regulation, established by the Supreme Court ruling in 2014, is not in line with the ruling C-486/18.

### 3.3 Transfer of undertakings

*CJEU case C-194/18, 08 May 2019, Dodič*

This ruling is in line with Danish regulations on the concept of transfers of undertakings. It is irrelevant whether the transfer is based on a legal obligation, as confirmed by a Western High Court ruling of 23 November 2018 in case B-0836-16, U 2019.1032 V. In this case, the local municipality, according to the Statutory Act of Social Services, was required to take over the home nursing duties following the bankruptcy of a private undertaking, which did not in itself rule out that the transfer could constitute a situation that is subject to the regulation in the Act on Transfers of Undertakings. The transfer of immaterial assets must also be assessed to determine whether a transfer of undertaking has taken place, confirmed in the Eastern High Court ruling U 2002.1128 Ø, where a transfer of all debt collection cases from a practicing lawyer to another constituted a transfer of undertaking, and the Eastern High Court ruling of 24 August 2007, case B-0103-07, where the transfer of the sales operations to a cooperating partner was deemed a transfer of undertaking.
In all of the mentioned cases, the employees were also transferred. This was a condition for the transfer in U 2002.1128 Ø. There is no Danish case law in which only immaterial assets were transferred. In Danish literature, one of the leading authors has criticised the CJEU rulings C-171/94 and C-172/94 for going too far. In light of the new ruling Alta Invest, this factor would need to be revised.

Another author arrives at a conclusion that aligns well with the ruling in Alta Invest, in which the decisive element was that a significant ‘characteristic part’ of the company was transferred; the other criteria did not play as significant a role in the assessment. In the Alta Invest ruling, neither the employees nor the physical assets were the decisive element, but the fact that a ‘characteristic part’ of the company had been transferred sufficed for the case to be considered a transfer of undertaking.

**CJEU case C-509/17, 16 May 2019, Plessers**

This case dealt with a transfer of undertaking in which not all employees were transferred. The transfer in itself is not a lawful reason for terminating employment relationships. However, technical, economic or organisational reasons can be lawful reasons for terminating the employment contract. The ruling also established when a transfer is deemed a normal transfer (Articles 3 and 4) and not a transfer as the result of bankruptcy (Article 5).

As regards the selection of employees to retain, the Belgian legislation stated that the transferee can choose the employees with whom to continue the employment relationship on the basis of economic, technical and organisational grounds. In the Court’s view, this was not in line with the provisions on protection enshrined in the directive, as such a regulation may breach the principal objective, namely the protection of employees against unjustified dismissal in the event of a transfer of undertaking, as the transferee is not required to demonstrate that the redundancies arising from the transfer are based on permissible reasons.

According to Danish regulations, dismissals due to transfers of undertakings must be based on reasonable grounds, i.e. technical, economic or organisational reasons. An employee can be dismissed due to the specific circumstances of the company, i.e. the employer must prove that the reasons for dismissal applied to the individual employee (also in case of a transfer of undertaking) and that the employment relationship was terminated for those reasons. Likewise, the transferee must prove that the dismissals are not unlawful for other reasons, such as discrimination.

The Danish Act on Transfers of Undertakings applies equally to transfers from a bankrupt transferee, cf. section 1 (3).

The ruling is therefore not expected to have significant implications on Danish regulations on transfers of undertakings.

### 3.4 Access to the profession of lawyer

**CJEU case C-431/17, 07 May 2019, Monachos Eirinaios**

This ruling concerned restrictions to registering and practising as a lawyer (Danish: *Advokat*) in a Member State on the basis of a certificate obtained in another Member State. The Court distinguished between the process of registration in another Member State, which may not be subject to additional requirements and, on the other hand, the practice of law in another Member State, which may be subject to the rules of professional conduct applicable in that Member State. The rules of professional conduct have not been aligned with Directive 98/5. Denying registration solely on the ground that the applicant is a monk is not possible.
Any rules on professional conduct must be proportionate, i.e. may not exceed the necessary requirements to attain the objectives pursued. The absence of conflicts of interests is essential for practicing the profession of lawyer. Lawyers should be independent vis-à-vis the authorities.

This ruling is not expected to have implications for lawyers from another Member State wishing to register in Denmark to practice law on the basis of a certificate obtained in another EU Member State. Lawyers’ code of ethics states that the lawyer may not have any conflicts of interests. The only other restriction to practising as a lawyer is individuals employed by the government. Practising lawyers must be independent vis-à-vis public authorities, and employment in the public sector is incompatible with such independence. However, individuals can apply for dispensation to retain their status as practicing lawyers while employed in the public sector, which is only granted under rare and extraordinary circumstances. The application must be filed by the individual, and the assessment is carried out with a specific view to the risk of conflict of interests that may arise between the public employee and her as a practicing lawyer. For this reason, professors of universities, for example, cannot be granted the status as practicing lawyer and are required to deposit their status as practicing lawyers for the time being.

From a Danish lawyer’s perspective, this requirement pursues the objective purpose of ensuring the practicing lawyer’s independence and the lack of conflict of interest, and is not excessive, as any public employee can apply for approval to continue practicing law, which can be granted after a thorough assessment of the Lawyers’ Board (AdvokatRådet), specifically taking any risk of conflict of interest of the public employee into consideration.

### 3.5 Working time

*CJEU case C-55/18, 14 May 2019, CCOO*

In this ruling, the CJEU stated that the employer has the duty to register each worker’s daily working time.

Danish law does not include this duty of the employer. Employers in Denmark frequently delegates the duty to register working time to the employee, and many categories of employees have a large degree of freedom to organise their own working time, including ensuring that they take time off in lieu of overtime. In some sectors, the employer has a distinct duty to monitor and register each worker’s working time. This, however, is not the case in all sectors where it is relevant, which is the message of this ruling.

This ruling has gained widespread attention. It has been cited and promoted extensively on several online media, news bulletins, blogs, etc. The official response is that the legislators’ and the social partners will discuss the implications and how to implement the recording of daily working time considering the varied working conditions of several categories of workers, referring also to Article 17 of the Working Time Directive, as mentioned by the CJEU in its ruling.

### 4 Other relevant information

#### 4.1 General election 2019

Elections took place on 05 June 2019, and coalition negotiations were underway until 28 June 2019.
Estonia

Summary
(I) An analysis of relevant CJEU case law in Fixed-term work, working time and transfer of undertakings is provided.
(II) Bus drivers are demanding a higher monthly minimum wage.

1 National Legislation
Nothing to report.

2 Court Rulings
Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Fixed-term work

*CJEU case C-494/17, 08 May 2019, Rossato*

The case concerned the conclusion of fixed-term contracts and possible measures to ensure employees’ rights in case of abuse of fixed-term employment contracts.

The case concerned teachers in public service. The case could have implications for Estonian labour legislation and case law.

In Estonia, teachers are not considered public sector employees. The general labour law, including the Employment Contracts Act (töölepingu seadus) (hereinafter: ECA; English version is available [here](#)), applies.

The regulations on the conclusion of fixed-term employment contracts are established in Section 9 and 10 of the ECA. A justification is needed to conclude a fixed-term employment contract.

The ECA does not envisage the possibility to demand compensation in case of abuse of fixed-term employment contracts. Demands for compensation are, however, not excluded under the general clauses of civil law (Law on Obligations Act; English version is available [here](#)).

3.2 Working time

*CJEU case C-55/18, 14 May 2019, CCOO*

The present case concerned the methods of calculating working time. The main question was how the employer can ensure that a system for the calculation of working time is properly implemented and that overtime is accurately recorded.

The ruling will have important implications for Estonian labour law. The Estonian ECA Section 28 Subsection 2.4 stipulates the employer’s obligation to ensure that the agreed working time and rest periods are applied and that the employee’s working time is recorded. Although this obligation is specified, the procedures to guarantee its fulfilment are modest. This obligation is usually fulfilled in cases of shift work. In cases of regular
(standard) working time (8 hours a day, 40 hours a week), working time is usually not recorded. There is room for improvement of the applicability of the ECA and requirement to record working time in practice.

3.3 Transfer of undertaking

**CJEU case C-509/17, 16 May 2019, Plessers**

This case clarified the situation of transfers of undertakings that are in the process of legal restructuring on the basis of a transfer of undertaking under judicial supervision.

The ruling has important implications for Estonian legislation. The general rule on transfers of undertakings are specified in Section 112 of the ECA. Accordingly, employment contracts shall be transferred to the transferee pursuant to the Law of Obligations Act if the undertaking continues to perform the same or similar economic activities as the transferor.

A transferor and transferee of an undertaking are prohibited from cancelling an employment contract based solely on the transfer of undertaking.

These rules do not apply if the employer has declared bankruptcy.

The Reorganisation Act (saneerimisseadus, English version is available [here](#)) regulates companies’ legal restructuring. The Reorganisation Act does not contain details on transfers of undertakings and of employment contracts. As neither the ECA nor the Reorganisation Act include any specific regulations, it can be presumed that in case of a legal reorganisation of an undertaking, the rules on transfers of undertakings and employment contracts will be applied.

**CJEU case C-194/18, 08 May 2019, Dodič**

The implications of the ruling will be modest in Estonia. The case concerned the transfer of an undertaking involving financial institutions. The case and its consequences can be used by the courts to assess whether a transfer of undertaking has taken place or not. Although the CJEU has stated that the number of clients who changed financial institutions is not important to determine whether a transfer has taken place, but it is it is for the national court to ascertain whether it is of relevance.

In case of a transfer of undertaking, the entire situation must be taken into account.

4 Other relevant information

4.1 Collective bargaining in transport sector

The Estonian Transport and Road Workers Trade Union has started negotiations on the new monthly minimum wage for the transport sector. The trade union aims to raise the monthly wage to EUR 1 200. The collective agreements in the transport sector and in particular for bus drivers will end in 2019. The negotiations have already lasted approximately one year. So far, no agreement has been reached. At present, the bus drivers’ monthly minimum wage is EUR 945 gross.

More information can be found [here](#) (in Estonian).
Finland

Summary
An analysis of relevant CJEU case law on parental leave, fixed-term work, working time and transfer of undertakings is provided

1 National Legislation
Nothing to report.

2 Court Rulings
Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Parental leave
*CJEU case C-486/18, 08 May 2019, Praxair MRC*

This judgment will have implications for Finnish labour law. The wages paid during the period of notice are based on the employee’s monthly salary at the time notice was given. The employee receives the same salary she would have earned if the employment relationship had continued, i.e. if the period of notice is six months, and the employee was on part-time parental leave for the following four months, she is entitled to four months of her reduced, part-time salary and two months of her normal salary.

The majority of employees who use their right to part-time parental leave are women.

3.2 Fixed-term work
*CJEU case C-494/17, 08 May 2019, Rossato*

The judgment will be taken into account by Finnish courts, but there is no need to modify the relevant legislation, which is in line with the Directive.

3.3 Access to the profession of lawyer
*CJEU case C-431/17, 07 May 2019, Monachos Eirinaios*

The fact that a lawyer is a monk as well seems to not be problematic according to the applicable legislation on lawyers and the regulations of the Finnish Bar Association.

3.4 Working time
*CJEU case C-55/18, 14 May 2019, CCOO*

The recording of working time is regulated in the Finnish working hours regulation. All employers are required to keep records of their employees’ working hours (with the exception of the few employees to whom the Working Hours Act is not applied, such as managers).
4 Other relevant information

Nothing to report.
France

Summary
(I) This report discusses a decree on the posting of workers.
(II) The case law of the Court of Cassation on social matters concerning dismissal, equal treatment or collective labour relations is also discussed.
(III) An analysis on the judgments of the Court of Justice of the European Union on parental leave, working time and the transfer of undertakings is also provided.

1 National Legislation
1.1 Posting of workers
Decree No. 2019-555 of 04 June 2019, ‘laying down various provisions on the posting of workers and strengthening the fight against illegal work’, finalises the posting section of the Professional Future Act of 05 September 2018 (N°2018-771, JORF n°0205 du 6 September 2018 texte n° 1). It modifies the regulatory part of the Labour Code to incorporate the new legal provisions: the possibility of the Directorate to temporarily prohibit the provision of services in the event of non-payment of administrative fines, vigilance of the principal with regard to the payment of these fines, control measures by the labour inspectorate, etc. An order dated with the same date specifies the sectors of activity exempt from the declaration of secondment.

1.1.1 Artists, scientists and athletes: exemptions from declaration
This decree specifies the employees who do not need to make a prior declaration of secondment or to appoint a representative of the company in France (C. trav., art. L. 1262-6). These are employees on secondment, for short-term services or as part of one-off events, who carry out one of the following activities:

- artists (performing arts, film and audio-visual production and distribution, phonographic publishing) whose performances do not exceed 90 days over 12 consecutive months;
- athletes, referees, members of the athlete support team, official delegates involved in the practice or organisation of sporting events, where the duration of their services does not exceed 90 days over 12 consecutive months;
- apprentices who temporarily work in France as part of their training and whose presence in the territory does not exceed 12 consecutive months (the apprentice’s presence in France may not be linked to the performance of a service on the national territory in which he is participating in the program abroad);
- participants in scientific symposia, seminars and events as well as visiting professors and researchers who carry out teaching activities, provided that the duration of the intervention does not exceed 12 consecutive months.

For these employees, the employer has 15 days to obtain and make available the documents (translated into French) to the labour inspectorate on the secondment service listed in Article R. 1263-1 of the Labour Code.
1.1.2 The declaration of posting has evolved
The content of the prior declaration of secondment listed in Articles R. 1263-3, R. 1263-4 or R. 1263-6 of the Labour Code depending on the type of secondment, will be amended on 01 July 2019. The decree adds the specification of gender of the seconded employees and indicates that the notion of remuneration mentioned in the declaration corresponds to the hourly rate applied during the secondment. It makes the mandatory information relating to the identification of the principal more flexible.

The decree states that the appointment by the employer of a representative on French soil should be included in the declaration of secondment. This designation is no longer the subject of a specific written document. The declaration of secondment must in particular indicate the representative's electronic and telephone details as well as the place of storage of the documents related to the secondment.

1.1.3 Contracting authority: the documents to be requested from the contracting partner
On 01 July 2019, the decree will amend the list of documents that the contracting authority or principal who concludes a contract with an employer established outside of France must request. Before the start of each secondment, they will now have to obtain an acknowledgement of receipt of the secondment declaration made via the ‘Sipsi’ teleservice (and no longer a copy of this declaration). They must also obtain a declaration that the contracting partner has, where applicable, paid the sums due for any fines relating to the posting of workers.

On the other hand, the decree removes the copy of the appointment of the employer’s representative in France from the list of documents. It will no longer be necessary to request this document, since the designation will now be included in the prior declaration made by the employer.

The decree specifies the form the request for documents or information from the labour inspectorate must take from 01 July 2019. This request must be made in writing. When it concerns information on unidentified persons, the request must fulfil certain conditions and cover a specific and limited period: it may be divided, but may not exceed a total of 18 months. At the agents’ request, the information shall be communicated on a computer medium, by a secure device, and kept for at least three years.

2 Court Rulings
2.1 Dismissal
The so-called ‘Macron Ordinances’ overhauled the Labour Code in September 2017. One of the main effects was the introduction of a schedule of damages in French labour law, whereby a judge can award damages for unfair dismissal only (i.e. dismissal without the existence of a serious ground) within certain limitations depending on the employee’s seniority. This is a ground-breaking change as it means that judges lose their power to freely assess the harm suffered following an unfair dismissal.

While some lower courts have applied the new law, an increasing number of courts are challenging it on the basis that it contravenes the provisions of the International Labour Organization (e.g. Convention 158, Termination of Employment Convention 1982) and the Council of Europe (e.g. Article 24 of the European Social Charter).

The first rulings by courts of appeal are expected in Summer 2019. The French Supreme Court has been asked for its advice, which it is free not to provide at this stage.

On 22 September 2017, the overburdened registries of the boards of industrial tribunals welcomed queues of lawyers filing requests for their clients. The next day, Ordinance
2017-1387 entered into force. One of the most emblematic but also disparaged measures of the Macron Ordinances is the creation of a scale framing damages that are granted to an employee in case of unfair dismissal.

In order to circumvent the maximum amount—which is applicable only to unfair dismissals—employees have raised claims on other grounds. For instance, employees have filed claims for nullity of dismissal (in case of harassment or discrimination). Moreover, complementary claims for damages (e.g. breach of the obligation of security, unfair execution of the contract or moral damage) have also increased.

However, an unprecedented number of industrial tribunals have dismissed the application of the damages scale. The first to dismiss the scale was the Troyes Industrial Tribunal (on 13 December 2018), which was followed by Amiens, Grenoble (where one section of the industrial tribunal ruled for the application of the scale and another against its application) as well as Paris and Montpellier.

Other industrial tribunals have dismissed employees who were trying to avoid the scale. Employees—with varying levels of success—have claimed the Macron scale’s violation of the International Labour Organization Convention 158, which established the principle of ‘adequate compensation or any other form of reparation considered appropriate’ in the event of unfair dismissal.

In fact, several International Labour Organization signatory states use such scales without their compliance being questioned. For example, the European Social Charter enshrines ‘the right of unfairly dismissed workers to appropriate remedy’.

The increase in contradictory judgments among the industrial tribunals has created legal uncertainty. It has now become an urgent matter to end the confusion.

On 26 February 2019, the Ministry of Justice issued a circular asking the presidents of the courts of appeal to notify the ministry of any decision relating to the application of the scale. The ministry also requested being kept informed of the ongoing appeal procedures to intervene in cases to publicise the Prosecutor General Office’s opinion. This was the case for the first time on 23 May 2019 before the Paris Court of Appeal.

The first judgments are expected from the Paris Court of Appeal in September 2019 and from the Reims Court of Appeal in June 2019.

Moreover, on 10 April 2019, the Louviers Industrial Tribunal appealed to the Cour de Cassation for an opinion. The tribunal asked the court to decide on the compatibility of the scale with these texts. The court’s answer should be announced on 08 July 2019.

### 2.2 Equal treatment

*Labour division of the Court of Cassation, No. 18-11.498, 05 June 2019*

In the present case, several employees of a cleaning company claimed that they did not benefit from certain wage elements paid to employees of another cleaning site between 2010 and 2015, and who have since been transferred to another company. They therefore brought an action before the labour court for the relevant premiums on the ground that the principle of equal treatment had been infringed.

Although the employer justified this difference in treatment with the obligation to maintain the rights and benefits granted to the transferred employees by their former employer on the day of the transfer, the Court of Appeal, granting the employees’ request, ordered the company to pay them the remainder of basket, holiday and travel bonuses. The court deemed that the employer had not provided any objective and relevant reason to legitimise the disparity in remuneration between the employees at the different sites. However, the Court of Appeal limited these remainders of remuneration to certain amounts since the employees of the site with whom the
plaintiffs compared themselves to had since been taken over by another company and were therefore no longer part of the company’s workforce. According to the appellate judges, since the payment of bonuses by the employer to these employees was not justified, the inequality in treatment could only be invoked during the period of employment of the relevant employees, i.e. between 2010 and 2015.

On the contrary, the Court of Cassation, reversing the decision handed down by the judges on the merits, considered the fact that the employees to whom the applicants compared themselves to were no longer part of the company’s workforce was not grounds to deprive them of the right to receive an element of remuneration due to them under the principle of equal treatment. Consequently, the High Court clarified that the justification that the employees with whom the applicants compared themselves with had left the company on the day of the request does not constitute an objective and relevant reason to legitimise a difference in treatment.

"Attendu que pour limiter à certaines sommes les rappels de primes de panier, de vacances et de trajet, les arrêts retiennent, d’une part que la société ISS propreté a repris à la société Onet le marché de la propreté du site « CEA de Cadarache » à compter du 1 juin 2010 mais a perdu celui ci le 31 octobre 2015 au profit de la société Onet, que les contrats de travail des salariés affectés à ce site ont été transférés de l’entreprise sortante à l’entreprise entrante en application des articles 7 et suivants de la convention collective nationale des entreprises de propreté et services associés du 26 juillet 2011, d’autre part qu’il n’est pas justifié que l’employeur aurait versé une prime de panier et une prime de trajet à d’autres salariés de l’entreprise avant le 1 juin 2010 et après le 31 octobre 2015, qu’il n’est pas non plus justifié du versement d’une prime de vacances à d’autres salariés de l’entreprise en dehors des années 2011, 2013, 2014 et 2015, de sorte que l’inégalité de traitement ne peut être invoquée en dehors de cette période;

Qu’en statuant ainsi, alors que la circonstance que les salariés auxquels ils se comparaient ne fassent plus partie des effectifs de l’entreprise ne saurait priver les intéressés du droit à percevoir un élément de rémunération qui leur est dû en application du principe d’égalité de traitement, la cour d'appel a violé le principe susvisé;"

2.3 Maternity leave

Labour division of the Court of Cassation, No. 18-12.862, 05 June 2019

An employee hired as a sales operator by a financial consulting firm was on maternity leave twice. During these periods, she received additional pay from her employer in accordance with Article 32 of the National Collective Agreement of Financial Companies of 22 November 1968. This agreement provides that 'in the event of maternity leave, employees will receive their full salary, up to a maximum of sixteen weeks, after deduction of daily allowances from social security and any pension fund to which the employer contributes'.

The employee, who received a fixed remuneration as well as a variable part that fluctuated every month according to the turnover she made on behalf of the company, contested the method used by her employer to calculate her 'full salary' during her two periods of leave.

More specifically, the employee questioned the reference period chosen by her employer to calculate the amount of her salary.

The Paris Court of Appeal rejected the employer’s reasoning and held that the remuneration to be taken into account must correspond 'to the most significant part of
remuneration compared to that received by the employee before her leave and include the variable part of remuneration (...)'.

Given the fluctuating nature of the turnover generated by the employee’s activity from one month to the next, the judges of the merits indicate that the employer should have withheld the salary received during the last 12 months before the beginning of each leave.

The Court of Cassation approved this reasoning and added that in the absence of a collective agreement, the employer could not take the last three months’ salary into account ‘since the employee had not achieved any turnover entitling her to her variable part of remuneration over this period’. For the Supreme Court, ‘the basis of the calculation over the last twelve months recommended by the employee was justified’ because it allows smoothing out the differences in variables.

"Mais attendu qu’ayant énoncé, à bon droit, que, selon l’article 32 de la convention collective nationale des sociétés financières du 22 novembre 1968, la salariée en congé de maternité bénéficiait de son "salaire plein", dans la limite de seize semaines, sous déduction des indemnités journalières de la sécurité sociale et de tout organisme de prévoyance auquel l’employeur contribue, la cour d’appel a exactement retenu que le salaire à prendre en compte devait intégrer la part variable de la rémunération; qu’en l’absence de précision de la convention collective de la période de référence à prendre en considération, elle a pu, relevant que l’activité tirée du chiffre d’affaires avait un caractère fluctuant en fonction des mois et des périodes dans l’année et que son évaluation annuelle permettait de lisser ces écarts de variables, décider que l’employeur ne pouvait fonder sa base de calcul sur les trois derniers mois précédant le congé de maternité dès lors que la salariée n’avait réalisé aucun chiffre d’affaires lui ouvrant droit à sa part variable sur cette période, que la base de calcul sur les douze derniers mois préconisée par la salariée était justifiée et qu’il convenait de retenir la moyenne annuelle ; que le moyen n’est pas fondé;

Et attendu qu’il n’y a pas lieu de statuer par une décision spécialement motivée sur le moyen unique, pris en ses deuxième, troisième et quatrième branches, qui n’est manifestement pas de nature à entraîner la cassation;"

2.4 Collective labour relations

Labour division of the Court of Cassation, QPC, No. 18-22.556, 05 June 2019

In the context of a dispute with the Health, Safety and Working Conditions Committee of its Ile de France establishment, Manpower France, a major temporary employment agency, submitted a priority constitutionality question (QPC) to the Court of Cassation.

