Flash Reports on Labour Law
July 2019
Summary and country reports

Written by The European Centre of Expertise (ECE), based on reports submitted by the Network of Labour Law Experts
July 2019
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Executive Summary

1 National level developments

In July 2019, important developments in labour law took place in several Member States and European Economic Area (EEA) countries (see Table 1). This month there is no relevant CJEU case law to comment. Legislative initiatives and case law focused specifically on the following issues:

Minimum wage

In Luxembourg, a recent law raised the minimum wage by 0.9 per cent with retroactive effects as from 01 January. In the Netherlands, the government has introduced fixed tariffs for the lower end of the labour market. The fixed minimum tariff shall be set at EUR 16 per hour and should lead to a fairer income. In Poland, the Parliament enacted the amendment to the Law of 10 October 2002 on minimum wage, establishing that employees are entitled to minimum wage, introducing some concepts and complements that were excluded from the minimum wage, such as seniority allowance.

Third country nationals

In Croatia, the number of work permits for aliens working in the area of tourism and hospitality has been increased. In Czech Republic, a new Act on the Residence of Foreign Nationals has been published, establishing that the duties regarding notification and registration obligations vis-à-vis the Labour Office will be exclusively borne by the employer, i.e. the foreign employer who posts foreign employees to the Czech Republic.

Posting of workers

In Czech Republic, a draft act aiming to transpose Directive (EU) 2018/957 on the posting of workers is currently in the legislative procedure. This draft aims at extending the list of working conditions for posted workers in the host state (so-called ‘hard core’ conditions) - the posted worker’s travel expenses shall also be reimbursed in connection with the performance of her work and is entitled not only to the minimum rates of pay, but also to all mandatory elements of pay, appropriate level of guaranteed salary and other salary components. It also foresee increased protection for long-term postings and improvements in the information’s obligation. In Liechtenstein, a draft act for the amendment of the provisions on posting of workers to transpose the Enforcement Directive (Directive 2014/67/EU) has been elaborated and is ready for consultation in the Parliament.

Equal treatment

In Norway, the Appellate Court has ruled in a case concerning temporary agency work where the main question was whether a company bonus was defined as ‘salary’ and thus subject to the equal treatment principle. The relevant company bonus was based on the overall performance of the company and not on the individual employee’s performance. The court of appeal found that such a company bonus was not ‘salary’ and thus not subject to the equal treatment principle. In Spain, the Supreme Court has ruled in a case on equality on salaries. An undertaking agreed to a modification of a wage supplement with the trade unions. Since then, the amount of this wage supplement has been higher for workers hired before the date of the agreement than for those hired after. After 20 years with that configuration, a trade union challenged this agreement in 2017, claiming that it violated the principle of equality recognised in Article 14 of the Spanish Constitution. The assertion was that all workers ought to be entitled to the higher supplement. The Supreme Court found that the configuration of this wage supplement created a ‘double salary scale’ based on the date of hiring. According to both the Constitutional Court and the Supreme Court’s case law, this type of supplement violates the principle of equality and the norm that requires same wage for work of
equal value (Article 28 of the Labour Code).
### Table 1. Main developments (excluding implications of CJEU or EFTA-Court rulings)

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Austria

Summary

(I) Before the end of the summer session of the Austrian Parliament, the political free play as a result of the vote of no confidence of the centre/right wing government, several laws were passed in quick succession. The next parliamentary elections will be on 29 October. Among the laws that were passed is an amendment to the Austrian Act on Fathers’ Leave (‘Väterkarenzgesetz’, VKG) and to the Act on the Protection of Mothers (‘Mutterschutzgesetz’, MSchG), introducing short-term paternity leave and fully including parental leave in the calculation for all entitlements based on the employee’s length of service.

(II) An amendment to the Act on Remuneration of Public Servants (GehG)/ the Act on Contract Agents for Public Authorities (VBG) following the CJEU’s judgments in C-24/17, 08 May 2019, Österreichischer Gewerkschaftsbund and C-396/17, 08 May 2019, Leitner, addresses age discrimination and a violation of Art. 45 TFEU.

(III) One decision of the Austrian Supreme Court published in July 2009 deals with an aspect of fixed-term employment in state public service.

1 National Legislation

1.1. Paternity Leave

Fathers are now entitled to one month of unpaid leave following the birth of their child. The law enters into force on 01 September 2019 and applies to births after 01 December 2019.

The expectant father must inform his employer that he plans to make use of his entitlement at least three months before the child’s calculated date of birth. The employer must be informed of the expected start of the leave, which must be taken within eight weeks after the child’s birth. After the child is born, the employee must immediately inform the employer and announce the exact date of the start of the leave. The employer’s consent is not required.

Once the employee has expressed the intention to make use of his entitlement to paternity leave, but no more than four months before the child’s expected date of birth, he is entitled to additional protection against dismissal. This protection applies until four weeks after the end of the unpaid leave.

Analytical Part

The provision on paternity leave entails strong protection against termination for those who want to make use of this (unpaid) leave. There is no specific mechanism to ensure that fathers are entitled to return to their jobs or equivalent posts. Employees may return to their job or a job that is covered by their employment contract. No specific provision ensures that these fathers shall benefit from an improvement in working conditions to which they would have been entitled during their absence, other than general statutory employment law.

Sources:

A press article of ‘Der Standard’ from 02 July 2019 is available here.

A press article of ‘Der Standard’ from 09 July 2019 is available here.
1.2. Parental leave

To date, parental leave was only partially included in the calculation for certain entitlements that depend on the employee’s length of service, such as the entitlement to paid annual leave and the duration of notice periods. The amendment enters into force on 01 August 2019. Parental leave, both for fathers and mothers, is now fully included in the calculation of all entitlements that depend on the length of service, including salary advancements.

Sources:
A press article in ‘Der Standard’ from 02 July 2019 is available here.
A press article in ‘Kontrast’ from 12 June 2019 is available here.

1.3. Remuneration for Civil Servants

Following the latest CJEU decisions in C-24/17, 08 May 2019, Österreichischer Gewerkschaftsbund and C-396/17, 08 May 2019, Leitner, which found the basis of remuneration of federal employees to be discriminatory on the grounds of age (again), and in breach of Art 45 TFEU, Parliament passed an act addressing these violations of EU law.

Factual part

Currently, remuneration in the public service is, in part, based on the length of service, namely on the so-called ‘Besoldungsdienstalter’ (‘salaried age’). This ‘salaried age’ is determined by the civil servant’s length of service. Previous work experience is partially taken into account. When considering previous work experience, work experience with public employers is always fully included, whereas work experience with private employers is only considered if it is relevant for the job, and for a maximum amount of ten years. This differentiation is a violation of Art 45 TFEU (C-24/17, ÖGB). The legislator has now amended the respective provisions by abolishing the ten-year limit for acknowledgement of previous work experience with private employers.

Prior to the implementation of the ‘salaried age’, public service referred to the date of the appointment for any entitlements linked to length of service, also taking into account previous work experience (‘Vorrückungsstichtag’). When taking into account previous work experience, any work experience with public employers was also always fully included, while experience with private employers was only partially considered. In addition, any work experience acquired before the age of 18 was not taken into account (see C-88/08, Hütter). The Austrian legislator’s first attempt to amend this provision was not in compliance with EU law (see C-530/13, Schmitzer), and the Austrian legislator’s second attempt failed as well: all public employees were transferred into the ‘salaried age’ scheme (see above) on the basis of their previous (discriminatorily calculated) remuneration (C-24/17, ÖGB and C-396/17, Leitner).

The legislator has now attempted to amend the ‘salaried age’ of the relevant public employees in a three-step procedure to ensure that their remuneration is non-discriminatory and in compliance with Art 45 TFEU.

First, in addition to the relevant date for remuneration (‘Vorrückungsstichtag’), which was initially calculated in a discriminatory manner, a comparable relevant date (‘Vergleichsstichtag’) is calculated in a—supposedly—non-discriminatory manner. Previous experience that must be included by law is now taken into consideration if it was acquired after the age of 14 (instead of 18). As regards the times that were taken into account even though they did not meet any specific criteria (‘sonstige Zeiten’), the law amended the previous age limit as well (14 years of age instead of 18), but a calculation was added that, in effect, prevented any change to the amount of times
included. Also, any relevant work experience with private employers may now be considered as well, approved on a case-by-case basis.

Second, the time between the original relevant date for remuneration ('Vorrückungsstichtag') and the comparable date for remuneration ('Vergleichsstichtag') is calculated, e.g. six months.

Thirdly, the calculated time is added to the 'salaried age' of each public employee. The law was amended in such a way that all 'salaried ages' are either unaffected or improved by the re-calculation. In case the "salaried age" is improved, public employees are entitled to a higher remuneration and entitled to additional remuneration, starting from 01 May 2016.

Analytical Part

The amendments address two different aspects: discrimination on the grounds of age for those public employees who were subject to laws that did not take any experience acquired before the age of 18 into account when calculating remuneration, and the violation of Art 45 TFEU by treating work experience acquired with public employers differently than that acquired with private employers when calculating remuneration.

The group of employees who entered public service before 2011 was subjected to both violations of EU law. Their remuneration is now being recalculated in accordance with the above-mentioned three-step-procedure. The procedure itself is compliant with EU law.

As for the amendments: previous work and study experience acquired between the ages of 14 and 18 are included, i.e. the amendment achieves the aim to establish discrimination-free remuneration. The law does not, however, introduce any changes to the inclusion of work periods that do not cover any specific work experience ('sonstige Zeiten')—meaning that as regards consideration of those periods of remuneration, the age discrimination factor has not been effectively dealt with.

The amendment also does not effectively address the difference in treatment between work experience acquired with public employers as opposed to work experience acquired with private employers. Even though the 10-year limit for acknowledgement of private work experience (which applied to some public employees) was abolished, public work experience is always taken into account (regardless of its relevance), whereas private work experience is only included if it is considered relevant according to the definition provided by law. The violation of Art 45 TFEU has therefore not yet been entirely abolished.

A press article in 'Der Standard' from 27 June 2019 is available here.

2 Court Rulings

2.1 Consecutive fixed-term term contracts

Supreme Court, No. 8 ObA 5/19x, 24 May 2019

Factual Part

No explicit provision exists in Austrian labour law preventing abuse arising from the use of successive fixed-term employment contracts. Case law based on the general civil law prohibition of contracts contra bonos mores or circumventing the law requires the employer to provide objective reasons to justify the renewal of fixed-term contracts – otherwise, the contract will be deemed to have been concluded for an indefinite duration after the first renewal (e.g. Supreme Court, No. 9 Ob A 156/08v, 28 January 2009).
This is not the case, however, in most regulations that cover the special employment law of public servants or contractual public workers who perform work under a fixed-term contract. In the present case, the successive fixed-term contract of a doctor who worked in a Viennese hospital was evaluated. The relevant § 2 (5) of the Act on Public Contractual Employees of the City of Vienna ("Wiener Vertragsbedienstetenordnung 1995" – hereinafter VBO) reads as follows (unofficial translation by the author):

"A fixed-term employment relationship may only be extended once for another fixed term, for a maximum of one year; this does not apply if the employment relationship also involves training for the acquisition of professional qualifications prescribed by law […]. If the employment relationship is continued beyond the maximum extension period, it shall be deemed to have been entered into from the beginning for an indefinite period."

