Flash Reports on Labour Law November 2020

Summary and country reports

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

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Executive Summary

National level developments

In October 2020, **extraordinary measures triggered by the COVID-19 crisis** continued to play an important role in the development of labour law in many Member States and European Economic Area (EEA) countries.

This Summary is therefore again divided into an overview of developments relating to COVID-19 crisis measures, and the second part sums up other labour law developments with particular relevance for the transposition of EU labour law.

Developments related to the COVID-19 crisis

Measures to reduce the risk of infection in the workplace

All countries still have measures in place to prevent the spread of the virus in the workplace. While lockdowns continue to be widespread, states of emergency have been declared or extended in the **Czech Republic**, **Hungary** and **Portugal**. In **Italy**, the government has divided the country into three zones, with different restrictions in accordance with the level of risk. At the same time, some countries such as the **Czech Republic** have extended or reintroduced measures such as travel bans, restrictions to the freedom of movement and the obligation to wear respiratory equipment. Bans and restrictions to the operation of businesses and other establishments remain in force in countries such as **Belgium**, **Croatia** and **Poland**. In **Denmark**, a particular COVID-19 mutation was discovered in the northern part of Jutland, which led to local restrictions and an order for all mink farmers to cull their mink.

Several countries have addressed the subject of teleworking as a measure to reduce the infection rate at the workplace. In countries such as **Belgium**, **Romania** and **Portugal**, teleworking is now mandatory wherever objectively possible. While **Hungary** has introduced new legislation, **Ireland** and **Germany** are discussing draft bills on the subject. In **Slovenia**, provisions on teleworking have been included in new collective agreements.

In case teleworking is not possible, specific health and safety standards for workplaces have been specified. In several countries, including **Croatia**, **Estonia**, **Slovakia** and **Slovenia**, the list of biohazard risk groups in the working environment has been integrated with new biological risk factors, including the coronavirus SARS-CoV-2.

Finally, a new act in **Denmark** established a legal basis for employers to require employees to be tested for COVID-19 and to demand to be informed by the employee about the test results.

Measures to mitigate the financial consequences for businesses and workers

A number of relief measures to compensate employees affected by business restrictions have been put in place. **Bulgaria** introduced compensation for employees engaged in economic activities for which temporary restrictions have been imposed. Similarly, **Norway** now provides temporary compensation schemes for the cancellation of cultural events as a result of COVID-19.

Ireland and the **United Kingdom** extended the Pandemic Unemployment Payment and the furlough scheme, respectively, until 31 March 2021. Finally, in **Finland**, the government has proposed to extend the unemployment benefits for laid-off employees.

Financial benefits for self-employed persons have been extended in the **United Kingdom**.

In **Slovenia**, the partial reimbursement of wage compensation for temporarily laid-off workers has been extended to help employers, and compensation schemes for businesses with losses in income as a result of the outbreak of COVID-19 have been introduced. The latter scheme is also being proposed in **Norway**. At the same time, in **Portugal**, the government launched new instruments to support the cashflow of companies operating in sectors particularly affected by COVID-19.

In **Hungary**, the employer is exceptionally exempted from the payment of social security contributions and can be reimbursed up to 50 per cent of employees' wages. Similarly, in **Italy**, the payment of social security contributions in November 2020 has been suspended for undertakings whose activity has been restricted.

Leave entitlements

Special rules on entitlements to family- and care-related leave and sick leave continue to apply in many countries. Specifically, special rules on leave schemes for employees with care obligations have been extended in **Austria**, the **Czech Republic** and **Luxembourg** to alleviate the adverse effects of the COVID-19 crisis. Similarly, exceptional rules to accommodate increasing care needs resulting from the suspension of teaching activities have been introduced in **Portugal** and in **Italy** for maximum risk regions.

Other measures to respond to the COVID-19 crisis

In **Spain**, the recently published Employment Plan for 2020 has been completely redesigned as a result of the pandemic, paying special attention to people who have lost their jobs due to COVID-19.

In **Luxemburg**, limits to salary earnings for early retirees in certain sectors have been neutralised to cover a potential lack of staff.

Table 1. Main developments related to measures addressing the COVID-19 crisis

Topic	Countries
Teleworking / working from home	AT BE HU IE PT RO SI
Benefits for workers / self-employed prevented from working	BG FI IE IT NO SI UK
Employer subsidies	IT LU NO SI PT UK
Restriction of business activity by lockdown measures	BE HR CZ IT PL
Health and safety measures	HR EE SI SK
Special care leave / parental leave	AT IT LU PT
Restrictions of free movement / travel ban	CZ NO
Right to require employees to undergo COVID-19 testing	DK
Temporary exception to the ban on Sunday trade	PL

Other developments

The following developments in November 2020 were particularly relevant from an **EU law perspective**:

Temporary agency work

In **Austria**, the Supreme Court stated that no minimum period of posting is necessary for agency workers to be treated like those who have been directly employed with the user undertaking for the purpose of calculating the number of members of the works council.

In **Spain**, the Supreme Court stated that the principle of equal pay for temporary agency workers also extends to all bonuses that are not paid regularly, in particular to profit-sharing. Similarly, the Supreme Court of **Norway** ruled that the principle of equal pay for agency workers also comprises the same results-based bonus direct employees of the user company benefit from.

Fixed-term work

In **Austria**, the Supreme Court confirmed the need for a strict test of the employer's claim that the employee benefited from consecutive fixed-term contracts instead of a continuous employment relationship. Similarly, in **France**, the Court of Cassation ruled that fixed-term contracts cannot be used to fill long-term positions, necessitating instead concrete elements establishing the temporary nature of the employment relationship. In the **Czech Republic**, the Supreme Court stated that it is up to the lawmaker to determine for which persons and to what extent the restrictions on successive fixed-term employment should apply, as long as the possibility of concluding successive fixed-term contracts is based on objective reasons.

In **Cyprus**, the Administrative Court ruled against the decision of the Director of Social Security Services, who designated a number of part-time teachers on fixed-term contracts in public schools as subcontractors under service contracts.

Work-life balance

In the **Netherlands**, a draft bill implementing Directive 2019/1158 on work-life balance of parents and carers was issued.

In **Slovenia**, rules on part-time work for parents have been amended.

Other aspects

In **Croatia**, a new Act on Posting of Workers and Cross-Border Implementation of the Decisions on Financial Penalties has been adopted, repealing the previous Act.

In **Germany**, the Federal Labour Court decided that crowdwork may qualify as an employment relationship. Furthermore, the Federal Ministry of Labour presented a number of measures aiming to strengthen the rights of platform workers towards the work platform.

In **Spain**, the Supreme Court issued two different rulings on transfers of undertakings, one ruling on a case of outsourcing of cleaning services by a public administration and one on a transfer of assets in the context of bankruptcy proceedings governed by a judge.

In the **UK**, an Administrative Court held that the UK failed to transpose Framework Directive 89/391/EC and Council Directive 89/656/EC on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace, because the Directives require Member States to confer certain protections on 'workers', while the UK legislation protects only 'employees'.

Table 2: Other major developments

Topic	Countries
Fixed-term work	AT CY CZ
Temporary agency work	AT ES NO
Minimum wage	CZ LU
Work-life balance	NL SI
Free movement of workers	AT
Posting of workers	HR
Crowdwork	DE
Transfer of undertakings	ES
Reasonable accommodation	SE
Health and safety at work	UK

Implications of CJEU Rulings

Collective redundancies

This FR analyses the implications of a CJEU ruling on collective redundancies.

CJEU case C-300/19, 11 November 2020, Marclean Technologies

The CJEU's findings in this case concerned the interpretation of Article 1 (1) (a) of **Directive 98/59/EC**. The Court held that in order to determine whether an individual dismissal is part of a collective dismissal, the reference period of 30 or 90 days shall be calculated, taking into account any period of 30 or 90 consecutive days during which the individual dismissal took place and the employer made the majority of dismissals.

In this regard, a large majority of national reports indicates that national legislation is compatible with the judgment.

In some countries, courts have already interpreted the calculation of the reference period in a manner consistent with the CJEU judgment (e.g. **AT**, **HR**, **RO**, **SI**), while in **Denmark**, this method of calculation is explicitly established by legislation.

However, it is rare for national legislation or case law to provide indications of how to apply the reference period. In this regard, the judgment can guide national interpretations of reference periods, especially for those national legislations which implemented Directive 98/59/EC by adopting a similar wording to that of Article 1 (1) (a) (i) (e.g. **BG**, **CY**, **CZ**, **HU**, **IS**, **MT**, **PL**, **SK**). At the same time, the ruling is also relevant for those countries that apply more favourable conditions or longer reference periods than those provided by the Directive (e.g. **BE**, **EE**, **IT**, **IE**, **LU**).

The CJEU ruling rejects the interpretation of the Supreme Court of **Spain**, which only considered terminations that had occurred in the 90 days prior to the date of the individual dismissal to establish the existence of a collective dismissal. However, Spanish legislation is compatible with the CJEU's interpretation. Similarly, in the **Netherlands**, the interpretation of the reference period does not seem to be fully in line with the ruling, as the period in which the highest number of dismissals takes place is not a relevant factor in Dutch law. However, interpretation of the law in conformity with the ruling is possible.

In **Greece**, the legislation establishes the period of reference as being a calendar month rather than any consecutive period of 30 or 90 days. As a result, Greek legislation does not seem to be in line with the CJEU ruling.

Finally, the CJEU ruling has no relevance in both **Finland** and **Sweden**, as there are no reference periods set by legislation. Employers are instead obligated to negotiate with employees before proceeding with layoffs.

Austria

Summary

(I) The state-funded paid leave scheme for employees with care obligations has been renewed and extended.

(II) Due to the economic crisis, the entry into force of longer notice periods for blue collar workers has been postponed for half a year.

(III) Three Supreme Court rulings of interest from an EU labour law perspective have been published on the free movement of workers, fixed-term contracts and temporary agency work.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Family support leave

State-funded paid leave for parents during COVID-19 was one of the first legislative measures introduced to help families during the lockdown and has since then been renegotiated and amended various times in response to the ever-evolving COVID-19 related legislation and restrictions (see also March and October Flash Reports). The Decision of the National Council of 20 November 2020 concerning a federal law amending the General Civil Code and the Employment Contract Law Amendment Act has been issued.

It establishes that employees with certain care responsibilities who are affected by the full or partial closure of care facilities may take additional paid leave for which the employer is subsequently reimbursed by the State. Four main issues have been discussed from the beginning and amended since the first introduction of state-funded paid leave, namely (1) the group of employees who are eligible to make use of this additional leave (type of care responsibilities, opportunities for care outside the home); (2) whether entitlement to that leave exists or whether the leave needs to be agreed between the employer and employee; (3) the duration of the leave, and (4) the amount of funding employers will receive.

Currently, as of 01 November 2020, the following regulations on state- funded paid leave apply:

(1) Employees are entitled to special care time with continued remuneration for the necessary care of:

a) children under 14 years of age, if educational institutions or childcare facilities are partially or fully closed as a result of officially imposed measures, *or* if the child is placed in quarantine by the authorities;

(b) persons with disabilities, if the establishment providing disability assistance/the teaching institution or school in which they are looked after or taught is partially or fully closed down as a result of officially imposed measures, *or* if the care is provided at home on a voluntary basis;

(d) dependents of persons in need of care (generally, these include elderly and/or sickly persons living at home with a professional caregiver at their side) if their caregiver is unavailable and therefore, care may not be ensured;

(c) relatives of persons with disabilities who usually have personal assistance but that personal assistance may no longer be guaranteed as a result of COVID-19;

(2) Entitlement to state-funded paid leave (which is new) and agreement on state-funded paid leave (which is not new):

The employee 'must' take all reasonable steps to ensure that he/she can perform the agreed work. Only in cases where no alternative care options exist is an employee entitled to state-funded paid leave. At present, kindergartens and schools are open to offer emergency care (all forms of teaching take place online/remotely), reasonable alternatives for child care do exist in most cases and parents are generally not entitled to state-funded paid leave.

Employees who are not entitled to state-funded paid leave or any other alternative care leave, and whose work is not required for the operation of the establishment they are employed in may agree on state-funded paid leave.

(3) State-funded paid leave is possible for up to four weeks

(4) Employers are refunded 100 per cent of the remuneration paid during the employee's state-funded paid leave, this amount is capped at the maximum monthly contribution basis according to the General Social Security Act, Federal Law Gazette No. 189/1955, and must be claimed by the employer within six weeks after the state-funded paid leave has ended by the respective public authority (accounting agency – Buchhaltungsagentur).

The amended provisions on state-funded paid leave (§ 18b para 1 and para 1b and 1c AVRAG) read as follows (unofficial translation by the author):

> § 18b (1) AMPFG:
>
> *"If, as a result of official measures, facilities are partially or fully closed, the employee is entitled to state-funded paid leave for the care of children up to the age of 14 years, for whom care is compulsory, for a total of up to four weeks from the date of official closure of educational institutions and childcare facilities. The employee must inform the employer immediately once the closure has become known and undertake all reasonable efforts to perform the agreed work. The same applies*
>
> *1. if a child up to the age of 14 years for whom care is compulsory is quarantined based on § 7 of the Epidemics Act 1950, Federal Law Gazette No. 186/1950, is or*
>
> *2. where there is an obligation to provide care for persons with disabilities, who are in a facility for disabled persons or in an educational facility for persons with disabilities or a higher school, and that facility or educational establishment or school is fully or partially closed as a result of officially imposed measures or in case the care of persons with disabilities takes place at home on a voluntary basis or*
>
> *3. for relatives of persons in need of care, if their care or support can no longer be ensured due to the loss/unavailability of the respective caregiver, or*
>
> *4. for relatives of persons with disabilities who are entitled to personal assistance, if the personal assistance is no longer guaranteed as a result of COVID-19.*
>
> *Employers are entitled to remuneration for the time their employees are on state-funded paid leave, reimbursed by the Federal Government from the COVID-19 crisis management fund. The refund for remuneration is capped at the maximum monthly contribution basis according to the General Social Security Act, Federal Law Gazette No. 189/1955, and may be claimed within six weeks of the end of state-funded paid leave via the accounting agency. The accounting agency decides on the refund of remuneration by means of notification. The employer has the right, within four weeks of notification of*

that communication, to request a decision via an administrative order if the request for remuneration is not granted in full. […]"

§ 18b (1b):

"If, due to the imposition of official measures, facilities are partially or fully closed and if an employee, whose work is not essential to maintaining the operation of the establishment, is neither entitled to absence from work to care for his or her child, nor has a right to state-funded paid leave in accordance with paragraph 1, the employer may grant the employee state-funded paid leave of up to four weeks from the time of the official closure of educational institutions and childcare facilities, for the care of children up to the age of 14 years, for which care is compulsory. The same applies to persons listed in paragraph 1 Z 1 to Z 4. Employers are entitled to a refund of the remuneration paid to said employees by the Federal Government from the COVID-19 crisis management fund. Entitlement to remuneration is capped at the monthly maximum contribution basis under the General Social Security Act, Federal Law Gazette No. 189/1955, and must be claimed from the accounting agency within six weeks from the end of the special care period. The accounting agency decides on the award of the refund by means of communication. The employer has the right, within four weeks of receiving this notification, to request a decision via an administrative order if the application for remuneration is not fully granted. For state-funded paid leave agreed under this provision and state-funded paid leave under paragraph 1, a maximum period of four weeks in total during the period between 1 November 2020 and 9 July 2021 shall apply. […]"

§ 18b (1c)

"Any remuneration unduly received shall be repaid."