Manpower France, assuming that the Health, Safety and Working Conditions Committee of the temporary company was entitled to request expertise within the user company, submitted a QPC with the following terms: ‘the provisions of Article L. 4614-12 of the Labour Code, in so far as they authorise the Health, Safety and Working Conditions Committee of a temporary employment agency to use an approved expert when a serious risk is identified in the establishment of a user undertaking that temporary workers are made available to and thus to conduct an expert assessment in a user undertaking, disregarding (…)’ various main constitutional principles, and in particular, the principle of workers’ participation in determining their working conditions.

Article L. 4612-1 of the Labour Code provides that the Health, Safety and Working Conditions Committee contributes to the prevention and protection of the health and safety of the establishment and those made available to it by an outside company. It is assumed that this also applies to temporary workers. However, there is no provision to initiate expertise for serious risks.
Thus, the Court has already ruled that the fact that an employee has been placed at the disposal of another company does not allow the members of the Health, Safety and Working Conditions Committee of the home company to visit the site of the user company, since only the Health, Safety and Working Conditions Committee of the latter had the task of contributing to the protection of the health and safety of employees placed at its disposal by an outside company (Cass. crim., 17 Jan. 1995, No. 94-80.192). This principle, which tends to consider that it is the Health, Safety and Working Conditions Committee of the user company that is in a position to intervene with the employees made available since its members are in the workplace, had already been mentioned in a ministerial reply (Rep. min. No. 22650: JOAN Q, 7 Dec. 1987, p. 6620).

The Court of Cassation, which acts as a 'filter' for the QPCs to decide whether they are serious and new enough to deserve transmission to the Constitutional Council, refused to transmit it. According to the Court, the question is neither new nor serious.

The Court, without even referring to the principles mentioned above, considered that the question was not of a serious nature because no consistent interpretation of case law in this area exists, authorising the Health, Safety and Working Conditions Committee of a temporary employment agency to conduct an assessment for serious risks within a user undertaking. There was therefore no solid legal basis for the challenge, and thus no need to refer the matter to the Constitutional Council.

Labour division of the Court of Cassation, No. 17-31.029, 29 May 2019

In this case, a company consisted of four separate establishments with a governing board. Professional elections in each of the units take place on the same date. An amendment to the pre-electoral protocol concerns the composition of the central works council renewed as a whole. It provides for 12 seats for members and 8 seats for alternates appointed from among the alternates of the works councils.

In one of the units, an elected alternate member changed her mind a few days after being appointed by her school committee. The latter therefore met again to make a new appointment. All of these operations took place within a few weeks: the elections of the works councils take place on 05 October, on 19 October, the works council meets and appoints its representatives to the works council, and meets again on 31 October to replace the substitute who resigned from his mandate on the works council.

A trade union brought an action before the district court to annul this designation. The judge dismissed the union on the grounds that no special provision had been made for the replacement of an alternate member, so the transaction was not irregular. For the Court, the appointment of a new substitute constituted a 'rectification of the delegation', and 'was intended to ensure that the CCE was, at least at the beginning of its constitution, filled with a maximum of its 12 titular seats and eight substitute seats as provided for in Amendment No. 2 to the Protocol on the Composition of the CCE'.

However, these common sense arguments have no legal basis, as confirmed by the Court of Cassation. Thus, it sweeps aside the logic deployed by the judge by explaining that the amendment to the protocol on the composition of the ECC did not provide for any stipulation relating to the replacement of an alternate member of the ECC. Thus, the district court 'violated the aforementioned amendment'.

In other words, if no regulations are provided for in the protocol or agreement, since the law does not provide for the replacement of substitutes, it is impossible to do so. This is the case even if the new designation follows the first one by a few days. It is therefore useful to include such provisions in the protocol or agreement that establishes the EAC, or at the very least to inform candidates with a mandate as alternate members of the EAC about the consequences of possible disaffection.
This solution is of course valid for the CSEC, as the rules in this respect have not been modified.

It should be noted that this solution confirms and complements another judgment of the Social Chamber which asserted that since the law did not provide for the replacement of substitute works council members who had become members during their term of office, only a specific provision in a collective agreement or a provision of the pre-electoral protocol could provide for a replacement by calling on non-elected candidates (Cass. soc., 30 May 2001, n° 00-60.192).

### 3 Implications of CJEU Rulings and ECHR

#### 3.1 Parental leave

**CJEU case C-486/18, 08 May 2019, Praxair MRC**

In response to the question of the Court of Cassation in particular on the methods of calculating severance pay for employees whose employment contracts are terminated during part-time parental leave, the Court of Justice of the European Union pointed out that such non-compliance leads to indirect discrimination. Although formulated in a neutral way, the provision of the French Labour Code effectively penalises more women than men, with far fewer men choosing to take parental leave. If this difference in treatment is not justified by objective factors unrelated to any discrimination, French legislation contravenes the principle of equal pay for female and male workers.

The European Court of Justice stated that when a full-time employee is dismissed while on part-time parental leave, his severance pay must be determined entirely on the basis of his full-time wages: in this particular case, the application of Article L 3123-5 of the Labour Code is not in line with European law.

The European Court of Justice also clarified that reclassification leave allowance must be determined entirely on the basis of the employee’s full-time wages. Consequently, the application of Article R. 1233-32 of the Labour Code providing for the calculation of this allowance on the basis of the employee’s average wages received during the 12 months preceding the notification of dismissal is not in line with European law.

The application of these regulations of French law implies unjustified indirect discrimination insofar as such leave is primarily requested by women. The Court of Cassation must now take this position into consideration in the disputes involving these questions.

#### 3.2 Access to the profession of lawyer

**CJEU case C-431/17, 07 May 2019, Monachos Eirinaios**

The Court of Justice of the European Union issued a ruling on this issue. It follows from this decision that national legislation cannot prevent a monk from entering the legal profession. Article 3(2) of Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained must be interpreted as precluding national legislation which, on account of the incompatibility under that legislation between the status of monk and the practice of the profession of lawyer, prohibits a lawyer who has the status of monk and who is registered as a lawyer with the competent authority of his home Member State, from registering with the competent authority of the host Member State to practise there under his home country’s professional title.
In France, the Law of 11 February 2004 (L. n° 2004-130, 11 February 2004: OJ, 12 February 2004) on the status of legal and judicial professions takes account of Directive 98/5/EC of 16 February 1998 and grants Community nationals access to the legal profession in France and ensures a certain equality between lawyers practising under a French title and Community lawyers practising under their original title. The Decree of 11 May 2016 (D. No 2016-576, 11 May 2016: OJ, 13 May 2016) amends Article 99 of the 1991 Decree and the procedures for recognition of the professional qualifications of lawyers practising in an EU Member State or in a state that is party to the EEA Agreement other than France. Hence, the qualifications of persons who have acquired their professional qualifications in an EU Member State or in a state that is party to the EEA Agreement other than France are recognised in France after one year of practice in their home state.

### 3.3 Working time

*CJEU case C-55/18, 14 May 2019, CCOO*

On 14 May 2019, the European Court of Justice handed down a landmark decision on the calculation of employees’ working time. The purpose of the request—which was referred to the European Court of Justice by a Spanish court—was to obtain confirmation that the employer is required to introduce a system for calculating employees’ actual working time. In its judgment of 14 May 2019, the European Court of Justice ruled that ‘Member States must require employers to set up an objective, reliable and accessible system to measure the daily working time of each worker’.

French law has already implemented such a system. Where no collective timetable exists that is applicable to all workers employed in a service or workshop, the employer is required to draw up the necessary documents for calculating working time, compensatory rest periods acquired and whether these are actually taken (Article L. 3171-2 of the Labour Code). This applies to all employees. The company must record the start and end times of each work period on a daily basis, or record the number of hours worked by each employee. A weekly summary must also be made using any means (Article D. 3171-8 of the Labour Code).

### 3.4 Transfer of undertaking

*CJEU case C-509/17, 16 May 2019, Plessers*

The Court of Justice of the European Union ruled on the question whether a national provision may allow the transferee of an undertaking to select the employees taken over in the context of a transfer of undertaking.

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, in particular Articles 3 to 5 thereof, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, in the event of the transfer of an undertaking which has taken place in the context of proceedings for legal restructuring by transfer under judicial supervision, applied with a view to maintaining all or part of the transferor or its activity, entitles the transferee to choose the employees it wishes to keep on.

In the event of a transfer of an undertaking, the employees’ employment contracts must be taken over pursuant to Article L. 1224-1 of the Labour Code. This principle applies regardless whether a partial or total transfer of the company occurs. All contracts are therefore taken over by the new employer, unless the employee and the employer agree to terminate or modify the contractual terms.
According to French legislation, the transfer of contracts is automatic and covers all employees. There is no legislation that allows the new employer to select the employees to be transferred and which are not.

4 Other relevant information
Nothing to report.
Germany

Summary
(I) The Federal Cabinet approved a bill proposed by the Federal Minister of Labour to improve the remuneration of nursing staff.

(II) The State Labour Court ruled that an employee’s leave generally only expires if the employer specifically requested the employee in advance to take leave and has clearly and timely informed him that the leave would otherwise expire at the end of the leave year or transfer period.

(III) The Labour Court Gießen handed down a ruling on the legal protection of works council members.

(IV) In the view of the Federal Labour Court, mass dismissal may only take place if the notice of mass dismissal has been received by the competent employment agency.

(V) According to the Federal Social Court, nursing staff working as so-called paid nursing staff in care facilities are generally not to be regarded as being self-employed, but are subject to compulsory social insurance like regular employees.

1 National Legislation

1.1 Minimum wage

On 19 June 2019, the Federal Cabinet approved a bill proposed by the Federal Minister of Labour to increase the remuneration of nursing staff. The draft of a law for higher wages in the care sector (Pflegelöhneverbesserungsgesetz) aims to improve working conditions in the care sector.

The draft provides, among other things, for trade unions and employers to negotiate a collective agreement on the basis of the law on the posting of workers (section 7a of the Act on Posting of Workers, Arbeitnehmerentsendegesetz). The procedure under the Act is to be adapted, taking into account the right of church autonomy and the importance of religious communities in the care sector. The aim is for minimum wages to be differentiated in the future according to auxiliary and skilled workers and for the East/West disparities to be eliminated. The Federal Government would be able to declare this agreement as generally binding for the entire sector by ordinance.

If no collective agreement can be concluded, the draft law provides for the establishment of a permanent commission which would then determine the working conditions in the nursing care sector.

2 Court Rulings

2.1 Annual Leave

State Labour Court Cologne, v– 4 Sa 242/18, 09 April 2019

Taking into account European law (CJEU case C-684/16, 06 November 2018, Max-Planck-Gesellschaft zur Förderung der Wissenschaften), the Court ruled that an employee’s leave generally only expires if the employer specifically requested the employee in advance to take leave and has clearly and timely informed him that the leave will otherwise expire at the end of the leave year or transfer period. The employer carries the burden of initiative to specifically request the employee to take leave in the current calendar year. This obligation of the employer also applies to leave from previous calendar years.
2.2 Works councils

*Labour Court Gießen, 3 Ca 433/17, 10 May 2019*

The Court sentenced an employer to pay a works council member compensation in the amount of 20 000 EUR because he had smuggled a detective into his company as a stool pigeon to discredit the works council member and to prompt reasons for dismissal. Such action was considered a serious violation of personality rights by the Court pursuant to sections 823(1), 830(1), 840(1) of the Civil Code in conjunction with Articles 2(1), Art. 1(1) of the Constitution.

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

2.3 Collective redundancies

*Federal Labour Court, 6 AZR 459/18, 13 June 2019*

According to section 17(1) sentence 1 of the Dismissal Protection Act (*Kündigungsschutzgesetz*), an employer is required to issue a collective redundancy notification to the Employment Agency before giving notice:

- in establishments with usually more than 20 employees and less than 60 employees, more than 5 employees;
- in establishments with usually at least 60 and less than 500 employees, 10 per cent of the employees regularly employed in the establishment or more than 25 employees;
- in establishments usually employing at least 500 employees, at least 30 employees within 30 calendar days.

According to the Federal Labour Court, the required notification of collective redundancy pursuant to section 17(1) KSchG can also be effectively filed if the employer has already decided to terminate the employment relationship at the time it is received by the employment agency. Subject to the fulfilment of other notice requirements, notices of dismissal in a mass dismissal procedure are therefore effective if the notification is received by the competent employment agency before the employee has received the letter of dismissal.

In the opinion of the Court, the dismissal may only take place, i.e. be received by the employee (section 130(1) of the Civil Code) if the notice of mass dismissal has been received by the competent employment agency. This was clarified in the case law of the CJEU on Art. 3 and Art. 4 of Directive 98/59/EC (Collective Redundancy Directive), so that the Senate had refrained from referring the question to the CJEU for a ruling pursuant to Art. 267(3) TFEU.

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

2.4 Concept of worker

*Federal Social Court, B 12 R 6/18 R a. o., 07 June 2019*

According to the Court, nursing staff working as so-called paid nursing staff (*Honorarpflegekräfte*) in care facilities are generally not to be regarded as being self-employed in this activity, but are subject to compulsory social insurance like regular employees.
The term ‘fee-based nurse’ is not defined by law. Nursing staff on a fee basis are employed primarily for inpatient hospital treatment and for inpatient or outpatient care. They work on the basis of individually agreed assignments and often work for several clients as well as for a limited number of days or weeks. They are often placed in the facilities by agencies and work for a pre-determined hourly rate, which is usually significantly higher than the salary of a comparable employed nurse. In the inpatient sector, paid nurses work both in hospitals and nursing homes.

A press release can be found here.

3 Implications of CJEU Rulings and ECHR

3.1 Parental leave

_CJEU case C-486/18, 08 May 2019, Praxair MRC_

German law seems to be in line with the requirements of the CJEU. However, German law does not, in principle, provide for any compensation in case of dismissal during that period.

3.2 Transfer of undertaking

_CJEU case C-194/18, 08 May 2019, Dodič_

Since the ruling of the CJEU in case C-24/85, 18 March 1986, _Spijkers_, it has been acknowledged that the possible transfer of clients is one of the aspects of the overall assessment whether a transfer of undertaking has taken place. This is also reflected in the case law of the Federal Labour Court. Reference can be made in particular to the decision of the Federal Labour Court, 8 AZR 733/13, of 18 September 2014 which dealt with a case in which the lessee of a service station changed while the purpose of the business and the location basically remained the same. In this context, the Court also considered the aspect of the taking over of clients as part of the overall assessment of whether a transfer of undertaking had taken place. In this regard, the Court stated that:

"in the absence of any significant aspects concerning the identity of the economic unit of the service station ÜH1 and the service station ÜH2, which could indicate a transfer of undertaking, and in the absence of any special 'brand loyalty' overriding a change of location, the isolated fact of a possibly far-reaching identity of the former and new customers of the petrol station is not decisive for determining the existence of a transfer of undertaking".

(Federal Labour Court of 18 September 2014– 8 AZR 733/13, note 31)

_CJEU case C-509/17, 16 May 2019, Plessers_

German law is in line with the requirements of the CJEU. The CJEU has concluded that the fact that the purchaser under Belgian law is free to select the employees she wishes to take over in a transfer of undertaking is incompatible with Union law. This is also the position of the Federal Labour Court. Some time ago, the Federal Labour Court decided that sellers and purchasers may not use the transfer of an undertaking, even in the event of insolvency, to dispose of employees who are in need of protection (Federal Labour Court of 20 September 2006 – 6 AZR 249/05). Such protection is achieved by the fact that the employees to be dismissed must be selected according to (social) criteria laid down in section 1(3) of the Dismissal Protection Act (Kündigungsschutzgesetz). As the insolvency administrator in dismissal protection proceedings bears the burden of proof for all circumstances that necessitate the
dismissal (see Federal Labour Court of 31 July 2014 – 2 AZR 422/13), it is incumbent on him to prove that the employees to be dismissed were selected for good reasons and not arbitrarily (see also *Fuchs*, EuGH: Unionsrechtswidrigkeit des Rechts zur Auswahl bestimmter Arbeitnehmer bei Betriebsübergang in der Insolvenz, in: Neue Zeitschrift für Insolvenzrecht (NZI) 2019, p. 559).

3.3 Fixed-term work

*CJEU case C-494/17, 08 May 2019, Rossato*

Section 16 of the Part-Time and Fixed-Term Contracts Act (*Teilzeit- und Befristungsgesetz*) reads as follows:

“If the fixed term is legally ineffective, the fixed-term employment contract shall be deemed as having been concluded for an indefinite period; it may be terminated by the employer at the earliest on the agreed end date, unless termination is possible at an earlier date pursuant to section 15(3). If the time limit is ineffective only because of the lack of written form, the employment contract can also be terminated before the agreed end date.”

This might be in line with the requirements of the CJEU. The German law does not provide for additional financial remedies, but the CJEU has made it clear that the case-law of the Court ‘does not require more than one measure to apply concurrently’ (CJEU of 08 May 2019 – C 494/17, note 41).

3.4 Working time

*CJEU case C-55/18, 14 May 2019, CCOO*

At present, pursuant to section 16(2) of the Working Time Act (*Arbeitszeitgesetz*), an obligation to record working time only exists for those hours that exceed the standard daily maximum working time of eight hours. In this respect, it is currently being discussed in Germany whether a referral to the European Court of Justice is necessary, at least if it is assumed that section 16 cannot be interpreted as being in conformity with Union law (see *Ulber*, Arbeitszeiterfassung als Pflicht des Arbeitgebers, in: Neue Zeitschrift für Arbeitsrecht 2019 (NZA), 2019, p. 677).

4 Other relevant information

Nothing to report.
Greece

**Summary**
An analysis of relevant CJEU case law is provided.

1  **National Legislation**
Nothing to report.

2  **Court Rulings**
Nothing to report.

3  **Implications of CJEU Rulings and ECHR**

3.1  **Transfer of undertakings**
*CJEU case C-194/18, 08 May 2019, Dodič*

According to the case law of the CJEU, the degree of importance to be attached to each criterion for determining whether a transfer of undertaking has taken place within the meaning of the directive varies according to the activity carried out, or on the production or operating methods employed in the relevant undertaking, business or part of a business. It is interesting that the Court actually underlines that in the event of investment activities it is relevant whether the clients had an express choice or not about the transfer of their accounts, or whether there was a default transfer of the records relating to their accounts.

3.2  **Fixed-term work**
*CJEU case C-494/17, 08 May 2019, Rossato*

The legal regime of fixed-term contracts in the public sector is regulated in the provisions of P.D. 164/2004 transposing Directive 1999/70 in the public sector. Directive 1999/70 provides for equal treatment between employees with fixed-term contracts and those with contracts of indefinite duration. According to the provisions of Article 103 of the Greek Constitution, it is unlawful to hire public sector employees for a fixed or for an indefinite period without applying a special administrative procedure.

A case brought before the Supreme Court concerned equal pay of employees with a fixed-term contract hired without recourse to the special administrative procedure (‘ASEP’) that is applicable to their posts, and employees with contracts of indefinite duration hired regularly under ‘ASEP’.

The Court stated that in view of Clause 4 of Directive 1999/70/EC as well as of the general principle of equal treatment, the time and procedure of recruitment or the duration of the contract may be considered reasons justifying inequality in pay.

On the other hand, Greek legislation provides that the period of service of civil servants completed under fixed-term employment contracts in the public sector must be taken into account to determine their salary.
3.3 Access to the profession of lawyer

*CJEU case C-431/17, 07 May 2019, Monachos Eirinaios*

This judgment directly affects Greek legislation.

3.4 Working time

*CJEU case C-55/18, 14 May 2019, CCOO*

Greek legislation does not require employers to establish a system that enables the calculation of daily working hours of each worker. However, according to Article 36 of Law 4488/2017, the employer has the obligation to electronically establish in the official information database any change in the hourly work schedule of employees (e.g. overtime) before initiating any supplementary work or introducing any changes to the work schedule. If the employer fails to do so, administrative sanctions will apply. This facilitates control by the labour inspectorate of adherence to the working time provisions.

3.5 Transfer of undertakings

*CJEU case C-509/17, 16 May 2019, Plessers*

Greek legislation does not provide that in the event of a transfer of undertaking, which takes place in the context of proceedings for legal restructuring by transfer under judicial supervision, the transferee is entitled to select the employees it wishes to keep on.

4 Other relevant information

Nothing to report.
Hungary

Summary
An analysis of relevant CJEU case law is provided.

1 National Legislation
Nothing to report.

2 Court Rulings
Nothing to report.

3 Implications of CJEU rulings and ECHR
3.1 Sex discrimination

*CJEU case C-161/18, Villar Láiz*

The relevant Hungarian legislation is as follows: Act LXXX of 1997 on the Eligibility for Social Security Benefits and Private Pensions and the Funding for These Services (hereinafter: Tbj); Act LXXXI of 1997 on Social Security Pension Benefits hereinafter (Tny).

Full-time or part-time employment is not relevant for entitlement to old-age pension. Section 5 Sub 1 point a) in Tbj states that for the purposes of this Act, insured persons are:

a) persons engaged under a contract of employment (not including any pensioner entitled to draw pensions on his own right who is engaged under an employment relationship provided for in the Labour Code), in a civil service relationship, in a service relationship with a law enforcement agencies, public officials, government officials, political officials, commissioners, judges and law enforcement employees, employees of public prosecution bodies, registered foster carers, persons engaged in employment under a scholarship agreement, guest lecturers within the framework of a scholarship programme, person employed in a public benefit employment programme, professional staff members of the Hungarian Armed Forces, law enforcement agencies, the Parliament Guard, civilian national security services, the Nemzeti Adó- és Vámhivatal (National Tax and Customs Authority), members of the Független Rendészeti Panasztestület (Independent Police Complaints Board), and contracted members of the Hungarian Armed Forces, volunteer reservists in active military service, army civilian personnel, Members of Parliament and national spokesmen, (hereinafter 'employment relationship'), irrespective of whether they have concluded a full-time or part-time employment relationship.

Part-time work is of significance for the calculation of the amount of old-age pension. This amount is calculated on the basis of the employee’s average monthly earnings and her service period. Under Section 20 Sub 1 of the Tny, “the amount of old-age pension benefits depends upon the recognised service time and the average monthly income on which the old-age pension is based.”

Section 20 Sub 2 of the Tny states that the amount of old-age pension benefits shall be a percentage of the average monthly income on which the old-age pension is based. Thus, if the insured person had a lower income during a certain period (e.g. due to part-
time work) than her monthly average wages, this lower amount will be taken into account in the calculation of the overall amount of old-age pension.

Nevertheless, Section 39 Sub 1 contains special rules for the calculation of old-age pension. Under this provision,

“If the income of an insured person comprising the basis of his pension contributions from employment that is subject to compulsory insurance as specified in Paragraphs a)-b) and g) of Subsection (1) of Section 5 and in Subsection (2) of Section 5 of the Tbj.—other than employees who work full time in accordance with Act I of 2012 of the Labour Code (hereinafter ‘Labour Code’), or whose working time is specified in provisions relating to the specific job in question—is less than the mandatory minimum wage regulated in special legislation, in the application of Section 20 (statement of amount of old age pension) to the periods after 31 December 1996, service time shall be determined based on a pro rata calculation of the insured periods. In this case, the ratio of service time and insured periods shall be consistent with the ratio between the income comprising the basis for pension contributions and the prevailing minimum wage.”

This provision generally applies to part-time employees, whereas the minimum wage is defined for full-time employment.

This regulation can be illustrated with the following example. Gov. Order 430/2016 (XII. 15) contained the rules of minimum wage for the years 2016-2017. Under Section 2 of this Order, “the mandatory minimum base wage (minimum wage) payable to full-time employees who have worked the entire work period shall be:

a) effective as of 01 January 2017 – HUF 127.500 if paid on a monthly basis, HUF 29.310 if paid on a weekly basis, HUF 5.870 if paid on a daily basis, and HUF 733 if paid on an hourly basis;

b) effective as of 01 January 2018 – HUF 138.000 if paid on a monthly basis, HUF 31.730 if paid on a weekly basis, HUF 6.350 if paid on a daily basis, and HUF 794 if paid on an hourly basis.”