In the present case, a doctor first worked as an assistant doctor for two years to acquire the necessary qualifications of a general practitioner. Thereafter, the contract was extended for another 51 months during which the doctor trained as a pulmonary specialist. After this training was completed and after he had acquired the legal qualifications to practice (iust prac ticand a) as a pulmonologist, his contract was again extended for another fixed term of 31 months to acquire special training in pulmonology intensive care. The doctor claimed that the last fixed-term contract was not covered by the provision in the VBO and that he therefore had been employed under an open-ended contract. The employer argued that the last fixed-term contract was justified by an objective reason and that the special training was considered 'training for the acquisition of a professional qualification prescribed by law' and that the extension of the fixed-term contract was lawful.

The Labour and Social Court of Vienna as well as the court of appeals decided in favour of the employer, deeming that the last fixed-term contract was justified by the 'training to acquire professional qualifications prescribed by law'.

The Supreme Court overturned these decisions. On the one hand, it argued that the general justification based on objective reasons does not apply as the VBO is a lex specialis and therefore, only the reasons stipulated therein may justify an consecutive fixed term. On the other hand, the specialisation in pulmonology intensive care does not result in any special professional qualification required by law. This was only the case with the training to become a pulmonary specialist but not for the specialisation within this field. Therefore, the third extension of the fixed-term contract exceeding one year resulted in an open-ended employment contract.

Analytical Part

It has been pointed out on several occasions (especially in the Labour Law Thematic Review 2018: Evaluation of the Part-Time Directive and the Fixed Term Directive) that the transposition of the Fixed Term Directive remains problematic with reference to measures to prevent abuse of fixed-term contracts. It has been argued that there is no need for special legislation as case law has considered extensions of fixed-term contracts or successive fixed-term contracts without good cause to be a circumvention of protection against dismissal and of provisions that base an employee’s right or entitlement on uninterrupted employment. The employer must therefore justify the second and any additional fixed-term contract, otherwise the agreement on the fixed-term contract is void and the contract is deemed to have been concluded for an indefinite duration. This, however, is not a proper transposition of the directive as the reference to general clauses and case law is not transparent enough. This only refers to general labour law, as public service law usually includes more restrictive and detailed provisions to prevent the abuse of consecutive fixed-term contracts. They are generally relevant, and especially with reference to the VBO and are in line with the Fixed Term Directive.
In the present case, the Supreme Court interpreted the exception clause restrictively and ensures that the provision fulfills its function to prevent abuse of consecutive fixed-term employment. As a result, the Court decided that the employee had in fact concluded a contract of indefinite duration after being employed under consecutive fixed-term contracts for more than five years in a hospital.

3 Implications of CJEU rulings and ECHR rulings
Nothing to report.

4 Other relevant information
Nothing to report.
Belgium

Summary
There have been no new developments in labour law, as the federal government has resigned and Members of Parliament are on holiday.

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

4.1 Collective redundancies

Terminology:
- ‘Announcement of collective redundancies’: announcement of the intention of collective redundancies as referred to in Article 6 of the Royal Decree of 24 May 1976 on collective redundancies. This marks the start of the information and consultation procedure;
- ‘Notification of collective redundancies’: notification of the draft of collective redundancies as referred to in Article 7 of the Royal Decree of 24 May 1976 on collective redundancies; this concludes the information and consultation procedure.

In the period from January 2019 to June 2019, 43 technical business units, i.e. establishments, announced collective redundancies affecting 2,681 employees. Within the same period, 43 technical business units, i.e. establishments, initiated the mandatory information and consultation procedure. Of the 2,681 employees affected by the planned collective redundancies in the period from January 2019 to June 2019, 389 were employed in Brussels, 1,452 in Flanders and 840 in Wallonia.

In the period from January 2019 to June 2019, 29 technical business units completed the information and consultation procedure.

In the first quarter of 2019, a number of mediated corporate dismissals were announced. A public law company that is not subject to private legislation on collective redundancies garnered the most attention. The public telecommunications company Proximus (1,900 announced redundancies) is not reflected in these statistics.

The metalworking sector accounted for more than one-third of the total number of collective redundancy announcements. The cable manufacturer Nexans had no
redundancies (83 redundancies at Buizingen and Dour) nor were any announced at Munters (211 redundancies at Dison, producer of air dehumidification systems). At the end of this period, the steel wire manufacturer Bekaert (Zwevegem and Ingelmunster) also announced 281 redundancies.

The large number of collective redundancies in Walloon Brabant is mostly attributable to two companies: the steel company NLMK Clabecq (base metal) with 290 jobs at risk and the American pharmaceutical group Baxter (90 jobs, petro-chemical, in Braine-l’Alleud and in Lessen).

The distribution sector, a sector which in recent years has already witnessed a substantial number of collective dismissals, announced nearly 100 redundancies in the multimedia and publication sector (57 jobs at Fnac, Brussels and 39 jobs at Actissia, Aat). The Flemish newspaper group Mediahuis (92 announced redundancies, Antwerp), and the courier service UPS (111 redundancies, Machelen) also announced collective redundancies.

The meal producer Chillfis announced collective redundancies as well (73 redundancies, Schoten).

At the beginning of the second quarter of 2019, the Federal Ministry of Labour received an announcement of collective redundancies at Unilever Lipton Tea (Forest, 126 jobs, nutrition). Some collective redundancies were also announced at the ‘De Zetel’ Seat Furniture Factory (Ardooie, 51 jobs, wood sector) and at Kiaal Belgium (Tournai, Belgium, 33 jobs).

Announcements of the intention of collective redundancies versus the notification of planned collective redundancies.

In the first quarter of 2019, the Federal Ministry of Labour received a limited number of notifications of collective dismissals. The total number of redundancies compared to the initial announcements is nearly identical. The negotiations with employees in the metalworking sector have not brought any relief. The number of redundancies remained, inter alia, the same at the fence producer Betafence in Zwevegem (80 jobs) and at Superia radiators in Zedelgem (81 jobs). The ministry received notifications from the chocolate manufacturer Baronie in Eupen (62 instead of 61 redundancies (+1 agri-food) and the meal producer Chillfis in Schoten (66 instead of 73 redundancies (-7, agri-food). Finally, the number of redundancies at the publisher Actissia in Aat (39 jobs) remained unchanged.

The second quarter of 2019 had a higher number of collective redundancy notifications compared to the first quarter (17 compared to 12) and a very high number of redundancies (1434 vs. 520). The number of redundancies is also slightly higher than the number of announced redundancies. The number of announced collective redundancies at Ikea was lower than the actual number of redundancies (head office in Zaventem, 245 jobs lost compared to 120 announced redundancies). The Federal Ministry of Labour received a notification of redundancies from Emerson Climate Technologies at Welkenraedt (52 announced redundancies as opposed to 72 actual redundancies (-20 jobs lost), from the steel company NLMK Clabecq (base metal, Walloon Brabant) with 271 announced as opposed to 290 redundancies, (-19) jobs lost, from the cable manufacturer Nexans (Buizingen) with 55 announced versus 61 (-5) redundancies, from the Flemish newspaper group Mediahuis (Antwerp) with 74 announced versus 92 actual redundancies (-18) jobs lost, from the steel wire manufacturer Bekaert (West Flanders) with 279 announced as opposed to 281 redundancies (-2) dismissed. The seating furniture factory ‘De Zetel’ (West Flanders) notified the ministry of 51 redundancies (the number of announced and actual redundancies was the same).
Croatia

Summary
The Act on Citizens of Member States of the EEA and Members of their Families has been adopted as has the Amendment to the Civil Servants Act and the Act on Regulated Professions and the Recognition of Foreign Professional Qualifications. A new Minister of Labour and Pension System has been appointed. The number of work permits for aliens working in the tourism and hospitality sector has been raised by 500.

1 National Legislation
1.1 Free movement of workers

1.2 Amendment to the Civil Servants Act
The Amendment to the Civil Servants Act has been adopted (Official Gazette No. 70/2019). Among others, the provisions on state exams, fixed-term civil servants, classifications of jobs, evaluation of work of civil servants and employees in civil service have been amended. So far, the employees in civil service have concluded employment contracts and the Labour Act has been applied to their employment relationships as is the case for employees employed in the private sector. It has been amended. Employees in civil service will be employed in the same manner as civil servants (they will no longer conclude employment contracts, but the decision on their admission to the civil service will be issued as the legal basis of their employment relationship) and the Civil Servants Act will apply to their employment relationship.

1.3 Mutual recognition
The amendment to the Act on Regulated Professions and Recognition of Foreign Professional Qualifications (Official Gazette No. 70/2019) has been adopted with the purpose of simplifying the procedure to recognise foreign professional qualifications and facilitate access to the labour market.

2 Court Rulings
Nothing to report.
3 Implications of CJEU Rulings and ECHR
Nothing to report.

4 Other relevant information

4.1 New Minister of labour and pension system
Mr Josip Aladrović, a former head of the Croatian Institute for Pension Insurance, has been appointed Minister of Labour and Pension System (Official Gazette No. 71/2019). More information is available here.

4.2 Employment of aliens in tourism
The number of work permits for aliens working in the area of tourism and hospitality has been raised by 500. More information is available here.
Czech Republic

Summary
(I) New long-term residence permits for the purpose of seeking employment and an amendment to the employer’s notification and registration duty of foreign employees have been introduced.
(II) E-sick notes have been introduced, which allow employers to verify the employee’s temporary incapacity for work in an easier and faster way.
(III) Directive (EU) 2016/2341 (‘Directive IORPs’) was transposed into national law.
(IV) By transposing the new Directive (EU) 2018/957 on the posting of workers, the rights of posted workers have been strengthened.

1 National Legislation

1.1 Employment of foreigners
Act No. 176/20, 19 Coll., amending Act No. 326/1999 Sb., on the Residence of Foreign Nationals in the Czech Republic and related Acts and Act No. 435/2004, Employment Act, was published (see also April, May and June 2019 Flash Reports)

Based on the Employment Act, which was valid until 30 July 2019, domestic (Czech) employers had to fulfil their notification and registration obligations vis-à-vis the Labour Office, even if they only ordered services from a foreign company that posted employees to the Czech Republic for this purpose. In practice, however, it was often difficult for the Czech employer to obtain the necessary information about the foreign employees, especially because foreign companies often provide services through subcontractors. This measure constituted a non-standard requirement that placed a considerable burden on the Czech entity to which the foreign employees were posted. In practice, these entities often did not have the relevant information at their disposal.