The Act passed the National Assembly on 20 November 2020 and is scheduled to pass the Federal Assembly. It will enter into force retroactively on 01 November 2020 and will remain in force until 09 July 2021.

The recently amended state-funded paid leave addresses the increasingly difficult situation employees with care obligations have been facing during the latest 'soft' lockdown imposed from 03 November 2020 onwards, which includes remote schooling and distance learning for upper grades, and the 'strict' lockdown, which includes remote teaching and distance learning for all school classes and a partial closure of kindergartens from 17 November until 06 December. Schools for under 14-year olds and kindergartens have remained open for those children who cannot be supervised at home; schools are not offering classes, only the supervision of children and help with learning. Moreover, the legislator has become increasingly aware of situations during which a child has to remain at home (because he/she has been quarantined), or because sickly, elderly or disabled persons are in need of care.

The legislator has thereby addressed the criticism that the employer's consent to state-funded paid leave was required so far. Employees are now required to find alternative care options for their children in accordance with the available options (open schools and kindergartens), but are entitled to leave if such opportunities are not available or cannot be used. Additionally, employees may still agree on state-funded paid leave with their employer – and get a full refund for the costs of the continuation of payment of their remuneration.

Press articles on special care can be found here and here.

1.1.2 Notice periods for blue collar workers

§ 1159 of the General Civil Code (*Allgemeines Bürgerliches Gesetzbuch* - ABGB) stipulates notice periods for blue collar workers that are significantly shorter than those for white collar workers (unofficial translation by the author):

> "*Termination is permissible: if, in the case of an employment relationship which does not involve any services of a complex nature, remuneration is calculated on the basis of hours or days, on the basis of pieces or individual services, at any time for the following day; if such an employment relationship mainly involves the employee's gainful employment and has already lasted for three months or if the remuneration is calculated on the basis of weeks, at the latest on the first working day for the end of the calendar week*."

This provision was scheduled to be replaced by 01 January 2021 with the same regulation on termination that applies to white collar workers. This would have meant that notice periods would have increased significantly: notice periods would have then been at least six weeks, increased to two months after the second year of service, to three months after the completion of the fifth year of service, to three months after completion of the fifteenth year, to four and to five months after completion of the twenty-fifth year of service. The date of termination is the end of each quarter, but the 15th or the last day of each month may be agreed as a termination date as well.

Due to the COVID-19 pandemic the strain on the economy, the entry into force of this amendment (which passed Parliament in 2017, BGBl. I No. 153/2017) has now been postponed by half a year. The amendment will now enter into force on 01 July 2021 and shall apply to terminations issued after 30 June 2021:

§ 1503 (15) ABGB now reads:

"*Notwithstanding subsection 10, section 1159, as amended by the Federal Act, BGBl. I No. 153/2017, shall enter into force on 1 July 2021 and shall apply to terminations issued after 30 June 2021*."

The full text of the amendment can be found here.

This amendment—the postponed introduction—has not received much attention in the media. It was described by some as a bad deal for blue collar workers, while others pointed out that postponing the amendment would buy social partners and employers more time to adapt to the amended legislation, as the social partners and employers have been preoccupied with the COVID-19 pandemic. The articles in the media on this amendment can be found here and here.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Free movement of workers

Oberster Gerichtshof, 9 ObA 40/20b, 29 September 2020

This case dealt with a provision in the collective agreement of medical employees of social security providers, which included a pay scheme that is based on service time, i.e. the longer an employee works with such an employer, the higher his/her salary. It also included provisions on taking service times of previous employment relationships into account. All previous service times with the same social security provider are fully taken into account without any cap, while all other relevant service times are capped at five years. The plaintiff, the works council at one of the hospitals, claimed that this

is in breach of EU law as it deters cross-border mobility. Therefore, all other relevant service times with employers within the EU or EEA shall be taken into account as though they have been performed with the present employer. The labour court's decision can be found here.

The labour court decided in favour of the plaintiff. The Court of Appeal abated the legal proceedings and waited for the ruling of the CJEU in the *Krah* case (C-703/17), and subsequently did not grant the appeal, also citing the cases *Köbler* (C-224/01), *Salk* (C-514/12) and *Österreichischer Gewerkschaftsbund* (C-24/17). It considered that the clause likely impedes the free movement of workers, and that it cannot be justified, considering that the clause rewards loyalty with the effect of sealing off the job market.

The Supreme Court upheld this decision and pointed out that such a measure (capping the relevant service times with employers other than social security providers) is not acceptable, unless it pursues one of the legitimate aims listed in the TFEU or is justified by overriding reasons in the public interest. Even so, the application of that measure must be such as to ensure the achievement of the objective in question and may not go beyond what is necessary for that purpose. The Court argued that the provision not only rewards employees' loyalty (which is fulfilled by bi-annual wage increases), but also encourages mobility within the defendant's company. A 'loyalty bonus' which takes into account work for several employers or 'departments', 'plants', 'locations' is not a 'genuine' loyalty bonus according to the CJEU's case law and is therefore unsuitable as a justification. An employer's interest in retaining certain employees would have to be justified specifically with regard to a certain position and the work actually performed in that position. This was not the case here.

The Supreme Court extensively cited CJEU case law and undertake efforts to align its decision accordingly, especially with the most recent *Krah* case, which reviewed the provisions for university professors in terms of taking their service times with other universities into account. The Supreme Court followed a rather strict interpretation of the justification of measures potentially infringing employees' transnational mobility. Taking into account all previous service times with the same, fairly large employer only (seven hospitals and four rehabilitation centres) was considered to encourage inter-employer mobility and therefore shutting out this internal job market to a certain extent to outside applicants, including those from other countries. It seems that this was deemed the main effect of the provision and less the reward of loyalty. The decision is therefore in line with EU legislation as well as with CJEU jurisprudence and applies a fairly strict approach to the justification as a reward of loyalty.

2.2 Successive fixed-term contracts

Oberster Gerichtshof, 9 ObA 55/20h*, 29 September 2020*

Consecutive fixed-term employment contracts are only legal if the sequence of individual fixed-term employment contracts is justified in individual cases by special social, economic reasons or organisational or technical reasons, because there is otherwise a risk that the employer may circumvent mandatory legal norms protecting the employee and thus abuse the freedom of contract. This, however, is not written law but long-standing court practice (e.g. Supreme Court 9 ObA 25/20x). One of the possible justifications is that consecutive fixed-term contracts are in the interest of the employee because he/she prefers the flexibility they provide. This must be justified, however, by informing the Court of this interest, e.g. that the employment is just a side job while studying at the university or that the employee is primarily taking care of children and therefore needs such flexibility as he/she is not continuously available.

The present case also applies a strict approach to the employer's claim that the employee benefited from consecutive fixed-term contracts. There was no evidence

that the employee's interests were also decisive for the selected contractual arrangement (see also 8 ObA 13/14s). It may well be that the employee could have refused to perform the services without sanction. In fact, however, the contractual relationship between the parties was such that the employee regularly performed night services from Saturday to Sunday without (longer) interruptions. The plaintiff's interests in a chain of fixed-term employment contracts instead of a continuous employment relationship was not evident. The employment relationship was therefore considered to be open-ended.

The decision of the Supreme Court can be found here.

This is another example of how the Austrian courts deal with consecutive fixed-term contracts in practice. Although no explicit legislation exists against the abuse of successive fixed-term contracts, this long-standing case law that dates back decades is in line with Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP and especially with clause 5 of the framework agreement on preventing abuse arising from the use of successive fixed-term employment contracts.

2.3 Temporary agency work

Oberster Gerichtshof, 9 ObA 65/20d, 29 September 2020

Agency workers work for two undertakings, on the one hand, for the temporary work agency, and on the other, for the user undertaking. Such employees are represented by both works councils whereas the competencies between those two are divided. Although this is not explicitly stated in statutory law, it is commonly understood, and the Supreme Court has already ruled accordingly (9 ObA 63/87). What was still disputed is the question whether all agency workers are taken into account in the calculation of the number of works council members or whether a minimum time with the user undertaking is necessary. The Supreme Court has ruled in the past that a service time of at least six months suffices, but has left open the question of how to deal with shorter periods (9 ObA 22/91).

The decision clarifies this and states that no minimum period of posting is necessary. Agency workers are treated the same as employees directly employed with the user undertaking.

The Supreme Court has delivered a judgment that is in line with the majority of voices in the Austrian legal literature based on a number of provisions in the Labour Constitution Act that does not distinguish between different categories of employees but treats them all equally as regards the calculation of the number of works council members. Although not explicitly mentioned, this decision also reflects the principle of equal treatment in Art. 5 of the Agency Work Directive 2008/104/EC and is therefore in line with EU legislation.

3 Implications of CJEU Rulings

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technology

The relevant provision on mass-redundancies is § 45a of the Act to Promote the Labour Market (*Arbeitsmarktförderungsgesetz* – AMPFG) and reads as follows (unofficial translation by the author):

"(1) Employers shall notify the competent regional office of the Public Employment Service according to the location of the establishment by written notification, if they intend to terminate employment relationships

1. of at least five employees in companies with normally more than 20 and less than 100 employees, or

2. at least five per cent of employees in companies with between 100 and 600 employees, or

3. of at least 30 employees in companies with normally more than 600 employees, or

4. of at least five employees who have reached the age of 50, within a period of 30 days.

(2) The notification pursuant to subsection 1 shall be made at least 30 days before the first declaration of termination of an employment relationship. This period may be extended by collective agreement. The obligation to give notice pursuant to para. 1 shall also apply in the event of insolvency and shall be fulfilled by the liquidator in the event of bankruptcy, if notice has not been given prior to the opening of bankruptcy proceedings. Paragraph 1 (4) shall not apply if the termination of employment is exclusively attributable to the end of the season in seasonal operations.

…

(5) The termination of employment relationships pursuant to paragraph 1 shall be legally ineffective if they are declared

1. before filing the notification referred to in para. 1 with the regional office of the Public Employment Service, or

2. after filing the notification with the regional office of the Public Employment Service within the period of time determined in accordance with para. 2 without prior consent of the regional office in accordance with para. 8."

Therefore, pursuant to § 45a (2) AMFG, notification of the Labour Market Services must be made at least 30 days before the first dismissal. The Supreme Court has stated that this reference period of 30 days 'moves continuously', i.e. it must be calculated for each dismissal and it must be determined whether this threshold is exceeded within the following 30 days (8 Ob A 33/09z).

This is in line with the CJEU's interpretation of the reference periods in Article 1(1)(a)(i) and (ii) of Directive 98/59 in such a way as to allow for account to be taken of dismissals or terminations taking place within 30 or 90 days of the dismissal at issue as falling within those periods. The Austrian approach, which considers a 30-day reference period as being flexible, as reference is made to `moving continuously' actually takes into account any period of 30 consecutive days, including the dismissal of the worker at issue.

4 Other Relevant Information

4.1 Mass testing

The Austrian government announced that after the end of the 'strict lockdown', which is expected to end on 06 December, mass testing should ensure a safe Christmas season for all. This announcement has stirred a lot of discussion and controversy, both in terms of the logistics and organisation of such mass testing as well as whether testing should be mandatory, at least for certain groups. Also, the potential obligation to get a COVID vaccination has been debated publicly. Given the current legislative

basis, both the testing and vaccination are voluntary, but academics argue that for some groups, a legal obligation could be possible.

4.2 Teleworking

The government has urged the social partners to develop a legislative proposal for teleworking (home office) soon, and not to wait until Spring 2021, as initially announced. Controversial issues reportedly include the costs for IT equipment used at home, equal treatment as well as works council involvement.

Belgium

Summary

(I) The new Ministerial Decree to contain the spread of the coronavirus impose teleworking wherever possible, but non-essential shops are gradually reopening.

(II) The new Federal Minister of Labour has published his policy paper, which does not contain any far-reaching measures.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Restrictions to business operations

The Ministerial Decrees of 01 November 2020 and of 28 November 2020, amending the Ministerial Decree of 28 October 2020 on urgent measures to contain the spread of the coronavirus COVID-19 imposes teleworking wherever possible, but non-essential shops are gradually reopening (see *Moniteur belge* of 01 November 2020 and 29 November 2020, p. 78924 and p. 83924, respectively).

There has been a general obligation since 01 November to work from home where possible. The new ministerial decrees impose an obligation on employers to provide workers who cannot telework (e.g. in the construction sector, manufacturing or in health care) with a declaration explaining why this is not possible.

Undertakings shall, in a timely manner, take appropriate preventive measures to enforce the rules of social distancing and to provide a maximum level of protection for workers. These preventive measures are health and safety requirements of a material, technical and/or organisational nature, defined in the so called 'Generic guidelines on preventing the spread of COVID-19 at work', drawn up by the social partners in the National Labour Council, supplemented by guidelines at sectoral level and/or undertaking level (see here for the guidelines on the website of the Federal Ministry of Labour).

These preventive measures shall be taken at company level in compliance with the applicable rules of the social dialogue.

The new Ministerial Decree of 28 November 2020, which contains the adapted measures to limit the spread of the coronavirus, was published in the *Moniteur belge* on Sunday, 29 November. The new measures will take effect on 01 December 2020 and will apply until 15 January 2021.

As announced on Friday, all shops may reopen on Tuesday, 01 December 2020, provided that they comply with the necessary health measures. For example, everyone must wear a face mask, a distance of one and a half metres between each customer must be guaranteed and customers may shop for a maximum of 30 minutes. If a shop only works by appointment, customers are allowed to shop longer.

People should go shopping on their own, shopping centres or public areas of companies larger than 400 square metres shall provide 'adequate access control'.

Shops must organise all of their activities in such a way as to avoid gatherings and to respect the rules of social distancing, including for people waiting outside the establishment. In addition, the company must appoint a contact person to whom customers and staff members can report a possible COVID-19 coronavirus infection to facilitate contact follow-up.

Local authorities that determine that health measures cannot be guaranteed may decide that non-essential shops must close down.

Not only shopping, but also visiting markets is limited to 30 minutes. In addition, a system must be introduced to check how many customers are present on the market. Restaurants, cafes, beauty salons, non-medical pedicure shops, nail salons, massage salons, hairdressers and barbershops, as well as tattoo and piercing salons will remain closed.

In addition to shops, accredited museums and art galleries may reopen on 01 December.