Under these provisions, the calculation is as follows:

If an employee was employed from 01 March 2018 until 31 December 2018 and her monthly salary was HUF 65 000, she earned 10 x HUF 65 000 = HUF 650 000 in this period. The mandatory minimum wage was 10 x HUF 138 000 =HUF 1, 380 000 HUF for this period. Since the earnings of the employee were less than the minimum wage during this period, a proportional service period must be calculated for her total amount of old-age pension. Therefore, the ratio of two amounts must be taken into account: HUF 650 000 /HUF 1 380 000 = 0.4710.

The number of calendar days is 365. 365 days minus 59 days = 306 days. 305 x 0.4710 = 144 days. Consequently, while the full period is evaluated as the employee’s service period with reference to her entitlement to old-age pension, 144 days will be taken into account for calculating the total amount of old-age pension.

Figures for part-time employees (STADAT):"

<table>
<thead>
<tr>
<th>Period quarter</th>
<th>Part-time</th>
<th>Full-time</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Men</td>
<td>Women</td>
<td>Total</td>
</tr>
<tr>
<td>2017. IV.</td>
<td>69.7</td>
<td>145.9</td>
<td>215.7</td>
</tr>
</tbody>
</table>
The share of part-time employees compared to all employed persons:
2017 IV quarter: 5.24 percent
2018 I quarter: 4.8 percent
2018 II quarter: 5.0 percent
2018 III quarter: 5.2 percent
2018 IV quarter: 5.3 percent

The percentage of part-time female employees:
2017 IV quarter: 67 per cent
2018 I quarter: 67 per cent
2018 II quarter: 63.5 per cent
2018 III quarter: 65 per cent
2018 IV quarter: 61.3 per cent

The share of part-time male employees compared to all male employees:
2017 IV quarter: 2.7 percent
2018 I quarter: 2.8 percent
2018 II quarter: 3.1 percent
2018 III quarter: 3.1 percent
2018 IV quarter: 3.3 percent

The share of part-time female employees compared to all female employees:
2017 IV quarter: 7.3 percent
2018 I quarter: 6.8 percent
2018 II quarter: 6.7 percent
2018 III quarter: 7.3 percent
2018 IV quarter: 6.9 percent
This provision not only affects part-time employees, but so-called full-time small taxpayers and small-scale agricultural producers as well. Section 5 Sub 1point j) and Section 30/A of Tny.

This ruling does not have any implications for Hungarian law.

3.2 Parental leave

CJEU case C-486/18, 08 May 2019, Praxair MRC

3.2.1 Provisions on redeployment in Hungary

Hungarian labour law does not regulate redeployment leave.

Severance pay for part-time employees is lower than that for full-time employees. The basis for the calculation of the amount of severance pay is the employee’s average wage at the time of notification of dismissal. The amount of working hours (full-time or part-time) is irrelevant with regard to the duration of the notice period; periods of exemption from work duty do not affect entitlement to severance pay.

Severance pay is regulated in Act I of 2012 of the Labour Code (hereinafter: LC). Under Section 77 Sub 1, an employee shall be entitled to severance pay if his employment relationship is terminated by the employer, upon the dissolution of the employer without succession or under Paragraph d) of Subsection (1) of Section 63. (The employment relationship shall terminate if the employer who takes over the economic entity under the legal transaction referred to in Subsection (1) of Section 36 or in accordance with law is not covered by this Act.)

Under Section 77 Sub 2, entitlement to severance pay shall only apply where an employment relationship exists with the employer during the period specified in Subsection (3) at the time the notice of dismissal is delivered or when the company is liquidated without succession.

In terms of entitlement to severance pay, any period of at least 30 consecutive days for which the employee did not receive any wages shall not be taken into consideration, with the exception of employees who are on:

a) maternity leave and any leave of absence without pay for nursing or caring for a child (Section 128);

b) any leave of absence without pay taken for the purpose of voluntary reserve military service for a period of not more than three months.

Under Section 77 Sub 3, severance pay shall be the sum of the average pay:

a) one month in case of at least three years;

b) two months in case of at least five years;

c) three months in case of at least ten years;

d) four months in case of at least 15 years;

e) five months in case of at least 20 years;

f) six months in case of at least 25 years of service.

3.2.2 Provisions on parental leave

Section 127 regulates maternity leave. Under this rule, mothers shall be entitled to 24 consecutive weeks of maternity leave, of which two weeks must be taken. Maternity
leave shall also be provided to the parent who provides care for a child under a court decision or resolution of the guardian authority capable of enforcement on account of the mother’s health condition or death. In the absence of an agreement to the contrary, maternity leave shall be allocated in such a way that not more than four weeks are taken before the expected time of birth. The duration of maternity leave, except in cases in which entitlement is specifically connected to work, shall be recognised as time spent at work.

Section 128 regulates leave of absence without pay. Under this provision, employees shall be entitled to unpaid leave for the purpose of taking care of their child until the child reaches the age of three years, and such leave shall be allocated at the time requested by the employee.

Under Section 130 in addition to the provisions contained in Section 128, employees shall be entitled to unpaid leave to provide care for a child until the child reaches the age of ten years and during the period in which child care allowance or child care assistance benefits are received.

According to Section 65, dismissal during maternity leave is prohibited. Section 65 Sub 3 states that the employer may not terminate the employment relationship by notice:

a) during pregnancy;

b) during maternity leave;

c) during a leave of absence taken without pay to care for a child (Sections 128 and 130).

3.2.3 Provisions in the LC on part-time employment

Under Section 61,

Sub 1 Employers shall inform their employees about the following opportunities, i.e. available jobs:

a) for full- or part-time work,

b) teleworking, and

c) permanent employment relationships.

Sub 2 Employers shall respond to employee requests for amendment of their employment contracts in writing within fifteen days.

Sub 3 Employers shall amend the employment contract based on the employee’s request to work part time, for half of the regular daily working time, until the child reaches the age of three years, or the age of five years in the case of parents with three or more children.

Section 62 Sub 2 states that derogations from Sections 59-61 in the collective agreement are only possible to the benefit of employees.

3.2.4 Special dismissal protection

Section 66 Sub 4-6 contains special dismissal protection. Under Sub 4, the employer may terminate the employment relationship of employees (other than pensioners) concluded for an indefinite duration within the five-year period preceding the date on which the employee reaches the age limit for old-age pension on the grounds of employee misconduct, i.e. only for reasons defined in Subsection (1) of Section 78. Sub 5 states that the employment relationship of employees referred to in Subsection (4) may be terminated in connection with the employee’s skills and qualifications or for
reasons related to the employer’s operations if the employer has no vacancies available at the workplace referred to in Subsection (3) of Section 45 that may be suitable for the employee in terms of her skills, education, experience required for her previous job, or if the employee refuses the offer for redeployment.

Section 66 Sub 6 states that where the employment relationship of a mother or a single father is terminated by notice, Subsections (4)-(5) shall apply until the child reaches the age of three years, if the employee does not take maternity leave or leave of absence without pay for the purpose of caring for the child (Section 128).

Such dismissal protection is linked to taking care of a child. Under the former LC (Act XXII of 1992 on Labour Code), employers may not terminate an employment relationship by ‘ordinary dismissal’ (by giving notice) during leave of absence without pay for the purpose of nursing or caring for children, until the child reaches the age of three years, irrespective of any leave of absence without pay. Consequently, the parent can interrupt his unpaid leave and in this case, the employer must continue the employment relationship. Recent amendments to the LC have modified this situation. Under Section 66, dismissal is only prohibited for the duration of actual used unpaid leave. The legal situation differs if the parent does not take unpaid leave or interrupts it. The employment relationship may be terminated in this case in connection with the employee’s skills and qualifications or for reasons related to the employer’s operations if the employer has no available vacancies at the workplace referred to in Subsection (3) of Section 45 that may be suitable for the employee in terms of his skills, education, experience required for his previous job, or if the employee refuses the offer for redeployment.

This ruling has no implications for Hungarian law.

3.3 Fixed-term work

CJEU case C-494/17, 08 May 2019, Rossato

3.3.1 Relevance for Hungarian employment law

This judgment is not relevant for Hungarian labour law. Monetary compensation in such situations is unknown in Hungarian law. The legal status of teachers (educators) is regulated in the Labour Code and in Act XXXIII of 1992 on the Legal Status of Public Servants (hereinafter: PS). The regulation depends on the legal status of the maintainer/owner of the school. Under the provisions of PS, the employment relationship is established for an indefinite period. Public service relationships can be established for a fixed term for the purpose of deputyship or for the performance of specific work. If the fixed-term employment relationship does not comply with the above mentioned conditions, the public service relationship will be deemed to have been established for an indefinite period (Section 21 of PS). (The LC does not contain this regulation.)

Moreover, Act CXC of 2011 on National Public Education contains provisions on teachers.

3.3.2 Main provisions of LC

Under Section 45 Sub 2, ‘the term of the employment relationship shall be defined in the employment contract. Failing this, the employment relationship is concluded for an indefinite duration’.

Section 192 contains provisions on fixed-term employment contracts. Under this Section, the period of fixed-term employment shall be determined in accordance with the calendar or on the basis of other appropriate means. The date of termination of the employment relationship may not depend solely on the party’s will, if the duration of
the employment relationship is not determined by the calendar. In the latter case, the employer is required to inform the employee of the expected duration of employment. The duration of a fixed-term employment relationship may not exceed five years, including any period of extension and that of another fixed-term employment relationship concluded within six months of the termination of the previous fixed-term employment contract. A fixed-term employment relationship may be extended, or another fixed-term employment relationship may be concluded within six months from the time of termination of the previous one to fulfil the employer’s legitimate interests. The agreement may not infringe upon the employee’s legitimate interests.

3.3.3 Main provisions of PS

The Labour Code is a so-called background act for the PS. Section 2 Sub 3 of the PS stipulates that the provisions of LC shall apply to public service relationships with derogation of PS.

Reference is made to the above mentioned Section 21 of the PS.

Section 37 Sub 3-4 of PS contains special provisions. Accordingly, if a fixed-term public service relationship is established between a public servant and the same employer at least twice, and if a period of at least six months has passed between the dismissal of the previous public service relationship and the establishment of the subsequent relationship, the public servant is entitled to severance pay (and naturally, when other conditions are met as well).

3.4 Access to the profession of lawyer

CJEU case C-431/17, 07 May 2019, Monachos Eirinaios

3.4.1 Provisions on the profession of lawyer

The practicing of law is regulated in Act CXXVIII of 2017 on Legal Practice (on Attorneys’ Activity) (Hereinafter Act LP.) Act CCVI of 2011 on the Rights to Conscience and Religious Freedom is of relevance in this regard, as is the Legal Status of Churches and Religious Communities (hereinafter RC). The solution to this issue can be found by combining both acts.

Under Section 74 of the Act LP, individuals who are qualified lawyers in another European Union country may practice law in the territory of Hungary

a) permanently, only after having been entered in the bar association register as a European Union lawyer,

b) on an ad hoc basis, after having been entered in the bar association register as a European Union lawyer or—with the exception specified in Section 76 Subsection (1)—after notifying the Hungarian Bar Association.

Section 75 of the Act LP states that upon request, any person can be entered in the bar association register as a European Union lawyer who

a) is entitled to practice law in an EEA State,

b) has liability insurance that is enforceable on the territory of Hungary and covers compensation for the damages caused by her legal practice and payment of any damages for pain and suffering,

c) with the exception of members of collective law firms, who have entered into an agreement with an attorney, European Union lawyers or law firms for substitution, and

d) does not fall under the grounds for exclusion of practicing the legal profession.
Under Section 22 Sub 1 point a) of the LP, ‘The following persons may not practice the legal profession:

a) any person to whom grounds for incompatibility specified in this Act apply…’

Section 23 Sub 1 of the LP states that ‘The following activities shall be incompatible with practicing the legal profession:

a) with the exception specified in this Act, employment relationships, government service, public service, state service, public servants, law enforcement administration employees, national defence employees, law enforcement agencies, professional or contracted military service relationships as well as notary publics, judicial bailiffs,

b) membership relationships in business associations entailing unlimited liability,

c) any other activity entailing obligations to perform work carried out in return for consideration.’

Under Section 12 Sub 1 of the RC, ecclesiastical persons are natural persons as defined in the internal rules of the Church who perform services for the Church based on a church-service relationship, employment relationship or other relationship.

The other provisions of the Act LP. are as follows:

Section 4 Sub 1 regulates that the profession of lawyer may be pursued by

a) attorneys,

b) European Union lawyers,

c) foreign legal counsels,

d) bar association legal counsels,

e) employed attorneys,

f) employed European Union lawyers,

g) articled clerks and

h) legal clerks registered with the bar association (hereinafter referred to as ‘legal clerk’).

3.4.2 Legal status of European Union lawyers

The legal status of European Union lawyers is regulated in Section 73-79 of the Act LP.

Under Section 73, a European Union lawyer is a natural person entitled to practice law in an EEA State, who practices law on an ad hoc or permanent basis, in a business-like manner, at his own economic risk, with the exception specified in this Act, as assigned by his client, under his professional designation stipulated in the ministerial decree on the professional designations of European Union lawyers.

Under Section 74, as a European Union lawyer, legal practice may be pursued in the territory of Hungary

a) permanently, only after having been entered in the bar association register as a European Union lawyer,

b) on an ad hoc basis, after having been entered in the bar association register as a European Union lawyer or—with the exception specified in Section 76 Subsection (1)—after having notified the Hungarian Bar Association.
Under Section 75 upon request, any person shall be entered in the bar association register as a European Union lawyer who

a) is entitled to pursue legal practice in an EEA State,

b) has liability insurance enforceable on the territory of Hungary, which covers compensation for any damages caused by her legal practice and the payment of damages for pain and suffering,

c) with the exception of members of collective law firms, who have entered into an agreement with an attorney, European Union lawyers or law firms for substitution, and

d) does not fall under the grounds for exclusion of practicing the legal profession.

Consequently, ecclesiastical persons are not directly excluded from practicing law. Nevertheless, it follows from the aforementioned that ecclesiastical persons do not have the possibility of working as lawyers in Hungary.

3.5 Transfer of undertakings

CJEU case C-194/18, 08 May 2019, Dodič

The Hungarian regulations are similar to the Slovenian ones.

Transfers of undertakings are regulated in the LC. Under Section 36, the rights and obligations arising from employment relationships that exist at the time of 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 66 Sub 3 point a) states that the transfer of employment upon a transfer of undertaking may not in itself serve as grounds for termination.

The transfer of accounts is regulated in Act CXXXVIII of 2007 on Investment Firms and Commodity Dealers, and on the Regulations Governing Their Activities (hereinafter: IA). Under Section 140 Sub 1 of IA subject to the authority’s prior consent, investment firms and commodity dealers shall be permitted—with the exceptions defined in Subsection (2)—to transfer their existing accounts to another investment firm or commodity dealer, also taking Subsection (4) into consideration.

Section 140 Sub 2 states that investment firms shall not be allowed to transfer their accounts to commodity dealers. Under Sub 3, an investment firm may take over the accounts of another investment firm and of another commodity dealer, whereas a commodity dealer may take over the accounts of another commodity dealer only.

Sub 4 regulates that the authorisation granted under Subsection (1) shall not substitute the authorisation of the Economic Competition Office prescribed in other legislation.

Section 141 states as follows:

Sub 1: The transfer of accounts by investment firms and commodity dealers shall be governed by the provisions of the Civil Code on the substitution of debt.

Sub 2: In connection with the transfer of accounts, the transferor investment firm or commodity dealer must notify the clients affected prior to the operative date of the transfer agreement concerning:

a) the proposed transfer; and

b) the provisions contained in Subsections (3)-(6);

including information on the place and time where and when the transferee’s standard service agreement can be obtained, and the format in which it is available.
Sub 3: If the client rejects the person or the standard service agreement of the transferee investment firm or commodity dealer, this client shall supply a written statement to the transferor investment firm or commodity dealer, indicating:

a) the investment firm or commodity dealer of his choosing; and

b) the number of the securities account, custody accounts and other accounts this investment firm or commodity dealer operates on his behalf for investment-related financial transactions.

Sub 4: The transferor investment firm and commodity dealer shall allow at least thirty days for the client to make the decision and to provide the statement referred to in Subsection 3.

Sub 5: If the client:

a) fails to supply the aforesaid statement within the time limit referred to in Subsection 4; or

b) if the statement supplied to the transferor investment firm or commodity dealer is missing any of the details mentioned in Paragraph b) of Subsection 3;

it shall be construed as acceptance of the transferee investment firm or commodity dealer, and their standard service agreement.

Sub 6: Upon acceptance of the transferee investment firm or commodity dealer, and their standard service agreement, the financial instruments and funds held for or belonging to the other client shall be transferred from the transferor to the transferee investment firm or commodity dealer effective as of the date indicated in the notice mentioned in Subsection (3), and they shall become subject to the standard service agreement of the transferee investment firm or commodity dealer.

Sub 7: The rights of the transferor investment firm or commodity dealer vis-à-vis clients shall be governed by the provisions of the Civil Code.

Sub 8: The costs and commissions arising in connection with the transfer of accounts cannot be charged to the clients.

Consequently, a transfer of accounts by investment firms is evaluated as a transfer of undertaking.

3.6 Age discrimination

CJEU case C-396/17, 08 May 2019, Leitner

3.6.1 Hungarian provisions on civil service staff

This ruling does not seem relevant for Hungarian legislation. Amendments to salaries were introduced in Hungarian legislation. However, the Hungarian legal situation differs from the Austrian legislation. Three elements of recent amendments can be highlighted in Hungarian civil service legislation.

Act XLII of 2015 on the Legal Relationship of Professional Staff of Law Enforcement Agencies covers police organisations, crime prevention bodies, antiterrorist bodies, disaster prevention bodies, the entities involved in the execution of sentences, the guards of Parliament, members of civilian national security entities and the National Office of Tax and Customs.

This act repealed Act XLIII of 1996 on the Legal Status of Members of Armed Bodies. The new act includes a new career and salary scheme for professional staff of law enforcement agencies. The purpose of the new act was to recognise the significance of the position, experience and performance. The act introduced an important pay raise.
The salary system of professional staff of law enforcement agencies consists of three elements. The first is salary based on rank, the second is allowance which depends on the employee’s service period, and the third is the so-called professional allowance.

The employee’s previous experience/period of service is an important element in this system. Professional staff members are entitled to a special benefit/allowance related to their service period. The new salary system does not disadvantage anyone. The salary system and calculation method are the same for all employees, i.e. this act contains uniform provisions for everyone. This method was already included in the previous regulation.

Section 280 of Act XLII of 2015 states that the following periods must be taken into account as service periods:

a) the period in law enforcement agencies
b) the period of civil service and public service relationships
c) the period of professional and contractual military relationships in the Hungarian Army
d) the period of regular and reserve relationships in the Hungarian Army, etc.

### 3.6.2 Amendment of the Act on the Legal Relationship of Professional Staff of Law Enforcement Agencies

The second step was the amendment of Act XLII of 2015 on the Legal Relationship of Professional Staff of Law Enforcement Agencies concerning civil servants. This amendment established a new sui generis relationship, namely the “law enforcement administrative service relationship”. The aim of the amendment was to establish a long-term, independent sectoral administration. Another purpose was to increase the salary of civil servants and to establish a stable and predictable career.

The previous legal status of civil servants was regulated in Act XXXIII of 1992 on the Legal Status of Public Servants and in Act CXCIX of 2011 on the Legal Status of Governmental Civil Servants. These legal relationships were modified to “law enforcement administrative service relationships” with the consent of the above mentioned staff.

Under Section 289H of Act XLII of 2015, the service periods of employees with a “law enforcement administrative service relationship” that must be taken into account are:

a) the period in law enforcement agencies
b) the period in administrative relationships
c) the period in professional service relationships
d) the period in public service relationships
e) the period in employment relationships, etc.

### 3.6.3 Act on Government Administration

The third significant amendments was introduced with Act CXXV of 2018 on Government Administration, which entered into force on 01 January 2019. This Act has unified the former legal status of government civil servants and the former legal status of state civil servants. The latter worked in regional government offices. They now work under government service relationships.
3.7 Age discrimination

*CJEU case C-24/17, 08 May 2019, Österreichischer Gewerkschaftsbund*

This decision does not seem to have any implications for Hungarian legislation.

The individuals affected by this decision are employees under Hungarian law. Their legal status is regulated by the Labour Code. The system of career and salary does not apply to these individuals. The mandatory element of the contract of employment is the agreement on the amount of salary.

The former Act CXCIX of 2011 on the Legal Status of Government Civil Servants stated that the number of persons employed on the basis of a contract of employment in the current year may not exceed 10 per cent of the total average number of employed persons in that year.

This Act was repealed by Act CXXV of 2018 on Government Administration which contains the same provision.

The former legal status of civil servants of law enforcement agencies was public or civil servant until 31 December 2018. Act XLII of 2015 on the Legal Status of Professional Staff of Law Enforcement Agencies includes a new regulation on the legal status of the “relationship of law enforcement administrative service” as amended by Act CXV of 2018.

Employees are also employed by these bodies. Their legal status is regulated in the Labour Code. The system of career and salary does not apply to these persons. The mandatory element of the contract of employment is agreement on the amount of salary; however, the upper wage limit is regulated by Act XLII of 2015. Under Section 278/C Sub 6, the monthly salary of such employees (for the period from 1 March to the end of February of the following year) may not exceed ten times the average monthly gross wage of the national economy for the year preceding the reference year. This gross wage is published by the Central Statistical Office. It was HUF 329 000 for the year 2018.

4 Other relevant information

Nothing to report.
Iceland

Summary

(I) New laws regarding tenants who are employees as well as the freedom of expression and confidentiality for employees of the state and municipalities have been passed.

(II) Implications for Iceland due to CJEU judgements regarding parental leave, transfer of undertakings, fixed-term work and access to the profession of a lawyer, are overviewed.

1 National Legislation

1.1 Tenants who are also employees and termination of employment

In June, Rental Act No. 36/1994 was amended by Act No. 63/2019 to clarify the position of tenants, who are also employees of their landlord. The new article, Article 50 of the Act, states that both parties may terminate the lease, if the employee or employer terminates the employment relationship or if the agreed working period has ended. The provision also clarifies that the termination of the lease shall be made in writing and submitted no later than eight weeks after the end of the employment relationship. The termination of the employee shall be effective immediately upon the sending of the termination letter, given that the employer sends the letter to the employee no later than eight weeks after the end of the employment relationship. However, if the employer terminates the agreement, the standard rules of the Rental Act, Art. 56(1) apply, which stipulates notice periods between three to 12 months, depending on the rented property and the length of the rental relationship. In addition, if the employment relationship is temporary, the rental agreement may not be shorter than the employment relationship. If the employment relationship is of indefinite duration, the rental agreement must also be so.

1.2 Freedom of expression and duty of confidentiality for civil servants

Administrative Act No. 37/1993 was amended in June to include provisions on the freedom of expression of civil servants and their duty of confidentiality. In the new Art. 41(1), the principle is reaffirmed. The provision states that employees of the state or municipalities have the freedom to publicly express their opinions if their duties of confidentiality or loyalty obligations do not stand in the way. Art. 41(2) stipulates that information on violations of the law or other misconduct of civil servants do not fall under the duty of confidentiality.