Based on the amendment to the Employment Act, effective as of 31 July 2019, this duty is exclusively borne by the employer, i.e. the foreign employer who posts the employees to the Czech Republic. The respective form for foreign employers can be found on the website of the Ministry of Labour and Social Affairs (only in Czech).

Act No. 176/2019 Coll. was published on 16 July 2019 and went into effect on 31 July 2019 (with exceptions).

1.2 E-sick notes

The Act was published on 01 July 2019 and will come into effect on 01 January 2020 (with exceptions).

1.3 Institutions for occupational pension schemes
Act No. 165/2019 Coll. amending Act No. 340/2006 Coll., on the activities of institutions for occupational pension schemes, was published.

This Act adjusts the institution's governance system, remuneration policy, extended information requirements for participants and the possibility of cross-border transfers of pension plans.

With regard to the fact that the system of institutions for occupational retirement has not been introduced in the Czech Republic so far, the Act only formally transposes Directive IORPs in order to comply with EU law without any practical impact.

Act No. 165/2019 Coll. was published on 01 July 2019 with the effective date set to be the same day.

Analytical part

This is not a relevant development in Czech Republic. The system of institutions for occupational pension schemes has not been introduced in practice. This development is in line with the EU aquis. There are no likely implications.

1.4 Posting of workers

Factual part


The Draft Act aims to:

i. extend the exhaustive list of working conditions for posted workers in the host state (so-called 'hard core' conditions) - the posted worker's travel expenses shall also be reimbursed in connection with the performance of her work (within the meaning of Section 152 of the Labour Code);

ii. amend the rules on remuneration of posted workers in the host state - the posted worker is entitled not only to the minimum rates of pay, but also to all mandatory elements of pay. Workers posted to the Czech Republic shall also be entitled to:

- the appropriate level of guaranteed salary (not only the minimum wage as is currently the case);
- other salary components (i.e. additional remuneration for public holidays, night work, work on Saturdays and Sundays and/or for work performed under unfavourable working conditions).

iii. increase the protection of posted workers in the event of long-term posting - if the posting period exceeds 12 months (or to 18 months in case of reasoned justification), the same conditions that apply to regular (non-posted) workers shall apply (i.e. not only the 'hard core' conditions);

iv. introduce the user's duty to inform the employment agency in case of 'double posting' - such information shall contain:

- place of work in another EU Member State;
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- type of work to be performed by the posted employee;
- commencement of work;
- estimated duration of posting;
- information whether the posted employee is replacing another employee.

The Draft Act is currently being deliberated by the government and will proceed to the Parliament for its first reading. The preliminary effective date is set to 30 July 2020.

Analytical part

This is quite an important development in Czech Republic. The Draft Act aims to strengthen and enhance the rights of posted employees and to introduce the information duty in case of double posting.

More information is available here.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.
Estonia

Summary
The Estonian Ministry of Social Affairs has prepared recommendations for occupational health and safety rules in telework.

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
4.1 Telework
The work environment has changed rapidly over recent decades. These changes have been caused by new technology, but the wishes and standpoints of employees have contributed to them as well. Employees are demanding more flexibility in order to be able to combine their work life with their private life. Taking into account the new trend of telework, the Estonian Trade Unions’ Confederation and the Estonian Employers’ Association agreed on the principles of telework in 2017.

The Ministry of Social Affairs recently prepared recommendations on the occupational health and safety of teleworkers. The employer is still responsible for a safe working environment, even in case of telework. Since the work is carried out outside of the employer’s premises, it is difficult for the employer to monitor the working environment. The employers therefore are not fully aware of their obligations and rights when using telework and what types of agreements must be reached before they make use of teleworkers.

The recommendations prepared by the Ministry of Social Affairs help clarify the occupational health and safety rules to be observed when using telework. These are only recommendations and clarifications and do not replace the law and responsibilities for non-observance of legal obligations.

The Estonian version of the recommendations is available here.
France

Summary
(I) The ordinance amending retirement savings plans is assessed.
(II) The case law of the Social Chamber of the Court of Cassation with regard to contractual terminations, company restructuring and trade union law is analysed.

1 National Legislation
1.1 Amendment of retirement savings plans

Law No. 2019-486 of 22 May 2019 on the development and transformation of companies, JORF n°019, the government sought to radically amend all retirement savings products. On 24 July 2019, the Council of Ministers adopted Ordinance No. 2019-766 on the amendment of retirement savings plans, JORF n°0171. It provides for the creation of three ‘retirement savings products that are more attractive to savers, because they are simpler and more flexible and more tax efficient’ as of November 2019, according to the Ministry of Economics, which points out that retirement savings are still underdeveloped compared to other savings products.

“The existing products are numerous (popular retirement savings plan (PERP), collective retirement savings plan (PERCO), Article 83, etc.), complex, difficult to transfer and insufficiently profitable. The amendment introduced by the Law on the Development and Transformation of Companies, implemented by the ordinance, therefore aims to make supplementary retirement savings more attractive”.

For this reason:
- investors will now benefit from transferable retirement savings products from one product to another throughout their lives;
- an early release is now possible to purchase the main residence;
- at the time of retirement, individual savings (excluding mandatory company payments) may be used freely by way of an annuity or capital outflow;
- investors will benefit from better returns due to adapted management over the long term;
- the development of long-term savings will provide companies with more equity financing to support their growth and to finance innovation.

The ordinance thus creates three new retirement savings products:
- two company retirement savings products: a collective product, open to all employees and intended to succeed the current PERCOs, and a product that can be reserved for certain categories of employees and succeeds ‘Article 83’ contracts. These products can be grouped into one category;
- an individual retirement savings product which will succeed the ‘PERP’ and ‘Madelin’ contracts, which may be opened in the form of a securities account or an insurance contract.

The Ministry of Economy and Finance asserts that these different products will be subject to the same operating rules and that the taxation of the different types of payments (voluntary payments, from employee savings plans, mandatory payments) will remain the same. This will allow individuals to deduct their individual payments from their income tax base, subject to certain limits. Amounts derived from profit-sharing and from...
employer contributions will continue to be exempt from income tax at the time of entry into the scheme and at the time of retirement.

Finally, savers who already have a retirement savings product will be able to freely transfer their savings to a new product, and companies that have already set up a retirement savings plan will be able to easily modify it so that their employees can quickly benefit from the new plan.

1.2 Reform of unemployment insurance

Decree No. 2019-796 of 26 July 2019 on new rights to compensation, various measures relating to unemployed workers and experimentation with a job search journal

Decree No. 2019-797 of 26 July 2019 on the unemployment insurance scheme

The decrees amending unemployment insurance were published in the Official Journal on 28 July 2019. The tightening of the rules applicable to jobseekers has been confirmed, as well as the introduction of a bonus-malus on contributions based on the use of short-term contracts in certain sectors, which will only enter into force on 01 January 2021. It defines the compensation arrangements for workers who are dismissed, measures to promote return to employment and to secure career paths, rules on unemployment contributions and measures to coordinate with other unemployment insurance or benefit schemes.

Specifically, it increases the minimum period of membership required to qualify for unemployment benefits and the threshold for recharging those benefits. It also modifies the duration of the reference period and the calculation reference period. It also defines the procedures for applying and coordinating the new compensation rights available to employees who resign and to self-employed workers. It sets the rate and procedures for applying the degressivity of large amounts of assistance for returning to work. It also modifies the methods for calculating the reference of the daily wage that must be taken into account when calculating the amount of allowance for assistance to return to work, the average of the previous earnings received over the reference period. Finally, it introduces a modulation of employer unemployment contributions for companies in an industry with very high separation rates.

Decree No. 2019-796 covers employees who resign to pursue a professional project: it specifies the criteria according to which the real and serious nature of the project will be certified by the regional inter-professional joint committees and the procedure for examining the project and defines the penalties applicable in the event of insufficient implementation procedures once the right to the insurance allowance has become available.

It also sets down the conditions of resources, the previous duration of activity and the previous income from activity to which the right to the allowance for self-employed workers is subject.

Finally, it provides for the implementation and evaluation of the experiment aimed at improving support for jobseekers by providing a job search journal when they are registered in the job seekers’ list on a monthly basis.

The two texts will enter into force on 01 November 2019 in stages according to the measures, it being specified that the bonus-malus on short-term contracts will apply on 01 January 2021.
2 Court Rulings

2.1 Common-consent termination

Labour division of the Court of Cassation, No. 18-22.897, 19 June 2019

**Factual Part**

From the day after the signing of the contractual termination by the employer and the employee, the employee has a withdrawal period of 15 calendar days. At the end of this period, the termination agreement is forwarded to the Directrice (‘Direction régionale des entreprises, de la concurrence, de la consommation, du travail et de l'emploi’), which has competence to approve the termination (Code du travail, Article L. 1237-13).

When the employee exercises her right of withdrawal, the date on which the resignation letter is sent determines whether it was sent within the 15-calendar day period, regardless of whether it was received after the deadline (Labour Division of the Court of Cassation, No. 17-10.035, 14 February 2018). What happens when the right of withdrawal is exercised by the employer? The Court of Cassation responded to this question in its decision of 19 June 2019.

In the present case, the employee had signed an agreement with his employer on 21 January 2015. The employer sent the employee a letter of retraction on 03 February 2015, which was not received until 6 February 2015. However, the employee contested the admissibility of this withdrawal, which he considered to have taken place after the expiry of the legal deadline of 15 calendar days, i.e. 05 February 2015. He therefore brought a claim before the labour court for payment of the contractual severance payment for the termination of the employment contract, which had been provided for.

**Analytical Part**

The Court of Appeal, granting the employee’s request, ordered the employer to pay the contractual severance payment, as it was the date of receipt and not the date of dispatch of the withdrawal letter that had to be taken into account to assess whether the latter had taken place within the legal period of 15 calendar days.

The Court of Cassation did not agree with this view. It emphasised that a party to an agreement can validly exercise its right of withdrawal as soon as it sends the other party a letter of withdrawal within 15 calendar days. It concluded that in the present case, since the letter had been sent to the employee before the expiry date of the deadline, it should have had effect.

The High Court thus considers that, like the employee’s right of withdrawal, although the letter was received after the deadline, the employer validly exercised his right of withdrawal as soon as the sending of the letter had taken place within the legal period of 15 calendar days. It is the date of dispatch and not the date of receipt of the letter that is used to assess the withdrawal’s validity.