The measures imposed by the Federal Minister of the Interior Affairs aim to substantially reduce the number of positive COVID infections, hospital admissions and corona deaths. Belgium now ranks fourteenth in Europe in terms of new infections, but the number of patients in hospitals is still higher than in other European countries.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Collective redundancies

CJEU Case C-300/19, 11 November 2020, Marclean Technologies

According to Article 1 of the collective redundancies Directing on the information and consultation of workers, dismissals not related to the individual workers concerned must take place within an uninterrupted period of a number of calendar days. Under Directive 95/59 of 20 July 1998, that period is 30 or 90 days.

In Belgium, the collective redundancies Directive is transposed by intersectoral Collective Bargaining Agreement (CBA) No. 24, concluded in the National Labour Council on 02 October 1976, and applicable to the private sector. Article 5 of the collective redundancies Directive leaves the possibility for Member States open to introduce more protective provisions at national level. Belgium did this by slightly modifying Option 1 of the Directive in the implementing measure. While the numerical criteria were retained, as in the Directive, Belgium extended the reference period from 30 to 60 calendar days in Article 2 of CBA No. 24. The extension of the reference period during which dismissals for non-personal reasons must be examined will provide increased protection for workers. This will make it more difficult to spread out the planned redundancies over time.

The *Juzgado de lo Social n° 3 de Barcelona* asked the CJEU how these 30 or 90 days should be calculated. The Catalan labour court saw three possible methods of calculation:

- the period should either always be calculated with the date of the individual dismissal as the end date;
- or the period should be calculated from the date of the individual dismissal at issue;

- or all dismissals that have occurred within a period of (for Belgium) 60 days within which the dismissal in question falls, without making a distinction according to whether that period falls before, after, or partly before and partly after the individual dismissal.

The Court of Justice ruled that the third method is the only one that is consistent with the Directive's objective and its effectiveness: to assess whether a disputed individual redundancy represents part of a collective redundancy, the reference period (60 days in Belgium) must be calculated by taking into account each period (of 60 days in Belgium) during which the individual redundancies took place and during which the employer made the highest number of redundancies for one or more reasons not related to the worker's person.

In Belgium, the concrete application of the reference period is unclear. Legal doctrine is of the opinion that the reference period can be interpreted as meaning that it can be calculated prospectively from the date of the individual dismissal at issue (for instance, R. Matthijssens and S. Lombaerts, *Herstructureringen in tijden van crisis: wat is het wettelijk kader nu?*, Mechelen, Kluwer, 2013, 7-8). Thus, only redundancies that take place subsequent to the dismissal at issue can be counted towards the required threshold according to legal doctrine.

It is clear that the commentary to the judgment of the CJEU in case C-300/19 is important for the new direction Belgian labour law will have to take with regard to the reference period to be used in the event of collective redundancies.

4 Other Relevant Information

4.1 New government

Following a long government crisis, Belgium has a new centre-left government led by Alexander De Croo, consisting of the Socialist Party, the Greens, the Liberals and the Flemish Christian Democrats, represented in Federal Parliament. The Walloon socialist Pierre-Yves Dermagne is the new Federal Minister of Labour. The Minister published his policy paper (Parliamentary Documents, Chamber of Representatives, 2020-2021, No. 55-1610/44, 1-14). It should be noted that part of the field of labour law is not a competence of the Federal Government, but is a de-federalised competence of the Regions, e.g. employment policy.

The Minister aims to fight the effects of the corona epidemic, among other things, by means of a system of temporary unemployment.

He wants to achieve an employment rate of 80 per cent by 2030. According to figures published by Statbel, Belgium is lagging behind in terms of employment of foreign workers. In 2019, 71.8 per cent of employees were of Belgian origin, while the employment rate of third-country nationals was only 43.2 per cent.

New impetus will be given to the social dialogue which will be ongoing with regard to all matters relating to the working environment.

Within this framework, unemployment insurance will be strengthened and minimum unemployment benefits will increase by 1.12 per cent annually.

The Minister wants to discuss the collective reduction of working hours.

He also aims to step up the fight against social fraud. The inspectorates and the labour inspectorate play an essential role in detecting and prosecuting infringements. These services will be strengthened and the number of inspectors will be gradually increased to comply with that International Labour Organization's standards.

The new government will also continue to pay close attention to the European basis of social rights. Several very important dossiers are being discussed in this regard, such

as the social responsibility of global supply chains, Regulation 883 (coordination of social security systems, agreement in 2020), the proposal for a directive on minimum wages, the equal opportunities/wage transparency directive (legislative proposal expected in 2020) and the European regulation on teleworking (legislative proposal expected in 2021). As far as a European minimum wage is concerned, Belgium seeks an instrument that guarantees every citizen of the European Union a minimum wage.

Bulgaria

Summary

A new Decree determines the levels of compensation of employees who perform economic activities that are affected by temporary restrictions imposed by a State body for the duration of the declared state of emergency.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Relief measures for employees

The Council of Ministers adopted Decree No. 325 of 26 November 2020 on Determination of Terms and Conditions for Payment of Compensation to Employees Performing Economic Activities Affected by Temporary Restrictions Imposed by a State Body for the Period of the State of Emergency or Declared Extraordinary Epidemic Situation. This Decree is promulgated in State Gazette No 101 of 27 November 2020.

Pursuant to this Decree, compensation shall be paid to employees employed in economic activities affected by temporary restrictions imposed by a State body for the declared period of the state of emergency or extraordinary epidemic situation. Such compensation shall be paid when employees are on unpaid leave due to temporary restrictions to performing their activities. The amount of compensation is BGN 24 (EUR 12 for an 8-hour working day. It will be paid for a maximum of 60 days. Employers are required to inform employees about the possibility of receiving such compensation, which shall be paid by the territorial body of the Employment Agency.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technologies

The Bulgarian legal definition of the concept 'collective dismissals' is established in § 1, point 9 of the Additional Provisions of the Labour Code.

Three criteria are necessary for such dismissals:

- 'The reason for dismissal' depends on the employer's opinion and is 'not related to the employee's behaviour'. Such reasons include, e.g. closure of the enterprise; closure of part of the enterprise or downsizing of staff; reduction in the volume of work; idling for more than 15 working days, etc.;
- 'Period of time' during which employment relationships are terminated. This period is '30 days';
- 'Number of employees' whose employment relationships are terminated in

relation to the overall number of employees prior to the collective dismissals. There are three approaches:

(a) 'at least 10' employees in enterprises normally employing more than 20 and less than 100 employees during the month preceding the collective dismissals and when the dismissals are carried out over a period of 30 days;

(b) 'at least 10' per cent of the number of employees in enterprises normally employing at least 100 but less than 300 employees during the month preceding the collective dismissals and the dismissals are carried out over a period of 30 days;

(c) 'at least 30 employees' in enterprises normally employing 300 employees or more during the month preceding the collective dismissals and the dismissals are carried out over a period of 30 days.

The methods for the calculation of the reference period to determine the extent of the collective dismissal includes cumulative two criteria:

- Calendar time – 'days'. This means the number of dismissed employees within '30 consecutive days';
- 'Number of dismissals' during a 30-day period. If the employer has dismissed at least five employees within a 30-day period, each succeeding the termination of an employment relationship upon the employer's initiative for reasons not related to the individual employee shall be counted in the total number of dismissals for the purpose of calculating the number of dismissals.

CJEU case C-300/19 will have no implications for Bulgarian legislation.

4 Other Relevant Information

Nothing to report.

Croatia

Summary

(I) New limitations to work in certain service sectors and epidemiological obligations of employers have been issued.

(II) An ordinance on the protection of employees from biological hazards at work has been issued.

(III) A new Act on Posting of Workers has been adopted, also regarding the cross-border implementation of decisions on financial penalties.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Restrictions to business operations

Restaurants and bars are closed but can be organised as drive-ins and can deliver food and beverages. Gyms, fitness and sport's centres are closed. Salary subsidies in the prescribed amounts are guaranteed.

All employers are required to:

- prohibit the arrival at work of workers who have fever and respiratory problems, especially a dry cough and shortness of breath;
- reduce physical contact between employees, whenever possible;
- introduce working from home arrangements, when possible, given the nature of the work;
- organise work in shifts, where possible;
- reduce the number of physical meetings to a minimum;
- regularly ventilate areas where workers reside/work.

The announcement of the government can be found here.

1.1.2 Biological hazards

The Ordinance on the Protection of Employees due to Exposure to Biological Hazards at Work has been issued (Official Gazette No 129/2020). It revises the previous ordinance of the same name (Official Gazette No 155/2008). The Ordinance transposes Directive 2000/54/EC into Croatian law. The new Ordinance has been issued because the new Act on Occupational Health and Safety has been adopted and because there was a need to transpose Directive (EU) 2020/739 into Croatian law.

1.2 Other legislative developments

1.2.1 Posting of workers

The new Act on Posting of Workers to the Republic of Croatia and Cross-Border Implementation of the Decisions on Financial Penalties has been adopted (Official Gazette No. 128/2020). It repealed the previous Act of 2017 of the same name.

Among others, the right of the posted worker to remuneration for the work performed is defined in the amount guaranteed to domestic employees when it is more favourable for the posted worker, the right to the remuneration for the work of the posted foreign agency worker is defined as are the exceptions for posted drivers in the road transport sector. Certain provisions of the Act on Posting of Workers to the Republic of Croatia and Cross-Border Implementation of the Decisions on Financial Penalties do not apply to drivers in the road transport sector until the date of entry into force of a separate law transposing Directive (EU) 2020/1057 into Croatian law. Until then, drivers in the road transport sector are entitled to minimum wage, including an increased salary for overtime work at the level of rights determined by Croatian legislation or extended collective agreement, whichever is more favourable for the employee (the driver).

The list of rights guaranteed to a posted worker during his/her posting in Croatia has been expanded by two additional rights relating to the quality of accommodation and the compensation of costs of the internal mobility of workers, but these additional rights do not apply to posted drivers in the road transport sector until the adoption of the separate law transposing Directive (EU) 2020/1057 into Croatian law.

A provision on long-term posting has been introduced. A higher level of protection is guaranteed to a long-term posted worker, as opposed to the level of protection guaranteed to a worker whose posting lasts a maximum of 12 months, exceptionally 18 months, provided that the employer notifies authorities that the posting will last more than 12 months. This rule does not apply to posted workers in the road transport sector until the date of entry into force of a separate law transposing Directive (EU) 2020/1057 into Croatian law.

The work of posted temporary agency workers is regulated in more detail, and the same treatment is more clearly regulated, i.e. the application of the same working conditions applicable to domestic agency workers is guaranteed to posted agency workers. The posted agency worker cannot be paid less than a comparable employee employed directly by the user undertaking.

1.2.2 Amendment to the Enforcement Act

The Amendment to the Enforcement Act has been adopted (Official Gazette No 131/2020).

Certain rights of employees are exempt from the enforcement: flat-rate benefits for covering the cost of employees' meals, occasional rewards (Christmas bonus, holiday allowance, etc.), cash rewards for work results and other forms of additional remuneration of employees, rewards for employees for completed years of service up to the prescribed amounts that are not taxable, and daily allowances for business trips, daily allowances for field work and daily allowances for business trips paid to employees from the European Union budget to perform their jobs, in connection with the employer's activities up to the prescribed amounts that are not taxable.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technologies

The judgment in the present case has no implications for Croatian law. Any 90-day period is taken into account in Croatia when calculating the relevant period for collective dismissals (Article 127(1) of the Labour Act of 2014 (amended in 2017 and 2019)). More precisely, collective dismissals in Croatia refer to a situation in which the employer, for example, has at least 20 redundancies, of which at least 5 employment contracts are terminated due to business reasons.

4 Other Relevant Information

Nothing to report.

Cyprus

Summary

The Administrative Court ruled against the decision of the Director of Social Security Services, who designated a number of part-time teachers on fixed-term contracts in public schools as subcontractors under service contracts.

1 National legislation

Nothing to report.

2 Court Rulings

2.1 Part-time public school teachers

Administrative Court, No. 1368/2014, 08 October 2020

The Administrative Court ruled against the decision of the Director of Social Security Services, who designated a number of part-time teachers on fixed-term contracts in public schools as subcontractors under service contracts (*ΠΑΓΚΥΠΡΙΑ ΣΥΝΤΕΧΝΙΑ ΕΡΓΑΖΟΜΕΝΩΝ ΣΤΙΣ ΥΠΗΡΕΣΙΕΣ Π.Α.Σ.Ε. Υ. - Π.Ε.Ο., ΧΑΤΖΗΑΝΔΡΕΟΥ, ΦΩΤΙΑΔΟΥ, ΧΑΡΙΛΑΟΥ, ΤΣΟΥΚΚΑ ΚΑΙ ΚΥΠΡΙΑΚΗΣ ΔΗΜΟΚΡΑΤΙΑΣ, ΜΕΣΩ ΤΟΥ ΥΠΟΥΡΓΕΙΟΥ ΕΡΓΑΣΙΑΣ ΚΑΙ ΚΟΙΝΩΝΙΚΩΝ ΑΣΦΑΛΙΣΕΩΝ*, 8 Οκτωβρίου, 2020, 1368/2014, see here).

In 2013, the Ministry of Education decided to change the status of teachers who were up to that year considered to be employed as part-time workers, and designated them as self-employed workers. The applicants disagreed and applied to the Director of Social Security Services to declare that their status was that of worker as provided for in Cypriot labour law, even though they signed the new service contracts, albeit under protest. It is estimated that this affected 5000 teachers. The Director of Social Security Services decided against the applicants on the grounds that they had signed service contracts and were registered as self-employed persons with the Social Security Services.

The trade union PASEY-PEO and four teachers applied to the administrative court to quash the decision of the Director of Social Security Services as erroneous due to the fact that the decision was not the result of due examination and proper evaluation of the basic elements and characteristics of the services rendered. The applicants claimed the following:

- If there was due examination in the light of the relevant legislation, they pointed to the status of paid employment, working as dependent labour under the control of the direction of the Ministry of Education;
- The decision was not properly justified and contrary to the principles of administrative law, good administration, meritocracy, equality and transparency.

The respondents rejected these claims, arguing the following:

- The trade union had no legitimate interest or locus standi as the matter did not affect all or a substantial share of their members;
- The applicant teachers had no legitimate interest or locus standi because they unreservedly competed in competitive tenders, accepted their terms and

conditions and signed the relevant service contracts with the Ministry of Education, and subsequently unreservedly applied to be registered as self-employed persons with the Social Security Services and paid their social security contributions;

- The decision was not executed in an administrative act.

The Court rejected the respondents' arguments about the absence of legal standing/ legitimate interest. It accepted the applicants' argument that the Director of Social Security Services had failed to conduct a proper examination of each case to determine the extent of the Ministry of Education's control over each of the teachers to identify whether they qualified as self-employed persons or dependent workers. The Court noted that the Director of Social Security Services failed to investigate the applicants' claim that their duties were identical to those other educators had performed in the relevant educational programmes prior to the change in procedure and who for many years were designated as employed workers.