Art. 42 covers the duty of confidentiality of civil servants. Art. 42(1) states that employees of the state or municipalities are bound by the duty of confidentiality regarding information that is marked confidential on the basis of the law or other rules, or when it is necessary to keep the information confidential to protect important state or individual interests. The provision lists examples of such interests. Art. 42(2) clarifies that it is only permitted to mark information as confidential if it protects state or individual interests on the basis of Art. 42(1) and is in line with democratic traditions. Art. 42(3) lists what the duty of confidentiality entails and affirms that this duty continues even after employment ends. Art. 42(5) states the penalties in case of violations of these provisions.
2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Parental leave

*CJEU case C-486/18, 08 May 2019, Praxair MRC*

Directive 96/34/EC was transposed into Icelandic law by the Act on Maternity, Paternity and Parental Leave No. 95/2000. Chapter VII of the Act concerns parental leave. Art 24(1) guarantees four months of parental leave for every parent and Art. 28 ensures that the rights an employee has acquired or continues to acquire at the beginning of the parental leave shall remain unchanged until the end of parental leave. At the end of parental leave, those rights, including any changes arising from the law or collective agreements, shall apply.

Art. 29 of the Act affirms the right of an employee to her job during maternal, paternal or parental leave. Art. 29(1) states that the employment relationship remains unchanged during such leave. Furthermore, Art. 29(2) stipulates that an employee shall have the right to return to her job at the end of her maternal, paternal or parental leave. Should that not be possible, she shall have the right to a comparable post with her employer.

Dismissal protection is guaranteed in Art. 30 of the Act. The provision states that it is prohibited to dismiss an employee who has notified her employer that she will be taking maternal, paternal or parental leave or is taking maternal, paternal or parental leave, unless valid reasons exist to dismiss the employee and a written reasoning follows the dismissal letter. Since such a dismissal is a derogation from the law, the courts interpret the provision very narrowly.

Violations of the provisions of this act can lead to liability for damages in accordance with Art. 31 and/or fines in accordance with Art. 31a.

Since an employee is protected from dismissal during her parental leave and is guaranteed her job once her parental leave ends, it is inconceivable that an employee would not be entitled to the same right to a notice period and her regular salary, just like any other employee, once her parental leave has ended.

3.2 Transfer of undertakings

*CJEU case C-194/18, 08 May 2019, Dodič*

Directive 2001/23/EC was transposed into Icelandic law by the Act on the Rights of Employees in Transfers of Undertakings No. 72/2002.

Transfers of undertakings are defined in Art. 2 of the abovementioned act. A transfer is defined as a transfer of an economic entity that retains its characteristics, that is an organised grouping of resources that will be used for an economic purpose, whether or not that activity is central or ancillary. In light of this and with regard to the limited case law on the issue (see, for example, *Hrd. 344/2005*, *Hrd. 222/2006* and *Hrd. 258/2011*), it does not seem that the act explicitly precludes such a circumstance as being defined as a transfer of undertaking.
**CJEU case C-509/17, 16 May 2019, Plessers**

There does not seem to be a comparable provision in Icelandic law on legal restructuring of companies and the position of employees in such situations.

### 3.4 Fixed-term work

**CJEU case C-494/17, 08 May 2019, Rossato**

Directive 1999/70/EC was transposed into Icelandic law by the Act on Temporary Employment of Employees No. 139/2003. Art. 5(1) of the Act stipulates that it is prohibited to extend or renew a temporary employment contract for a total duration of more than two years, unless otherwise stated in law. One example of such a derogation is *inter alia* Art. 17(4) of the Act on Public Universities No. 85/2008, which states that an employment contract for an academic position may be indefinite or for a fixed-term of up to five years.

According to a principle of Icelandic labour law on fixed-term employment relationship, an employment relationship continues indefinitely if it extends beyond the fixed term initially agreed without a subsequent fixed-term contract being concluded. Since an employment agreement that exceeds the two-year period would be contrary to the law and therefore invalid, given that no derogation applies, it can be concluded that the result would be an automatic conversion into an employment contract of indefinite duration, with the applicable notice period.

Art. 8 of the Act states that if an employer violates the provisions of the Act, the result may be that she is liable for damages. As of 03 July 2019, there was no case law on this provision in Iceland (according to the search engines of court websites) (see [www.heradsdomstolar.is](http://www.heradsdomstolar.is); [www.landsrettur.is](http://www.landsrettur.is) and [www.haestirettur.is](http://www.haestirettur.is)).

### 3.5 Access to the profession of lawyer

**CJEU case C-431/17, 07 May 2019, Monachos Eirinaios**

The Act on Barristers No. 77/1998 discusses access to the profession of barrister (or ‘lawyer’ in the sense of Directive 98/5/EC). Art. 6(1) sets forth the conditions that need to be fulfilled to be able to practice law and plead cases in the district courts (Héraðsdómar) on behalf of a client. Arts. 9 and 10 a. list the conditions a barrister must fulfil to plead a case in the Court of Appeal (Landsréttur) and the Supreme Court (Hæstiréttur). The act does not differentiate on the basis of other professions that an individual, who otherwise fulfils the conditions laid out by the law, participates in.

### 4 Other relevant information

Nothing to report.
Ireland

**Summary**

(I) The Minister has issued two sectoral employment orders regulating minimum wage rates for the construction and electrical contracting sectors.

(II) The International Transport Workers’ Federation has settled its High Court action over the atypical permission scheme for non-EEA fishing crews.

(III) The Joint Committee on Employment Affairs and Social Protection has heard from the IALPA and UNITE trade unions on bogus self-employment in the aviation and construction sectors.

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### 1 National Legislation

#### 1.1 Minimum wage

As a result of the successful constitutional challenge to Ireland’s sectoral wage setting mechanism in *McGowan v Labour Court* [2013] IESC 21, the legislature enacted the *Industrial Relations (Amendment) Act 2015*, Chapter 3 which provides for the issuance of sectoral employment orders, the terms of which are to apply to every worker of the class, type or group in the economic sector to which the order applies.

The Minister of State at the Department of Business, Enterprise and Innovation has issued two sectoral employment orders – one for the construction sector (S.I. No. 234 of 2019) and one for the electrical contracting sector (S.I. No. 251 of 2019).

The former order comes into effect on 1 October 2019 and provides for pay increases of up to 5.4 per cent, with craftspersons receiving EUR 19.44 per hour increasing to EUR 19.96 per hour from 01 October 2020. Hourly rates of pay of EUR 14.52 will apply to all new entrant general operative workers. The order also provides for overtime rates, a defined contribution pension scheme and a revised sick pay scheme.

The latter order is due to come into effect on 1 September 2019 and provides for hourly rates of pay for newly qualified electricians of EUR 23.49, increasing to EUR 23.96 for those with three years of qualifications and to EUR 24.34 for those with six years of qualifications. The order also provides for overtime rates, a defined contribution pension scheme and a sick pay scheme. An employers’ association that opposes the issuance of the order is seeking an injunction to prevent the order from coming into effect and the application is scheduled to be heard in the High Court on 16 July 2019.

A key feature of both sectoral employment orders is a dispute resolution procedure which must be followed before any form of industrial action can be taken.

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### 2 Court Rulings

Nothing to report.

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### 3 Implications of CJEU rulings and ECHR

#### 3.1 Transfer of undertakings

*CJEU case C-509/17, 16 May 2019, Plessers*

Articles 3, 4 and 5 of Directive 2001/23/EC were transposed in Ireland by regulations 4, 5 and 6 of the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (S.I. No.131 of 2003). Regulation 6 provides that...
contractual rights are not transferred when the transferor is subject to proceedings whereby he may be adjudicated bankrupt, or whereby the company might be wound up for reasons of insolvency by court order. The Employment Appeals Tribunal has confirmed that although the regulations do not apply to a transfer of undertaking where the transferor has been adjudged insolvent and the undertaking in question forms part of its assets, they do apply to transfers effected during procedures prior to a winding up, such as transfers effected by a receiver, an examiner or a provisional liquidator: see *Blany v Vanguard Plastics Ireland Ltd* UD 271/2000 (decision not available online). The Tribunal (whose decision was upheld by the Circuit Court) stated that the regulations applied to a transfer of undertaking or part thereof ‘unless the company involved is subject to a compulsory court-ordered winding up and has been adjudged insolvent by a competent authority’.

4 Other relevant information

4.1 Atypical employment

In November 2015, the Irish government established a high-level inter-departmental task force in response to allegations of exploitation of undocumented migrant workers on Irish fishing vessels. The task force recommended putting in place an atypical worker permission mechanism for non-EEA crew members in parts of the Irish commercial sea-fishing fleet. The Atypical Permission Scheme for non-EEA workers on Irish fishing vessels opened for applications in February 2016. In 2018, the International Transport Workers Federation applied for an injunction requiring the Minister of Justice and Equality to modify the scheme. A temporary injunction was rejected but, before the full hearing was due to be heard, a settlement agreement was negotiated with the various government departments. The terms of the agreement aim to provide better implementation of the European Communities (Workers on Board Sea-Going Fishing Vessels) (Organisation of Working Time) Regulations 2003 (*S.I. No. 709 of 2003*) through improved liaison between the Workplace Relations Commission Inspectors and the Marine Survey Office. The agreement further guarantees that regulations on the maximum working hours, the minimum hours of rest and manning requirements will be provided for in a Statutory Instrument transposing Directive 2017/159/EU (implementing the 2007 ILO Convention on Work in Fishing) by 15 November 2019.

4.2 Bogus self-employment

The Joint Committee on Employment Affairs and Social Protection has held its final meeting on bogus self-employment. The Committee heard from the IALPA and UNITE trade unions, with the representative of the former maintaining that almost 50 per cent of pilots operating on Irish registered airlines are not employed directly by the airline for which they fly. This means that the airline does not pay the 10.85 per cent employer social insurance contributions; the pilot does not enjoy the benefits and protection of employment legislation; and the pilot's right to participate in collective bargaining and industrial action are neutralised. The latter's representative submitted that bogus self-employment was 'a tool used by employers to maximise flexibility in the utilisation of inputs, putting labour on a par with parts, tools, equipment and materials'. He continued by stating that the phenomenon also undermined solidarity, 'since the worker is no longer part of a workforce, but instead an atomised individual provider of labour and is used as part of an aggressive union-avoidance policy'. The Committee is now in the process of concluding its report and hopes to produce it before the end of July 2019.
Italy

Summary
(I) The Decree-Law 28 June 2019, n. 59, concerning among the others, the use of fixed-term contracts by public Opera houses and concert halls foundations has been published. According to Article 29(3) Legislative Decree n. 81 of 2015, these were excluded from the scope of application of Article 19 of the same provisions foreseeing anti-abuse rules of fixed-term contracts. Such an exclusion was suspected to be against EU Law.

(II) Several decisions of the CJEU and their impact on the national legal order are analysed.

1 National Legislation
1.1 Fixed-term contracts
The Decree Law of 28 June 2019, No. 59, concerning, among the others, the use of fixed-term contracts by public opera houses and concert halls foundations, has been published in the OJ of 29 June 2019, No. 151. According to Article 29(3) Legislative Decree No. 81 of 2015, they were excluded from the scope of application of Article 19 of the same provisions envisaging anti-abuse rules of fixed-term contracts. Such an exclusion was suspected to contravene EU law.

For this reason, the government submitted a proposal to Parliament to urgently adopt new regulations for the sector covered by Article 1(1) of the Decree Law, adding Para. 3-bis to Article 29 Legislative Decree No. 81 of 2015, they were excluded from the scope of application of Article 19 of the same provisions envisaging anti-abuse rules of fixed-term contracts. Such an exclusion was suspected to contravene EU law.

Conversion into an open-ended employment relationship is excluded in case of violation of these regulations. The worker is entitled to compensation according to the case law of the Cassazione. Article 1 (2-octies) of the Decree Law provides stabilisation measures for precarious workers in the sector. Parliament has 60 days to transform the Decree Law into an act.

2 Court Rulings
Nothing to report.

3 Implications of CJEU rulings and ECHR
3.1 Transfer of undertaking
CJEU case C-194/18, 08 May 2019, Dodič
The decision extends the notion of transfer of undertaking. This is new for the Italian legal system.

3.2 Access to the profession of lawyer
CJEU case C-431/17, 07 May 2019, Monachos Eirinaios
In its Opinion of 13 February 2019, No. 18, the Italian National Bar Council (Consiglio Nazionale Forense) affirmed that a person involved in pastoral care cannot be excluded from the bar, if she respects the Code of Conduct.

3.3 Parental leave

*CJEU case C-486/18, 08 May 2019, Praxair MRC*

Italian legislation (Legislative Decree No. 151 of 2001) does not explicitly envisage part-time parental leave. However, it allows parental leave to be taken on an hourly basis up to half of the normal daily working time (Article 32(1-bis)). On the other hand, Italian Dismissal Law on compensation in case of unfair dismissal refers to the last wage received by the worker. Hence, if the employee takes part-time leave, the compensation due in case of dismissal will be calculated on the basis of the reduced wage. In such a case, the decision of the CJEU could become relevant.

4 Other relevant information

Nothing to report.
Latvia

Summary

(I) The Constitutional Court found unconstitutional legal norms envisaging employment of academic staff (professors/associate professors) only on 6 years fixed-term contracts.

(II) The decisions of the CJEU in cases C-509/17, C-664/17 and C-317/18 have implications on Latvian law as much as they provide for the interpretation of the concepts for the protection of the employees in event of the transfer of the undertakings.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Fixed-term work

Constitutional Court, case No. 2018-15-01, 07 June 2019

On 07 June 2019, the Constitutional Court of Latvia delivered a decision on the constitutionality of the legal norms providing that only fixed-term contracts of a total duration of six years could be concluded with academic staff (professors and associate professors) of establishments of higher education (see Article 27(5) and 30(4) of the Law on Higher Education Establishments (Augstskolu likums)). The Constitutional Court found that the respective rules constitute a restriction of the right provided in Article 106 of the Constitution to choose employment and the profession according to one’s qualifications and abilities, taking into account the right to academic freedom. Furthermore, it found that although in the adoption of the contested norm, no due account was taken of the obligations deriving from EU law, in particular, Directive 1999/70/EC, it must be acknowledged that the contested norms were adopted in due legislative procedure, thus the restriction is provided by the law. The contested norms have a legitimate aim – the provision of welfare to society and the protection of the right of others, in other words, the provision of the highest qualified staff at establishments of higher education, thus ensuring the development of science and the highest standards of higher education. The contested norms are appropriate for the attainment of the legitimate aim and there are no less restrictive means to achieve these aims since dismissal grounds as provided by the Labour Law do not include considerations such as the availability of a better candidate for the position in question. The legislator has not found a fair balance between the interests of society and the rights of academic staff, thus the contested norms are unconstitutional. The Court also elaborated on why there is no need to refer this issue to the CJEU for a preliminary ruling. The Constitutional Court asserted that the principle of the protection of employees from misuse of fixed-term contracts clearly derives from the case law of the CJEU and no specific separate issues arise in the present case.

This decision has brought Latvian law in line with Directive 1999/70/EC only to a certain extent, because the rules on fixed-term contracts still only apply to academic staff members who are lecturers and docents/assistant professors (see the Law on Higher Education Establishments); directors of state institutions are also only appointed for five years (see Article 11(2) of the State Civil Service Law), directors of state agencies are appointed for five years as well (see Article 9(4) of Public Agency Law).
3  Implications of CJEU rulings and ECHR
Nothing to report.

4  Other relevant information
Nothing to report.
Liechtenstein

Summary

Relevant case law of the CJEU, namely: C-486/18 on parental leave, C-194/18 on transfer of undertakings, C-494/17 on fixed-term work, C-431/17 on access to the profession of lawyer, C-55/18 on working time, C-509/17 on transfer of undertakings, is analysed.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Parental leave

_CJEU case C-486/18, 08 May 2019, Praxair MRC_

In case C-486/18, the CJEU (First Chamber) ruled as follows:

Clause 2.6 of the framework agreement on parental leave concluded on 14 December 1995, which is annexed to Council Directive 96/34/EC of 03 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, as amended by Council Directive 97/75/EC of 15 December 1997, must be interpreted as precluding, where a worker employed full-time and for an indefinite duration is dismissed at the time he is on part-time parental leave, the compensation payment for dismissal and the redeployment leave allowance to be paid to that worker being determined at least in part on the basis of the reduced salary which he receives when the dismissal takes place.

Article 157 TFEU must be interpreted as precluding legislation such as that in the main proceedings which provides that, where a worker employed full-time and for an indefinite duration is dismissed at the time he is on part-time parental leave, that worker receives a compensation payment for dismissal and a redeployment leave allowance determined at least in part on the basis of the reduced salary being received when the dismissal takes place, in circumstances when a far greater number of women than men choose to take part-time parental leave and when that difference in treatment which results therefrom cannot be explained by objective factors unrelated to any sex discrimination.

The case concerned French law. The two main provisions dealt with were the following:

First, the compensation payment for dismissal and the retirement benefit payable to an employee who has worked on both a full-time and part-time basis for the same undertaking shall be calculated in proportion to the periods of each of those types of employment completed since the employee joined the undertaking.

Second, during a period of redeployment leave exceeding the period of notice, an employee shall receive a monthly payment from her employer. The amount of that payment shall be equivalent to at least 65 per cent of the employee’s average gross
monthly salary for the 12 months preceding the notification of dismissal, subject to the contributions referred to in Art. L. 5422-9.

The Liechtenstein Civil Code (Allgemeines bürgerliches Gesetzbuch, LR 210) does not contain such provisions and therefore does not contravene the judgment of the CJEU.

In connection with the dismissal of an employee, the Civil Code contains a number of provisions on compensation based on a certain number of monthly salaries:

- compensation for up to six months’ wages in the event of unfair dismissal, § 1173a Art. 47(2) and (3) of the Civil Code;
- compensation for up to six months’ wages in the event of dismissal with immediate effect, § 1173a Art. 56(3) and (4) of the Civil Code;
- compensation of between two and eight months’ salary in the event of termination of employment of an employee aged 50 or older after 20 or more years of service, § 1173a Art. 63(1) and (2) of the Civil Code.

However, these provisions do not mandatorily require the above mentioned wages to be calculated in proportion to full-time and part-time periods of work on the basis of an average monthly salary for a certain amount of months preceding the notification of dismissal. The courts can therefore take account of part-time parental leave and interpret the legal provisions in accordance with European law and the CJEU's ruling C-486/18.

3.2 Transfer of undertaking

CJEU case C-194/18, 08 May 2019, Dodič

In case C-194/18, the CJEU (Ninth Chamber) ruled as follows:

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 the transfer, to a second undertaking, of financial instruments and other assets of the clients of a first undertaking, following the cessation of the first undertaking's activity, under a contract the conclusion of which is required by national legislation, even though the first undertaking's clients remain free not to entrust the management of their stock market securities to the second undertaking, may constitute a transfer of an undertaking or of part of an undertaking if it is established that there was a transfer of clients, that being a matter for the referring court to determine. In that context, the number of clients actually transferred, even if very high, is not, in itself, decisive as regards classification as a 'transfer' and the fact that the first undertaking cooperates with the second undertaking as a dependent stock-exchange intermediary, is, in principle, irrelevant.

According to § 1173a Art. 43(2) of the Liechtenstein Civil Code (Allgemeines bürgerliches Gesetzbuch, LR 210), a transfer of an undertaking, business or part of an undertaking or business is defined as the transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

Liechtenstein law does not provide for any further restrictions. The courts can thus take the requirements of the CJEU into account. In particular, the following factors are included in these requirements:

- The decisive criterion for establishing the existence of a transfer of an undertaking or of part of an undertaking is the fact that the economic entity retains its identity, as indicated inter alia by the fact that its activity is actually continued or resumed (C-194/18 No. 33);
If the economic activity is primarily based on intangible assets, the transfer of those assets is undoubtedly of importance for the purpose of classification as a ‘transfer of part of an undertaking’ (C-194/18 No. 36);

In order for the transaction at issue in the main proceedings to be classified as a ‘transfer of part of an undertaking’, it must be established that a transfer of clients took place (C-194/18 No. 40);

Ultimately, it is for the national court, which has sole jurisdiction to determine the facts in the case before it and to interpret the national legislation, to determine whether a ‘transfer of part of an undertaking’ within the meaning of Art. 1(1) of Directive 2001/23 (C-194/18 No. 45) has taken place.

In short, no provision in Liechtenstein law prevents the courts from complying with the requirements established by the CJEU’s ruling.

*CJEU case C-509/17, 16 May 2019, Plessers*

In case C-509/17, the CJEU (Third Chamber) ruled as follows:

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, in particular Articles 3 to 5 thereof, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, in the event of the transfer of an undertaking which has taken place in the context of proceedings for judicial restructuring by transfer under judicial supervision applied with a view to maintaining all or part of the transferor or its activity, entitles the transferee to choose the employees which it wishes to keep on.

In the present case, the transfer of an undertaking is not covered by the exception laid down in Art. 5(1) of Directive 2001/23 (transfer of an undertaking, business or part of an undertaking or business where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority). Thus, Arts. 3 and 4 of Directive 2001/23 remain applicable to a case such as that at issue in the main proceedings (C-509/17 No. 48 and 49).

Under Art. 4(1) of Directive 2001/23, the transfer of an undertaking does not in itself constitute grounds for dismissal by the transferor or the transferee. That being said, that provision does not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce (C-509/17 no. 53). But in the present case, according to Belgian law, the transferee is entitled to choose the employees whom it wishes to keep on, although that choice must be based on technical, economic and organisational reasons and be implemented without making any prohibited distinction (C-509/17 no. 56). That’s not the same. Under Belgian law, the transferee is not required to show that the redundancies arising from the transfer are due to technical, economic or organisational reasons (C-509/17 No. 58).

Liechtenstein law regulates the transfer of an undertaking in the Civil Code (*Allgemeines bürgerliches Gesetzbuch, LR 210*). § 1173a Art. 43(4) of the Civil Code stipulates the following: The transfer of an undertaking, business or parts of an undertaking or business does not constitute a reason for termination by the transferor or the transferee. Economic, technical or organisational reasons entailing changes in the workforce remain reserved. This provision is consistent with Directive 2001/23 and C-509/17, and no other provision is apparent which has content comparable to that of the Belgian legislation at issue. This applies in particular to the Bankruptcy Act (*Gesetz über das
Konkursverfahren, Konkursordnung, KO, LR 282.0) and the Execution Act (Gesetz über das Exekutions- und Rechtssicherungsverfahren, Exekutionsordnung, EO, LR 281.0).

3.3 Fixed-term work

CJEU case C-494/17, 08 May 2019, Rossato

In case C-494/17, the CJEU (First Chamber) ruled as follows:

Clause 5(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, is to be interpreted as not precluding legislation which, as applied by the national supreme courts, precludes any entitlement to financial compensation on account of the misuse of successive fixed-term employment contracts for public-sector teachers whose employment relationship has been converted from a fixed-term relationship into one of indefinite duration, with limited retroactive effect, if such conversion is neither uncertain nor unpredictable or fortuitous and the limited account taken of the period of service completed under those successive fixed-term employment contracts constitutes a measure that is proportionate for the purpose of punishing that misuse, which is a matter for the national court to determine.

The key to understanding the judgment lies in the following passages:

- The Member States enjoy a certain discretion in this regard since they have the choice of relying on one or more of the measures listed in Clause 5(1)(a) to (c) of the Framework Agreement, or on existing equivalent legal measures, while taking account of the needs of specific sectors and/or categories of workers (C-494/17 No. 25);
- Legislation which lays down a mandatory rule that, where there is misuse of fixed-term employment contracts, such contracts are to be converted into an employment relationship of indefinite duration, is likely to comprise a measure that actually penalises such misuse (C-494/17 No. 40);
- In the present case, it is apparent from the documents before the Court that in order to provide for the transition to a new system introducing measures to prevent and impose penalties in respect of misuse of fixed-term employment contracts, the national legislature adopted a special recruitment plan which provided for the conversion, during the 2015/2016 academic year, of all fixed-term employment relationships concluded with teachers whose status was ‘precarious’, by means of the gradual and definitive exhaustion of the ranking lists and classifications used by the administrative authorities to recruit teachers on a fixed-term basis (C-494/17 No. 32).