> Qu’en statuant ainsi, alors qu’une partie à une convention de rupture peut valablement exercer son droit de rétractation dès lors qu’elle adresse à l’autre partie, dans le délai de quinze jours calendaires, une lettre de rétractation, la cour d’appel, qui n’a pas tiré les conséquences de ses constatations dont il résultait que la lettre de rétractation, adressée au salarié avant la date d’expiration du délai, devait produire ses effets, a violé le texte susvisé ;

Et attendu que la cassation n’atteste pas les chefs de dispositif de l’arrêt relatifs au paiement des rappels de salaires, de primes et de congés payés ;"
Factual part

If the contractual termination is subject to a simplified procedure, certain formalities must be respected under penalty that the termination agreement will be declared null and void. Two judgments of 03 July illustrate the precautions the employer must take when concluding a contractual termination agreement. In the first case, a junior commercial attaché entered into a contractual termination agreement with his company on 14 May 2013. The employee subsequently brought an action before the court to obtain the nullity of the contractual termination. The employer did not sign his copy. According to the employee, due to the lack of signature, the withdrawal period could not commence.

Analytical part

First, the Metz Court of Appeal rejected the employee’s request. According to the court, “notwithstanding the absence of the employer’s signature on the copy of the termination agreement given to the employee, the latter always had the possibility of exercising his right of withdrawal within a 15-day period from signing this document, which expressly recalls the existence of this option”.

The Court of Cassation did not share this opinion. The employer’s signature is not an ancillary formality. “Only the provision of a copy of the agreement to the employee signed by both parties enables him to request approval of the agreement and to exercise his right of withdrawal in full knowledge of the facts”.

2.2 Company rules and regulations

Article L. 1321-4 of the Labour Code requires the employee representatives to be consulted when introducing internal work regulations or any modification of their content.

This is a formality considered substantial and protective of the employees’ interests. Failure to comply with this formality results in the invalidity of the new provisions of the internal work regulations, which therefore cannot be applied (Labour Division of the Court of Cassation, No. 68-40.377, 04 June 1969: Bull. civ. V, No. 367). The employer is deprived of part of her disciplinary power since she cannot accuse the employee of breaching the obligations laid down in the unilaterally amended internal work regulations (Labour Division of the Court of Cassation, No. 11-13.687 and No. 1167 FS -P + B, 09 May 2012).

A set of internal regulations dated 05 September 1983 was amended in 1985 at the request of the labour inspectorate. These were not preceded by a consultation of the employee representative institutions.
The President of the TGI was referred to the court of first instance for interim measures in 2017. A company trade union wanted to introduce the unenforceability of the internal work regulations against the company’s employees, the irregularity of the disciplinary procedures implemented and to prohibit the company from implementing disciplinary procedures based on these internal work regulations.

Analytical part

The Court of Cassation noted that the initial internal regulations had been submitted to the employee representatives in 1983 for consultation. It stated that the amendments made in 1985 were only the result of injunctions from the labour inspectorate with which the employer had to comply. There was therefore no need for new consultations.

Mais attendu qu’ayant constaté que les modifications apportées en 1985 au règlement intérieur initial qui avait été soumis à la consultation des institutions représentatives du personnel résulteraient uniquement des injonctions de l’inspection du travail auxquelles l’employeur ne pouvait que se conformer sans qu’il y ait lieu à nouvelle consultation, la cour d’appel a pu estimer que n’était pas caractérisé de trouble manifestement illicite ; que le moyen, inopérant en sa première branche et qui critique en sa troisième branche un motif surabondant, n’est pas fondé pour le surplus ;”

The ruling of the Court of Cassation is available [here](#).

2.3 Trade union

Labour Division of the Court of Cassation, No. 18-24.814 and No. 18-24.817, 13 June 2019

Factual part

In 2008, financial transparency was introduced as one of the criteria for trade union representation. This criterion is reflected in the obligation to keep accounts, which must be justified, approved by a management body, approved by the general meeting of members or by a statutory body and published (Code du travail, Articles L. 2135-1 to L. 2135-5). If these requirements are not met, the criterion of financial transparency is not met, and the trade union consequently does not meet all the necessary criteria to exercise trade union prerogatives in the company (in particular, to be representative and to be entitled to this, to be able to appoint a representative of a trade union section, or to submit lists of candidates for professional elections).

In both cases, the requirement discussed was approval of the accounts. Article L. 2135-4 of the Labour Code provides that ‘the accounts shall be drawn up by the body responsible for management and approved by the general meeting of members or by a collegial control body designated by the statutes’. However, in granting the RATP’s request, the court held that ‘no evidence presented by the union makes it possible to establish that the closed and published accounts have been approved by the general meeting in accordance with the articles of association’. To defend itself, the union argued in particular that ‘the criterion of financial transparency must be considered to have been satisfied when the preparation of the accounting documents required by law are published, regardless of the union’s failure to comply with the accounting obligations laid down in its statutes’.

Analytical part

The Court of Cassation did not accept this argument. It stated that when the accounts have not been approved by the competent statutory body (in this case, the general
meeting), the criterion of financial transparency is not met. And this, even if the accounts have been published.

"Mais attendu que le tribunal d’instance, après avoir examiné les comptes publiés par le syndicat pour les années 2015 à 2017, a constaté que ces comptes n’avaient pas été approuvés par l’organe statutaire compétent pour le faire, qu’il a pu en déduire que ces comptes ne correspondaient pas aux obligations prévues par les articles L. 2135-1 et L. 2135-4 du code du travail et que le syndicat ne remplissait pas la condition de transparence financière ; que le moyen n’est pas fondé ;"

2.4 Restructuring

Labour Division of the Court of Cassation, No. 18-10.815, 10 July 2019

**Factual part**

In the present case, the company drew up a restructuring and reorganisation plan for its activities under the name 'Prospero'. It consulted the CHSCT and the EC on the project. It brought together trade union organisations to negotiate the project’s social aspects. The Committee was informed of the content of the agreement under negotiation, but was not consulted on it. The Committee issued a negative opinion on the project. The negotiations failed. The employer immediately implemented accompanying measures based on four human resources notes, measures that were very different from those negotiated with the trade unions.

The Committee asserted that it must be consulted on the social aspects and referred to the judge who heard the application for interim measures from the court of first instance for a double request for conviction under the company’s penalty payment to initiate the process of information and consultation, on the one hand, and for suspension of the implementation of the social aspect pending that.

**Analytical part**

The Court of Cassation explained that the Committee must be consulted again when the draft on which it was initially consulted undergoes major changes. In that case, however, the committee’s consultation involved social aspects which were subject to collective bargaining, whereas the accompanying measures that were ultimately implemented unilaterally following the failure of the collective negotiations contained substantial changes in relation to the draft, which gave rise to the consultation, such as to affect the volume or structure of the workforce, working time, employment, working or vocational training conditions.

As a result, the lack of consultation on the amended project constituted a manifestly unlawful disturbance that justified ordering the employer to carry out this consultation and to suspend the implementation of the social component of the project pending it.

Thus, even if the Committee does not have to be (and has not been) consulted on the draft agreement on the social aspects, the provisions of which it has been informed represent an integral part of the consultation on the draft itself. Since the accompanying measures ultimately adopted unilaterally constituted substantial changes that affected the general operation of the company, the consultation should have been resumed.
importantes ; qu'il en résulte que la cour d'appel, qui a constaté que la consultation du comité d'entreprise, entre juillet et novembre 2016, s'était faite sur la base d'un volet social qui était soumis parallèlement à une négociation collective et que les mesures d'accompagnement social finalement mises en oeuvre de façon unilatérale à la suite de l'échec de la négociation collective comportaient par rapport au projet ayant donné lieu à consultation des modifications substantielles de nature à affecter le volume ou la structure des effectifs, la durée du travail, les conditions d'emploi, de travail ou de formation professionnelle, a pu en déduire que le défaut de consultation sur le projet modifié constituait un trouble manifestement illicite qui justifiait qu'il soit ordonné à l'employeur de procéder à cette consultation et de suspendre la mise en oeuvre du volet social du projet dans cette attente ;

D'où il suit que le moyen, inopérant en ses quatre premières branches, n'est pas fondé pour le surplus ;”

Another interesting point was raised by this decision. One of the employer’s arguments was that the Committee should have used the procedure to appeal to the TGI in the event of insufficient information (Code du travail, Article L. 2323-4 for the works council, and Article L. 2312-15 for the CSE). It should be recalled that this provision provides that the Committee may, if it considers that it does not have sufficient evidence, refer the matter to the President of the Court of First Instance, requesting an order for the employer to provide the missing evidence. It is also possible in this context to request an extension of the time limit for the Committee to deliver its opinion. For the management, the consultation was over, as the EC had not taken any action in this context.

The Court of Cassation did not directly respond to this argument, but it is interesting to analyse its analysis. In fact, the Court ruled in favour of the staff representatives and confirmed that the consultation should have been resumed and that the implementation of the project had been suspended pending this. It therefore effectively precluded the application of this specific procedure, which is logical. Within the context of the consultation on the project, the social aspects were subject to negotiation: the Committee was therefore not required to be consulted on the draft agreement (Code du travail, Article L. 2323-2 for the EC and Article L. 2312-14 for the ESC). It was only after the end of the consultation process and the failure of these negotiations that the employer implemented unilateral accompanying measures that differed significantly from the draft agreement.

2.5 Dismissal law
Court of Cassation, Opinion No. 15012, 17 July 2019

Since its introduction by one of the Labour Orders of 22 September 2017, the scale of compensation for dismissal without real and serious cause and, in particular, its ceiling (between 1 and 20 months' gross salary, depending on the employee's seniority), has divided the labour courts. Troyes, Amiens, Lyon, Grenoble, Angers, Agen... the list of courts that have decided to waive the ceilings imposed by Article 1235-3 of the Labour Code is continuously increasing on the grounds that the scale would not allow adequate compensation or appropriate compensation for damage within the meaning of Articles 10 of ILO Convention No. 158 and 24 of the European Social Charter.

The Court of Cassation, intervening in the plenary session as part of the procedure for requesting an opinion, initiated by the industrial tribunals of Louviers and Toulouse, countered this resistance movement. Taking a general scope and intended to unify case law, the two opinions delivered on 17 July concluded that the scale was in conformity
with ILO Convention No. 158, while Article 24 of the Charter could not be invoked by employees before national courts.

### 2.5.1 Admissibility of requests for opinions

The Court of Cassation first introduced changes in its case law which, since 2002, considered that the question of compatibility of a provision of domestic law with the European Convention for the Protection of Human Rights or with other international standards, including ILO Convention No. 158, was outside the scope of the procedure for requesting an opinion (Court of Cassation, No. 17-70.009, 12 July 2017).

In its opinions of 17 July 2019, the Court of Cassation stated that 'the compatibility of a provision of national law with the provisions of European and international standards may be the subject of a request for an opinion, provided that its examination involves an abstract review not requiring the analysis of factual elements falling within the remit of the office of the trial judge'.