Whilst a process of negotiation is underway between the trade union and the Ministry of Education, the Director of Social Security Services has appealed against the Administrative Court's decision.

This case is very important, not only because it affects 5000 workers, but because it is a test case on the application of basic labour law to workers in atypical forms of employment under EU Directives 97/81/EC on part-time and 1999/70/EC on fixed-term work. Some teachers have expressed their will to pursue their case via the courts as well as placing a complaint with the EU Commission on the ground that they are being discriminated and that their right to convert their temporary employment status into a permanent one is not respected by the Republic of Cyprus.

3 Implications of CJEU Rulings

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technologies

The CJEU ruled on the methods for calculating the reference period to determine the existence of collective dismissals. The Court decided that in order to assess whether a contested individual dismissal is part of a collective dismissal, the reference period provided for in the said provision to determine the existence of a collective dismissal must be calculated by computing any period of 30 or of 90 consecutive days in which that individual dismissal took place and during which the largest number of dismissals made by the employer for one or more reasons not inherent to the person of the worker, in the sense of the same provision.

This ruling may have some implications for Cypriot legislation pertaining to the methods of calculating the reference period to determine whether a collective dismissal has taken place. The Cypriot law on Collective Redundancies (*Ο Περί Ομαδικών Απολύσεων Νόμος του 2001* (28(I)/2001), see here) replicates the Directive on Collective Redundancies *verbatim* in the relevant law. Article 2 of the Collective Redundancies Law refers to 'competent authority', namely the Minister of Labour and Social Insurance; 'representatives of the employees' means the representatives of any employees provided for by legislation or practice, and 'workers' representatives' means the workers' representatives provided for by legislation or practice.

Article 2 of the Collective Redundancies Law defines 'collective dismissals' as dismissals for one or more reasons unrelated to the person of the employee, where the number of employees dismissed within a 30-day period is as follows:

- at least ten employees where the organisation normally employs more than 20 but fewer than 100 employees, provided that for the purpose of calculating the

number of redundancies referred to above, all individual contracts of employment that have been terminated by reason of simple expiry shall be included, if the number of actual redundancies is at least five;

- at least 10 per cent of the number of employees in undertakings that normally employ at least 100 and fewer than 300 employees; and
- at least 30 employees in undertakings that normally employ at least 300 employees.

4 Other Relevant Information

Nothing to report.

Czech Republic

Summary

(I) The state of emergency has been extended. Several COVID-19-related measures have been retained and amended. An act introducing extended carers' allowance has been introduced.

(II) The minimum salary will be raised from 01 January 2021.

(III) The amount of relevant gross income an employee must earn in order to participate in the State sickness insurance scheme will be increased. New reduction limits for the purposes of calculating sickness benefits will be introduced.

(IV) The Supreme Court has ruled on the conditions of successive fixed-term contracts.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 State of emergency

The Resolution of the Government No. 1195 of 20 November 2020 has been adopted and published as Resolution No. 471/2020 Coll., and entered into effect on 20 November 2020.

The text of the Resolution is available here.

With effect from 05 October 2020 until 03 November 2020, the government declared a state of emergency in response to the COVID-19 crisis – under the state of emergency, the government is authorised to issue extraordinary measures (some of these measures are described below).

On 30 October 2020, the Chamber of Deputies of the Parliament of the Czech Republic approved the extension of the state of emergency until 20 November 2020.

Subsequently, the state of emergency was extended until 12 December 2020, again with approval from the Chamber of Deputies of the Parliament of the Czech Republic.

A further extension of the state of emergency is subject to approval by the Chamber of Deputies of the Parliament of the Czech Republic.

A state of emergency was declared in response to the outbreak of the COVID-19 pandemic in March and lasted for several months. It is, however, uncertain whether the state of emergency will be extended for that long this time around.

1.1.2 Travel ban

The government has retained and amended the travel ban.

The Protective Measure of the Ministry of Health No. MZDR 20599/2020-37/MIN/KAN of 16 November 2020 has been adopted with effect as of 17 November 2020.

The text of the extraordinary measure is available here.

The list of low-risk countries is available here.

With effect as of 17 November 2020, restrictions on the entry of persons into the territory of the Czech Republic have been re-adopted – with certain minor amendments.

1.1.3 Restrictions on freedom of movement

The restrictions on freedom of movement have been readopted and amended in response to the deterioration of the epidemiological situation in the Czech Republic.

The Resolution of the Government No. 1200 of 20 November 2020 has been adopted and published as Resolution No. 476/2020 Coll. and entered into effect on 20 November 2020.

The text of the resolution is available here.

With effect from 23 November 2020 (0:00) until 12 December 2020 (23:59), the restrictions on the free movement of persons in the territory of the Czech Republic is readopted.

1.1.4 Obligation to wear respiratory protective equipment

The obligation to wear respiratory protective equipment has been readopted.

The Extraordinary Measure of the Ministry of Health No. MZDR 15757/2020-41/MIN/KAN of 23 November 2020 has been adopted with effect as of 24 November 2020.

The text of the extraordinary measure is available here.

With effect as of 24 November 2020 until further notice, the Ministry of Health has reissued an order by which movement and stay is banned for all persons not wearing protective face equipment (such as respirators, drapes, face masks, headscarves, etc.) in the following spaces:

- all indoor spaces of buildings (outside of the place of residence);
- inside public transport;
- public transport stops and stations;
- inside motor vehicles (unless only members of the same household are in the vehicle);
- all other publicly accessible places in the built-up area of the municipality, where at least 2 persons are present less than 2 metres apart at the same place and at the same time, unless they are members of the same household.

The extraordinary measure continues to list a number of exceptions from the above rule.

1.1.5 Restrictions to business operations

The government has reintroduced and amended specific rules for businesses in connection with the COVID-19 crisis.

The Resolution of the Government No. 1201 of 20 November 2020 has been adopted and published as Resolution No. 477/2020 Coll.

The text of the Resolution is available here.

With effect from 23 November 2020 until 12 December 2020, the operation of businesses, as well as other establishments continues to be restricted or banned.

1.1.6 Carers' allowance

The scheme for providing carers' allowance has been extended again to alleviate the adverse effects of the COVID-19 crisis and of the measures adopted by the government on employees.

Act No. 438/2020 Coll. on the regulation of the provision of carers' allowance in connection with the extraordinary measures to fight the pandemic and on the amendment of Act No. 187/2006 Sb. on Sickness Insurance, as amended, has been adopted and published. The Act entered into effect on 30 October 2020.

The Act is available here.

For more details on the Act, see October 2020 Flash Report.

1.2 Other legislative developments

1.2.1 Minimum wage

Government Regulation No. 487/2020 Coll. on Amendment of Government Regulation No. 567/2006, on minimum wage, on the minimum amount of guaranteed salary, on the delineation of difficult working conditions and on the amount of payment for work under difficult conditions, as amended, has been adopted and published. The Government Regulation will enter into effect on 01 January 2021.

The Government Regulation is available here.

The minimum hourly wage is set to CZK 90.50 (i.e. approx. EUR 3.46) and the minimum monthly salary is set to CZK 15 200 (i.e. approx. EUR 580.61).

The amount of guaranteed salary (i.e. minimum salary amount with regard to certain categories of jobs depending on their responsibility, complexity and difficulty) have increased as well. For the lowest category, it amounts to CZK 90.50 (i.e. approx. EUR 3.46) per hour or CZK 15 200 (i.e. approx. EUR 580.61) per month. For the highest category, it amounts to CZK 181 (i.e. approx. EUR 6.91) per hour or CZK 30 400 (i.e. approx. EUR 1 161.21) per month.

The increase in minimum wage is implemented on a regular basis.

1.2.2 Sickness insurance

The Communication of the Ministry of Labour and Social Affairs No. 436/2020 Coll., on the increase of the relevant amount necessary for participation of employees in the State sickness insurance scheme has been published and will enter into effect on 01 January 2021.

The Communication is available here. Such amendments are implemented on a regular basis.

The amount of the relevant gross income employees must earn to participate in the State sickness insurance scheme has been increased from CZK 3 000 to CZK 3 500 (i.e. approx. EUR 134).

The Communication of the Ministry of Labour and Social Affairs No. 435/2020 Coll., on the amounts of reduction limits for the calculation of the daily assessment basis in 2021 for the purposes of sickness insurance has been published and will enter into effect on 01 January 2021.

The Communication is available here. Such amendments are implemented on a regular basis.

The Ministry of Labour and Social Affairs has issued new reduction limits for the purposes of calculating sickness insurance benefits in 2021. The first reduction limit is CZK 1 182, the second reduction limit is CZK 1 773, and the third is CZK 3 545.

These limits will also affect the salary compensation paid by the employer, who is required to pay salary compensation to employees from the 1st to the 14th day of the employee's sick leave. The reduction limits for the purposes of calculating salary compensation (calculated on an hourly basis) in 2021 will be as follows: the first reduction limit will be CZK 206.85, the second reduction limit will be CZK 310.28, and the third will be CZK 620.38.

2 Court Rulings

2.1 Successive fixed-term contracts

Supreme Court, IV. US 122/19, 11 August 2020

The Supreme Court has ruled on the regulations on successive fixed-term employment contracts. The ruling was issued on 11 August 2020 under File No. IV. ÚS 122/19 and is available here.

In the past, two sets of rules for successive fixed-term employment contracts existed, as follows:

- a specific regime for academic workers only – fixed-term employment for a minimum of 2 years and a maximum of 5 years that could be repeated twice;
- a general regime (for other employees) – fixed-term employment for a maximum of 3 years that could be repeated twice.

With effect as of 01 January 2012, the separate regime for academic workers has been eliminated.

In the present case, an employee (an academic worker) was employed based on successive fixed-term employment contracts. Three of them were concluded under the specific regime for academic workers before 01 January 2012, subsequent ones under the general regime after 01 January 2012. The employee argued that the number of fixed-term contracts concluded under the special regime counted towards the maximum number of successive contracts under the general regime and that the limit had therefore been exceeded in violation of the law.

The general courts ruled that the number of fixed-term contracts concluded under the special regime did not count towards the maximum number of such contracts under the general regime, as they were two separate regimes and the general regime could not apply retrospectively to relationships concluded under the specific regime.

The employee appealed to the Constitutional Court. The Constitutional Court deemed the decisions of the general courts to be constitutional and concluded that it is solely up to the lawmaker to decide whether and to what extent to subject past or existing relationships to the new regulation – taking into account the principle of legal certainty, compatibility of different sets of rules, as well as practical problems that may arise.

The Court also briefly mentioned clause 5 of Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (Directive 1999/70/EC), stating that it is up to the lawmaker to determine—based on the current economic situation—the needs of employees and employers, as well as other relevant circumstances, for which persons and to what extent the restrictions to successive fixed-term employment should apply; it is also, however, necessary to base the possibility of concluding successive fixed-term employment contracts for objective reasons, whereas the only circumstance that

successive fixed-term employment contracts are in certain cases provided for by a general provision of statute does not constitute an objective reason (referencing CJEU in case C-212/04, 04 July 2006, *Adelener*). The Court, however, did not proceed to examine whether the possibility of successive fixed-term employment contracts of academic workers was based on objective reasons.

The Constitutional Court referred to Directive 1999/70/EC and the *Adelener* case of the CJEU.

3 Implications of CJEU Rulings

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technologies

As regards the method of determining the relevant period to establish whether an individual redundancy falls within collective redundancies, Section 62(1) of the Labour Code states that collective redundancy means the ending of employment relationships within a period of 30 calendar days based on notices given by the employer on the stated grounds in relation to at least:

- 10 employees for employers employing between 20 and 100 employees;
- 10 per cent of employees for employers employing between 101 and 300 employees; or
- 30 employees for employers employing over 300 employees.

Such regulation allows for the interpretation of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies as adopted by the CJEU in the present case.

The ruling has no implications for national law.

4 Other Relevant Information

Nothing to report.

Denmark

Summary

(I) A particular COVID-19 mutation was discovered in the northern part of Jutland, which has led to local restrictions and an (unlawful) order for all mink farmers to cull their mink.

(II) A new Act recognising the right of employers to require COVID-19 tests from employees has been issued. The Act, which also introduces new rules on posted workers, is assessed to be in conformity with EU law.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 General measures

Denmark witnessed a resurgence of COVID-19 cases at the beginning of August, and the infection rate has since then risen. The numbers are now relatively stable, but still too high according to health authorities.

In November, the infection among mink attracted much attention (see Section 1.1.2 below).

The prohibition of large gatherings is still in place, and a maximum of 10 people may meet at one time (exceptions apply to education, cultural activities, etc.). Both public and private employers are still encouraged to let employees work from home to the extent possible, and to cancel all social events. These and many other measures will preliminarily apply until 02 January 2021. Help packages were adopted in October (for more details, see Flash Report October).

In November, the Danish Working Environment Authority (*Arbejdstilsynet*) expanded and intensified its COVID-19 inspections in workplaces. The Working Environment Authority will give mandatory guidance on prevention of infection and has intensified inspections of workplaces that have a high degree of cross-border workers.

A press release on further initiatives from the Danish Working Environment Authority can be found here.

1.1.2 Infected minks

The widespread infection of COVID-19 in mink has given rise to various measures in November. The government was particularly concerned about a particular mutation of the COVID-19 virus, named 'cluster 5', found in mink. A few citizens had been tested positive with 'cluster 5', but recent data suggest that the mutation has been destroyed.

The infection among mink with the 'cluster 5' mutation led the government to impose restrictions in seven municipalities in the northern part of Jutland, an area with many mink farmers. The restrictions included the halting of all public transportation, the closing of borders between municipalities (with exceptions), and citizens in the affected municipalities were strongly encouraged to get tested for COVID-19. For details, see the Ministry's Fact Sheet of 05 November 2020 and that of 19 November 2020.

The restrictions were initially in effect for four weeks. Many were lifted on 20 November 2020 as the infection rate dropped and tests showed a decline in mink-variables in positive COVID-19 tests.

For the press release of 19 November 2020 of the Ministry of Elderly and Health, see here.

In connection with these restrictions, a joint Statement was drafted on the working conditions for the affected municipal employees. The Statement was drafted by the 'Local Government Denmark' (KL), the association and interest organisation of Denmark's 98 municipalities, and the 'Danish Association of Local Government Employees' Organisations' ('*Forhandlingsfællesskabet*').

In addition, the government decided simultaneously with the above-mentioned restrictions that Danish mink farmers should cull all mink. The Prime Minister delivered this message in a press conference on 04 November 2020. It was later established that the government did not have a legal basis to issue such an order to cull all mink, irrespective of whether their mink were infected or not,. The case has given rise to intense political and legal debate. The case has so far led to the departure of the Minister of Food, Fishery and Equal Treatment.

The government measure of imposing new local sanctions and of the ordering of all mink to be culled are two of the numerous measures taken to minimise the risk of infection with COVID-19 among the Danish population. The measures are not related to any EU law aspects.