In the private sector, § 1173a Art. 44a(1) of the Liechtenstein Civil Code (Allgemeines bürgerliches Gesetzbuch, LR 210) stipulates that a fixed-term employment relationship may be extended up to a maximum of three times and up to a total duration of five years. If the duration is longer, the employment relationship is considered to be of indefinite duration.

In the public sector, Art. 13 of the State Personnel Act (Gesetz über das Dienstverhältnis des Staatspersonals, Staatspersonalgesetz, StPG, LR 174.11) stipulates that a fixed-term employment relationship shall be established for a maximum period of three years. The government may, in justified cases, extend a fixed-term employment contract for a maximum of two additional years.

The State Personnel Ordinance (Verordnung über das Dienstverhältnis des Staatspersonals, Staatspersonalverordnung, StPV, LR 174.111), the Act on the Employment of Teachers (Gesetz über das Dienstverhältnis der Lehrer,
Lehrerdienstgesetz, LdG, LR 411.31) and the Ordinance on the Employment of Teachers (Verordnung zum Lehrerdienstgesetz, Lehrerdienstverordnung, LdV, LR 411.311) do not contain relevant provisions.

Therefore, the aforementioned Art. 13 of the State Personnel Act is to be applied to teachers in the public sector. This provision provides teachers with better protection than the Italian legislation which case C-494/17 dealt with. Liechtenstein law does not contain any provision comparable to that contained in Italian law. Thus, Liechtenstein law does not contravene C-494/17.

3.4 Access to the profession of lawyer

CJEU case C-431/17, 07 May 2019, Monachos Eirinaios

In case C-431/17, the CJEU (Grand Chamber) ruled as follows:

Article 3(2) of Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained must be interpreted as precluding national legislation which, on account of the incompatibility under that legislation between the status of monk and practice of the profession of lawyer, prohibits a lawyer who has the status of monk, and who is registered as a lawyer with the competent authority of the home Member State, from registering with the competent authority of the host Member State in order to practise there under his home-country professional title.

The facts of the case are as follows: A monk at a Greek monastery requested the Athens Bar Association to enter him on the special register of the Athens Bar as a lawyer having acquired that professional status in Cyprus. Greek law contains the following provision: ‘The lawyer must ... not have the status of ... monk.’

It must be held that lawyers who have acquired the right to use that professional title in a Member State, and who present to the competent authority of the host Member State a certificate attesting to their registration with the competent authority of the first Member State must be regarded as satisfying all the conditions required for their registration with the competent authority of the host Member State, under their professional title obtained in the home Member State (C-431/17 No. 28).

That conclusion is not called into question by the fact that under Art. 6(1) of Directive 98/5 a lawyer practising in the host Member State under his home-country professional title is, irrespective of the rules of professional conduct to which he is subject in his home Member State, subject to the same rules of professional conduct as lawyers practising under the relevant professional title of the host Member State in respect of all the activities pursued in its territory (C-431/17 No. 29).

It is permissible for the national legislature to prescribe guarantees provided that the rules laid down for that purpose do not go beyond what is necessary in order to attain the objectives pursued. It is for the referring court to carry out the necessary checks in respect of the rules regarding incompatibility. In particular, the absence of conflicts of interest is essential for practice of the profession of lawyer and requires, inter alia, that lawyers should be in a situation of independence vis-à-vis the authorities, by which they must never be influenced (C-431/17 No. 33 and 35).

According to Liechtenstein law, the profession of lawyer may be practised by anyone who fulfills the legal requirements and is registered in the list of Liechtenstein lawyers, see Art. 3(1) of the Lawyers Act (Rechtsanwaltsgesetz, RAG, LR 173.510). Anyone who proves that she meets the requirements shall, upon request, be entered by the Bar Association in the list of Liechtenstein lawyers, Art. 7(1) of the Lawyers Act. Nationals of an EEA Member State who are entitled to practise as lawyers in their country of
origin under a recognised professional title may establish themselves in Liechtenstein for the purpose of practising law if they are registered in the list of established European lawyers. In addition to the rules of professional conduct applicable in the home Member State, the established European lawyer is subject to the same rules of professional conduct as domestic lawyers, Art. 59(1) and (2) of the Lawyers Act. The application for entry in the list of established European lawyers is examined by the Bar Association, Art. 60(1) of the Lawyers Act.

Liechtenstein law does not contain any provision comparable to Greek law in the present case. Liechtenstein law does not exclude either domestic or foreign lawyers who at the same time belong to a clerical class, such as monks or priests, from registration in the list of Liechtenstein or European lawyers. In that regard, Liechtenstein law does not violate C-431/17.

3.5 Working time

*CJEU case C-55/18, 14 May 2019, CCOO*

In case C-55/18, the CJEU (Grand Chamber) ruled as follows:

Articles 3, 5 and 6 of Directive 2003/88/EC of the European Parliament and of the Council of 04 November 2003 concerning certain aspects of the organisation of working time, read in the light of Article 31(2) of the Charter of Fundamental Rights of the European Union, and Article 4(1), Article 11(3) and Article 16(3) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, must be interpreted as precluding a law of a Member State that, according to the interpretation given to it in national case-law, does not require employers to set up a system enabling the duration of time worked each day by each worker to be measured.

The following remarks in the judgment are particularly important:

- ‘Explanations on the basic requirements regarding the system for recording working time’: In order to ensure the effectiveness of those rights provided for in Directive 2003/88 and of the fundamental right enshrined in Art. 31(2) of the Charter, the Member States must require employers to set up an ‘objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured’ (C-55/18 No. 60).

- ‘Explanations on the concrete design of the system’: It is for the Member States, in the exercise of their discretion in that regard, to determine the specific arrangements for implementing such a system, in particular the form that it must take, having regard, as necessary, to the particular characteristics of each sector of activity concerned, or the specific characteristics of certain undertakings concerning, inter alia, their size, and without prejudice to Art. 17(1) of Directive 2003/88, which permits Member States, while having due regard for the general principles of the protection of the safety and health of workers, to derogate, inter alia, from Arts. 3 to 6 of that directive, when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves (C-55/18 No. 63).

In Liechtenstein, Directive 2003/88 was transposed in the Employment Act (*Gesetz über die Arbeit in Industrie, Gewerbe und Handel, Arbeitsgesetz, LR 822.10*). According to Art. 43 of the Employment Act, the employer shall keep lists, reports or other documents containing information necessary for the enforcement of the Employment Act and the related ordinances at the disposal of the enforcement and supervisory authority. Swiss law contains a provision with the same content (Art. 46 of the Swiss Employment Act).
The general view is that this provision is the legal basis that requires employers to establish a system enabling the recording of each worker’s daily working time.

Arts. 59(1) and (2) of Ordinance I to the Employment Act (Verordnung I zum Arbeitsgesetz, ArGV I, LR 822.101.1) contain a more detailed explanation of what information the lists, reports and other documents mentioned in the Act must contain. If there are reasonable grounds to suspect that the regulations on working hours and rest periods are not being observed, the following additional information shall be provided at the request of the enforcement and supervisory authority:

- the daily and weekly working hours worked, including compensatory and overtime work, and the employee’s position;
- the position and duration of breaks and rest periods.

It is doubtful that these provisions meet the requirements of C-55/18, because only some important information needs to be provided

- if there are reasonable grounds to suspect that the regulations on working hours and rest periods are not being observed; and
- if the additional information is required by the enforcement and supervisory authority.

If a Liechtenstein court arrives at the conclusion that Art. 59(1) and (2) of Ordinance I to the Employment Act violates C-55/18, it could leave this provision unapplied, rely directly on the higher ranking provision of Art. 43 of the Employment Act and interpret this provision according to the requirements of C-55/18. As already mentioned, Art. 43 of the Employment Act forms a comprehensive legal basis for the recording of working time. Nevertheless, it would seem advisable for the government to adapt Art. 59(1) and (2) of Ordinance I to the Employment Act to the requirements of C-55/18 in a manner that ensures that these are fully complied with.

4 Other relevant information

Nothing to report.
Lithuania

Summary
Lithuanian law and practice has little experience with the majority of regulations in other Member States under review by the CJEU. The judgments of the Court do not suggest that Lithuanian regulations contravene EU law.

1 National Legislation
Nothing to report.

2 Court Rulings
Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Parental leave

*CJEU case C-486/18, 08 May 2019, Praxair MRC*

The ruling has no direct implications for Lithuania as no 'partial' parental leave exists, i.e. the employee cannot make use of such part-time leave. Parental leave (in Lithuanian – *atostogos vaikui priziureti*) means full absence from work. Part-time work, even if formally based on the fact that the employee has children (Article 40 (500 of the Labour Code), shall not be associated with part-time parental leave, but as 'part-time work' only (in Lithuanian – *ne visas darbo laikas*). If a part-time employee is dismissed, her average pay for the period of the last three months (which is relevant for the calculation of severance pay) shall be calculated on the basis of the employee’s agreed contractual pay, if the employee did not work during the reference period (Article 5.13 of the rules on the calculation of average pay, approved by Decree No. 496 of the Government on 21 June 2017. Registry of Legal Acts, No. 2017-10853). In other words, the Lithuanian legislator has tried to prevent such situations from arising where severance pay can be reduced due to a decrease in the employee’s salary. Redeployment leave allowance does not exist in statutory law and there are no examples of such arrangements in collective bargaining agreements.

3.2 Transfer of undertaking

*CJEU case C-194/18, 08 May 2019, Dodič*

The ruling provides guidelines for the interpretation of the notion of 'transfer of undertaking'. Currently, there is no case law or statutory regulation in Lithuania which stands in the way of this interpretation.

*CJEU case C-509/17, 16 May 2019, Plessers*

In Lithuania, the law (Article 51 of the Labour Code) and case law consolidate the principle of automatic transfer of all employment relations from the transferor to the transferee, regardless of the grounds for the transfer (Article 51 (2) of the Labour Code). There is no other statutory provision or case law which would suggest that the selection.
procedure under which some employees would be transferred and others not, would be legal under Lithuanian law.

### 3.3 Fixed-term work

*CJEU case C-494/17, 08 May 2019, Rossato*

In case of misuse of successive fixed-term employment contracts, the legislator provides for a penalty, namely the conversion of the fixed-term contract into one of indefinite duration (Article 68 (2) – 68 (3) of the Labour Code). The periods between contracts, if there were any, shall be included in the total duration of the employee’s length of service, but they shall not be additionally paid. Theoretically, the employee can claim damages from the employer on the basis of the new general provision of Article 24 (6) of the Labour Code, but this is highly unlikely.

### 3.4 Access to the profession of lawyer

*CJEU case C-431/17, 07 May 2019, Monachos Eirinaios*

In Lithuania, there is no law prohibiting a lawyer who has the status of monk and who is registered as a lawyer with the competent authority in his Member State from registering with the Council of Advocates (the competent authority of lawyers in Lithuania) in order to practice there under his home country’s professional title. There have not been any similar cases in Lithuania so far.

### 3.5 Working time

*CJEU case C-55/18, 14 May 2019, CCOO*

A general requirement has existed in Lithuania for quite some time to record all employees’ working times. The new Labour Code of 2017 has slightly modified the law, making it possible to not record the working time of employees who regularly work a fixed number of working days and hours (e.g. white collar workers in offices or employees who have 8-hour working days daily from Monday to Friday). This formal change has not, however, affected the practice of recording employees’ working time – employers continue to fill in the sheets of all employees, regardless of their working patterns. Deviations (overtime, night work, etc.) from the normal working hours must mandatorily be recorded. The legislator requires employers to record the working time of employees, except those working under a pattern of a fixed number of days and hours (Article 120 (1) of the Labour Code). Secondly, the legislator imposes the obligation on the employer to record, regardless of the type of contract, the periods of time actually worked by an employee, i.e. overtime, working time on public holidays, working time on a day of rest if not established in the work schedule, night time work; working time under an agreement for additional work (Article 120 (2) of the Labour Code). Working time shall be recorded in model time sheets approved by the employer, which may be completed and stored in electronic form. An employee shall be entitled to have access to the recording of her working time and request a statement thereof free of charge.

### 4 Other relevant information

Nothing to report.
Luxembourg

Summary

(I) The only new legislation slightly affecting labour law is a law implementing the Directive on trade secrets.

(II) Two Court rulings are worth to be mentioned, one dealing with notice periods and another dealing with the procedure to expulse members from a Trade Union.

1 National Legislation

1.1 Trade secrets

Bill No. 7353 (see August 2018 Flash Report) on trade secrets has been adopted. As far as employees are concerned, the implementing law nearly literally copied the directive’s wording. Even the numbering of the articles is the same in both texts:

- Art. 1 (3): no limitation to the mobility of employees, the use of experience and skills honestly acquired, etc.;
- Art. 3 (1) pt. c: acquisition of trade secrets by exercise of the right of workers or workers’ representatives to information and consultation;
- Art. 5 pt. c: no measures in case of disclosure by workers to their representatives as part of the legitimate exercise by those representatives of their functions.


2 Court Rulings

2.1 Trade union membership


Because this type of litigation is extremely rare in Luxembourg, a recent decision of the interim relief judge (juge des référés) dealing with the expulsion of two members from a major national trade union should be mentioned. One of the accusations was that during the social elections, these two members were candidates on the list of another major national trade union.

The judge decided that the interim relief procedure was applicable to this type of litigation, as the union members requested a decision on the regularity of its exclusion.

The judgment is based on a “fundamental principal that any person subject to disciplinary proceedings, such as the exclusion from a trade union, must be granted the rights of defence which implies that he/she is informed of the subject and precise content of the accusations and has, at any stage of the procedure, a right to be assisted by a lawyer”.

The letter of convocation only mentioned the date for an interview and the general information that an exclusion procedure has been initiated.

Therefore, the exclusion procedure was declared formally invalid, and the trade union was ordered to reintegrate the plaintiffs as members of the trade union.
Whereas exclusions from a trade union remain exceptional in Luxembourg, the general principle outlined by this decision may have an impact on disciplinary procedures in labour law in general, and especially on dismissal procedures.

Indeed, until now there has not been an explicit text or case law stating that the right to be heard, to be informed of the accusations and to be assisted by a lawyer exists for any disciplinary sanction (for example, disciplinary warnings).

For the pre-dismissal hearings (entretien préalable au licenciement), which are mandatory in companies with 150 employees or more, the Labour Code does not require the invitation to the hearing to indicate the grounds for the intended dismissal, nor that the employee can be assisted by a lawyer. This may thus be in contradiction with the right of defence.

2.2 Notice period

Cour de Cassation, n° 4092, 14. February 2019

In another case, the Court of Appeal ruled that an employee resigning from the employment relationship without respecting the full mandatory duration of the notice period subsequently has the possibility to rectify the mistake. If he does so, the employer is not entitled to any compensation in lieu of notice (indemnité compensatoire de préavis).

The Court of Cassation clearly stated that this was not possible and quashed the decision of the Court of Appeal. Once notice has been given, the period of notice is set and can no longer be unilaterally modified by the employee.

3 Implications of CJEU rulings and ECHR

3.1 Transfer of undertakings

CJEU case C-509/17, 16 May 2019, Plessers

This decision does not have any implications for national law, as there is no mechanism providing for a selective transfer of employees in the context of legal restructuring proceedings.

The procedure of the ‘concordat préventif de faillite’ is hardly ever used and focusses on the creditor’s interests and not on maintaining employment contracts. The law dates back to 1886 and was modified in 1911 and 1934; it is clearly outdated.

To achieve better management of insolvency procedures, especially with regard to the many insolvencies without any assets, a bill has been deposited to fully modernise insolvency procedures. The initial bill was deposited in 2013; the parliamentary procedure is still ongoing and multiple amendments have been made.

The bill implements legal restructuring proceedings (‘Réorganisation judiciaire par transfert sous autorité de justice’). As regards the issue dealt with in case C-509/17, the bill contains the same provisions as Belgian law. The parliamentary document explicitly highlights that Luxembourg intended to follow the Belgian example (Art. 56 of the bill; the comments state: ‘Source d’inspiration: art. 61 de la loi belge du 31 janvier 2009 relative à la continuité des entreprises’).

As a consequence of the decision of the CJEU, the bill must be amended. However, the entire balance and utility of this procedure is challenged if all employment contracts must be maintained or if the costs of a collective redundancy must be borne.
4 Other relevant information

Nothing to report.
Malta

**Summary**
An analysis of relevant CJEU case law is provided

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1  National Legislation
Nothing to report.

2  Court Rulings
Nothing to report.

3  Implications of CJEU rulings and ECHR

3.1  Parental leave

*CJEU case C-486/18, 08 May 2019, Praxair MRC*

Part-time parental leave is possible under Maltese law. However, there are no specific provisions on part-time parental leave. It is, however, submitted that in view of the fact that one of the reasons underlying these regulations is to ensure that the employee on parental leave does not lose any benefits accrued in his favour prior to taking such leave, than it is to be assumed that any compensation payment for dismissal would take into account the full salary of the employee, and not his part-time salary. It is to be emphasised, however, that dismissal just because the employee is on parental leave is not permitted in accordance with Maltese Law (Article 10, ibid). This particular judgment will therefore not have any implications for Malta. Rather, it reinforces the underlying rationale of the law. Furthermore, any form of direct or indirect discrimination, including sex discrimination, is prohibited. Hence, even such a measure would be prohibited.

3.2  Fixed-term work

*CJEU case C-494/17, 08 May 2019, Rossato*

The Fixed-Term Work Regulations 2007 do not consider the non-conversion of fixed-term contracts into contracts of indefinite duration. The law does not therefore provide for any compensation. Should any employer violate the provisions of these Regulations, there may be a referral to the Industrial Tribunal which then sets compensation itself. However, such compensation is not the compensation to which this decision refers, and it is indeed entirely up to the Industrial Tribunal to determine the amount of compensation. Consequently, this decision has no particular implications for Malta, given that such an alternative is not available to Maltese employers.

3.3  Access to the profession of lawyer

*CJEU case C-431/17, 07 May 2019, Monachos Eirinaios*

There is no such exclusion from the exercise of the profession of lawyer under Maltese law. The list of qualifications are established in Articles 81 et seq/ of the Code of Organisation and Civil Procedure. However, if there were such an exclusion, of course, this judgment would be undoubtedly quoted. It must be made clear, however, that to exercise the profession of lawyer in Malta, one needs to fill in an application form online.
and provide the necessary documentation. It is as simple as that. Hence, given there are no special qualifications or disqualifications (or incompatibility) envisaged in Maltese law, a person cannot be excluded from practising the profession of lawyer.

### 3.4 Working time
*CJEU case C-55/18, 14 May 2019, CCOO*

Maltese law does not require employers to record working time and it does not make any reference to appropriate time recording systems. However, as a general rule, employers measure working time to not be short-changed. However, technically, there is no law forcing employers to record the time an employee spends at the workplace. The question, at this point, therefore, should be: does the fact that Maltese law does not force workers to record working time constitute a violation of the principles expressed in this decision? Does Maltese law have a lacuna that violates European Union law? If one were to take the reasoning behind this judgment and apply it to Maltese law, it follows that Maltese law should introduce a law that requires employers to record working time.

### 3.5 Transfer of undertakings
*CJEU case C-509/17, 16 May 2019, Plessers*

The Transfers of Undertakings (Protection of Employment) Regulations, 2003 (Vide note 3) do not have any provisions such as those at issue in the case and there is no case law, even in the restructuring of companies, giving such authority to the transferee. Consequently, this particular judgment has, at present, no implications for Maltese law. It is very doubtful that a Maltese court would vest on any transferee such power as to determine which of the employees to retain and who to dismiss and, in such cases, the employees ought to resist, anyway (through the appropriate legal channels).

### 4 Other relevant information
Nothing to report.
Netherlands

Summary

The government has launched an internet consultation on a draft legislative bill on the transfer of undertaking in case of bankruptcy, with the objective of applying the rules of Directive 2001/23/EC on transfers of undertakings in case of bankruptcy.

1 National Legislation

1.1 Transfer of undertaking in case of bankruptcy

On 29 May 2019, the government launched an internet consultation on a draft bill on transfers of undertakings in case of bankruptcy. The proposal is linked to the bill Continuity of Undertakings I which has been debated in Parliament since 2016 and is still pending. This latter bill intends to provide a statutory basis for the pre-pack method (a transfer of assets prepared prior to the declaration of insolvency, with the consent of a prospective insolvency administrator appointed by the court, and is put into effect by that administrator immediately after the declaration of insolvency). The CJEU decided in case C-126/16, 22 June 2017, FNV that in such a situation, the exception of Article 5 § 1 Directive 2001/23/EC, which has been transposed in the Netherlands, only applies if the following three conditions are met:

(i) the transferor must be the subject of bankruptcy proceedings, that condition may not extend to the preparation for insolvency proceedings which does not result in a declaration of insolvency,

(ii) the bankruptcy proceedings must be instituted with a view to liquidation of the assets of the transferor, and

(iii) the proceeding must be under the supervision of a public authority.

This CJEU decision has raised questions about the legality of Dutch law, mainly because of the second condition mentioned above, since that condition relates to the actual intention in a specific situation to be assessed on the basis of the circumstances in the individual case. Although case law and legal doctrine have brought some clarification, the government decided to minimise this uncertainty by launching a draft bill that implements Article 5 §1 and 2 of the Directive.

Employees of the insolvent company will be transferred if the undertaking is transferred and continues its activities. They will be employed by the transferee under the same conditions. The transfer as such cannot be used as a ground for dismissal, unless the dismissal is for business reasons. The draft bill includes a method to decide in such a case which employees shall be transferred. It remains to be seen whether this proposed method is in line with CJEU case C-509/17, 16 May 2019, Plessers (see point 3.)

The bill introduces other measures as well, e.g. non-applicability of non-competition clauses in employment contracts of non-transferred employees and a specific right of the works council to be consulted in case of a pre-pack transfer.

Position papers can be uploaded until 31 August 2019. Thereafter, the actual parliamentary debate will begin with a legislative bill.

This proposal is considered an important step towards a more clear system in case of prepack situations. Current legislation states that the rules on transfer of undertaking do not apply in case of a bankruptcy, so this is a new approach. It can be seen as an attempt to bring practice and legislation more in line with the Directive.
It is to be expected that prepack practice will change. It will still be possible, but with more safeguards for employees. The envisaged amendments are in line with Directive 2001/23.

1.2 Posting of workers

Directive (EU) 2018/957 on the posting of workers must be transposed by 30 July 2020. This draft legislative bill entails its implementation.

The core terms and conditions that apply to posted workers have been extended to include housing conditions and certain allowances. After 12 or 18 months, posted workers are entitled to more employment conditions. Allowances can only be part of the remuneration if they are not compensation for costs such as travel costs, etc. If it is unclear whether an allowance is compensation for certain costs, the compensation will be considered compensation as such, and will not be considered to be part of the employee’s remuneration. More collective agreements will be covered by the scope of the law (and thus part of the terms and conditions that must be applied to posted workers), including collective agreements that are not universally binding. Temporary work agencies remain responsible for the payment of correct remuneration, even if the employee is placed elsewhere by the hiring company.

The internet consultation ended in mid-June. The actual parliamentary debate will begin shortly.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Transfer of undertaking

_CJEU case C-509/17, 16 May 2019, Plessers_

In the present case, the CJEU dealt with a Belgian law that makes it possible to take over a business that is facing insolvency and to select the employees it will keep on. The court first confirmed its ruling in case C-126/16, 22 June 2017, _FNV_ and stated that the criteria formulated in that ruling always apply if the activity of an insolvent business continues, but not only when there is a seamless continuation of the activity as was the case in _FNV_. Furthermore, the court held that Directive 2001/23/EC on transfers of undertakings precludes national legislation which, in the event of the transfer of an undertaking which has taken place in the context of proceedings for legal restructuring by transfer under judicial supervision, applied with a view to maintaining all or part of the transferor or its activity, entitles the transferee to choose the employees which it wishes to keep on.