### 2.5.2 Compliance of the scale with Article 10 of ILO Convention No. 158

According to Article 10 of ILO Convention No. 158,

"If the bodies referred to in Article 8 of this Convention conclude that the dismissal is unjustified, and if, having regard to national law and practice, they do not have the power or do not consider it possible in the circumstances to annul the dismissal and/or order or propose the reinstatement of the worker, they shall be entitled to order the payment of adequate compensation or any other form of compensation considered appropriate".

Recognising that these provisions have direct effect on domestic law, the Court of Cassation concluded that Article L. 1235-3 of the Labour Code is compatible with Article 10. Several reasons were mentioned:

- "The term 'adequate' should be understood as allowing State parties a margin of appreciation". A margin of appreciation, according to the explanatory note, has only been used by the French State to introduce floors and compensation ceilings;
- when the dismissal has no real and serious cause, the judge may propose reinstatement and it is only when this is refused by one of the parties that the judge will grant the employee a fixed compensation amount within the limits of the scale;
- the scale is waived in the event of nullity of the dismissal, pursuant to the provisions of Article L. 1235-3-1 of the same Code.

It follows from this that "the provisions of Article L. 1235-3 of the Labour Code, which lay down a scale applicable to the determination by the judge of the amount of compensation for dismissal without real and serious cause, are compatible with the provisions of Article 10 of ILO Convention No. 158".

The Court of Cassation did not have any reservations about employees with low seniority, for whom the effect of the cap was particularly noticeable: "the provisions of Article L. 1235-3 of the Labour Code, which in particular provide for an employee with a full year’s seniority in a company employing at least 11 employees to receive compensation for dismissal without real and serious cause ranging from a minimum of one month’s gross salary to a maximum of two months’ gross salary, are compatible with the provisions of Article 10 of ILO Convention No. 158".
2.5.3 Lack of direct effect of Article 24 of the European Social Charter

With regard to Article 24 of the revised European Social Charter, the terms of which also refer in a similar way to the 'right of workers dismissed without just cause to adequate compensation or other appropriate reparation', the Court of Cassation considered that it is in any event not invokable in a dispute between individuals (employee, employer) before national judicial courts.

Leaving too much discretion to the 'Contracting Parties' (States), Article 24 is therefore devoid of horizontal direct effect.

As the Advocate General pointed out in his Opinion, the Council of State, in a decision of 10 February 2014 (No 358992), recognised a direct effect in Article 24, but it was a vertical direct effect (dispute between an individual and the State) and not a horizontal direct effect (dispute between individuals).

2.5.4 Article 6 § 1 of the CESDH inoperative

In response to the argument that the right to a fair trial, guaranteed by Article 6 § 1 of the European Convention on Human Rights, would no longer be guaranteed if the judge's power was drastically limited, the Court of Cassation also held, in one of its two opinions (No. 15012) that "the provisions of Article L. 1235-3 of the Labour Code, which limit the substantive right of employees to the amount of compensation that may be awarded to them in the event of dismissal without real and serious cause, do not constitute a procedural obstacle to their access to justice, so that they do not fall within the scope of Article 6 § 1 of the European Convention on Human Rights".

2.5.5 Successful conventionality test

These two opinions thus end the debate on the conventionality of the scale, which has been validated in principle. It is true that technically, judges of the merits are not bound by the opinion rendered by the Court of Cassation, not even the labour courts of Louviers and Toulouse, which initiated this procedure. Nevertheless, in the event of an appeal, the Social Chamber should not deviate from the line drawn by the plenary session of the Court and cassation will logically be incurred.

The Paris and Reims Courts of Appeal will set the tone for the start of the academic year, since they are dealing with cases involving, in the same terms, the conventionality of the scale. Their decisions will be announced on 25 September 2019, and there is little doubt that the position of the Court of Cassation will be followed.

It should be noted that several complaints brought by trade unions are still being examined before the International Labour Office (concerning the conformity of the scale with Article 10 of Convention No. 158), and the European Committee of Social Rights (on conformity with Article 24 of the Charter). The government is not concerned about this, Muriel Pénicaud having declared at a press conference held on 17 July that the opinions of the Court of Cassation constitute important elements that will be included in the file and that the ECSR is not a judicial body.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.
Germany

Summary
(I) The Administrative Court Lüneburg held that there is no blanket need for the employer to monitor the collection of data, even outside working hours, by means of positioning GPS systems in employees’ company cars.

(II) According to the State Labour Court Lower-Saxony, the works council can be the bearer of fundamental rights under the Constitution.

(III) The federal government provided information on the number of inspections of drivers and the number of working hours. The federal government also provided information on the existence of working time accounts in companies.

1 National Legislation
Nothing to report.

2 Court Rulings
2.1 Limits of the use of GPS systems
Administrative Court Lüneburg, No. 4 A 12/19, 19 March 2019 – 4 A 12/19
The plaintiff, a building cleaning company, had equipped some of the company vehicles used by cleaners and maintenance workers with GPS systems. These systems recorded any distance travelled based on the start and finish points, including total travel time and the status of the ignition (on or off). Since the system also recorded the vehicles’ licence plates, the data obtained could be clearly assigned to the respective operational users. The cleaning company challenged an order issued by the local data protection authority regarding their use of GPS tracking in court proceedings.

The Administrative Court Lüneburg held that, at least in the case of acceptable private trips, there is no blanket need for the employer to monitor the collection of data, even outside working hours, by means of positioning systems in employees’ company cars. In this case, the interference with the right to informational self-determination was not countered by a justified entrepreneurial interest on the part of the employer.

2.2 Ability of works councils to invoke fundamental rights
State Labour Court Lower Saxony, No. 5 TaBV 107/17, 06 December 2018
The employer, a health care company that operates several specialised psychiatric clinics, and the works council disagreed on whether and to what extent the works council was allowed to comment on operational matters via a Twitter account.

The Court held that works councils have limited basic legal capacity on the basis of Article 19(3) of the German Constitution and that the fundamental right of free expression of opinion under Article 5(1) of the Constitution was applicable due to the nature of the works council committee’s activities. Accordingly, the court dismissed a request by the employer to prohibit the works council from publishing ‘company affairs’ via Twitter.

Article 19(3) of the Constitution reads as follows: “The basic rights shall also apply to domestic artificial persons to the extent that the nature of such rights permits.”
3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Inspections of drivers

In 2018, the Federal Office for Goods Transport ("Bundesamt für Güterverkehr") inspected 153,793 vehicles and found 691 violations of the weekly rest period without suitable sleeping facilities. Complaints were lodged against 25,954 vehicles. The federal government mentioned this in its reply (19/11544) to a parliamentary enquiry.

A press release on this issue is available [here](#).

4.2 Company regulations on working time accounts

Thirty-five per cent of all German companies have regulations on working time accounts, 29 per cent have regulations on trust-based working hours. This is the result of a response given by the federal government (19/11469) to a parliamentary enquiry. A total of 15 per cent of all employees would actually make use of the possibility of a trust-based working time.

A press release on this issue is available [here](#).

4.3 Inspections of working hours

In Bavaria, the highest number of inspections by far were carried out last year by the supervisory authorities to ensure compliance with the Working Hours Act. A total of 4,318 inspectors visited the companies for this purpose. The second highest number of inspections were conducted in Brandenburg (2,219 inspections), the third highest were in North Rhine-Westphalia with 1,733 inspections. The lowest number of inspections (non-city states only) were carried out in Saarland (90 checks), Schleswig-Holstein (226 checks) and Saxony (408 checks). This was mentioned by the federal government in its reply (19/11376) to a parliamentary enquiry.

A press release on this issue is available [here](#).
Ireland

Summary
The Labour Court has ruled that the Kingdom of Saudi Arabia and the State of Kuwait cannot rely on the doctrine of sovereign immunity to resist employment rights complaints.

1 National Legislation
Nothing to report.

2 Court Rulings
2.1 Dismissal law
Labour Court, No. ADJ-00011995, 15 July 2019, Kingdom of Saudi Arabia v Ibrahim and Labour Court, No. ADJ-00009123, 22 July 2019, State of Kuwait v Kanj

The circumstances in which a State can claim sovereign immunity to resist a complaint of unfair dismissal or discrimination have now been considered by the Labour Court in two cases decided on 15 and 22 July 2019: Kingdom of Saudi Arabia v Ibrahim and State of Kuwait v Kanj. In both cases, the complainants were academic advisors employed in the Saudi Cultural Bureau and the Kuwaiti Cultural Office, respectively, in Dublin, assisting students attending third level institutions in Ireland and performing related administrative and secretarial functions. In the former case, the complainant alleged that she had been discriminated against on the ground of religion and in the latter case, the complainant alleged that she had been unfairly dismissed. In first instance, the Kingdom of Saudi Arabia unsuccessfully attempted to invoke the doctrine whereas the State of Kuwait successfully invoked the doctrine.

On appeal, the Labour Court, having considered inter alia the decision of the Court of Justice in case C-154/11, Mahamdia v Algeria and the decisions of the European Court of Human Rights in Cudak v Lithuania and El Leil v France, ruled that neither respondent could invoke the doctrine. The Labour Court was satisfied that there was no evidence before it in either case in which it could find that the complainants’ employment touched upon the business of the respondents’ sovereign government. The complainants’ work at all material times was merely of ‘a routine administrative nature’, which could not be said to have impacted in any meaningful way on either the formulation or implementation of sovereign policy.

3 Implications of CJEU rulings and ECHR
Nothing to report.

4 Other relevant information
Nothing to report.
Liechtenstein

Summary
The Liechtenstein government plans to amend the Posting of Workers Act and the Act on Employment Services and the Hiring of Services. The main purpose of the amendment is to transpose Directive 2014/67/EU. One of the primary reasons is to facilitate the fight against bogus posting and bogus self-employment. To achieve this goal, substantial provisions in the law on the posting of workers have been more clearly defined. Furthermore, the possibilities for asserting wage claims against an employer’s client have been improved. Finally, the amendment aims to ensure close cooperation between Liechtenstein and the other EEA Member States. Based on the results of the consultation process, the government has produced a report and motion for Parliament on the amendment of the aforementioned acts.

1 National Legislation
1.3 Protection of workers

To adequately enforce the protection of workers in cross-border services, the EU decided to leave the European law on the posting of workers unchanged in substance, but to allow this law to be enforced as effectively as possible. This is why the Enforcement Directive (Directive 2014/67/EU) was developed. Liechtenstein has elaborated a draft for the amendment of the provisions to transpose this directive.

Four main points should be mentioned:

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

The amendments will be made in the following acts:

- Posting of Workers Act (‘Gesetz über die Entsendung von Arbeitnehmern, Entsendegesetz, LR 823.21’)
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- Act on Employment Services and the Hiring of Services ('Gesetz über die Arbeitsvermittlung und den Personalverlei, Arbeitsvermittlungsgesetz, AVG, LR 823.10):

The source provided for the explanations is available [here](#).