1.1.3 Health and safety at work

A new Act, L 1641 of 19 November 2020 establishes a legal basis for employers to require employees to be tested for COVID-19 and to demand that the employee inform the employer of the test result.

An employer may only require an employee to be tested, if it is based on a legitimate aim to mitigate the spread of infection with COVID-19, including working environment considerations, or with regard to the company's essential operational interests.

An employee who does not follow the instruction of being tested may be sanctioned, including termination, given that such a sanction is stated in advance.

Furthermore, the new Act introduces changes to the Danish Posting of Workers Act (L 1144 of 14 September 2018).

The new rules on the employer's right to require COVID-19 testing from employees are also applicable when a company posts workers to Denmark, irrespective of which country's rules otherwise govern the employment relationship, cf. new Article 5 (8) of Posting of Workers Act.

Service providers in Denmark must still register in the Danish Registry of Foreign Service Providers (RUT). Any service provider and their contact persons in Denmark must provide contact information of workers posted to Denmark, to the Danish Working Environment Authority, cf. new Article 7 e (4) of Posting of Workers Act. Non-compliance with this duty of providing contact information may be sanctioned with a fine.

The Danish Working Environment Authority may pass on contact information to other public authorities, when it is based on the legitimate interest of limiting the spread of infection with COVID-19, cf. new Article 7 e (5).

Finally, the Minister of Employment, following consultations with the Minister of Health and the Elderly, is authorised to lay down more specific rules on service providers'

obligation to cooperate in containing the spread of COVID-19, e.g. to draw up action plans for the prevention of infection at the workplace, cf. new Article 7 g.

The new legislation represents one of numerous measures taken to minimise the risk of infection with COVID-19 among persons residing or working in Denmark.

The Act establishes a new right for employers, who may require employees to be tested for COVID-19. The Ministry of Employment position is that it is necessary from a health perspective to establish a right for all employers, who employ workers on Danish territory, to require COVID-19 testing. The requirement is applicable to all workers in the same manner and on the same terms, including cross-border employees performing work in Denmark. The Ministry of Employment determines that an employer's right to require testing from employees who are cross-border workers is in line with TFEU Article 45 on free movement of workers.

The new amendments of section 5 of the Danish Posting of Workers Act on the testing of employees, are based on Article 3(1), litra e, on 'safety, security and health in the workplace' in the Posted Workers Directive, with later amendments. The requirement for an employee to test for COVID-19 is intended to minimise the spread of infection among workers and thereby also protect the health and working environment for all other workers in the same workplace. The new rules also give foreign service providers the possibility of carrying out their business on the same terms as Danish companies, including the operational interest of limiting infection risk at the workplace.

The new Act also contains new enforcement measures, e.g. the obligation to provide contact information to the Danish Working Environment Authority. The Ministry of Employment assesses that the current rules on foreign service providers are not adequate in the present situation, and that additional measures are required in light of COVID-19. Thus, new enforcement measures are required in terms of the Enforcement Directive, Articles 9(2) and 10. The Ministry of Employment emphasises that it is more difficult to contact employees who are only temporarily residing in Denmark than it is to contact permanent residents. The assessment thus is that the new enforcement measures live up to the principle of proportionality as laid down by EU law.

In conclusion, the new Act establishes a new right for employers, but the exercise of that right follows ordinary employment law principles in Denmark. As for the new Act's EU law aspects, it is assessed to be in conformity with current EU law.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technologies

The ruling does not have any implications for Danish law, as it corresponds to the interpretation of the CJEU in the present case.

The CJEU ruling clarified that the reference period in Article 1 (1), first paragraph, litra a, in Directive 1998/59 must be calculated by taking any consecutive period of 30 or 90 days into consideration, during which the individual dismissal or the highest number of dismissals has occurred.

Directive 1998/59 is implemented in the Danish Act on Collective Dismissals (L 291 of 22 March 2010). In the Danish implementation of the Directive, the reference period is set to 30 days, cf. section 1 (1) of the Act. The Act itself is silent on the calculation method of the reference period. This question, however, is specifically regulated in the Executive Order on Collective Redundancies, No. 1152 of 27 October 2017. Section 5 (2) of the Executive Order reads:

> *"The 30-day period is a continuous ('rullende') period, which covers any given time period of 30 calendar days. The 30-day period thus is independent from e.g. the turn of the month."*

There is no relevant case law on the calculation method. The wording of the provision corresponds to the interpretation of the CJEU in the present case. In any case, the interpretation of the provision conforms to EU law should the scope of applicability give rise to doubt.

4 Other Relevant Information

Nothing to report.

Estonia

Summary

(I) A new decree has added the coronavirus SARS-CoV-2 to the list of biological hazards in the working environment.

(II) The Ministry of Social Affairs has prepared a draft of amendments to the Collective Agreements Act to determine the applicability of collective agreements.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Biological hazards

The government has approved a decree supplementing the list of biohazard risk groups with new biological risk factors, including the coronavirus SARS-CoV-2 (hazard group 3). The amendments were adopted and entered into force as of 24 November 2020, to protect workers' health at the workplace more effectively and to ensure safety against the spread of viruses.

The changes are primarily related to the amendment of Annexes 1 to 3 of the Regulation, which adds new hazards, hazard groups and comments to the list of biohazards that may occur in the working environment, and updates the lists of safety levels and specific measures. The amendments to the Regulation require employers to update, where necessary, the risk assessment of the working environment to assess the nature, extent and duration of the risk of infection if workers are or could be exposed to new biological hazards and to take risk mitigation, adaptation and other suitable actions. The amendments to the Regulation in Estonian are available here.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technologies

The case concerned the legal regulation of collective redundancies.

In Estonia, collective terminations of employment contracts (redundancies) are regulated in the Employment Contracts Act (hereinafter ECA). An English translation of the Employment Contracts Act is available here.

According to the section 90 the following has been regulated in the ECA:

> *"§ 90. Collective cancellation of employment contracts*

(1) Collective cancellation of employment contracts means cancellation, within 30 calendar days, due to lay-offs, i.e. terminations of the employment contract of no less than:

1) 5 employees in an enterprise where the average number of employees is up to 19;
2) 10 employees in an enterprise where the average number of employees is 20–99;
3) 10 per cent of employees in an enterprise where the average number of employees is 100 to 299;
4) 30 employees in an enterprise where the average number of employees is at least 300."

According to the ECA, these rules stipulate that the termination of the employment contracts must take place within 30 calendar days. The law and relevant case law do not prescribe how the period is calculated, but can be interpreted as being a period of every 30 calendar days during which the high number of employment contracts is terminated.

Based on that observation, the implications of the CJEU's ruling is minimal on Estonian labour law.

4 Other Relevant Information

4.1 Applicability of collective agreements

In June 2020, the Estonian Supreme Court declared the possibility to extend the applicability of collective agreements to all employees and employers active within the same economic sector as unconstitutional. The Estonian Supreme Court found that if an employer was not involved in the negotiation process, it cannot be presumed that an employer could be a party to the collective agreement. This also violates the freedom of entrepreneurship. The Estonian Supreme Court's decision is available here.

The Ministry of Social Affairs prepared a draft to amend the Collective Agreements Act. The Ministry will thereby introduce the criteria of representativeness for the employers' side as well to expand the collective agreement's applicability.

Finland

Summary

(I) The government has proposed temporary amendments to unemployment benefits for employees who have been laid off and support for entrepreneurs to continue their operations.

(II) The Labour Court dealt with a collective action related to the Competitiveness Pact Agreement, as well as with a case on wage determination.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Unemployment benefits

The government has proposed legislative amendments to unemployment benefits for employees who have been laid off, support for entrepreneurs, and the activities of the Employment and Economic Development Offices (TE Offices), which shall partially be continued. The amendments aim to safeguard the livelihoods of employees who have been laid off and to support entrepreneurs and facilitate measures related to unemployment security amid the prolonged coronavirus pandemic.

The Government Proposal (HE 229/2020 vp), which is included in the supplementary budget proposal for the year 2021, was submitted to Parliament on 19 November 2020. Some of the temporary amendments, which are set to expire at the end of 2020, would be extended.

Employees who have been laid off have had a temporary right to study full time without this affecting their unemployment benefits. In accordance with the Government Proposal, the amendment would remain in force until 31 December 2021 and would apply to workers who were laid off on or after 16 March 2020. The amendment would help employees who have been laid off and those who are working and studying to apply for and receive unemployment benefits during the layoff period, because the TE Office does not assess whether the individual is studying full time or part time. Entrepreneurs have a temporary entitlement to labour market support if the company is not operational full time as a result of the coronavirus pandemic. The amendment would remain in force until 31 March 2021, according to the Government Proposal.

To receive labour market support, a person must register as a jobseeker with the TE Office, which in turn must issue a labour policy statement on the entitlement to labour market support to the Social Insurance Institution of Finland (Kela). Kela has paid labour market support to approximately 42 500 entrepreneurs between April 2020 and September 2020. Due to the coronavirus pandemic, TE Offices have been able to organise periodic interviews with jobseekers more flexibly than usual. Interviews have only been arranged at the start of the job search with jobseekers with a special need for an interview. According to the Government Proposal, the amendment would remain in force until 31 January 2021. In addition, the provision under which unemployed jobseekers will not lose their right to unemployment benefits due to the failure to implement the employment plan would remain in force until 31 January 2021.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Sick leave and holiday pay

Labour Court, TT 2020:95, 17 November 2020

The judgment dealt with the question whether an employee had a right to holiday pay based on the collective agreement as a result of interruption of annual leave, i.e. when that leave has been partially transferred to take place outside the initially planned leave period because the employee goes on sick leave. The Labour Court held that the collective agreement provision in question was not applicable in a situation where annual leave has been postponed to take place outside the initially planned annual leave period due to sick leave.

2.2 Collective action

Labour Court, TT 2020:92, 04 November 2020

The collective action aimed at boosting ongoing collective bargaining, the central aim of which was to break away from the extension of working hours based on the Competitiveness Pact Agreement. Collective action was directed at the provisions on the management of work, working hours and wages in the collective agreement. The trade union branch admitted breaching its industrial peace obligation.

2.3 Determination of wages

Labour Court, TT 2020:91, 04 November 2020

The Labour Court found no reason to deviate from the joint position of the parties to the collective agreement. The Court held that as an employment contract of a dance teacher included a minimum of 510 minutes of weekly teaching, the wage system of the teacher comprised full-time work on a monthly basis. The question of the regularity of the fulfillment of the agreed working hours had no relevance when the type of wage system was assessed. The fact that the work was interrupted during summer and the Christmas period had no relevance when assessing the full-time nature of the employee's teaching services. The payment could also not be simultaneously based on two different wage systems.

3 Implications of CJEU rulings

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technology

In Finland, neither the Employment Contracts Act nor the Act on Co-determination within Undertakings contains a reference period to be applied to collective redundancies when calculating the number of employees to be dismissed. The Finnish regulatory approach thus deviates from the Spanish model dealt with in CJEU case C-300/19. A similar problem would not arise in Finland.

4 Other relevant information

4.1 Non-competition agreements

According to the Government Proposal (HE 222/2020 vp), which was submitted to Parliament on 12 November 2020, employers would be required to pay compensation to an employee for all types of non-competition agreements. At present, the obligation to pay compensation only applies to agreements that last longer than six months. The proposal aims to reduce the number of groundless non-competition agreements that cause inflexibility in the labour market.

The amount of compensation paid for non-competition agreements would be tied to the employee's salary and the agreed duration of the non-competition period. For a non-competition period of up to six months, the compensation would be equal to 40 per cent of the salary during that period. For a non-competition period with a duration longer than six months, the compensation would be equal to 60 per cent of the salary for the entire non-competition period. A non-competition agreement could be concluded for a maximum of one year, which corresponds to the present regulatory approach in the Employment Contracts Act.

4.2 Cooperation within undertakings

The purpose of the amendment of the Act on Cooperation within Undertakings is to improve interactions between employers and staff and to create a regulatory framework for developing the company and work community. The amendment aims to improve employees' access to information and their opportunity to exercise influence. The tripartite working group submitted a report on the amendment of 19 November 2020. The report has been circulated for comments between 19 November 2020 and 15 January 2021.

France

Summary

(I) The Labour Division of the Court of Cassation has ruled on the employment conditions of temporary workers as well as on the possibility of an employee to claim whistleblower status.

(II) The French *Conseil d'Etat* has ruled on State responsibility for the dismissal of a protected employee.

(III) The Second Civil Division of the Court of Cassation has held that collective benefit guarantees are maintained in the event of company liquidation subject to court supervision.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Temporary work

Labour Division of the Court of Cassation, No. 19-11.402, 12 November 2020

In the present case, an employee hired under temporary employment agreements was made available to a user undertaking between 2006 and 2013 based on 201 successive assignment agreements. He was then recruited by the user undertaking under fixed-term employment agreements. The employment relationship ended in 2014 and the employee brought an action before the Employment Tribunal, seeking reclassification of the assignment agreements and fixed-term employment agreements as an employment contract of indefinite duration.

First instance and appeal judges accepted the claim for reclassification of the employee's employment relationship and drew consequences for the termination of his employment relationship: it was reclassified as a dismissal without real or serious cause.

The employer appealed to the Court of Cassation, arguing that the fluctuating nature of maritime traffic and the continuous variation in the loading and unloading of ships are objective elements establishing the temporary nature of the job. Consequently, the judges of the Court of Appeal should not have qualified this activity as a regular and permanent activity of the company.

The Court of Cassation rejected the arguments submitted by the appellant. It reaffirmed that according to Article L. 1251-5 of the Labour Code, the purpose and effect of an assignment agreement may not be to fill a long-term job linked to the regular and permanent activity of the user undertaking. The Court of Cassation reiterated the same exact principle as that applicable to fixed-term employment agreements. Thereby, it brought these two types of contracts closer together in terms of their underlying purpose.

The Labour Division further stated that if there is an exception to assignment agreements when it is not common practice to use a permanent contract, it is on the condition that the nature of the activity carried out justifies it and that the employment is temporary in nature.

It concludes that

> "*the use of successive assignment agreements necessitates verification that it is justified by objective reasons which are understood to mean the existence of concrete elements establishing the temporary nature of the employment relationship*".

Finally, the Court of Cassation approved the reasoning of the other judges with regard to the absence of evidence provided by the employer as to the concrete elements establishing the temporary nature of the employment.

2.2 Whistleblower status

Labour Division of the Court of Cassation, No. 18-15.669, 04 November 2020

In the present case, an employer had entrusted one of his employees with a mission within the Renault company. This employee sent an e-mail of a political nature to the company's employees. He was then summoned by his employer, who was informed that the e-mail had been sent. The employee recorded their conversation without the employer's consent and posted it on YouTube. The employer can be heard telling the employee that as an assigned employee, he does not have to talk to the trade unions of the Renault company. The employee was dismissed for serious misconduct, as the employer accused him of having recorded their interview without the employer's knowledge and of having broadcast it on YouTube, thereby breaching his obligation of loyalty and good faith.