The ruling is relevant for the draft legislative bill on transfers of undertakings in case of bankruptcy discussed above (sub 1.1.). The envisaged law includes a possibility that is quite similar to that in Belgian law, which was scrutinised in this case, although the Dutch proposal ascertains that the transferee must demonstrate that any dismissal is justified due to economic reasons (economic, organisational or technical reasons).

Currently, there is no statutory law on this issue. The ruling does to some extent touch upon a sensitive national matter, as the pre-pack practice in the Netherlands is the subject of debate and this ruling contributes to the legal debate on the draft bill.

Very few comments have appeared so far. Comments mostly relate to the draft bill and the question whether or not there should be an amendment. Given the fact that the bill
only is in internet consultation phase, it is too premature to clarify its influence on that legislative process.

4 Other relevant information
Nothing to report.
Norway

Summary
(I) A new Act on whistle-blowing has been adopted
(II) The Appel Court has issued and important ruling on transfer of undertakings
(III) An analysis of relevant CJEU case law is provided
(IV) The Ministry of Labour has issued a proposal to strengthen the Labour Inspection authority on matters of Equal treatment and hiring of personnel

1 National Legislation
On 21 June 2019, an amendment to Chapter 2A of the Working Environment Act on whistle-blowing was adopted. The main amendments included the terms ‘censurable conditions’, ‘proceed responsibly’ and ‘retaliation’. The amendment will come into force on 01 January 2020.

2 Court Rulings
2.1 Transfer of undertakings
On 11 June 2019, the Appellate Court ruled in a case on the terms and conditions of a transfer in connection with a transfer of undertaking. The cleaners in the Norwegian Armed Forced were transferred to a cleaning company (ISS). The parties agreed that the transfer constituted a transfer of undertaking under Chapter 16 of the Norwegian Working Environment Act, implementing Directive 2001/23/EC.

According to the Civil Services Act, the employees were entitled to a 6-month notice period while employed in the Norwegian Armed Forces. After the transfer to the private company ISS, the mandatory notice period was between two and six months depending on the employee’s age and length of service. This mandatory notice period was applied to the transferred employees. The employees disputed this, arguing that the 6-month notice period was their ‘right’ that had been transferred under Chapter 16. The Appellate Court found that the notice period was indeed a right and that the employees were entitled to the 6-month notice period.

As employees of the Norwegian Armed Forces, the employees by law had certain pension rights related to retirement age of 65 years. ISS did not uphold these rights, arguing that they were based on a retirement age laid down by a law that no longer applied. The employees disputed this, arguing that the pension rights were ‘rights’ that had been transferred under Chapter 16. The Appellate Court found that the pension rights were indeed rights and that the employees were entitled to them after the transfer.

Lastly, the employees were entitled to early retirement benefits under a public sector early retirement scheme (‘offentlig AFP’). ISS argued that this early retirement scheme was not a right. The Appellate Court found that the early retirement scheme was not a right and that the employees were not entitled to it after the transfer.
3  Implications of CJEU rulings and ECHR

3.1  Parental leave

*CJEU case C-486/18, 08 May 2019, Praxair MRC*

Case C-486/18 does not have any implications for Norwegian law. Part-time parental leave does not result in reduced payments when calculating compensation in case of termination. The reasoning according to Norwegian law is that the person is treated like a full-time employee.

3.2  Access to the profession of lawyer

*CJEU case C-431/17, 07 May 2019, Monachos Eirinaios*

Case C-431/17 has no implications for Norwegian law. There is no prohibition of monks or other individuals from practicing as lawyers in Norway.

3.3  Transfer of undertakings

*CJEU case C-194/18, 08 May 2019, Dodić*

Case C-194/18 has no implications for Norwegian law. In future cases, Norwegian courts will interpret the ‘transfer’ criterion in line with the ruling.

*CJEU case C-509/17, 16 May 2019, Plessers*

Case C-509/17 has no implications for Norwegian law. Section 16-1(2), which states that 'Sections 16-2 and 16-4 shall not apply in connection with transfers from a bankrupt company' has been and will continue to be interpreted in line with CJEU rulings.

3.4  Fixed-term work

*CJEU case C-494/17, 08 May 2019, Rossato*

Case C-494/17 has no implications for Norwegian law. There are various legal grounds for hiring teaching staff on a fixed-term basis; Sections 6-4 and 6-5 of the University and College Act, the Public Servants Act (Section 9) and the Working Environment Act (Section 14-9). The two latter acts state that a fixed-term employment contract shall be converted into a permanent one after a consecutive employment of three or four years. This is also the main regulation in the University and College Act.

None of the Acts specify a penalty for abuse of fixed-term employment contracts. In future cases, Norwegian courts will, however, take the ruling into account if employees argue that they have suffered economic loss as a consequence of abuse of fixed-term employment contracts.

3.5  Working time

*CJEU case C-55/18, 14 May 2019, CCOO*

Case C-55/18 has no implications for Norwegian law. Section 10-7 requires all employers to record each employee’s working hours: “An account shall be kept of the hours worked by each employee. This account shall be accessible to the Labour Inspection Authority and the employees’ elected representatives”.
4 Other relevant information

On 06 June 2019, the Ministry of Labour issued a proposal to strengthen the enforcement of rules on the hiring of staff and the equal treatment principle. The proposal implies increased authority for the Labour Inspection Authority.
Poland

**Summary**


1. National Legislation

Nothing to report.

2. Court Rulings

Nothing to report.

3. Implications of CJEU rulings and ECHR

3.1. Access to the profession of lawyer

*CJEU case C-431/17, 07 May 2019, Monachos Eirinaios*

Poland has implemented Directive 1998/5/EC by the Law of 05 July 2002 on the provision of legal assistance by foreign lawyers in the Republic of Poland (consolidated text: Journal of Laws 2016, item 1874, with further amendments can be found [here](#))

According to Section 4 of the Law, lawyers from other Member States who intend to provide legal assistance in Poland must register with the district bar association (with regard to barristers) or the district council of legal advisers (with regard to legal advisers). The above mentioned rules apply to those lawyers who obtained their professional title in their home country that enables them to carry out the profession of lawyer. There are no further requirements for lawyers from other Member States to practice law in Poland.

Under Polish law, there are no additional requirements to those stipulated in Directive 1998/5/EC. Polish law seems to be compatible with the abovementioned Directive, as interpreted by the CJEU.

3.2. Fixed-term work

*CJEU case C-494/17, 08 May 2019, Rossato*

Under Polish law, protection against abuse of fixed-term employment contracts is regulated in Article 25 I of the Labour Code. According to this provision, the period of employment under a fixed-term contract(s), may not exceed 33 months, and the total number of such contracts cannot exceed three (§ 1). If the parties agree on a longer period of work, it is deemed that the parties have concluded a successive fixed-term contract (§ 2). When the period of employment exceeds 33 months or the number of employment contracts is higher than three, it will be deemed that the employee was employed under a contract of indefinite duration (§ 3). The abovementioned provision does not apply where (Article 25 § 4):
• an employee is employed under a fixed-term contract for the purpose of substitution of another employee during her justified absence,
• for the purpose of completing occasional or seasonal work,
• for the purpose of performing work during a period in office,
• if the employer indicates objective reasons that justify employment for a fixed term due to the temporary needs of the employer.

In such a case, the employer is required to inform the relevant district labour inspectorate in writing or in electronic form within 5 days from concluding the contract and state the reasons for concluding a fixed-term contract (Article 25 I § 5). In addition, where a fixed-term contract exceeds 33 months or is concluded for the fourth time, the reasons justifying such action should be indicated in the contract (Article 29 § 1 LC).

The Labour Code of 26 June 1974 (consolidated text: Journal of Laws 2019, item 1040) can be found here.

In other words, after three years (three months on a probation contract and 33 months on a fixed-term contract), the contract will automatically convert into an open-ended contract (unless the abovementioned exceptions apply). These regulations apply to all fixed-term contracts, irrespective of the type of employer (public or private), or the branch of activity, including the teaching sector. There are no further financial compensations in case of misuse of fixed-term contracts by the employer.

The abovementioned regulations apply to teachers in Poland as analysed by the CJEU in the present case.

Polish law seems to be compatible with Directive 1999/70/EC on part-time work, as interpreted in case Rossato. In contrast to the case Rossato, the scheme of protection against abuse of fixed-term employment as provided by Polish law can be described as certain and predictable. The conversion of a fixed-term contract into an open-ended contract would not have retroactive effect, but all employee rights (e.g. those connected with seniority) would be taken into account.

The problem might arise under Article 25 I § 4 LC, since the scope of exceptions is quite broad. However, this issue was not analysed by the CJEU in the present case.

3.3 Transfer of undertakings

CJEU case C-509/17, 16 May 2019, Plessers and CJEU case C-194/18, 08 May 2019, Dodič

Under Polish law, transfers of undertakings are regulated in Article 23 LC. According to § 1, if an establishment or a part thereof is transferred to another employer, the new employer becomes party to the existing employment relationships by operation of the law, subject to the provisions of § 5 (the latter provision refers to nominations and appointments in the public service sector). Under § 2, the transferor and the transferee shall be jointly and severally liable with regard to obligations that arose from the employment relationship before the date of the transfer. Article 23 § 6 provides that the transfer of an establishment or any part thereof shall not in itself constitute grounds for termination of an employment relationship by the employer.

Thus, under Polish law, the regulations on transfers of undertakings are very compact. In fact, restructurings of a company can be covered by Article 23 LC. Polish courts interpret the notion of ‘transfer of undertaking’ in accordance with the criteria elaborated by the CJEU.

It seems that the situation dealt with in case C-194/18, Dodič (i.e. the transfer to a second undertaking of financial instruments and other assets of the clients of the first
undertaking, following the cessation of the first undertaking’s activity, under a contract the conclusion of which is required by national legislation, even though the first undertaking’s clients remain free to not entrust the management of their stock market securities to the second undertaking), may constitute a transfer of undertaking or of part of an undertaking if it is established that a transfer of clients took place, would constitute a transfer of undertaking under Article 23 LC.

In addition, according to Article 23 § 6 LC, there is an express prohibition of terminations of an employment contracts as a result of a transfer of undertaking. Therefore, it seems that any situation that would allow the transferee to select the employees it wishes to keep on (whether in the context of legal restructuring or any other transfer) would be prohibited by Polish law (as analysed in case C-509/17, Plessers).

Polish law seems to be compatible with Directive 2003/21 on transfers of undertakings, as interpreted by the CJEU in cases Plessers and Dodic. As already mentioned, Polish courts use the case-law of the CJEU as a guideline for interpreting national regulations on transfers of undertakings.

3.4 Working time

*CJEU case C-55/18, 14 May 2019, CCOO*

The ruling referred to the employer’s duty to establish a system that enables the employer to record each employee’s daily working hours.

In Poland, Article 149 LC provides that an employer is required to keep records of employees’ working time in order to correctly determine each worker’s remuneration and other benefits connected to her work. The employer must deliver these records to the employee upon his request (§ 1). No such records are required for employees who carry out work under the task-based working time system, who manage the company in the name of the employer, and employees who are paid a lump sum for overtime work or for night work.

Thus, under Polish law, the employer is expressly required to record employee’s daily working time.

The abovementioned provision does not require expressis verbis that the duration of each working day is recorded. There is no express statutory obligation indicating that the specific start and end time of work must be recorded. However, since the objective of the recording of working time is to determine the employee’s remuneration, it seems that the records should be specific and detailed enough to fulfil this purpose, i.e. the records should enable precise determination of the daily and weekly working time of each employee. Polish law seems to be compatible with Directive 2003/88/EC on working time as interpreted by the CJEU.

3.5 Parental leave

*CJEU case C-486/18, 08 May 2019, Praxair MRC*

Parental leave is regulated in Article 182 Ia LC and other provisions of the Labour Code. Parental leave amounts to 32 or 34 weeks. According to Article 182 § Ie 1 LC, an employee may combine parental leave with the performance of work for an employer who may grant him leave up to half of the full-time working time. In such a case, parental leave is granted for the remaining part of working time. In other words, an employee is entitled to request the reduction of his working time within the period during which he would be entitled to use full-time parental leave. In such a situation,
remuneration is reduced accordingly, and the remaining part of the employee’s wages is substituted by the maternity allowance provided by the social security institution.

The Law of 13 March 2003 on Particular Rules of Terminating Employment Relationships with Employees for Reasons Not Related to the Individual Employees Concerned (consolidated text Journal of Laws 2018, item 1969) provides for severance pay in case of dismissals that are justified by grounds lying on the employer’s side (so-called ‘Law on Collective Dismissals’, which can be found here).

Article 8 of the Law provides the right to severance pay that amounts to:

- one month’s remuneration if the employee has been employed with the same employer for less than 2 years,
- two months’ remuneration if the employee has been employed with the same employer for 2 to 8 years,
- three months’ remuneration if the employee has been employed with the same employer for more than 8 years,

Under Polish law, there is no statutory redeployment leave, therefore, this part of the ruling is irrelevant for the national system.

It seems that in case of dismissal of an employee who took recourse to parental leave and combines it with part-time work, the reduced monthly remuneration would be the point of reference to determine the amount of her severance pay. Such a solution would be incompatible with Directive 1996/34 on parental leave as interpreted by the CJEU.

Another factor should be mentioned here as well. Under Article 5 item 5(1) of the Law on Particular Rules of Terminating Employment Relationships with Employees for Reasons Not Related to the Individual Employees Concerned, the employer only has competence to unilaterally modify the employment conditions of an employee who uses parental leave. In other words, such an employee cannot be made redundant within the framework of collective dismissals, although it is possible to adapt her employment conditions (e.g. transfer to another post or reducing her remuneration). Employees on parental leave can only be dismissed in case of liquidation or bankruptcy of the employer.

4 Other relevant information

Nothing to report.
Portugal

Summary

(I) An analysis of the implications for Portugal of recent CJEU rulings in the following cases is provided: C-486/18 on parental leave; C-194/18 and C-509/17 on transfers of undertakings; C-55/18 on working time; C-494/17 on fixed-term work; C-431/17 on access to the profession of lawyer.

(II) The Draft Law transposing Regulation (EU) 2016/679 on the protection of personal data in Portuguese law was approved by the Portuguese Parliament, although it has not yet been published.

(III) The Labour Code amendments are still being discussed in Parliament.

1 National Legislation

1.1 Data protection

Draft Law no. 120/XIII/3º, which assures the execution in the Portuguese legal framework of the Regulation (EU) 2016/679 concerning the protection of the natural persons regarding the processing and free movement of personal data, was approved by the Portuguese Parliament on 14 June 2019. The referred draft foresees some legal provisions with impact on the labour relationships, such as Article 19 related to the video surveillance and Article 28 concerning the processing of personal data in the context of the labour relationships. Despite its approval, this Draft Law has not been published yet.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Parental leave

CJEU case C-486/18, 08 May 2019, Praxair MRC

In case C-486/18, the CJEU analysed a French law according to which when a worker who is employed full time and for an indefinite duration is dismissed while she is on part-time parental leave, her compensation for dismissal and redeployment leave allowance should be calculated, at least in part, on the basis of the reduced salary she receives at the time of dismissal.


According to the CJEU, a national law that would result in the reduction of rights arising from the employment relationship in the event of parental leave could discourage workers from taking such leave and could encourage employers to dismiss workers who are on parental leave rather than other workers. This seems to be in contradiction with the aim of the Framework Agreement on parental leave, which seeks conciliation between working and family life.
Therefore, the CJEU ruled that Clause 2.6 of the Framework Agreement must be interpreted as precluding, where a worker employed full-time and for an indefinite duration is dismissed while she is on part-time parental leave, the compensation payment for dismissal and the redeployment leave allowance to be paid to that worker to be determined, at least in part, on the basis of the reduced salary she receives at the time of dismissal.

In addition, the CJEU analysed whether the French law complies with the principle of equal pay for male and female workers as foreseen in Article 157 of TFEU.

For the purpose of Article 157 of TFEU, ‘remuneration’ means the ordinary (basic or minimum) wage and any other benefits paid, directly or indirectly, in cash or in kind, by the employer to the employee for the performance of work.

According to European case law, the concept of remuneration within the meaning of Article 157 of TFEU must be interpreted broadly, including the benefits paid after the termination of the employment relationship as is the case for compensation for dismissal and the redeployment leave allowance.

The principle of equal pay envisaged in Article 157 of TFEU precludes not only the application of provisions leading to direct sex discrimination, but also the application of provisions that maintain different treatment between men and women at work as a result of the application of criteria not based on sex, where those differences of treatment are not attributable to objective factors unrelated to sex discrimination (indirect sex discrimination).

In this ruling, the CJEU concluded that the difference in treatment arising from the French rules on the calculation of compensation for dismissal and the redeployment leave allowance was not justified by such objective factors.

Therefore, the CJEU also ruled that Article 157 TFEU must be interpreted as precluding legislation which provides that where a worker who is employed full-time and for an indefinite duration is dismissed at the time she is on part-time parental leave, that worker receives compensation payment for dismissal and redeployment leave allowance that is determined, at least in part, on the basis of the reduced salary she receives at the time of dismissal, under circumstances when a far greater number of women than men choose to take part-time parental leave and when that difference in treatment that results therefrom cannot be explained by objective factors unrelated to any sex discrimination.

According to Article 51 of the Portuguese Labour Code, complementary parental leave that can be used to take care of a child that is younger than six years old, in one of its forms, consists of part-time work for a period of 12 months, with a normal period of work corresponding to half of full-time working time. In addition, employees who have a child that is younger than 12 years old or, regardless of age, has a disability or a chronic illness and is living with the employee, is entitled to work under a part-time regime for a certain period of time (Article 55 of the Portuguese Labour Code).

Pursuant to Portuguese law, the compensation due in case of dismissal for objective reasons is calculated on the basis of the amount of the employee’s base remuneration and seniority premiums (‘diurnidades’), which the employee receives on the date of dismissal.

Taking into account this decision of the CJEU, it seems that the reduction of normal working time in the context of parental rights, with the corresponding reduction of the amount of remuneration, cannot prejudice the employee in case of dismissal for objective reasons. Thus, in case of dismissal of an employee who is temporarily working part time and simultaneously taking care of a child, the compensation for dismissal...
should be calculated not on the basis of the remuneration received on the date of dismissal, but on the basis of the remuneration she would receive for full-time work.

3.2 Transfers of undertakings

*CJEU case C-194/18, 08 May 2019, Dodič and CJEU case C-509/17, 16 May 2019, Plessers*


In case C-194/18, the CJEU ruled that Article 1(1) of the Directive 2001/23/EC:

"must be interpreted as meaning that the transfer, to a second undertaking, of financial instruments and other assets of the clients of a first undertaking, following the cessation of the first undertaking’s activity, under a contract the conclusion of which is required by national legislation, even though the first undertaking’s clients remain free not to entrust the management of their stock market securities to the second undertaking, may constitute a transfer of an undertaking or of a part of an undertaking if it is established that there was a transfer of clients (...). In that context, the number of clients actually transferred, even if very high, is not, in itself, decisive as regards classification as a “transfer” and the fact that the first undertaking cooperates with the second undertaking as a dependent stock-exchange intermediary, is, in principle, irrelevant”.

In case C-509/17, the CJEU concluded that Articles 3 to 5 of the Directive 2001/23/EC:

"must be interpreted as precluding national legislation, as such that at issue in the main proceedings, which, in the event of the transfer of an undertaking which has taken place in the context of proceedings for judicial restructuring by transfer under judicial supervision applied with a view to maintaining all or part of the transferor or its activity, entitled the transforee to choose the employees which it wishes to keep on”.

These recent judgments seem to be relevant for the interpretation of the national legal framework applicable in the event of transfers of undertakings, namely Article 285 of the Portuguese Labour Code, which was recently amended by Law No. 14/2018, of 19 March.

3.3 Working time

*CJEU case C-55/18, 14 May 2019, CCOO*

In case C-55/18, the CJEU examined whether Articles 3, 5, 6, 16 and 22 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (hereinafter: Directive 2003/88/EC), Articles 4(1), 11(3) and 16(3) of Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (hereinafter: Directive 89/391/EEC) and Article 31(2) of the Charter of Fundamental Rights of the European Union (hereinafter: Charter) must be interpreted as precluding a law of a Member State—like the Spanish law at issue (Estatuto de los Trabajadores)—which does not require employers to establish a system that enables the recording of each employee’s daily working time to ensure effective compliance with maximum weekly working time and minimum daily and weekly rest periods.
According to the CJEU, in the absence of such a system, it is not possible to objectively and reliably determine either the number of hours worked by each employee and when her work was completed, or the number of hours worked beyond the normal working hours, as overtime. As a result, it appears to be excessively difficult, if not impossible in practice, for employees to ensure compliance with the rights conferred on them by Article 31(2) of the Charter and Directive 2003/88/EC, with a view to actually benefiting from the limitation on weekly working time and minimum daily and weekly rest periods provided for by the directive.

Consequently, the CJEU concluded that in order to ensure the effectiveness of those rights, the Member States must require employers to set up an objective, reliable and accessible system enabling the recording of each employee’s daily working time. However, the Member States are free to determine what method of recording of daily working time is best suited to achieve the effectiveness of the provisions of EU law, taking into account the particular characteristics of each sector of activity or the specific characteristics of certain undertakings, inter alia, their size.

For the reasons mentioned above, the CJEU ruled that Articles 3, 5 and 6 of Directive 2003/88/EC, read in the light of Article 31(2) of the Charter, and Articles 4(1), 11(3) and 16(3) of Directive 89/391/EEC "must be interpreted as precluding a law of a Member State that, according to the interpretation given to it in national case-law, does not require employer to set up a system enabling the duration of time worked each day by each worker to be measured”.

Portuguese legislation seems to be in line with this interpretation of European law, taking into account that Article 202 of the Portuguese Labour Code states that the employer—regardless of its size or sector of activity—must keep a record of working time, including for those employees exempted from timetables. This record must include an indication of the start and end times of work as well as interruptions and breaks not included in the working time in order to determine the number of hours worked by the employee per day and week. This record must be kept for a period of five years. Furthermore, according to Article 231 of the Portuguese Labour Code, the employer must keep a record of overtime work rendered by the employee, which must indicate (i) the start and end times of the overtime working hours, (ii) the grounds for the provision of such work, and (iii) compensatory rest periods (if applicable).

3.4 Fixed-term work

CJEU case C-494/17, 08 May 2019, Rossato

In case C-494/17, the CJEU ruled that:

“Clause 5(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, is to be interpreted as not precluding legislation which, as applied by the national supreme courts, excludes any entitlement to financial compensation on account of the misuse of successive fixed-term employment contracts for public-sector teachers whose employment relationship has been converted from a fixed-term relationship into one of indefinite duration, with limited retroactive effect, if such conversion is neither uncertain nor unpredictable or fortuitous and the limited account taken of the period of service completed under those successive fixed-term employment contracts constitutes a measure that is proportionate for the purpose of punishing that misuse, which is a matter for the national court to determine”.

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Under Portuguese law, fixed-term employment contracts are exceptional: as a rule, they may only be entered into to meet temporary needs and for the period strictly required for that purpose (Article 140(1) of the Portuguese Labour Code). Such employment contracts shall be concluded in writing and shall explicitly mention the objective reasons justifying the term, its duration and the causal link between the reasons and the duration. If the fixed-term employment contract does not meet these conditions, it will be considered to be an open-ended contract.

Furthermore, according to Portuguese law currently in force, fixed-term employment contracts are subject to the maximum duration stipulated in the law, which as a rule is three years. In addition, contracts entered into for a fixed term are subject to a maximum of three renewals (Article 148 of the Portuguese Labour Code).