On 10 July 2018, the Liechtenstein government submitted a draft law with an accompanying report, which was submitted to Parliament for consultation. The consultation lasted until 10 October 2018. Based on the results of the consultation, the government has produced a report and motion for Parliament on the amendment of the Posting of Workers Act and the Act on Employment Services and the Hiring of Services ('Bericht und Antrag der Regierung an den Landtag des Fürstentums Liechtenstein betreffend die Abänderung des Entsendegesetzes (Umsetzung Richtlinie 2014/67/EU) sowie die Abänderung des Arbeitsvermittlungsgesetzes').

The next steps will be the consultation phase in Parliament and the adoption of the relevant legislative amendments. It is not possible to project when the amendments will be passed.

**Analytical part**

The amendment is of considerable significance. It has been found that although worker protection existed for cross-border services, it could not be sufficiently enforced. This defect will be remedied with this amendment. It departs from previous lines of reasoning because the substantive law on the posting of workers will not be modified. As already stated above, the only objective is to improve the efficiency of its enforcement. In addition, no new laws have been created, but the existing norms (Posting of Workers Act, Act on Employment Services and the Hiring of Services) will be used to implement the amendments.

The purpose of the consultation of municipalities, the Court of First Instance, the bar association, business and employers' associations, the Liechtenstein trade unions and other organisations is to provide the government with an idea of the likely implications on the legal and political area. The government therefore adapted its original draft law on the basis of the results of the consultation process before it was submitted to Parliament.

The main objective of the amendment is to transpose Directive 2014/67/EU. An initial review of the draft law reveals that the government aims to implement the provisions in line with the Directive.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Health and Safety

Annex XVIII to the EEA Agreement

On 08 May 2019, the EEA Joint Committee in Brussels decided to amend Annex XVIII to the EEA Agreement and to incorporate Directive 2017/2398/EU of the European
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Lithuania

Summary
The Lithuanian legislator has amended the Labour Code to increase transparency in the labor market by requiring employers to include information on the projected salary in job advertisements. Another amendment introduces the restriction of EU law for information and consultation rights and the non-application of collective agreements in case of employer bankruptcy. These provisions do not conform with the case law of the CJEU.

1 National Legislation

1.1 Wage transparency
Wage fairness has become a hot topic in ongoing public debates about labour market inequalities. Trade unions and some politicians believe that wage transparency in the recruitment process could contribute to wage fairness. Article 25 of the Labour Code was consequently amended (see Law No. XIII-2327 of 11 July 2019, Registry of Legal Acts, 2019, No. 12397) to include the new section 6 of the Article, stipulating that the employer shall indicate the projected salary (including wage brackets, if applicable) in all job advertisements. Employers argue that the implementation requirements of the new law are meaningless and difficult to perceive. In fact, no specific sanctions apply for violations of the new provisions, hence, the general sanction for non-compliance with labour legislation (an administrative fine between EUR 80 to EUR 880 pursuant to Article 96 (3) of the Code of Administrative Offences) will be applicable.

The Ministry of Economics and Innovation initiated the revision of the articles of the Labour Code to align them with the (slightly) new regulations on bankruptcy. The amendments introduced to the Labour Code (Law No. XIII-2224 of 13 June 2019, Registry of Legal Acts, 2019, No. 10338, which will enter into force on 01 January 2020) will violate the provisions of Directive 98/59. The problem lies in the fact that the amendments aim to eliminate the employer’s information and consultation obligation in case of bankruptcy. The new Section 6 of Article 62 of the Labour Code reads that ‘in case of bankruptcy, the provisions of Sections 3, 4 and 5 on consultations with the works council and trade union are not applicable’. This clashes with the position of the CJEU, expressed in the joined cases C-235/10 to C-239/10, Claes. In addition, the legislator introduced amendments to Article 200 which defines the conditions of the expiration of collective bargaining agreements. A uniquely formulated provision states that in case of bankruptcy, the provisions of the agreements that improve employment conditions but increase the losses of the creditors are not applicable. It could be argued that the first amendments and—in certain circumstances—the second amendment are not in line with the requirements of the transposition of Directives 98/59 and 2002/14.

2 Court Rulings
Nothing to report.

3 Implications of CJEU rulings and ECHR
Nothing to report.
4 Other relevant information

Nothing to report.
Luxembourg

Summary
The minimum wage has been increased. A law on apprenticeships and internships has been voted on.

1 National Legislation

1.1 Minimum wage
A recent law raised the minimum wage by 0.9 per cent. In combination with an earlier increase (1.1 per cent in January) and a new tax credit, the total net increase now has reached EUR 100, as promised by the coalition agreement (see also March 2019 Flash Report).

Aside from the general criticism of employers’ associations about the raise in the minimum wage, this law was criticised in particular because it is retroactive to 01 January. The question can be raised whether the law can retroactively modify contractual relationships. In practice, the law raises complex payroll management problems for undertakings, especially for employees that have left the company and have been disaffiliated since.

More information is available here.

1.2 Professional training (apprenticeships and internships)
Bill No. 7268 has been adopted and modernises the legislation on apprenticeships and traineeships in relation to their initial education. The law is primarily the result of an agreement between the social partners. The professional chambers ("chambres professionnelles") are closely involved in the organisation of apprenticeships. This law is not directly related to Bill No. 7265 on traineeships (see also March 2018 Flash Report).

The new law mainly amends the rules on educational programmes and evaluations of apprentices. With regard to labour law, the main changes are:

- The legislation on apprenticeships is reintroduced into the Labour Code (Art. L. 111-1ff.);
- The mandatory content of the apprenticeship contract has been clarified;
- The rule that an apprenticeship of N years must be terminated after N+1 years is considered to be too restrictive, so the possibility of a (conditional) extension for an additional year has been introduced;
- A special conciliation procedure has been introduced in case of litigation;
- The termination of apprenticeship contracts must be based on additional cancellation grounds;
- In case of long-term sickness, the contract shall be suspended, and thus extended;
- For internships, the concept of 'contrat de stage de formation' is replaced by 'convention de stage' to clarify that it is not an employment relationship.

Furthermore, a legal framework has been adopted for trans-border apprenticeships ("apprentissage transfontalier"), i.e. students in French, Belgian or German schools performing their apprenticeship in undertakings established in Luxembourg.
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More information is available here.

2 Court Rulings

2.1 Salary split arrangement
Court of Appeal, No. 8e 453599, 25 April 2019
As an employment relationship can only be concluded between one employee and one employer in Luxembourg, it is difficult to conclude complex employment relationships in larger company groups, especially if they operate in an international environment. Employers tend to use a ‘salary split’ by concluding multiple part-time employment contracts. The court of appeal dealt with such a ‘salary split’ arrangement whereby the parties agreed that the salary is paid at a ratio of 60 per cent by the French branch and 40 per cent by the Luxembourg branch. According to the court, the two relationships must be considered to be legally independent. The fact that the employee was entitled to a bonus payment according to French case law did not imply that 40 per cent of this bonus was also due under the Luxembourg part of the employment contract.

2.2 Recurrent payment
Court of Appeal, No. CAL-2018-00558, 28 March 2019
The principle of ‘acquired rights’ (‘droits acquis’), especially in case of repeated bonus payments, is well recognised in case law. The court of appeal confirmed a former decision, stating that payment for two successive years may suffice to be considered a ‘recurrent payment’. The same decision also provided an indication of the legal basis for acquired rights is, i.e. an implied undertaking (‘engagement tacite’).

2.3 Overtime
Court of Appeal, No. CAL-2018-00155, 28 February 2019
By applying European and case law rules to the definition of working time, the court of appeal decided that an employee who is hired to care for an individual who is sick overnight is ‘at work’. Even though that individual might be able to sleep, she is on call, must remain in the room and cannot freely engage in personal activities.

Unlike former decisions of the court of appeal, which determined that overtime hours that exceeded the legal limits are not subject to any compensation payment because they are illegal as such, the court in this case decided to grant the employee compensation for up to 8 overtime hours per day (16 hours of work).

2.4 Deferral of annual leave
Court of Appeal, No. 8e 44958, 04 April 2019
The right to defer annual leave is a recurring issue before the courts. A recent decision confirmed the general principle that annual leave can be deferred if the employer agrees; the employer’s agreement is sufficiently documented if the leave balance appears on the pay slip. The court of appeal decided that this also applies if the pay slips are drafted by third parties (such as an accounting office), because they act on behalf of the employer. This decision is noteworthy because of the amount of annual leave that can be deferred, namely 33 weeks (169 days).
Whereas the courts usually decide that deferrals of annual leave comply with EU law, the question arises whether this still applies if this balance goes back to more than 6 years of work.

2.5 Duration of the notice period
Court of Appeal, No. 3e 45250, 07 March 2019
The duration of the notice period cannot be reduced in advance, notably by a clause in the employment contract, because this would be unfavourable to the employee. It was now decided that this principle also applies after the dismissal; the employer and employee cannot reduce the legal duration of the notice period by mutual consent.

2.6 Parental leave and protection against dismissal
Court of Appeal, No. CAL-2019-00189, 04 April 2019
The special protection against dismissal that applies to employees who are on parental leave ("congé parental") is not applicable if the application was filed after the expiration of the legal deadline (i.e. four months before the commencement of the leave).

2.7 Part-time employees as employee delegates
Court of Appeal, No. 8e 44412, 13 June 2019
Although most trade unions in Luxembourg chose to not acquire legal personality, and are thus unable to act in court, it is admitted that they nevertheless have a limited legal personality if the Labour Code entrusts specific rights of action to the trade union. Such cases are exceptional; in the present case, a trade union acquired the right to act if the case involved discrimination. The problem related to the question whether part-time employees can be designated as ‘employee delegates who are fully released from work’ (‘délégué libéré’) and whether their working hours could be allotted to other delegates.

3 Implications of CJEU rulings and ECHR
Nothing to report.

4 Other relevant information
Nothing to report.
Netherlands

Summary
The government has announced the introduction of fixed tariffs for the lower end of the labour market and the possibility for the higher end of the labour market to opt out.

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 Dutch government has introduced fixed tariffs for the lower end of the labour market and the possibility for the higher end of the labour market to opt out (letter of 24 June 2019).

The Dutch labour market has one of the highest percentages of self-employed workers in Europe. This is considered problematic at the lower end of the labour market, because of the low tariffs, lack of negotiation power of the workers, possibility of bogus self-employment and competition between employees who work on the basis of an employment contract and self-employed workers. The statutory definition of the employment contract in the Netherlands is primarily shaped by case law with an emphasis on the prevalence of the facts. This led to insecurity with regard to the classification of the employment relationship, not only at the lower end of the labour market but also amongst high paid professionals.