The employee applied to the urgent applications judge, requesting the termination of the manifestly unlawful disruption resulting from his dismissal. He claimed that his dismissal violated the provisions relating to the protection of whistleblowers. The Court of Appeal declared his dismissal null and void pursuant to the whistleblower statute.

The employer appealed to the Court of Cassation, claiming that there had been no violation of the whistleblower regulations since he had not committed any acts constituting a misdemeanour or crime.

The judges of the Court of Cassation referred to Article L. 1132-3-3 of the Labour Code in its wording resulting from Law No. 2013-1117 of 06 December 2013 relating to the fight against tax fraud and serious economic and financial crimes.

The introduction in France of a general whistleblower status dates back to Law No. 2016-1691 of 09 December 2016 on transparency, the fight against corruption and the modernisation of economic life, but the article referred to by the Court of Cassation had been applicable in French law before then.

According to the article referred to by the Court of Cassation,

> "*no employee may be sanctioned, dismissed or subject to a discriminatory measure, directly or indirectly, for having reported or testified, in good faith, to facts constituting a misdemeanour or a crime of which he or she would have become aware of in the performance of his or her duties*".

The Court of Cassation noted that the appeal judges had not found that the employee had reported or testified about facts that could constitute a misdemeanour or crime. The Court of Cassation overturned and annulled in its entirety the judgment handed down by the Court of Appeal for violation of the article in question.

2.3 Dismissal of a protected employee

Council of State, No. 428741 and No. 428198, 04 November 2020

The facts are similar in the cases that came before the Council of State. A company applied for and received permission from the labour inspector to dismiss a protected employee. The judges, however, annulled this authorisation on the grounds that the administration had not verified the reality of the economic reason for the dismissal at the level of the sector of activity to which the company belonged within its group. The company was subsequently ordered by the judicial judge to compensate the employee for the dismissal.

The company asked the administrative judge to recognise the responsibility of the French State and to order it to compensate the damage suffered by the company as a result of the payment of the compensation ordered by the judicial judge. The judges of the Administrative Court of Appeal ordered the State to pay the company a sum much lower than that requested. The company then appealed to the Council of State against the appeal decision.

The Council of State recalled that the dismissal of a protected employee may only take place following authorisation by the administrative authority and that the illegality of this decision, or the unlawful refusal to authorise the dismissal, "*constitutes a fault of such a nature as to engage the responsibility of the public authority towards the employer, provided that it has resulted in direct and certain prejudice to the latter*".

In the first case, the Council of State invoked the general principles of public liability to take into account the fault that was also committed by the employer who applied for dismissal authorisation. The Administrative Court of Appeal had found fault on the part of the employer in its refusal to appeal to the Court of Cassation against the decision ordering him to pay compensation to the employee in respect of his dismissal and had ruled that this fault was such as to exonerate the State by half. The Council of State stated that *"the court erred in law and, as a result, tainted its ruling with an incorrect legal characterisation of the facts".*

In the second case, the Council of State affirmed that when the employer claims compensation for the damage suffered as a result of the unlawfulness of the refusal to authorise the dismissal of a protected employee, the judge must investigate, by forging his/her own conviction, whether the same decision could have been taken in the context of due process. The judges had not pronounced their decision on the merits of the refusal to authorise the dismissal of the employee, and this is what led the Council of State to annul the judgment handed down by the Administrative Court of Appeal.

2.4 Collective benefit guarantees in the event of company liquidation

Second Civil Division of the Court of Cassation, 05 November 2020, No. 19-17.164

In the present case, a company had signed a collective supplementary health insurance contract for the benefit of its employees. The company was subsequently placed in post-insolvency liquidation. The liquidator requested that the insurer provide the company's dismissed employees with the guarantee continuation mechanism provided for in Article L. 911-8 of the Social Security Code. The insurer refused to maintain the guarantees because the employer was in liquidation. The liquidator then filed a suit against the insurer before the Commercial Court.

The appeal judges ordered the insurer to maintain the collective benefit guarantees of former employees of the company on the basis of Article L. 911-8 of the Social Security Code. The insurer appealed to the Court of Cassation on the grounds that there was no funding mechanism for the continuation of those guarantees.

Article L. 911-8 of the Social Security Code provides for the temporary continuation of the collective benefit guarantees set up within the company for former employees

whose termination of the employment agreement (not due to gross negligence) entitles them to compensation from the unemployment insurance scheme.

The Social Security Code provides that the funding of this continuation of guarantees is ensured by contributions paid by the employer and the employees. However, this funding is only possible when the company is 'in good health'. When it is in compulsory liquidation, the question arises as to which party bears the burden of paying the contribution. Is it borne by the employee or is it the insurer who covers the continuation of the guarantees? The Social Security Code makes no specific provision for companies in compulsory liquidation.

In the present judgment, after recalling the provisions of Article L. 911-8 of the Social Security Code, the Court of Cassation affirmed its nature of public order and stated that Article L. 911-8 of the Social Security Code makes no distinction between employees of companies *in bonis* and employees of companies in post-insolvency liquidation. Moreover, the article does not subordinate the continuation of the collective benefit guarantees to the existence of a procedure for funding this continuation. As a result, the judges require the insurer to maintain employee benefit guarantees even in the absence of a funding mechanism.

The Court of Cassation had previously issued two opinions in which it had made the continuation of guarantees subject to the condition that the contract between the employer and the insurer had not been terminated (Court of Cassation, Opinion, No. 17013 to 17017, 06 November 2017). According to the present judgment, there is no longer any condition for the continuation of the benefit guarantees.

3 Implications of CJEU Rulings

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technologies

In the present case, a request for a preliminary ruling was made by an Employment Tribunal in Spain. It asked the Court about the interpretation of Article 1 (1) of Council Directive 98/59 EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1998 L 225, p. 16).

The French Labour Code regulates the procedure for dismissals for economic reasons in articles L. 1233-1 et seq. of the Labour Code. Dismissals are qualified as collective dismissals when there are at least two dismissals with a common economic cause (Labour Division of the Court of Cassation, No. 89-43.845, 15 May 1991). Although the collective nature of the dismissal is met when there are two dismissals with a common economic cause, the French legislator provides for different procedures that are applicable depending on the number of dismissals during the reference period, but also depending on the size of the company.

For example, Articles L. 1233-8 et seq. of the Labour Code provide for a special procedure to consult the Social and Economic Council in companies with more than 10 employees where the employer plans a collective dismissal for economic reasons of less than 10 employees over a period of 30 days. Thus, under French law, to rule on the procedure applicable to dismissals for economic reasons, the judge must take into account the dismissal plan as it was definitively presented and not the number of ultimate dismissals (Labour Division of the Court of Cassation, No. 09-40.581, 10 February 2010).

As stated in Article L. 1233-8 of the Labour Code, French law has chosen a reference period of 30 days. According to the French administration, the beginning of each period is the date of the first meeting with staff representatives consulted on a proposed dismissal for a given economic reason. In the absence of employee

representative institutions or when the consultation procedure is not compulsory, this starting point is the first meeting prior to the dismissal of several employees for the same economic reason (Circular DE/DRT No. 89-46 of 01 October 1989, No. 2-1-1). This circular nevertheless preceded Council Directive 98/59/EC and the French court has not yet ruled on the interpretation of the provisions in question.

For example, if a company initially planned to proceed with two dismissals and 26 days later called a meeting eith employee representatives to consult them on a plan to cut nine jobs, the Court of Cassation confirmed the reasoning of the Court of Appeal, which had inferred that the limit of 10 dismissals for economic reasons over a period of 30 days had been exceeded (Labour Division of the Court of Cassation, No. 01-12.094, 19 March 2003).

There are also special provisions regulating employers' repeated recourse to collective dismissals for economic reasons to avoid the procedure for dismissal of more than 10 employees over a period of 30 days. Indeed, to prevent the employer of a company with at least 50 employees from waiting until the end of the reference period to announce new dismissals for economic reasons, Article L. 1233-26 of the Labour Code provides that when such a company "*has carried out economic redundancies of more than ten employees in total for three consecutive months, without reaching ten employees within the same 30-day period, any new economic dismissal planned during the following three months is subject*" to the procedure for collective dismissals for economic reasons.

In this context, the Court of Cassation ruled on the reference period in a judgment of 17 January 2001 (Labour Division of the Court of Cassation, No. 99-42.970, 17 January 2001). In this case, the Court of Appeal judges had retained the period of 30 days or three months immediately prior to the disputed dismissal. The Court of Cassation overturned and annulled this ruling, stating that

> "*in so ruling, by reference only to the dismissals actually pronounced and to the only period of thirty days or three months immediately prior to the disputed dismissal, without considering whether at least ten dismissals were envisaged during the same thirty-day period during which the economic dismissal of the person concerned was planned, during the preliminary interview preceding it, or if no more than ten economic dismissals had been pronounced during the three consecutive months preceding the period of three months during which the economic dismissal of the person concerned was envisaged, the Court of Appeal did not give a legal basis for its decision*".

The Court of Cassation seems to have adopted the same approach as the judges of the Court of Justice and appears to allow judges to take into account any period of 30 days, including the disputed dismissal, to assess the number of dismissals for economic reasons that occurred during that period. As a result, the French legislation, although it does not indicate the precise starting point of the reference period, is interpreted in a manner consistent with the provisions of Article 1(1) of Council Directive 98/59/EC.

4 Other Relevant Information

Nothing to report.

Germany

Summary

(I) The Federal Ministry of Labour presented a number of measures aiming to strengthen the rights of platform workers vis-à-vis work platforms. The Ministry also presented a second draft to regulate teleworking.

(II) The Federal Labour Court determined that the performance of micro-jobs by users of an online platform may qualify as employment relationships. It has also requested a preliminary ruling relating to possible discrimination between part-time and full-time workers.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Platform work

On 27 November 2020, the Federal Ministry of Labour presented a number of measures aiming to strengthen the rights of platform workers vis-à-vis work platforms and to ensure fair conditions and higher social protection. In principle, platform operators who do not limit themselves to exclusively act as brokers but take advantage of the structural peculiarities of the platform economy to influence the drafting and implementation of contracts, will have to take more responsibility.

In the context of labour law, the most pertinent measures are the following:

By introducing a shift in the burden of proof in favour of platform workers in court proceedings to clarify employee status, the enforcement of their rights is to be facilitated. Solo self-employed platform workers will be given the opportunity to organise themselves and negotiate the basic conditions of their activities with the platforms. Certain contractual practices of platforms, such as the establishment of binding minimum notice periods depending on the duration of activity on a platform, will be prohibited. Some protective regulations of labour law, such as regulations on continued remuneration in case of illness, maternity protection and the right to annual leave, are to be extended to solo self-employed persons. In the future, it will be possible to review the general terms and conditions of platforms in court more easily and without complications. Finally, platform employees will be given the opportunity to 'transfer' their ratings to another platform.

1.2.2 Teleworking

The Federal Ministry of Labour has presented a second draft to regulate teleworking. However, this does not go as far as the first draft, which actually provided for the right to telework.

According to the new draft, the following must be regulated: the employee will be able to request to perform work remotely. If the parties to the contract of employment do not agree on the performance of mobile work requested by the employee, the employer must justify his/her refusal in due form and time. If the employer fails to do so, it will be considered a legal fiction and the mobile work will be deemed set in

accordance with the employee's request for a maximum period of six months. The legal fiction also applies if the employer does not discuss the employee's request to perform mobile work.

2 Court Rulings

2.1 Status of crowdworkers

Federal Labour Court, 9 AZR 102/20, 01 December 2020

The Federal Labour Court decided that the execution of micro-jobs by users of an online platform ('crowdworkers') on the basis of a framework agreement concluded with its operator ('crowdsourcer') may result in the legal relationship qualifying as an employment relationship.

Under section 611a of the German Civil Code (*Bürgerliches Gesetzbuch*), the employee's status depends on the fact that the employee performs work in personal dependence. If the actual performance of a contractual relationship indicates that it is an employment relationship, the designation in the contract is not relevant.

According to the Court, the overall assessment of all circumstances required by law may reveal that crowdworkers are to be considered to be employees. In the present case, the crowdworker was not contractually obligated to accept offers of the crowdsourcer. However, the organisational structure of the online platform operated by the latter was designed to ensure that users registered and trained via an account continuously and accepted bundles of simple, step-by-step, contractually specified small jobs in order to complete them personally. Only a higher level in the evaluation system, which increased with the number of completed orders, enabled the crowdworker to accept several orders at the same time to complete them on one route and thus achieve a higher hourly wage. Through this incentive system, the crowdworker was induced to continuously perform work activities.

2.2 Part-time work

Federal Labour Court, 10 AZR 185/20, 11 November 2020

Provisions of collective agreements that make additional remuneration dependent on exceeding a given number of working hours without distinguishing between part-time and full-time employees, raise questions about the interpretation of Union law. The Federal Labour Court has asked the CJEU to answer questions on the interpretation of the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC in the Annex to Directive 97/81/EC: Is it necessary, in order to determine whether part-time workers are being treated less favourably than full-time workers because an additional remuneration is conditional on a uniformly applicable number of working hours being exceeded, to take account the total remuneration and not the remuneration component of the additional remuneration? Can a potentially less favourable treatment of part-time workers be justified if the additional remuneration is intended to compensate for a specific workload?

3 Implications of CJEU Rulings

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technology

According to the Court, Article 1(1)(a) of Council Directive 98/59/EC is to be interpreted as meaning that for the purposes of determining whether an individual

redundancy which is the subject of a complaint forms part of a collective redundancy, the reference period laid down in that provision is to be determined by taking into account any period of 30 or 90 consecutive days in which the individual dismissal took place and in which the employer has made the majority of dismissals.

Under section 17(1) of the Dismissal Protection Act (*Kündigungsschutzgesetz*), a reference period of 30 days applies if the number of notices of termination issued within a 30/90-day period exceeds the threshold value. This is in line with the judgment of the CJEU (see also *Hlava/Höller/Klengel*, in: Neue Zeitschrift für Arbeitsrecht 2020, p. 1294). According to German law, all redundancies within a certain period must be added together.

4 Other Relevant Information

Nothing to report.

Greece

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Ruling

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technologies

Pursuant to Article 1 of Law 1387/1983 "*Collective redundancy shall mean any dismissal effected by undertakings or establishments employing more than twenty (20) employees for reasons not relating to the employee him/herself and exceeding a specific number every calendar month*". Therefore, the period of reference is the calendar month and not any period of 30 (or 90) consecutive days. Greek law, therefore, does not seem to be in compliance with the CJEU ruling. The Court's solution is more favourable for the labour side because longer periods may be taken into account and not just the calendar month; abuse may be avoided, considering that some employers wait until the very end of the calendar month to proceed with new dismissals.

4 Other Relevant Information

Nothing to report.

Hungary

Summary

(I) A Government Decree has declared a state of emergency, which entails the introduction of a special legal order.