As a rule, an immediate successive fixed-term contract for the same position is prohibited and only admitted in exceptional cases (Article 143 of the Portuguese Labour Code).

If the employer terminates the fixed-term employment contract, the employee may decide to bring a case before the labour court, arguing unlawful termination, by invoking that the employment contract should be (re)qualified as a permanent one. In case of conversion of the contract into a permanent one (e.g. due to lack of justifiable grounds), the employee is entitled to all rights inherent to a permanent employment relationship and unilateral termination by the employer shall be considered an unfair dismissal.

For the reasons mentioned above, the Portuguese system generally applies the different types of measures set forth in Clause 5 of the Framework Agreement to prevent abusive use of fixed-term contracts.

### 3.5 Access to the profession of lawyer

**CJEU case C-431/17, 07 May 2019, Monachos Eirinaios**

This ruling is related to the interpretation of Article 3(2) of Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 concerning the facilitation of the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.

According to Greek law, a person who is a clergyman or a monk shall lose *ipso jure* the status of lawyer and be removed from the register of the bar association of which he is a member.

Monachos Eirinaios was a monk in Greece and requested to be registered in the special register of the Athens Bar as a lawyer who had acquired his professional status in another Member State, namely in Cyprus. His application was rejected on the basis of Greek law relating to the incompatibility between the practice of the profession of lawyer and the status of monk.

According to European case law, Article 3 of Directive 98/5/EC fully harmonises the preconditions for exercising the right of establishment conferred by that directive, laying down that a lawyer who wishes to practice in a Member State other than that in which she obtained her professional qualifications is required to register with the competent authority of that Member State, the registration being based ‘upon presentation of a certificate attesting to his registration with the competent authority of the home Member State’. The presentation of such a certificate is the only condition the individual in the host Member State is subject to, enabling her to practice there under her home country’s professional title.

For these reasons, the CJEU ruled that Article 3(2) of the above mentioned directive:
"must be interpreted as precluding national legislation which, on account of the incompatibility under that legislation between the status of monk and practice of the profession of lawyer, prohibits a lawyer who has the status of monk, and who is registered as a lawyer with the competent authority of the host Member State in order to practice there under his home-country professional title”.

In Portugal, Article 82 of the Statute of Bar Association contains a list of activities considered incompatible with the practice of the profession of lawyer. This ruling seems to be relevant for assessing whether such incompatibilities may apply in case of a person who acquired his professional title in another Member State in which a similar rule does not exist.

4 Other relevant information

Draft Law No. 136/XIII and Draft Law No. 1025/XIII are still being debated in the Portuguese Parliament.
Summary

(I) The High Court of Cassation and Justice decided that the clauses of an employment contract whereby penalties for the employee are provided are null.

(II) An analysis of relevant CJEU case law is provided

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Judgment on penalty clauses in employment contracts

Court of cassation, judgment no. 19/2019

In commercial contracts, by means of penalty clauses, the parties stipulate the amount of compensation in the event of breach of the contract. Consequently, if the contract provides for penalties, the creditor no longer needs to prove the amount of the damage caused by the debtor's non-performance of its obligations, but the debtor will automatically be required to pay the compensation.

The question that arose in practice was whether such a clause would also be admissible in employment contracts. The High Court of Cassation and Justice ruled in Decision No. 19/2019 that a penalty clause in the employment contract, providing the compensation due by the employee in the event of damaging the employer's property during work is prohibited and was declared null and void.

Thus, even if the parties agree on an amount in the employment contract to be paid by the employee for failure to fulfil her obligations or for causing harm to the employer, such a clause has no effect. If the employer wishes to establish the liability of the employee, she will have to assess the damage after the act has been committed. The motivation behind the High Court of Cassation and Justice's decision has not yet been published, but it is presumed that the legal basis of the invalidity of a penalty clause inserted in an employment contract would be the provisions of Article 38 of the Labour Code, according to which "Employees cannot waive the rights recognised by law. Any transaction seeking to waive the rights recognised by law or to limit the rights of employees is null and void."

A penalty provision would constitute a contractual provision that disadvantages the employee in relation to the legal regime to which she would have been entitled.

The decision of the High Court of Cassation and Justice is mandatory for all courts in the country.

3 Implications of CJEU rulings and ECHR

3.1 Working time

CJEU case C-55/18, 14 May 2019, CCOO

Romanian legislation requires employers to set up a system enabling the recording of each worker's daily working time.
Thus, according to Article 119 of the Labour Code, as amended by Government Emergency Ordinance No. 53/2017, amending and supplementing the Labour Code, published in the Romanian Official Gazette No. 644 of 07 August 2017, the employer is required to keep records of the daily working hours of each employee, including his start and end time, and submitting this information to the labour inspectors upon request.

Government Emergency Ordinance No. 53/2017 was approved by Law No. 88/2018, published in the Official Gazette No. 315 of 10 April 2018.

The obligation to record working hours was stipulated by law, but there was no mention that all daily working hours were to be recorded. The amendment introduced in 2017 aimed to make it possible to monitor employees’ daily working time as closely as possible. On the basis of these records, labour inspectors monitor the observance of working time and the application of special rules prohibiting the provision of overtime. For example, part-time employees cannot provide overtime; if the working time records indicate that they have worked overtime hours, those hours will be considered undeclared work.

How an employer keeps records of working time can be determined by the employer through an internal regulation. According to Art. 260 (1) m) of the Labour Code, a violation of the obligation to record employees’ working time is considered a breach of labour law and results in a fine between RON 1 500 and 3 000.

### 3.2 Transfer of undertakings

**CJEU case C-509/17, 16 May 2019, Plessers**

In Romania, transfers of undertakings are governed by Law No. 67/2006 on the protection of employee rights in the event of a transfer of undertaking, a unit or parts thereof which, in accordance with the provisions of Directive 2001/23/EC, prohibits the dismissal of employees based exclusively on the transfer of the undertaking, business or part of the undertaking or business. The procedure for insolvency and insolvency prevention is regulated in Romania in Law No. 85/2014, published in the Official Gazette No. 466 of 25 June 2014. It does not contain any derogating rules regarding the transfer of an undertaking in the event that the transferee is insolvent.

Therefore, case C-509/17 does not seem to have any implications for Romanian legislation or jurisprudence.

### 4 Other relevant information

Nothing to report.
Slovakia

Summary
An analysis of relevant CJEU case law is provided.

1 National Legislation
Nothing to report.

2 Court Rulings
Nothing to report.

3 Implications of CJEU rulings and ECHR
3.1 Working time

*CJEU case C-55/18, 14 May 2019, CCOO*


Working time is regulated in the Third Part of the Labour Code (Articles 85-99). According to Article 99 of the Labour Code, the employer must record employees’ working time, overtime work, night work, the active and inactive part of standby work, including the start and end time of any work performed by the employee or standby work as agreed or required.

In the current wording, the Labour Code does not specify how employers should keep records of working time. It should be noted, however, that despite the fact that employees have the opportunity not only to work at home, but also from home, the obligation to maintain records of working time is imposed on the employer and she is not allowed to transfer this obligation to the employee.

According to Article 52 paragraph 1 of the Labour Code, the employment relationship of an employee who performs work for an employer at home or at another agreed place, pursuant to conditions agreed in the employment contract (‘home working’) or who performs work for an employer at home or at another agreed place, pursuant to the conditions agreed in the employment contract, using information technology (‘teleworking’) within the working time arranged on her own, shall be governed by this Act, with the following derogations:

- provisions on the arrangement of the determined weekly working time, continuous daily rest period, continuous weekly rest period and on stoppage shall not apply to such employees;
- in case of substantive personal obstacles to work, the employee shall not be entitled to wage compensation from the employer, except in case of death of a family member;
- such employees shall not be entitled to wages for overtime work, to wage surcharges for a period of work on a public holiday, to wage surcharges for night work and to wage compensation for work in hazardous working environments, unless the employee agrees otherwise with the employer.
Employees performing clerical activities must be mentioned as well. According to Article 52a of the Labour Code, provisions on working time and on collective labour law relationships shall not apply to labour law relationships of employees of churches and religious communities who perform clerical activities.

In the two cases mentioned above, the employer does not have the obligation to record working time. Given the short time since the judgment was adopted, the legislative bodies have not yet responded.

### 3.2 Transfer of undertakings

*CJEU case C-509/17, 16 May 2019, Plessers*

The main legal source in this regard is the Labour Code (Act No. 311/2001 Collection of Laws – ‘Coll’) as amended. The provisions of the Labour Code are binding for all employers in the private (business) sector and in the public sector.

The issue is broadly regulated in the legal regulation of the ‘Transfer of rights and obligations resulting from employment relationships’. According to Article 28 paragraph 1 of the Labour Code, if a business unit, which is an employer or part of an employer for the purposes of this act or if a task or activity of an employer or part thereof is transferred to another employer, the rights and obligations arising from the relationships governed by labour law with the transferred employee shall be transferred to the transferee employer.

The provision in Article 28 paragraph 2 of the Labour Code – ‘A transfer pursuant to Paragraph 1 is the transfer of a business unit, which preserves its identity as an organised group of resources (tangible components, intangible components and personal components), whose purpose is to carry out the economic activity, regardless whether this activity is primary or secondary’. From this provision, it follows that the new employer cannot, in principle, select the employees it wishes to keep on. There is a key link to the ‘organised group of resources’.

According to Article 31 paragraph 9 of the Labour Code, the provisions on the transfer of rights and obligations governed by labour law shall not apply to an employer that a court has declared insolvent.

Act No 7/2005 Coll. on bankruptcy and restructuring and on amendments to certain Acts, as amended, applies to proceedings for legal restructuring by transfer under judicial supervision. According to Article 56 of this Act, by declaring bankruptcy, the trustee is authorised to act on behalf of the bankrupt employer. As regards restructuring, the debtor’s legal acts during the restructuring are subject to the trustee’s approval to the extent determined by the court in the resolution on the restructuring. The debtor’s legal acts in labour law relationships are also subject to the trustee’s approval during the restructuring (Article 130 paragraph 1 of this Act). There is no mention in the Act of the right (possibility) of the transferee to select the employees it wishes to keep on.

*CJEU case C-194/18, 08 May 2019, Dodić*


As already mentioned above, the issue is broadly regulated in the legal regulation of the ‘Transfer of rights and obligations resulting from employment relationships’. According to Article 28 paragraph 1 of the Labour Code, if a business unit, which is an employer or a part of an employer for the purposes of this act or if a task or activity of an employer
or part thereof is transferred to another employer, the rights and obligations arising from the relationships governed by labour law with the transferred employee shall be transferred to the transferee employer. A transfer pursuant to paragraph 1 is the transfer of a business unit, which preserves its identity as an organised group of resources (tangible components, intangible components and personal components), whose purpose is to carry out an economic activity regardless of whether this activity is primary or secondary (Article 28 paragraph 2 of the LC).

In this case, the words ‘or if a task or activity of an employer or part thereof is transferred to another employer’ in the cited Article 28 paragraph 1 of the Labour Code is particularly relevant. In this sense, the Labour Code is compatible with the judgment.

3.3 Access to the profession of lawyer

**CJEU case C-431/17, 07 May 2019, Monachos Eirinaios**

The main legal source is Act No. 586/2003 Coll. on Advocacy and on Amendment of Act No. 455/1991 Coll. on Trade Business (Trade Act), as amended and other acts related to the practice of law.

According to Article 4 paragraph 1 of Act No. 586/2003 Coll., the Slovak Bar Association (Bar) shall admit anyone within two months from receipt of her written application, provided that such a person:

- is admitted as a registered European lawyer (Article 39);
- took the oath under Article 3 paragraph 6;
- practised law and provided legal services in the Slovak Republic for a period of three years without any significant interruption under this Act; and
- provided legal services and gave advice under letter c) on Slovak law.

According to Article 4 paragraph 7 of Act No. 586/2003 Coll., once the European lawyer (Article 30 letter a/) is registered in the list of lawyers, the Bar shall strike her name off the list of registered European lawyers (Article 39).

For the purposes of this Act:

- ‘European lawyer’ refers to a national of any EU Member State or a national of any other signatory of the EEA Treaty, who is authorised to pursue her professional activities and provide legal services as a sole practitioner under the professional title specified in Annex 1 of the Act (Article 30 letter a/);
- ‘registered European lawyer’: according to Article 39 paragraph 1 of the Act, the Bar shall enrol any person as a registered European lawyer within two months from receiving her written application, provided that she:
  - is a national of an EU Member State or any other signatory of the EEA Treaty;
  - is authorised to pursue her professional activities and provide legal services as a sole practitioner in her home Member State under one of the professional titles specified in Annex 1 of the Act;
  - has taken out compulsory professional indemnity insurance in respect of loss or damage, which might arise in connection with her practice of law in the Slovak Republic.
According to Article 5 paragraph 1 of Act No. 586/2003 Coll., the Bar shall admit anyone within two months from receipt of her written application, provided that such a person:

- is a national of an EU Member State or any other signatory of the EEA Treaty;
- has met the requirement of professional legal education and practice prescribed by this Member State for practising law individually under the professional title specified in Annex 1;
- passed the aptitude test pursuant to paragraph 3 below; and
- took the oath pursuant to Article 3 paragraph 6.

Annex 1 of Act No. 586/2003 Coll. contains the list of individual professional titles which entitles them to practice law in that State (Article 1 paragraph 2 of Directive 98/5 EC). Since the accession of the Slovak Republic to the European Union, the professional titles listed in the Annex were extended from 15 to 30 states.

The aptitude test is a test intended to measure the European lawyer’s professional knowledge (Article 30 letter a/) and her knowledge of Slovak law, as well as of the Bar’s internal rules. The aptitude test shall be taken in the official language. Details of the aptitude test shall be determined by the Bar (Article 5 paragraph 3 of the Act). Within six months from receipt of a written application and from the payment of the application fee set by the Bar, the Bar shall enable each applicant, who has met the requirements laid down in paragraph 1 letters a) and b) to take the aptitude test (Article 5 paragraph 4 of the Act).

A European lawyer (Article 30 letter a/) admitted to the Bar under Article 5 paragraph 1 may practise law under her home country’s professional title (Article 30 letter g/), which must be expressed in the official language of her home Member State. If the European lawyer is a partner or shareowner in a foreign legal entity or a Slovak legal entity authorised to provide legal services, in addition to her home country’s professional title, she may also use the corporate name and corporate type of such legal entity (Article 5 paragraph 5 of the Act).

Based on the cited provisions, the legislation does not exclude anyone from the possibility of ‘registering with the competent authority of the Member State in order to practice there under her home country’s professional title’, as is the case in the judgment.

### 3.4 Parental leave

*CJEU case C-486/18, 08 May 2019, Praxair MRC*

Under the Labour Code, severance (pay, compensation payment for dismissal) is paid to the employee in the event of termination due to organisational changes or the employee’s health condition. According to Article 76 paragraph 1 of the Labour Code, if an employment relationship is terminated with notice for reasons set out in Article 63 paragraph 1 letters a/ (if the employer or part thereof - 1. is repealed (cancelled) or - 2. is relocated and the employee does not agree with the change in the initially agreed location for the performance of work) or b/ (if an employee becomes redundant by virtue of the employer or competent body issuing a written resolution on a change in duties,
technical equipment or reduction in the number of employees with the aim of securing work efficiency, or due to other organisational changes) or because the employee's health condition has, according to a medical assessment, caused the long-term loss of her ability to perform her previous work, the employee shall be entitled to severance pay upon the termination of the employment relationship in the amount equal to at least:

- her average monthly wages, if the employee’s employment relationship lasted at least two years and less than five years;
- two times her average monthly wages, if the employee’s employment relationship lasted at least five years and less than ten years;
- three times her average monthly wages, if the employee’s employment relationship lasted at least ten years and less than 20 years;
- four times her average monthly wages, if the employee’s employment relationship lasted at least 20 years.

If the employment relationship is terminated by agreement for reasons set out in § 63 paragraph 1 letter a/ or b/ or because the employee’s health condition has, according to a medical assessment, caused the long-term loss of her ability to perform her previous work, the employee shall be entitled to severance pay upon the termination of her employment relationship in the amount equal to at least:

- her average monthly wages, if the employee’s employment relationship lasted less than two years;
- two times her average monthly wages, if the employee’s employment relationship lasted at least two years and less than five years;
- three times her average monthly wages, if the employee’s employment relationship lasted at least five years and less than ten years;
- four times her average monthly wages, if the employee’s employment relationship lasted at least ten years and less than 20 years;
- five times her average monthly earnings, if the employee’s employment relationship lasted at least 20 years (Article 76 paragraph 2 of the Labour Code).

In the cases provided for in Article 76 paragraph 3 of the Labour Code, the employee shall, at the end of her employment relationship, receive severance pay of at least ten times her average monthly wages.

An employee shall not be entitled to severance pay where the rights and duties resulting from the employment relationship are transferred to another employer in accordance with this act in the event of organisational changes or rationalisation measures (Article 76 paragraph 5 of the LC).

An employer may pay an employee severance in other cases besides those laid down in paragraphs 1 and 2 (Article 76 paragraph 7 of the LC).

As regards the employee’s average monthly wages, the calculation is regulated in Article 134 of the Labour Code. The most important elements of this provision are:

- average wages for labour law purposes shall be ascertained by an employer from the wages paid to an employee within a decisive period, and from the period worked by the employee in this decisive period (paragraph 1);
- the decisive period is the calendar quarter preceding the quarter in which the average wages are being determined. The average wages are always determined on the first day of the calendar month following the decisive period and used throughout the quarter, unless otherwise provided by this Act (paragraph 2);
• if the employee did not work at least 21 days or 168 hours during the decisive period, her probable (likely) wages are used instead of her average wages. The probable wages are determined from the wages the employee has earned since the start of the decisive period, or from the wages she evidently might have earned.

Redeployment leave allowance is not regulated in Slovak legislation.

The legislation in question (cited provisions) is uniform, irrespective of the employee’s gender.

4 Other relevant information

Nothing to report.
Slovenia

Summary
An analysis of relevant CJEU is provided.

1 National Legislation
Nothing to report.

2 Court Rulings
Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Parental leave

CJEU case C-486/18, 08 May 2019, Praxair MRC

The referring Court focussed on the calculation of co-called compensation payments for dismissal and redeployment of an employee who was on part-time parental leave and stated that the calculation must be based on the employee’s full-time wages. This is necessary to provide workers with the choice of taking full-time or part-time parental leave and on the other hand, to prevent indirect discrimination between female and male workers (a greater number of female workers chooses to take part-time parental leave) and to strengthen the principle of equal pay for male and female workers for equal work or work of equal value.

National legislation on the issues referred to in the preliminary ruling differ and the judgment of the CJEU can be assessed only from the viewpoint of individual national legal systems.

Compensation for redeployment leave

Compensation for redeployment leave and/or redeployment leave will be excluded from further consideration. The right to redeployment leave as known in France is not recognised by the Employment Relationships Act (ERA-1). The said Act broadly provides the right of workers to ongoing education, training and further training with the purpose, inter alia, of retaining their employment (Article 170 (1)), and requires the employer to provide education, training and further training to prevent the termination of the employment contract for business reasons (Article 170 (2)).

Four types of parental leave

In the case dealt with by the CJEU, the general term ‘parental leave’ was referred to. The Slovenian Parental Protection and Family Benefits Act includes four types of parental leave: maternity leave, paternity leave, child care leave and adoptive parents’ leave (see: Zakon o starševskem varstvu in družinskih prejemkih (ZSDP-1), Official Gazette of the RS, No.26/14, 90/15, 14/18- ZSDP-1B). Only some of these leaves entail either full-time or part-time absence from work. ‘Maternity leave’ is the right of a mother to be absent from work and as a rule is not transferable (there are some statutory exceptions). Maternity leave lasts 105 days. It can only be used continuously and in the form of full-time absence. ‘Paternity leave’ (90 days) is the right of a father and is not transferable. It can only be used in the form of full-time absence from work. ‘Child care leave’ (260 days) refers to leave that either parent is eligible to take immediately.
following the expiry of maternity leave. It must be used without interruptions on the basis of a previous written agreement between the parents. It may be used in the form of full or partial absence from work. ‘Partial absence’ means an absence shorter than the length of a regular work week and cannot be longer than half of the normal work week. It can be used either by the mother or father or both, but as a rule, cannot be used at the same time, except if both use it in the form of part-time absence from work. Up to 75 days of child care leave can be used at a later point in time, but before the child turns eight years old. This part of child care leave may be either used on a continuous basis or a day-by-day basis. In the first case, the leave may either be used in the form of full-time or part-time absence from work. The duration of the ‘adoptive parents’ leave’ depends on the age of the adopted child (150 days for a child between the ages of 1 and 4 years, 120 days for a child between the ages of 4 and 10 years). The leave may be used in the form of full-time or part-time absence from work.

A person who has a right to parental leave or who is not entitled to parental leave but to a parental benefit if she had insurance for parental protection for at least 12 months within the last three years, is entitled to either maternity, paternity, child care, adoptive parents’ compensation). The basis for the calculation of parental compensation is the average base wage of the worker for which social security contributions have been paid in the 12 months preceding the first application for parental compensation. The contribution base does not include income gained outside the employment relationship, remuneration for expenses related to work, holiday allowance, financial rewards for work anniversaries, payments in kind and other income apart from the employee's wages. Parental compensation for full-time absence from work comprises 100 per cent of the calculated basis. However, a minimum and maximum limit applies. Parental compensation for partial absence from work amounts to the proportional part of the full parental compensation, depending on the length of the partial absence from work. Reference to Article 67 of the ERA-1 should be made in this regard. It provides that a part-time worker pursuant to social insurance regulations, including parental leave regulations, shall have the same rights arising from social insurance as if she worked full time. Such a worker shall be entitled to remuneration according to her actual work obligations and shall be entitled to the same rights and obligations arising from the employment relationship as a full-time worker, unless otherwise stipulated by this Act (the ERA-1).

According to the ERA-1, a part-time worker is entitled to her rights on the basis of the pro rata temporis principle. Workers covered by Article 67 of the ERA-1 are entitled to the right to holiday allowance (regres) and compensation for dismissal (severance pay) due to business reasons. They are entitled to the same amount of benefits as full-time workers. The legislation in force and the respective case law are in line with the framework agreement on parental leave and the reasoning of the CJEU related to the principle of equality of full-time and part-time workers who are dismissed while they are on parental leave (see, for example, the decision of the Constitutional Court USRS Up-810/12, 20 January 2015).

*Interpretation of Article 157 TFEU*

The Court’s judgment is important from the Slovenian perspective as regards the understanding of ‘pay’ in Article 157(2) TFEU, which must be interpreted broadly. This means that the employee’s ordinary basic or minimum wage or salary and any other monetary benefits, regardless whether in cash or in kind, which a worker receives directly or indirectly within the scope of her employment from her employer, must be taken into account. The CJEU is of the opinion that compensation for dismissal is a form of deferred pay to which the worker is entitled by reason of his employment but which is paid to him upon the termination of his employment relationship.

Pay in the narrow or broad sense is an issue that is sometimes still discussed in Slovenia.
3.2 Transfer of undertakings

*CJEU case C-194/18, 08 May 2019, Dodič*

Information on how the Supreme Court of the RS, the Court which referred the questions to the CJEU for a preliminary ruling, implemented the judgment of the CJEU will be provided in September or October 2019 when the Supreme Court’s judgment is expected.

3.3 Fixed-term work

*CJEU case C-494/17, 08 May 2019, Rossato*

**Slovenian legal context**

Cases in which a fixed-term employment contract may be exceptionally concluded are specified in Article 54 of the Employment Relationships Act (ERA-1). In addition, Article 22(3) of the ERA-1 must be taken into consideration. It provides that if none of the applying candidates fulfils the job requirements for the performance of work prescribed in the collective agreement or the employer’s general act or required by the employer in the public notice of a vacancy, the employer may conclude a fixed-term employment contract for a period of up to one year with one of the candidates who fulfils the requirements provided by an act. This provision was frequently used in the education sector in the past when a candidate for a teaching job did not fulfil all of the requirements.