The announced introduction of fixed minimum tariffs for self-employed workers at the lower end of the labour market and the opt-out possibility for the higher end of the labour market should be viewed within the framework of the 2017 coalition agreement that the government is implementing. The fixed minimum tariff shall be set at EUR 16 per hour and should lead to a fairer income. It should also prevent employers from hiring self-employed persons instead of regular employees because of a price advantage. The amount of the minimum tariff is based on the social minimum.

The envisaged opting-out option gives contracting parties the possibility to opt out from wage tax and employee insurance schemes. This is only possible if the hourly tariff equals or exceeds EUR 75 and if the contract has a duration of one year or less.

The government aims to open an internet consultation on the draft bill in the third quarter of 2019.

In his letter announcing these intended regulations (letter of 24 June 2019), the Minister of Social Affairs and Employment points out that setting a minimum tariff might constitute an infringement of Directive 2006/123/EC on services in the internal market, but deems it can be justified by an overriding reason relating to the public interest:
defeating poverty. Furthermore, the envisaged regulation is non-discriminatory and proportional.
Summary
The court of appeal issued a ruling dealing with equal treatment principle.

1 National Legislation
Nothing to report.

2 Court Rulings

2.1 Equal treatment principle
Appellate Court, LG-2018-162656, 27 June 2019
In LG-2018-162656, the Appellate Court ruled in a case concerning the interpretation of section 14-12a of the Working Environment Act, which transposes Directive 2008/104/EC on temporary agency work. The main question was whether a company bonus was defined as 'salary' and thus subject to the equal treatment principle. The relevant company bonus was based on the overall performance of the company and not on the individual employee's performance. The court of appeal found that such a company bonus was not 'salary' and thus not subject to the equal treatment principle.

3 Implications of CJEU rulings and ECHR
Nothing to report.

4 Other relevant information
Nothing to report.
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Poland

Summary
On 19 July, the Parliament (Sejm) enacted the amendment to the Law on Minimum Wage. The intention is to exclude the seniority allowance when calculating the amount of minimum wage of employees.

1 National Legislation

1.1 Minimum wage

On 19 July 2019, the Sejm (lower chamber of Parliament) enacted the amendment to the Law of 10 October 2002 on minimum wage. The government submitted the draft of the amendment to the Sejm on 03 July 2019. It was the subject of intense parliamentary debate.

According to Polish law, employees are entitled to minimum wage, which is calculated on a monthly basis. The minimum wage consists of their basic remuneration and other components (in practice, different components of remuneration exist, depending on the sector of activity, the type of establishment, internal work regulations, etc.). Some components are expressly excluded from the minimum wage. The amendment intends to modify the way the minimum wage is calculated.

Currently, the following components are excluded from the scope of calculation of the minimum wage:
- jubilee award;
- severance pay due to retirement or acquisition of the right to invalidity benefits;
- bonus for overtime work;
- bonus for work at night.

The amendment modifies this list. Accordingly, an additional component, i.e. seniority allowance (‘dodatek za staż pracy’), will be included in this list. Consequently, this allowance will not be taken into account to determine the amount of minimum wage of employees (new Article 6 Section 5 Item 4 of the Law on Minimum Wage).

Seniority allowance is an allowance that is due to employees who have worked for the employer for a given period under the principles determined in separate provisions, collective labour agreements, collective arrangements based on the law and remuneration regulations that determine the rights and duties of the parties to an employment relationship, employment contract or a co-operative employment contract (new Article 1 Section 9 item 10 of the Law on Minimum Wage).

In Poland, seniority allowance is not regulated in the Labour Code. However, it is quite common in practice. It is a regular component of public sector employees’ wage. The relevant provisions provide for an increase of the base wage by 5 per cent after five years of employment, and by 1 per cent for each subsequent year of employment, but no more than 20 per cent of the employee’s base remuneration. The seniority allowance is also frequently found in the private sector, and included in collective labour agreements, workplace regulations, or employment contracts.

The draft will be subject to legislative proceedings in the Senate and signed by the President.

The amendment is expected to take effect on 01 January 2020.
The Law of 10 October 2002 on minimum wage (consolidated text, Journal of Laws 2018, item 2177) can be found [here](#).

The draft and its substantiation as well as information on the legislative process can be found [here](#).

**Analytical part**

The amendment should be evaluated positively. Currently, an employee with a long employment record, whose salary amounts to the statutory minimum wage, may receive a lower base remuneration than the basic remuneration of a new employee (or an employee with a short employment record), even if both of them perform the same work or work for the same value. The amendment intends to modify the method used to calculate the minimum wage and eliminate this discrepancy.

It should be noted, however, that the general method for calculating the statutory minimum wage of employees remains unchanged. The minimum wage still consists of basic pay and other components provided by the relevant provisions, with the exception of considerations explicitly indicated by the Law on Minimum Wage, i.e. jubilee awards, severance pay due to retirement or the acquisition of the right to indemnity benefits, bonus for overtime work, bonus for work at night, and — from 2020 onwards — seniority allowance.

The fast legislative track should be emphasised as well (the draft was submitted by the government only a few weeks ago). In the present reporter’s view, it is almost certain that the amendment will be accepted by the Senate soon and signed by the President. Consequently, it can be expected that the new regulations will take effect on 01 January 2020, as planned.

**2 Court Rulings**

Nothing to report.

**3 Implications of CJEU rulings and ECHR**

Nothing to report.

**4 Other relevant information**

Nothing to report.
Summary

(I) Decree No. 85/2019 of 01 July 2019 asserts the right of public administration employees to be justifiably absent from work to accompany their child that is under the age of 12 years on the first day of school in the academic year.

(II) In a recent ruling that involved an analysis of Portuguese legislation, the CJEU decided on the application of Directive 2001/23/EC to a transfer of undertaking in which the transferee was a municipality.

(III) The draft law transposing Regulation (EU) 2016/679 on the protection of personal data has already been approved by the Portuguese Parliament, although it has not yet been published.

(IV) Relevant laws on employment, including substantial amendments to the Portuguese Labour Code, were approved in July 2019 by the Portuguese Parliament, their promulgation and publication in the Official Journal is currently pending.

1 National Legislation

1.1 Justified absence to accompany a child on the first day of school – Public Administration

The 'Programa 3 em Linha' attempts to conciliate work, personal and family life, Decree Law No. 85/2019 of 01 July and stipulates that public administration employees who are responsible for the education of a child that is under the age of 12 years are entitled to be justifiably absent from work to accompany their child on their first day of school for up to three hours per child.

This absence does not entail the loss of any right of the employee and shall be deemed as effective performance of work for all intents and purposes.

This scheme also applies to:

- public administration employees who have a public employment relationship that is governed by the General Labour Law in Public Functions, approved by Law No. 35/2014 of 20 June;
- public administration employees who have an employment relationship that is governed by the Labour Code; and
- employees with an employment relationship governed by the Labour Code, who work for public business entities, regulatory entities or support offices.

This decree entered into force on 01 August 2019.

2 Court Rulings

Nothing to report.
3 Implications of CJEU rulings and ECHR

3.1. Transfer of undertakings

CJEU case C-317/18, 13 June 2019, Correia Moreira

In case C-317/18, the CJEU analysed the Portuguese legislation according to which employees affected by a transfer of undertaking to a municipality (‘Município de Portimão’) must undergo a competitive selection procedure and establish a new relationship with the transferee.

According to the CJEU, such national legislation cannot be interpreted in a way as to deprive the employee of the protection granted by the European Union law in force, namely by 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 other words, the employee cannot be placed in a less favourable position solely as a result of a transfer.

The fact that the transferee is a legal person governed by public law does not exclude the existence of a transfer of undertaking within the scope of Directive 2001/23/EC, whether that legal person is a public undertaking responsible for a public service or a municipal authority.

For this reason, Directive 2001/23/EC, read in conjunction with Article 4 (2) of TEU, must be interpreted as meaning that it precludes a national legislation, such as the Portuguese one referred to above, which provides that in the event of a transfer within the meaning of that directive and where the transferee is a municipality, the employees affected must, firstly, undergo a public competitive selection procedure and, secondly, establish a new relationship with the transferee.

This ruling has significant relevance in Portugal, because it clarifies that the protection granted to employees by Directive 2001/23/EC also applies when a transfer of business takes place—within the meaning of Article 1(1) of that Directive—to a legal person governed by public law, despite the applicable restrictions to the hiring of employees in public entities set forth in Portuguese law.

4 Other relevant information

4.1 Data protection

On 14 June 2019, the Portuguese Parliament approved Draft Law No. 120/XIII/3, which transposes Regulation (EU) 2016/679 on the protection of natural persons in the processing and free movement of personal data into Portuguese law, and repeals Directive 95/46/EC (General Data Protection Regulation).

The law contains several provisions that have an impact on employment relationships, such as Article 19 on video surveillance and Article 28 on the processing of personal data in the context of employment relationships.

This law was promulgated by the President on 26 July 2019, and is pending publication in the Official Gazette. It shall enter into force on the first day after its publication.

4.2 Amendments to the Labour Code and other legislation

The Portuguese Parliament recently approved two new laws amending the Labour Code, other related legislation and some social security schemes:

The second law (Decree No. 329/XIII) was approved by Parliament on 17 July 2019. Such legislation introduces, among others, relevant amendments on the following issues:

- probation period;
- fixed-term employment contract;
- protection of specific groups of employees (e.g. employees on parental leave; employees with an oncological illness);
- professional training;
- harassment;
- working hours bank;
- temporary and intermittent work;
- dismissal due to redundancy;
- collective regulation.

As a rule, the amendments to the Labour Code shall enter into force on the first business day of the month following publication in the Official Gazette.

Furthermore, on 19 July 2019, the Portuguese Parliament also approved Draft Law No. 185/XIII on the application to the public administration of the framework on occupational safety and health set forth in the Labour Code and related legislation, amending the General Labour Law in Public Functions, approved by Law No. 35/2014 of 20 June. This new law shall enter into force on the first business day of the month following its publication.

Please note that all these amendments have not yet been promulgated by the President or published in the Official Gazette.
Romania

Summary
(I) The Administrative Code, which regulates the employment relationships of civil servants and employees of public authorities and institutions, was adopted.
(II) Applicants in certain categories of entities must present a certificate of behavioural integrity.

1 National Legislation
1.1 The Administrative Code
Government Emergency Ordinance No. 57/2019 on the Administrative Code, published in the Official Gazette No. 555 of 05 July 2019, introduced a series of new rules applicable to civil servants (who are appointed by an administrative act), as well as to subcontractors (employees with individual employment contracts) of public authorities and institutions.