(II) The government has issued a ecree containing special rules on teleworking during the state of emergency, while another decree introduces rules on the new wage subsidy.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 State of emergency

Government Decree No. 478/2020 has introduced a state of emergency from 4 November 2020 for an unlimited period, which entails a special legal order. The special legal order authorises the government to issue government decrees in accordance with the Basic Law (Constitution). The temporal scope of these government decrees is 15 days.

Act 109 of 2020 on protection against the second wave of the coronavirus came into force on 11 November 2020 for 90 days. This Act authorises the government to extend the temporal scope of government decrees issued during the state of emergency, up to 90 days from 11 November.

1.1.2 Teleworking

Government Decree No. 487/2020 on 'application of the rules on teleworking during the state of emergency' came into force on 12 November 2020 and will remain in force until 8 February 2021, based on government authorisation in accordance with Act 109 of 2020 (see above). The Decree contains the following rules:

- Article 86/A of Act 93 of 1993 (see below for text) on Occupational Safety and Health shall not be applied. It contains specific labour safety provisions on teleworking. This will not have any real impact, as all other provisions of the Occupational Safety and Health Act must be applied.

Article 86/A reads as follows:

> *"(1) The provisions of this Act shall apply to teleworking, subject to the exceptions set out in this Chapter.*
>
> *(2) By way of derogation from what is contained in the third sentence of Subsection (2) of Section 2 and in Paragraph c) of Subsection (7) of Section 54, work equipment for teleworking may also be provided by the employee subject to an agreement with the employer. Use of such equipment shall be contingent upon having a preliminary inspection for occupational safety conducted in accordance with Subsections (3)-(4) of Section 21 by the employer in advance.*
>
> *(3) The workplace designated for teleworking must be approved by the employer in advance for occupational safety standards. The employee shall be authorised to make any changes of bearing for occupational safety purposes upon the employer's prior consent.*

(4) Within the meaning of the Labour Code, an inspection conducted by the employer or its representative shall be considered justified if performed for the implementation of Paragraph b)of Subsection (7) of Section 54.

(5) Apart from the inspection referred to in Subsection (4), the employer or its representative, in particular the persons referred to in Sections 8, 57 and 58, shall be entitled to gain admission to the property where the work is performed to carry out the duties and procedure related to occupational safety, such as the commissioning of equipment, assessment of risks, safety inspection and the investigation of accidents.

(6) The employer shall inform the employee about the facilities available for consultation and the representation of interests with respect to safety at work as governed under Chapter VI, and the names of persons placed in charge of these duties and information as to where they can be reached. The labour safety representative may enter the designated place of work upon the employee's consent.

(7) The Occupational Safety and Health Board shall conduct the inspection in accordance with Subsection (4) of Section 81 only on workdays, between 8 a.m. and 8 p.m. The occupational safety and health administration shall notify the employer and the employee at least three working days in advance concerning the inspection. The employer shall obtain the employee's consent for admission into the designated workplace for this purpose prior to the commencement of the inspection."

- Tax deduction allowing an automatic reduction (without documents) of the basis of taxation by 10 per cent of the minimum wage as a cost. This will decrease the cost of employment as a teleworker.
- The employer and employee may derogate from Article 196 of the Labour Code. This implies that they may freely derogate from this (and only this) Article, even to the detriment of the employee. It does not imply an important change in accordance with the rules of Article 196. The main difference is that the parties may agree on teleworking, change their place of work or apply partial teleworking (certain days a week) without amending the employment contract.

Article 196 reads as follows:

"(1) 'Teleworking' shall mean activities performed on a regular basis at a place other than the employer's facilities, using computers or other means of information technology (hereinafter referred to collectively as "computing equipment"), where the end product is delivered by way of electronic means.

(2) In the employment contract, the parties shall agree on the employee's employment by means of teleworking.

(3) In addition to what is contained in Section 46, the employer shall inform the employee:

a) concerning inspections conducted by the employer;

b) concerning any restrictions as to the use of computing equipment or electronic devices; and

c) concerning the department to which the employee's work is in fact connected.

(4) The employer shall provide all information to persons employed in teleworking as is provided to other employees.

(5) The employer shall provide access to the employee for entering its premises and to communicate with other employees."

Overall, the above described changes will not imply a real change in the legal environment of teleworking and does not affect the implementation of EU law.

1.1.3 Wage subsidy

Government Decree No. 485/2020 introduces the rules of the new wage subsidy. The Decree designates economic activities (catering, entertainment, cinema, theatres, sport, museum, fitness, amusement park, recreation), which can be subsidised. The employer is exempt from the payment of social security contributions and can be reimbursed 50 per cent of the employee's wage after the subsidised period, if

- the employment relationship existed on the last day of the subsidised period (November 2020); and
- pays the entire amount of the employee's salary (Article 14).

Strangely, the 'Announcement' of the National Employment Service on the wage subsidy added further conditions to the Decree's provisions. Thus, the announcement supplemented the conditions of the Government Decree with additional relevant conditions, such as: maximum payment (150 per cent of minimum wage); employment must be maintained until the end 2020.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technologies

The Labour Code contains the following provisions on the implementation of Article 1(1)a) of Directive 98/59/EC:

Article 71 reads as follows:

"(1) 'Collective redundancy' refers to an employer, who, based on the average statistical workforce for the preceding six-month period, intends to terminate the employment relationship:

a) of at least ten employees, when employing more than twenty and less than one hundred employees,

b) of 10 per cent of employees, when employing one hundred or more, but less than three hundred employees,

c) of at least thirty employees, when employing three hundred or more employees,

in accordance with Subsection (3), within a period of thirty days, for reasons in connection with its operations."

Article 71 (3) reads as follows:

> *"Compliance with the requirements specified in Subsection (1) shall be ascertained, where applicable, separately for each place of business; however, the number of employees employed at various locations, but within the jurisdiction of the same county (Budapest) shall be calculated based on the aggregate. The employee shall be accounted at the location where he/she works in the position registered at the time when the decision on collective redundancy was adopted."*

Article 73 reads as follows:

> *"(1) The decision for the implementation of collective redundancies shall specify:*
>
> *a) the number of employees affected, broken down by job categories; and*
>
> *b) the date of commencement and conclusion and the timeframe of collective redundancy, or the timetable for implementing the said redundancies.*
>
> *(2) The timetable of collective redundancies shall be established in thirty-day periods. To this end, the timetable indicated in the employer's decision shall be taken into account.*
>
> *(3) The number of employees shall be calculated on the aggregate, if within thirty days from the date of disclosure of the legal statement for the termination of the last employment relationship or from the date of reaching an agreement, the employer communicates another statement or concludes an agreement for the termination of employment."*

This regulation is in line with the judgment.

4 Other Relevant Information

Nothing to report.

Iceland

Summary

A controversial Act on Working Conditions of Aircraft Maintenance Engineers of the Icelandic Coast Guard has been issued, ending a strike.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Working conditions of the Aircraft Engineers of the Coast Guard

On 27 November 2020, the *Althing* passed the Act on Working Conditions of Aircraft Maintenance Engineers of the Icelandic Coast Guard, ending the work stoppage of the aforementioned employees, who had been on strike since 06 November 2020. The main purpose of the Act is to ensure that the Icelandic Coast Guard can function properly. According to the preparatory works, the Coast Guard could not provide essential security and rescue services due to the strike, as the aircraft had become inoperable. The safety of seafarers is considered especially important in connection with this.

Art. 1 of the Act prohibits work stoppages and Art. 2 establishes an arbitration tribunal if the State and the Icelandic Aircraft Maintenance Engineers' Union cannot finalise a collective agreement by 04 January 2021. Should that be the case, the tribunal shall finalise an agreement between the actors before 17 February 2021. Art. 2(2) states *inter alia* that the Supreme Court will nominate the three members of the tribunal; their tasks and scope are further outlined in Art. 3 of the Act.

The Act concerns Art. 11 of the European Convention on Human Rights on the freedom of assembly and association on the labour market. The preparatory works of the Act explicitly discuss the limitation of the freedom, stating *inter alia* that such limitation must firstly be prescribed by law, secondly, to protect public interests or the rights of others, and finally, respect the principle of necessity and proportionality. Furthermore, the preparatory works compare the tasks of the Icelandic Coast Guard to those of the Police and armed services abroad and refers in that context to ECHR case No. 45892/09, Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.) against Spain from 21 April 2015.

The Iceland Aircraft Maintenance Engineers' Union strongly criticised the legislation, stating, amongst others, that the Act constituted a breach of their freedom of assembly and trade union bargaining rights. Several parliamentarians voiced similar concerns, but 2/3 of Parliament ultimately approved the bill. The last legislation ending a work stoppage came in 2016. Althing passed a similar legislation in 2010 against aircraft maintenance engineers working for Icelandair. However, the justification and purpose of that 2010 legislation was different, referring to the economic importance of Icelandair as the country's largest carrier and general stability on the labour market. By contrast, the legislation passed on 27 November 2020 refers to the importance of the Icelandic Coast Guard for security and rescue reasons as well as the life and health of the public, especially seafarers.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technologies

Council Directive 98/59/EC was transposed into Icelandic law by Act No. 63/2000, on Collective Redundancies. Collective redundancies are defined in Art. 1(1) of the Act in Art. 1(1)(a)(i) of the Directive, namely redundancies which over a period of 30 days affect (1) at least 10 employees in establishments normally employing more than 20 and less than 100 workers, (2) at least 10 per cent of the number of workers in establishments normally employing at least 100 but less than 300 workers, (3) at least 30 employees in establishments normally employing 300 workers or more.

Comparable case law on the interpretation of the reference period as disputed in the case in question, does not exist in Icelandic law. It therefore is unlikely that this ruling will have direct implications for Icelandic law.

4 Other Relevant Information

Nothing to report.

Ireland

Summary

(I) The COVID-19 unemployment payment scheme was extended until 31 March 2021.

(II) Responsibility for employment legislation was transferred to the Minister for Enterprise, Trade and Employment.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Pandemic Unemployment Payment

The Minister for Social Protection has announced that the Pandemic Unemployment Payment will remain open to new applicants until 31 March 2021. The scheme had been due to close to new applicants on 31 December 2020, but the extension of the closing date will ensure that workers can still access the payment in the new year in the event that their employment ceases after Christmas.

As of 01 December 2020, 351 424 persons (50.3 per cent of whom are female) were in receipt of the Pandemic Unemployment Payment. The sectors with the highest number of recipients are accommodation and food services (102 321) and wholesale and retail trade (56 893), a decrease from 128 500 and 90 300, respectively, on 05 May 2020. In terms of the age profile of recipients, 25.4 per cent were under 25.

1.2 Other legislative developments

1.2.1 Transfer of ministerial functions

The Employment Affairs and Employment Law (Transfer of Departmental Administration and Ministerial Functions) Order 2020 (S.I. No. 438 of 2020) and the Business, Enterprise and Innovation (Alteration of Name of Department and Title of Minister) Order 2020 (S.I. No. 519 of 2020) have been issued.

The effect of these Orders is to transfer the ministerial functions in relation to the legislation implementing Directives 91/533, 96/71, 97/81, 98/59, 99/70, 2001/23, 2003/88, 2008/94, 2008/104, 2014/67 and 2018/957 to the Minister for Enterprise, Trade and Employment (Leo Varadkar TD).

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technologies

Directive 98/59/EC is implemented in Ireland by the Protection of Employment Act 1977, s.6 of which (as substituted by Art. 5 of the Protection of Employment Order 1996 (S.I. No. 370 of 1996)) provides that 'collective redundancies' means dismissals effected by an employer 'for one or more reasons not related to the individual

concerned' where 'in any period of 30 consecutive days' the number of such dismissals is:

- at least 5 in an establishment normally employing more than 20 and less than 50 employees;
- at least 10 in an establishment normally employing at least 50 but less than 100 employees;
- at least 10 per cent of the number of employees in an establishment normally employing at least 100 but less than 300 employees; and
- at least 30 in an establishment normally employing 300 or more employees.

In case C-300/19, *Marclean Technologies*, the Court of Justice was asked whether, in order to assess whether a disputed individual dismissal is part of a collective dismissal, the reference period should be calculated by taking into account only the period prior to or after the impugned dismissal. The Court stated that neither option satisfied the Directive's requirements. Instead, the reference period was to be calculated by each period of (in Ireland's case) 30 days in which the individual dismissal took place and the largest number of dismissals had occurred by reason of redundancy.

Given that s. 6 of the 1977 Act refers to 'any period of 30 consecutive days', it is clear that there is no conflict between Irish domestic law and the Directive as interpreted by the Court of Justice.

4 Other Relevant Information

4.1 Teleworking

The Labour Party has introduced the Working from Home (COVID-19) Bill 2020 which, if enacted, will provide employees who are working remotely with a right to switch off from out of working hours work-related electronic communications. The government did not oppose the Bill, but the Minister indicated that amendments would need to be made later in the legislative process, see here.

Italy

Summary

(I) The Italian legislator has imposed several limits to economic activities, dividing the country into three zones. New rules to help workers and companies during the emergency were introduced.

(II) Two rulings by the Supreme Court on professional downgrading and staff subcontracting have been issued.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Restrictions to business operations

The Decree of the President of the Council of Ministers 03 November 2020 introduces additional restrictions to economic activities to those already issued on 18 October 2020.
Italy is divided into three zones (so-called 'yellow, orange and red zones').

These measures have been adopted for the entire country:

- Museums, libraries, archives and archaeological sites remain closed;
- Ski resorts are closed and can only be used by professional athletes for training;
- Teaching in high schools will take place online only;
- Carry out in bars, pubs and restaurants is allowed until 10 p.m., while delivery has no time limits. The hourly limits do not apply to canteens in hospitals, airports and highways.

An additional measure has been adopted for high-risk regions (i.e. 'orange zone'):

- Bars, pubs and restaurants can only offer carry out until 10 p.m., while deliveries have no time limits. These limits do not apply to canteens in hospitals, airports and highways.

Other measures have been adopted for maximum risk regions (i.e. 'red zone'):

- All retail shops are closed, except those that sell essential goods, expressly indicated in the annex to the Decree;
- Beauty centres are closed;
- University classes can only take place online;
- Teaching in the second and third year of secondary school can only take place online.

1.1.2 Relief measures

The Law Decree of 09 November 2020, No. 149 introduces new rules to support workers and companies during the emergency.

Art. 11: suspension of the payment of social security contributions in November 2020 for companies closed by the Decree of the President of the Council of Ministers of 03 November 2020;

Art. 12: extension of the term to request *Cassa Integrazione Guadagni* (COVID-19);

Art. 13-14: in maximum risk regions (red zone), parents with children attending the second or third year of secondary school can, alternatively, take special leave for the entire period of suspension of face-to-face teaching, if they cannot work remotely. In the same situation, workers registered as *Gestione separata Inps* (collaborators) or as *Gestioni speciali Inps* (workers in agricultural, artisanal and commercial sectors) are eligible for a bonus to pay for child care.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Professional downgrading

Corte di Cassazione, No. 25394, 11 November 2020

An employee can be moved from his/her post to a lower one due to supervening incapacity only if this incapacity is incompatible with all the duties of his/her pay grade.