Reasons and/or cases in which a fixed-term employment contract may be concluded are deemed to be objective reasons justifying the conclusion of a fixed-term contract.

The employer may not conclude one or more successive fixed-term employment contracts for the same work, the uninterrupted period of which would last more than two years. This time limitation does not apply in cases where a temporarily absent worker is being replaced, a foreign worker obtains a work permit for a defined period of time, a manager or executive employee, etc. (Article 55 (2) of the ERA-1). As the provision applies to one fixed-term contract as well as to successive fixed-term contracts, the ERA-1 does not specifically refer to objective reasons for the renewal of such contracts.

In the case of an unlawfully concluded fixed-term contract, it will automatically be converted into a contract of indefinite duration (Article 56). This is a presumption iuris at de iure. It begins ex lege, automatically. If the employer does not accept/honour the conversion, the worker has the right to either enforce her right to judicial protection after the contract has been terminated. The employer may also be fined.

The ERA-1 does not provide a right to compensation for damage in addition to the conversion of the fixed-term employment contract into one of indefinite duration in case of unlawful conclusion of a fixed-term contract. A conversion with limited retroactive effect does not seem common in Slovenian case law.

The Organisation and Financing of Education Act (Zakon o organizaciji in financiranju vzgoje in izobraževanja, Official Gazette of the RS, No. 16/07 - official consolidated text, 36/08, 58/09, 64/09-popr., 65/09-popr., 20/11, 40/12-ZUJF, 57/12-ZPCP-2D, 47/15, 46/16, 49/16-popr., 25/17-ZVaj) supplements the ERA-1 with two provisions in Article 109(5) and (6). Teachers (and professional staff) may conclude fixed-term contracts in two cases: when the candidates do not fulfil the formal job requirements (very similar to the provision in Article 22(3) of the ERA-1) and when the decrease of pupils and/or
secondary students is foreseen or changes to the curriculum are being prepared. The Act does not contain any provisions on renewals of fixed-term contracts or penalties for unlawful conclusions of such contracts. The regulations of the ERA-1 must be applied.

3.4 Access to the profession of lawyer

_CJEU case C-431/17, 07 May 2019, Monachos Eirinaios_

**Brief overview of Slovenian law**

Article 7 of the Constitution of the Republic of Slovenia provides that the state and religious communities shall be separate and that religious communities shall enjoy equal rights. They shall pursue their activities freely.

The status and/or activities of monks are regulated by church law.

The Attorneys Act (see _Zakon o odvetništvu_, Official Gazette of the RS, No. 18/93-ZOdv, 24/96-Odl.US, 24/01, 54/08, 35/09, 97/14, 8/16-Odl.US, 46/16,36/19) provides that attorneyship is part of the judiciary. It is pursued as an autonomous and independent service. Attorneyship is performed by attorneys as a liberal profession. The right to perform the profession of lawyer is acquired when she (or the attorney’s firm) is entered in a special register (Article 2).

Lawyers from another EU Member State, EEA States or the Swiss Confederation have the right to pursue the profession of lawyer in any other Member State under the professional title acquired in their home State (Article 2a).

Before a lawyer is entered in the register of attorneys, she must produce evidence of a concluded contract on a fiduciary account.

ZOdv specifies the activities that are incompatible with the pursuit of the profession of lawyer (namely the performance of another profession with some exceptions, the performance of paid state service, the profession of notary, the performance of other business/work which contravenes the reputation and independence of the attorney’s profession) (Article 21 (1)).

The Act requires the profession of lawyer to be carried out on the basis of facts and permanently (Article 22).

As regards the conditions that must be fulfilled by an attorney, Article 26 of the ZOdv requires, inter alia, citizenship of the RS, another Member State of the EU, EEA States or the Swiss Confederation, knowledge of the Slovenian language, etc.

As regards the case dealt with in the preliminary proceedings, there is no explicit legal provision on the incompatibility between practicing law and the status of monk. In light of the applicable constitutional and statutory provisions, there is no lawyer with Slovenian or EU citizenship in Slovenia who also has the status of monk.

The case has no relevance for the Slovenian legal system.

4 Other relevant information

Nothing to report.
Spain

Summary

(I) A new law has modified the duration and conditions of parental leaves for judges
(II) Three national judgements, by the Constitutional Court on harassment and by the Supreme Court on fixed-term contracts and freedom of association are analysed
(III) An analysis on relevant CJEU case law is provided.

1 National Legislation

1.1 Parental leave

Factual part

The duration and conditions of parental leave for judges correspond to those of workers under the labour law.

Royal Decree Law 6/2019 of 01 March 2019, modified the legal regime of maternity and paternity leave (for both workers and civil servants), in order to ensure equivalent rights for both parents. Therefore, maternity and paternity leaves were replaced by a parental leave of 16 weeks for each parent. However, a parent other than the biological mother, who thus far was entitled to take five weeks of leave, cannot take the 16 weeks immediately; the law provides for a gradual application of the 16-week rule. Under the new regulations, parental leave will last for 8 weeks in 2019, 12 weeks in 2020 and 16 weeks after 2021. These new rules are complemented by the relevant changes in the field of social security.

These rules have now been extended to judges, who in Spain are not governed by labour law. They are civil servants to whom a special regime applies. The influence of EU law and CJEU case law is the main reason why certain rights, which to date were only applicable to workers in the private sector, have been extended.

2 Court Rulings

2.1 Harassment at work

Constitutional Court, 56/2019, 06 May 2019

A civil servant requested reinstatement to his previous job after concluding a period of special services in another area of the Administration. The employee was reinstated, but the employer did not assign any functions or tasks to him, although the civil servant had made several requests. The civil servant filed a complaint for harassment at work, which was dismissed by the Courts of the Social Order, but the Constitutional Court decided in his favour because it considered the employee had proved that he had been exposed to harassment at work.

The Constitutional Court recalled that acts of harassment at work can affect different rights of the person, although this degrading treatment is primarily an attack on moral integrity. Treatment of an individual is considered degrading when it is aimed to humiliate the person. Analysing the case, the Court considered that the civil servant suffered degrading treatment that affected his moral integrity, since the employer intentionally did not provide him with work for a long period without an acceptable
justification. The administration acted arbitrarily, abusing its power and showing no willingness to repair the situation.

2.2 Fixed-term contracts

Supreme Court, 397/2019, 23 May 2019

The Supreme Court stated that workers with a temporary replacement contract have no right to severance pay when the contract expires.

The first ruling in the CJEU case C-596/14, 14 September 2016, De Diego Porras had a huge impact on the Spanish legal system. Until then, workers had the right to a severance pay of 12 days of salary per year at the end of the fixed-term contract, except in case of fixed-term replacement contracts (interim contracts), which do not entail the right to severance pay unless otherwise agreed. On the other hand, the termination of an employment contract (permanent or fixed-term) for objective reasons is a form of dismissal, and the worker has the right to a severance pay of 20 days of salary per year. The De Diego Porras ruling asserted that this difference in treatment violated Article 4 of the framework agreement on fixed-term work.

The CJEU’s rulings in cases C-677/16, 05 June 2018, Montero Mateos and C-574/16, 05 June 2018, Grupo Norte Facility corrected the De Diego Porras ruling, and stated (paragraph 62) that: “Spanish law does not treat fixed-term workers and comparable permanent workers differently, since Article 53(1)(b) of the Workers’ Statute provides for statutory compensation equivalent to twenty days’ remuneration per year of service with the employer to be paid to a worker, irrespective of whether his employment contract is for a fixed-term or for an indefinite duration”.

The CJEU ruling of 21 November 2018 again dealt with De Diego Porras, and confirmed the Montero Mateos ruling. It seems that this specific problem should be resolved now.

The Spanish Supreme Court, referring to CJEU case law, stated that a worker who had concluded a temporary replacement contract did not have a right to severance pay once the contract expires and does not consider this difference to be a discrimination of temporary workers.

2.3 Freedom of association

Supreme Court, 347/2019, 08 May 2019

A union filed a lawsuit for the protection of fundamental rights for alleged damage to the freedom of association, with the request to end the anti-union action and seeking compensation for damages. The specificities of the conflict were in the fact that this trade union organisation acted in defence of the interests of members of a work cooperative, which according to Spanish legislation, are not workers. They do not fall under the scope of labour law, but commercial law applies to them. However, the rules on working conditions for this activity are very similar to those of labour law. The Supreme Court affirmed that the members of a work cooperative could join a union, and that unions can exercise their trade union activity in this field.

Workers and civil servants are entitled to the freedom of association in Spain. Members of worker cooperatives are neither workers nor civil servants, but rather self-employed workers, although they carry out work within a productive organisation (the cooperative) that gives instructions about the work and manages the economic compensation of the activity.

The Supreme Court affirmed that exceptions, limitations or exclusions of a fundamental right cannot be interpreted broadly. The members of a work cooperative carry out their
activity under the direction of the cooperative, and therefore may have conflicting interests. The freedom of association may be an adequate right to defend those interests. Finally, the Supreme Court expressly relied on ILO Conventions to recognise the right to freedom of association for members of a work cooperative.

3 Implications of CJEU rulings and ECHR

3.1 Working time

*CJEU case C-55/18, 14 May 2019, CCOO*

According to the CJEU ruling in case C-55/18, 14 May 2019, Federación de Servicios de Comisiones Obreras (CCOO), Articles 3, 5 and 6 of Directive 2003/88/EC of the European Parliament and of the Council of 04 November 2003 concerning certain aspects of the organisation of working time, read in the light of Article 31(2) of the Charter of Fundamental Rights of the European Union, and Article 4(1), Article 11(3) and Article 16(3) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, must be interpreted as precluding a law of a Member State that, according to the interpretation given to it in national case-law, does not require employers to set up a system enabling the duration of time worked each day by each worker to be measured.

This ruling could have had a huge impact in Spain if it were not for Royal Decree Law 8/2019, reported on in the March 2019 Flash Report. Traditionally, Spanish labour law did not require employers to record employees’ working time, with some exceptions.

Royal Decree Law 8/2019 introduced the obligation to record each worker’s daily working time (since 12 May 2019). This CJUE ruling is dated 14 May 2019, hence Spanish law complied with EU law on this specific issue before the ruling was published.
3.2 Transfer of undertaking

CJEU case C-509/17, 16 May 2019, Plessers

According to the CJEU’s ruling in case C-509/17, 16 May 2019, Plessers, 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, in particular Articles 3 to 5 thereof, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, in the event of the transfer of an undertaking which has taken place in the context of proceedings for judicial restructuring by transfer under judicial supervision applied with a view to maintaining all or part of the transferor or its activity, entitles the transferee to choose the employees which it wishes to keep on.

In Spain, the rules on transfers of undertakings are included in the Labour Code (Article 44). However, when the transfer occurs during proceedings of legal restructuring, the rules are included in Act 22/2003 of 09 July 2003, on Insolvency Proceedings. This Law allows a transfer of the undertaking with the aim of rescuing the company, but does not allow the transferee to select the employees it wishes to keep on (Article 146.bis.3). Thus, Spanish law seems to comply with this CJEU ruling.

4 Other relevant information

4.1 Unemployment

Unemployment declined in June (84 075 people). The total number of unemployed persons continued at their lowest levels over the last ten years, standing at 3 079 491 unemployed persons.
Sweden

Summary
The CJEU has presented a number of cases on EU labour law, on issues including transfers of undertakings, working time, fixed-term contracts and the profession of lawyer in a host Member State. While all of the cases are of interest for the Swedish perspective and regulated somewhat differently in Swedish law, none of the cases appear to have major implications for Swedish provisions, but some changes to the Working Time Act might have to be initiated to fully comply with the most recent case law of the CJEU.

1 National Legislation
Nothing to report.

2 Court Rulings
Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Transfer of undertakings

CJEU case C-509/17, 16 May 2019, Plessers

In case C-509/17, the CJEU dealt with issues related to transfers of undertakings, this time in a Belgian case. The employer was subject to a restructuring process and the majority of employees, along with assets, were transferred to another company. The applicant, who was not selected for the transfer and therefore made redundant, complained and argued that she had certain entitlements under the Transfer of Undertakings Directive. The CJEU concluded that the Directive should be applied in the specific situation and that the Directive precluded domestic legislation which allowed selection among employees in or during a transfer of undertaking.

The Swedish Employment Protection Act (lagen om anställningsskydd, section 6b) transposes the Transfer of Undertakings Directive. The provisions in the Act do not provide for such selection among employees as is the case in Belgium, and any collective agreement containing deviations from section 6b of the Act must take into account the standards of the Directive and are not allowed to undermine those standards (section 2(1) of the Employment Protection Act).

3.2 Working time

CJEU case C-55/18, 14 May 2019, CCOO

The CJEU decided in case C-55/18 on a dispute regarding the application of the Working Time Directive, the 89/291/EEC Directive on the safety and health of workers, and Article 31(2) of the Charter of Fundamental Rights of the European Union. EU law precludes a law of a Member State that, ‘according to the interpretation given to it in national case-law, does not require employers to set up a system enabling the duration of time worked each day by each worker to be measured’ (Grand Chamber ruling, last para).
The Swedish Working Time Directive, along with the provision established by the Work Environment Authority (Arbetsmiljöverket) regulates employers’ duty to keep records of overtime and on-call working times of each employee. The format of such records may differ significantly, but the employers are required to keep such records and, upon request, provide them to the employee and the relevant trade union (see AFS 1982:17). The situation that arose in the Spanish case before the CJEU could therefore not occur in Sweden. Collective agreements might include derogations from the Working Time Act, and perhaps even a total derogation from the Act, but only with respect to the rights provided for in the Directive (Section 3, Working Time Act, Arbetstidslagen). Neither the Working Time Act nor the Work Environment Authority’s regulations prescribe a duty for employers to keep records of ordinary working time. The decision in case C-55/18, if interpreted in line with the wording of the case, would likely call for such legislation, and amendments to the Swedish Working Time Act would be necessary to cover the entire labour market, including outside the range of collective agreements.

3.3 Fixed-term work

*CJEU case C-494/17, 08 May 2019, Rossato*

In the decision C-494/17 on fixed-term work, the CJEU concluded that Clause 5.1. of the Framework Agreement on fixed-term work did not preclude an Italian provision that barred entitlements to financial compensation due to misuse of successive fixed-term employment contracts. The case concerned a music teacher (accordion) employed for many years under multiple successive fixed-term contracts, but eventually granted a permanent contract during the litigation before the courts of law. The Swedish situation differs significantly from the Italian one dealt with in the case. The application of fixed-term contracts is widespread and successive fixed-term employment contracts are common in Sweden. However, the Employment Protection Act, Lagen om anställningsskydd, para 5 and para 5a, stipulates that ‘ordinary’ fixed-term contracts can only be concluded for a maximum duration of 24 months. The number of such contracts (successive or not) is irrelevant and they can also be intermittent during a period of 5 years. Once the employee has been employed for more than 24 months in total as an ‘ordinary’ fixed-term employee, the contract is converted into a permanent one. Interestingly, the use of ‘ordinary’ fixed-term contracts can be to some extent combined with substitute employment (vikariat), which can apply for a maximum additional 24 months. If such contracts are concluded with the aim of extending the period of fixed-term or substitute employment as much as possible, the employer can employ the employee on a temporary contract for at least four years (24 months plus another 24 months). Collective agreements can, and often do, regulate limitations or extensions of the possibility to employ employees on a temporary basis. Compared to the Italian case, there are no Swedish statutes that preclude the employee’s right to entitlements under the Act (or collective agreements).

3.4 Access to the profession of lawyer

*CJEU case C-431/17, 07 May 2019, Monachos Eirinaios*

In a somewhat peculiar Greek case, the CJEU had to decide a case in which a monk, active in the Greek monastery Petra, and who had obtained professional qualifications to practice law in Cyprus, was denied registration in the Athens Bar Association. The CJEU concluded that Directive 98/5/EC precluded national legislation which, "on account of the incompatibility under that legislation between the status of mon and practice of the profession of lawyer, prohibits a lawyer who has the status of monk, and who is registered as a lawyer with the competent authority of the home Member State, from
registering with the competent authority of the host Member State in order to practice there under the home-country professional title”.

The CJEU decision in C-431/17 on access to the profession of lawyer represents a situation that has not been previously subject to any Swedish decision. The Swedish situation differs somewhat from the Greek one described in the case. There is no legal requirement per se to practice law or to represent clients before the courts of law in Sweden and there is no public authority for practicing lawyers. The Swedish Bar Association, Advokatsamfundet, holds the right to grant an applicant the title ‘advocate’ under certain conditions, but the Association is a private entity, with a semi-public position. The articles of association for the Swedish Bar Association stipulate, inter alia, that a member of the Association (advokat) cannot be employed in a public or private enterprise, other than by a law firm (advokatfirma), unless the Board does not grant special permission. This might be in contradiction to the decision in the Greek case before the CJEU.

4 Other relevant information

Nothing to report.
United Kingdom

Summary
This report addresses issues related to working time and overtime; misuse of fixed term contracts, the application of transfer rules to restructuring with the exception of insolvency cases.

1 National Legislation
Nothing to report.

2 Court Rulings

2.1 Working time


In East of England Ambulance Service v Flowers [2019] EWCA Civ 947, the question was raised whether voluntary overtime should be taken into account when calculating holiday pay. The answer was yes if it was sufficiently regular and settled for payments made in respect of it to amount to 'normal' remuneration (para 32). The Court of Appeal struggled to deal with the CJEU’s judgment in Case C-385/17 Hein v Albert Holzkamm GmbH and decided to distinguish it. Two paragraphs are worthy of note:

“45. I therefore accept the submission of Mr Jones that the distinction being drawn in paragraphs 46-47 of Hein is between exceptional and unforeseeable overtime payments on the one hand and broadly regular and predictable ones on the other.

46. I have considered whether this would be an appropriate case for a reference to the CJEU. But quite apart from the fact that the UK may well withdraw from the jurisdiction of the Court in the near future, the parties to the present litigation would not be assisted by a reference. The Claimants have won their case on the basis of contract. They understandably wish the ET to proceed to determine remedy and make them an award. The rights and wrongs of the interpretation of the Directive are of no concern to them nor to the Appellant Trust.”

3 Implications of CJEU rulings and ECHR

3.1 Fixed-term work

CJEU Case C-494/17, 08 May 2019, Rossato

In the CJEU’s case C-494/17, 08 May 2019, Rossato, the Court ruled that Clause 5(1) of the Framework Agreement on fixed-term work is to be interpreted as not precluding legislation which, as applied by the national supreme courts, precludes any entitlement to financial compensation on account of the misuse of successive fixed-term employment contracts for public-sector teachers whose employment relationship has been converted from a fixed-term relationship into one of indefinite duration, with limited retroactive effect, if such conversion is neither uncertain nor unpredictable or fortuitous and the limited account taken of the period of service completed under those successive fixed-term employment contracts constitutes a measure that is proportionate for the purpose of punishing that misuse, which is a matter for the national court to determine.
Under UK law, the relevant provision is Reg 8 of the Fixed-Term Work (Prevention of Less Favourable Treatment) Regulations 2002. This provides:

"8.—(1) This regulation applies where—
(a) an employee is employed under a contract purporting to be a fixed-term contract, and
(b) the contract mentioned in sub-paragraph (a) has previously been renewed, or the employee has previously been employed on a fixed-term contract before the start of the contract mentioned in sub-paragraph (a).

(2) Where this regulation applies then, with effect from the date specified in paragraph (3), the provision of the contract mentioned in paragraph (1)(a) that restricts the duration of the contract shall be of no effect, and the employee shall be a permanent employee, if—
(a) the employee has been continuously employed under the contract mentioned in paragraph 1(a), or under that contract taken with a previous fixed-term contract, for a period of four years or more, and
(b) the employment of the employee under a fixed-term contract was not justified on objective grounds—
(i) where the contract mentioned in paragraph (1)(a) has been renewed, at the time when it was last renewed;
(ii) where that contract has not been renewed, at the time when it was entered into.

(3) The date referred to in paragraph (2) is whichever is the later of—
(a) the date on which the contract mentioned in paragraph (1)(a) was entered into or last renewed, and
(b) the date on which the employee acquired four years' continuous employment.

(4) For the purposes of this regulation Chapter 1 of Part 14 of the 1996 Act shall apply in determining whether an employee has been continuously employed, and any period of continuous employment falling before the 10th July 2002 shall be disregarded.

(5) A collective agreement or a workforce agreement may modify the application of paragraphs (1) to (3) of this regulation in relation to any employee or specified description of employees, by substituting for the provisions of paragraph (2) or paragraph (3), or for the provisions of both of those paragraphs, one or more different provisions which, in order to prevent abuse arising from the use of successive fixed-term contracts, specify one or more of the following—
(a) the maximum total period for which the employee or employees of that description may be continuously employed on a fixed-term contract or on successive fixed-term contracts;
(b) the maximum number of successive fixed-term contracts and renewals of such contracts under which the employee or employees of that description may be employed; or
(c) objective grounds justifying the renewal of fixed-term contracts, or the engagement of the employee or employees of that description under successive fixed-term contracts,
and those provisions shall have effect in relation to that employee or an employee of that description as if they were contained in paragraphs (2) and (3)."
As can be seen from Reg 8(3), the law operates so as to convert a fixed-term contract into a permanent one on the renewal after four years, unless there are objectively justified reasons as to why this should not happen. Therefore, the question of abuse does not arise as it might under the Italian system. However, under English law, there is no such thing as a ‘permanent’ contract. All contracts can be terminated on notice and with good reason.

3.2 Transfer of undertakings

Case C 509/107, 16 May 2019, Plessers

As regards case C-509/107, 16 May 2019, Plessers, the Court ruled that Council Directive 2001/23/EC, in particular Articles 3 to 5 thereof, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, in the event of the transfer of an undertaking which has taken place in the context of proceedings for legal restructuring by transfer under judicial supervision applied with a view to maintaining all or part of the transferor or its activity, entitles the transferee to select the employees it wishes to keep on. In the UK, the relevant regulations, the Transfer of Undertakings (Protection of Employees) Regulations 2006, as amended, apply to employees in all situations, except cases of insolvency. Regulation 8 provides:

"8.— Insolvency

(1) If at the time of a relevant transfer the transferor is subject to relevant insolvency proceedings paragraphs (2) to (6) apply.

(2) In this regulation “relevant employee” means an employee of the transferor—

(a) whose contract of employment transfers to the transferee by virtue of the operation of these Regulations; or

(b) whose employment with the transferor is terminated before the time of the relevant transfer in the circumstances described in regulation 7(1).

(3) The relevant statutory scheme specified in paragraph (4)(b) (including that sub-paragraph as applied by paragraph 5 of Schedule 1) shall apply in the case of a relevant employee irrespective of the fact that the qualifying requirement that the employee’s employment has been terminated is not met and for those purposes the date of the transfer shall be treated as the date of the termination and the transferor shall be treated as the employer.

(4) In this regulation the "relevant statutory schemes” are—

(a) Chapter VI of Part XI of the 1996 Act;

(b) Part XII of the 1996 Act.

(5) Regulation 4 shall not operate to transfer liability for the sums payable to the relevant employee under the relevant statutory schemes.

(6) In this regulation “relevant insolvency proceedings” means insolvency proceedings which have been opened in relation to the transferor not with a view to the liquidation of the assets of the transferor and which are under the supervision of an insolvency practitioner.

(7) Regulations 4 and 7 do not apply to any relevant transfer where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner.”
The case confirms the Court’s detailed requirements which apply in the case of the insolvency exception. The UK specifically identifies the UK’s insolvency carve out in Regulation 8.

4 Other relevant information

Nothing to report.
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