Employees of these public entities must, in addition to the specific requirements of the Labour Code, be Romanian citizens or be a citizen of another Member State of the European Union or a state that belongs to the European Economic Area, be a resident of Romania and have knowledge of the Romanian language. By way of exception, foreign citizens may also be employed in compliance with the regime established by the specific legislation.

In addition, candidates may not have been convicted for offenses against national security, against authority, corruption or job-related crimes, false or misdemeanour offenses, unless rehabilitation has taken place.

Employees of public authorities and institutions must submit statements of their assets and statements on the lack of any conflicts of interest.

The new law contains detailed provisions on the conditions of employment and the role of subcontractors. Rules of conduct for employees of public authorities and institutions are also provided.

The provisions of the Administrative Code are supplemented by the provisions of labour law as well as by civil common law provisions, administrative or criminal law regulations, as the case may be.

1.2 Certificate of behavioural integrity
For employment in certain units, candidates must now submit a new type of certificate, the so-called behavioural integrity certificate. This certificate is issued under the conditions of Law No. 118/2019 on the National Automated Register published in the Official Gazette No. 522 of 26 June 2019, directed at persons who have committed sexual crimes, exploited others or minors.

According to the new law, this certificate is required for employment in institutions of education, health or social protection, as well as in any public or private entity in which the activity involves direct contact with children, the elderly, disabled persons or other categories of vulnerable persons or involves the physical examination or psychological evaluation of individuals.

Withdrawal or cancellation of the certificate of behavioural integrity prompts automatic termination of the employment contract, according to Article 56 lit. g) of the Labour Code.
2 Court Rulings
Nothing to report.

3 Implications of CJEU rulings and ECHR
Nothing to report.

4 Other relevant information
Nothing to report.
Slovenia

Summary
The first half of July was mostly characterised by social partner activities within the Economic and Social Council on amendments to the legislation on pension and invalidity insurance, the labour market and an efficient system of recording of working time.

1 National Legislation
1.1 Social dialogue
No new or amended pieces of legislation were adopted in July. July was, however, characterised by social dialogue on the preparation of amendments/new acts. The government announced amendments of the pension and invalidity insurance system as well as of the labour market several months. Issues related to these reforms complemented with the proposals to amend the current system of recording of working time were put on the agenda of the Economic and Social Council (hereinafter ESS). Special negotiating bodies/groups were established by the ESS to carry out the so-called negotiation procedure to arrive at compromises on numerous dilemmas afflicting the pension and invalidity insurance system.

Reports of the negotiation groups were discussed at the ordinary and extraordinary July sessions of the ESS. On 15 July, a decision was taken that consensus on the most controversial issues suffices and that the Ministry of Labour can present proposals on possible reforms into the 'public discussion'. The comments and proposals received until the beginning of September 2019 will be discussed by ESS. On the basis of this discussion, the Ministry of Labour shall prepare formal draft acts and send them to further legislative procedure.

The envisaged amendments to the Pension and Invalidity Insurance Act (the amendments will focus on the retirement age, the amount of pensions, etc.) and to the Labour Market Regulation Act (it focuses on increasing the amount of unemployment benefits and the duration of unemployment benefits) entirely or at least partly address social security issues. These will not be dealt with further in this report. There is, however, one issue that is of interest from a labour law perspective. In accordance with the coalition agreement concluded during the last general elections, the proposal was made for the Pension and Invalidity Insurance Act to enact the possibility for old-age pensioners to continue working under the employment relationship (the so-called 'double status of pensioners'). In the first three years of retirement, if they continue working, they may—in addition to their wage—be entitled to 40 per cent of their pension and after three years, to 20 per cent of their pension.

The double status of pensioners was, in principle, required by a fairly small group of craftsmen who chose to pay the lowest social insurance contributions during their active work life and now receive very low pensions. They receive pensions without deductions. The notion of double status of pensioners is also hotly debated by some other groups, e.g. by academia (the system would be unfair; above all, it would contradict the intra-generation solidarity principle and some other principles and the basic purpose of pension insurance; the double status of pensioners and/or the pension would not have the features of a pension, but of an active employment policy measure), by some politicians (who maintain that in some other countries, the employment of pensioners is allowed, which is in line with the right to work) and by trade unions (who warn against unfair competition of retired craftsmen who could sell their products at lower prices). It is difficult to predict whether the proposal will be included in the amended Act.
Another issue in the present discussion about the future reforms is the recording of working time. At present, it is covered by the Employment Relationships Act and the Labour and Social Security Records Act of 2006. In practice, labour inspectors often find different violations of the law (records are not properly/correctly maintained, some employers do not keep them at all, etc.). For this reason, also bearing in mind the CJEU case law, trade unions proposed adopting a special new act and/or to amend the legislation in force. A special negotiation group has been established by the ESS to find appropriate solutions to prevent violations that will be discussed by the ESS and included in the draft act prepared by the Ministry of Labour before entering the legislative procedure.

2 Court Rulings
Nothing to report.

3 Implications of CJEU rulings and ECHR
Nothing to report.

4 Other relevant information
Nothing to report.
Spain

Summary
There were no new developments in the field of labour law, because there is currently only an interim government. General elections will likely take place in November, because Congress has failed to appoint a new prime minister so far.

1 National Legislation
Nothing to report.

2 Court Rulings
2.1 Equality and non-discrimination
Supreme Court, No. 2463/2019, 24 June 2019

Factual part
In 1997, an undertaking agreed to a modification of a wage supplement with the trade unions. Since then, the amount of this wage supplement has been higher for workers hired before 1997 than for those hired after 1997. After 20 years with that configuration, a trade union challenged this agreement in 2017, claiming that it violated the principle of equality recognised in Article 14 of the Spanish Constitution. The assertion was that all workers ought to be entitled to the higher supplement.

The Supreme Court found that the configuration of this wage supplement created a 'double salary scale' based on the date of hiring. According to both the Constitutional Court and the Supreme Court’s case law, this type of supplement violates the principle of equality and the norm that requires same wage for work of equal value (Article 28 of the Labour Code).

Analytical part
According to the Supreme Court’s case law, a double salary scale does not violate the principles of equality and non-discrimination when it arises from an occasional and temporary circumstance, so that the difference is reduced or eliminated over time, which did not happen in this case.

The ruling recalled that the wage difference had its origin in collective bargaining, which requires a stricter approach with regard to principles of equality and non-discrimination than is the case in individual employment contracts. Wage differences that derive from individual agreements between the employer and certain workers are interpreted more generously.

Finally, the Supreme Court mentioned the CJEU judgment in case C-154/18, 14 February 2019, but did not deem it applicable, because the key element of the difference in treatment in the Spanish case was not the age of the workers, but the date of their hiring.

3 Implications of CJEU rulings and ECHR
Nothing to report.
4 Other relevant information

4.1 Political situation
After the general elections of April 2019, Congress had to appoint a new prime minister. However, the first investiture attempt failed and no new government has yet been formed. The government plans to amend the Labour Code and introduce other legal changes requested by the trade unions, but these initiatives are currently on hold. It is not possible to rule out new general elections in autumn.

4.2 Unemployment
Unemployment has declined to 3,015,686 people, the lowest number since 2008.

4.3 Gig economy and platform economy
The platform economy has been a controversial issue in recent months, especially in the fast food delivery sector. The labour inspectorate and social security consider riders to be employees of the platform (mainly Glovo and Deliveroo), and not self-employed workers, which has a huge impact on their social security entitlements and duties. Case law is not yet conclusive, although it seems that the courts are more inclined to consider these riders to be workers and not self-employed persons. However, this seems to be a long-term problem.
Swedish Parliament has passed legislation to amend and limit the right to strike in situations where the workplace is already covered by a collective agreement. The amendment emphasises the traditional majority trade unions.

1 National Legislation
The Swedish Parliament has passed a bill (based on Prop. 2018/19:105 Utökad fredsplikt på arbetsplatser där det finns kollektivavtal) which amends the right to strike. The new provisions in the Co-determination Act, which enter into force on 01 August 2019, will emphasise the strong position of the major trade unions and respect for the workplace in existing collective agreements. The changes reflect the frustration of both the political actors and the major industrial partners in Sweden.

According to the amendments of the legislation, an employee is entitled under specific circumstances to participate in industrial action against an employer who is bound by a collective agreement. The industrial action must have been authorised by a trade union in line with proper proceedings and should aim at achieving a binding collective agreement between the parties. Prior to the industrial action, the parties must have engaged in negotiations to discuss the demands. The trade union (or employee) cannot request replacing (and thus making obsolete) any already existing collective agreement at the workplace.

This reform was initiated after the far-reaching and long-lasting conflict in Gothenburg Harbour. The harbour workers’ union had challenged the existing industrial relations and the collective agreement between the employers and the Transportation Workers’ Union, the latter being a member of the central trade union federation (LO). Despite the application of the content of the collective agreement to non-members and members of the trade union that had not signed the collective agreement, the harbour workers’ union engaged in collective action and, eventually, concluded a collective agreement with the same content as the already existing Transport Workers’ Agreement. While the major trade unions and the employers have been calling for this change in the legislation, the ‘minority’ unions or trade unions that are not members of the Trade Union Federation (LO) expressed major concern about the amendments and argued that any limitations of the right to strike (or collective action) should be very limited.

2 Court Rulings
Nothing to report.

3 Implications of CJEU rulings and ECHR
Nothing to report.

4 Other relevant information
Nothing to report.
United Kingdom

Summary
The court of appeal has issued a ruling on the Agency Work Regulations and the meaning of equal treatment between agency workers and directly employed workers.

1 National Legislation
Nothing to report.

2 Court Rulings
2.1 Non-discrimination of agency workers
Court of Appeal, No. [2019] EWCA Civ 1185, 11 July 2019, Kocur v Angard Staffing Solutions Ltd and another
In Kocur v Angard Staffing Solutions Ltd and another [2019] EWCA Civ 1185, the court of appeal ruled that the Agency Work Regulations (hereinafter AWR) 2010 did not entitle agency workers to the same number of contractual hours as a directly recruited comparator. The agency worker argued that he was entitled to be offered a 39-hour week, which was the standard working week for full-time, directly employed workers at Royal Mail. The court of appeal stated:

"The purpose of the Directive is plainly to ensure the equal treatment of agency workers and permanent employees while at work, and in respect of rights arising from their work; but there is nothing in either the preamble or its actual provisions to suggest that it is intended to regulate the amount of work which agency workers are entitled to be given. And of course a provision with the effect contended for by the Claimant would be contrary to the whole purpose of making use of agency workers, which is to afford the hirer flexibility in the size of workforce available to it from time to time – a purpose which the Directive expressly recognises and endorses (see in particular recital (11)). Both the ET and the EAT – in each case incorporating lay members – recognised this, and full weight must be given to their specialist expertise."

3 Implications of CJEU rulings and ECHR
Nothing to report.

4 Other relevant information
Nothing to report.
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