If the employer moves to a lower post due to a supervening incapacity to perform his/her job, he/she must demonstrate that this incapacity affects all of the tasks of the employee's pay grade.

2.2 Staff subcontracting

Corte di Cassazione, No. 25220, 10 November 2020

If the client supplies equipment and the subcontractor supplies the workers in accordance with a contract, there is a presumption of a prohibited supply of staff.

A contract for the supply of staff is prohibited and can only take place through a temporary work agency. A contract for the supply of staff refers to situations in which an undertaking uses a client's machines and tools and when no autonomous management of the undertaking exists. In these cases, the contract is fictitious. In the case before the Court, the client supplied machines and tools to the contractor and the subcontractor had supplied the workers. The unlawfulness of the contract was thus presumed, unless the contractor provided an important contribution to the realisation of the work (i.e. capital or know-how)

3 Implications of CJEU Rulings and ECHR

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technologies

To determine whether an individual dismissal is part of a collective dismissal, the CJEU ruling, case C-300/19, of 11 November 2020, *Marclean Technologies*, established that Article 1, first subparagraph, letter a) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, must be interpreted as meaning that the reference period to determine the existence of a collective dismissal must be calculated considering all periods of 30 or 90 consecutive days during which such individual dismissal occurred, and during

which the greatest number of dismissals by the employer occurred for one or more reasons not inherent to the person of the worker.

According to the Italian Act No. 223/1991, collective redundancies refers to terminations of employment relationships by the employer for reasons not related to the individual workers where the number of redundancies is at least 5 over a 120-day period.

The reference period of 120 days is calculated by considering all consecutive 120-day periods during which such individual dismissals occurred. Furthermore, Act No. 233 of 1991, in implementing the Directive on Collective Redundancies, provides for a higher level of protection than the required minimum, providing for the numerical requirement of at least five dismissals (instead of ten or more, depending on the reference period and the number of employees in the company), over a 120-day period (instead of over a period of 30 or 90 days).

This CJEU ruling therefore does not have any implications on Italian legislation.

For further judgments on this topic, see *Corte di Cassazione,* No. 15401, 20 July 2020; No. 14079, 25 October 2000. In a consistent sense see also *Corte di Cassazione,* No. 7519, 29 March 2010; No. 1334, 22 January 2007; No. 3866, 22 June 2006; No. 13714, 06 November 2001.

4 Other Relevant Information

Nothing to report.

Latvia

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technologies

Article 105 of the Labour Law sets as a reference period any 30-day period during which the number of employees as defined by law have been dismissed on all grounds (not only due to technological and organisational reasons, but other reasons as well (except for dismissals as a result of the employee's conduct or skills).

It follows that the CJEU ruling in this case may have implications for the interpretation and application of Article 150 of the Labour Law. There have been no relevant national court decisions.

4 Other Relevant Information

Nothing to report.

Liechtenstein

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technologies

In case C-300/19, the CJEU (First Chamber) ruled as follows (presented in French, as an English version is currently not available):

> *"L'article 1er, paragraphe 1, premier alinéa, sous a), de la directive 98/59/CE du Conseil, du 20 juillet 1998, concernant le rapprochement des législations des États membres relatives aux licenciements collectifs, doit être interprété en ce sens que, aux fins d'apprécier si un licenciement individuel contesté fait partie d'un licenciement collectif, la période de référence prévue à cette disposition pour déterminer l'existence d'un licenciement collectif doit être calculée en prenant en compte toute période de 30 ou de 90 jours consécutifs au cours de laquelle ce licenciement individuel est intervenu et pendant laquelle s'est produit le plus grand nombre de licenciements effectués par l'employeur pour un ou plusieurs motifs non inhérents à la personne du travailleur, au sens de cette même disposition."*

The above-mentioned provision of Directive 98/59/EC gives Member States the choice of applying a 30- or 90-day system to determine whether a collective redundancy has occurred. According to Liechtenstein law—similar to Spanish law, which was the subject of the main proceedings—has established a reference period of 90 days. Section 1173a Art. 59a(1) of the Civil Code provides for the following:

Collective redundancies are considered to be dismissals the employer is planning within the establishment for one or more reasons that are not related to the person of the employee and that affect at least 20 employees within a 90-day period, regardless of the employer's size.

The present case dealt with the issue whether an individual dismissal was part of a collective redundancy. To answer this question, the Court had to clarify when precisely the aforementioned reference period of 90 days commences.

In accordance with the requirements of Spanish law, the competent Spanish court submitted the following three options to the CJEU:

- only the period before the controversial individual dismissal is considered;
- in case of unfair dismissal, the period following the dismissal is also taken into account;

- a reference period of any 90-day period during which the disputed individual dismissal took place shall be taken into account, without distinction as to whether that period is prior to, after or partly before and partly after that single dismissal (CJEU C-300/19 No. 28).

The CJEU ruled that only the third option is compatible with Directive 98/59/EC (CJEU C-300/19 No. 34).

Liechtenstein law, unlike Spanish law, does not provide any comparable specifications as to how the reference period of 90 days is to be positioned. Liechtenstein law is therefore fully compatible with CJEU C-300/19.

Since Liechtenstein is a small country, there is generally little case law and relevant legal literature. The Liechtenstein courts, therefore, often refer to Swiss case law and/or legal literature.

Also, according to the prevailing Swiss doctrine, the provisions on collective redundancies are applicable if the required number of dismissals is reached during any placed reference period.

From this perspective, Liechtenstein legislation is in line with CJEU C-300/19. This judgment therefore does not have any implications for Liechtenstein law.

4 Other Relevant Information

Nothing to report.

Lithuania

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technologies

The Lithuanian legislator has chosen a reference period of 30 calendar days for calculating the number of dismissals to qualify them as a collective dismissal. Article 63 (1) of the Labour Code mentions a period of 30 calendar days, without indicating when that period commences. There is no case law or practice that would suggest that the commencement of the calculation shall be prior or following the individual dismissal. In other words, the 30 calendar days refer to any period within which the individual dismissal in question can fall.

4 Other Relevant Information

4.1 New government

Following general elections in October 2020, the new conservative right-centre government will take up its work soon. The Government Programme, to soon be approved by Parliament, does not indicate any major changes to the current labour legislation. The social dialogue and social partners received no mention in the programme document.

Luxembourg

Summary

(I) Some legislative measures in the context of the pandemic have been or will be extended.

(II) The minimum wage will be increased by 2.8 per cent.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Family support leave

The special rules on family support leave implemented in the context of the pandemic crisis (see also June 2020 Flash Report, title 1.1.2.) have been extended until 25 May 2021.

Reference: The Law of 23 November 2020 amending the Law of 20 June 2020 introducing family support leave in the fight against the COVID-19 pandemic can be found here.

1.1.2 Early retirement benefits

As mentioned in title 1.1.4.2 of the April 2020 Flash Report, persons who have gone into early retirement may only earn a limited salary in addition to their pension, otherwise their retirement benefits will cease. For persons hired in certain sectors, the limit to such additional revenues has been repealed to offset a potential lack of staff.

These measures have been extended until 31 December 2020 (see also June 2020 Flash Report, title 1.1.1.).

Due to the outbreak of the second wave of COVID-19, which has also affected multiple persons working in hospitals, a bill has been deposited to extend this exception until 30 June 2020.

However, the scope of application of the derogatory measures will be limited to staff in the healthcare sector, including medical analysis laboratories, and in the assistance and care sector.

Reference: Draft Law No. 7709 amending the Law of 20 June 2020 on the first temporary derogation from certain provisions of the Labour Code due to the state of emergency related to COVID-19 can be found here.

1.1.3 Quarantine medical leave

Until now, it was admitted that quarantine/isolation orders by the Ministry of Health (*ordonnance de mise en quarantaine/isolement*) had the same effect as a medical certificate of incapacity for work *(certificate médical d'incapacité de travail*). According to general labour law, this certificate must be submitted to the employer at the latest on the third day of absence; the employee is protected against dismissal during sickness leave.

A bill has been deposited to implement two temporary changes/clarifications that will be valid until 30 June 2021:

Because the tracing staff has had difficulty keeping track of files, quarantine/isolation orders are often issued with delay. To avoid negative consequences for the employee,

the deadline to submit such an order to the employer is set at 8 days (not 3 as is the case for medical certificates).
During quarantine/isolation, the employee is protected against dismissal just as he /she would be when on sick leave.

Reference: Draft Law No. 7726 temporarily amending Article L. 121-6 of the Labour Code can be found here.

1.1.4 Minimum wage

Aside from the fact that Luxembourg's minimum wage is linked to the cost-of-living index, the Labour Code also states that it should be reviewed bi-annually by the legislative chamber (*Chambre des Députés,* Art. L. 222-2 (2)). The general practice is that based on statistical data, the minimum wage is adapted at the same percentage as the general raise of wages.

On this basis, a raise of the minimum wage by 2.8 per cent is projected. This raise is quite substantial, especially when considering that last year, an increase of the minimum wage by EUR 100 was decided.

Reference: Draft Law No. 7719 amending Article L. 222-9 of the Labour Code can be found here.

Especially as regards the economic difficulties caused by the pandemic, employers strongly criticised this bill. However, a parallel bill was deposited to provide financial assistance to businesses to compensate for the increase in the minimum wage. Only companies in certain sectors affected by the pandemic can benefit from this support; they must demonstrate that the crisis has had a real impact on their activity. In summary, these companies are eligible for a one-time grant of EUR 500 for each employee paid between the basic minimum wage and the qualified minimum wage.

Reference: Draft Law No. 7718 on subsidies to compensate for the increase in the minimum social wage in connection with the COVID-19 pandemic can be found here.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technologies

For the definition of collective redundancies, Luxembourg's national legislation does not differentiate by size of the undertaking. The thresholds apply to the undertaking (*employeur*) as a whole, and not to individual establishments, which makes Luxembourg's legislation even more favourable for employees.

According to Article L. 166-1 (1) of the Labour Code, a collective dismissal occurs when the number of redundancies is
1 at least equal to 7 employees within a 30-day period;
2 at least equal to 15 employees within a 90-day period.

Another important difference with the Directive's provisions is that the dismissals may not be 'effected' (*effectués*), but simply contemplated (*envisagés*).
A case such as the one that arose in Spain according to which the 90-day period referred to was to be calculated by referring exclusively to the period prior to the date of the disputed dismissal would not occur in Luxembourg.

There is generally very little case law in Luxembourg on collective dismissals.

Although the approach in Luxembourg differs, national law can be interpreted as complying with the CJEU's most recent case law.

4 Other Relevant Information

Nothing to report.

Malta

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technologies

Under Maltese law, 'collective redundancy' refers to the termination of the employment relationship by an employer on the grounds of redundancy over a period of 30 days, of:

- ten or more employees in establishments normally employing more than 20 employees but less than 100 employees;
- 10 per cent or more of the number of employees in establishments employing 100 or more employees but less than 300 employees; and
- 30 employees or more in establishments employing 300 employees or more.

Provided that for the purposes of calculating the number of redundancies, the termination of an employment contract that occurs on the employer's initiative for one or more reasons that are beyond the control of the individual employee, shall be considered redundancies, provided that at least five redundancies occur (Collective Redundancies (Protection of Employment) Regulations, 2003 (SL 452.80), Regulation 2 (1)).

The above definition reflects how Maltese law interprets collective redundancy. It is important to note as well that in case of fixed-term contracts, the law specifically states that the law on collective redundancies in Malta does not apply to terminations of employment relationships effected under contracts of employment concluded for limited periods of time or for specific tasks, except where such terminations take place prior to the date of expiry or the completion of such tasks and the reason for such prior terminations is the redundancy of employees so terminated (Collective Redundancies (Protection of Employment) Regulations, Regulation 3).

It would appear that the provisions of Maltese law and the pronouncements of the judgments are very much aligned.

4 Other Relevant Information

Nothing to report.

Netherlands

Summary

(I) A draft bill implementing Directive 2019/1158 on the work-life balance of parents and carers has been issued.

(II) The Dutch Supreme Court has issued a landmark decision on the notion of the employment relationship.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Parental leave

A draft bill of 28 October 2020 (parliamentary documentation 35316) provides amendments of several laws to transpose Directive 2019/1158/EU. For a significant part, Dutch law was already in compliance with said Directive. The current proposal implies the following changes: paternity leave already exists; the scope will be brought in line with the Directive (mainly: employees who are not insured through social security, such as domestic workers and defence personnel). Parental leave is also already part of Dutch legislation, but is not paid. This will be brought in line with the Directive: nine weeks of parental leave will be paid. Flexible working arrangements are already provided for under Dutch legislation, however, they are limited to employers with 10 or more employees. This is not in line with the Directive and will be amended. Finally, with respect to employment rights, Dutch legal practice is in compliance with the Directive, but this will be made more explicit in the relevant legislation, especially with respect to accrual of paid leave during parental and birth leave.

The draft bill seems to be in compliance with the Directive; the parliamentary process will be followed and the final Act that is adopted will be reported in the near future.

2 Court Rulings

2.1 Notion of employment relationship

Supreme Court, ECLI:NL:HR:2020:1746, 06 November 2020

The case concerned a person working for the City of Amsterdam on the basis of a so-called 'participation job'. These are jobs that aim to reintegrate those who have been marginalised from the labour market and have been recipients of long-term social benefits. The parties disagreed about whether the relationship should be qualified as one of employment. In the first and second instance (Court of Appeal), it was not considered an employment contract. The Supreme Court agreed with those decisions, but reneged on the important standing of case law on the classification of the employment relationship.

The Supreme Court decision of 14 November 1997 ECLI:NL:HR:1997:ZC2495 (*Groen/Schoevers*) led to widespread acceptance in case law and academic literature that the parties' intention is of relevance when classifying contracts between parties. In other words, whether or not the parties had the intention of concluding an

employment contract or a service contract is a relevant factor (amongst others) in the assessment of the given contract. This approach has been criticised and in the 06 November decision, the Supreme Court states under 3.2.2 that it is not relevant whether the parties had the intention of concluding an employment contract or not. The key question is whether the agreed rights and obligations correspond to the statutory definition of the employment contract.

In Dutch academic literature, this decision is embraced as a welcome correction of what has been perceived as an anomaly. It is expected that this will facilitate the classification of employment relationships. The parties' intention does not play a role for CJEU case law on the notion of employee (taking into account that more than one notion of employee exists), meaning that this decision might not be of particular interest from an EU-law perspective.

3 Implications of CJEU Rulings

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technologies

In the Netherlands, Directive 75/129/EC (currently 98/59/EC) has been transposed in the Collective Redundancy Notification Act (hereinafter 'the Act'). Article 3 (1) of the Act stipulates that the Act's provisions apply if there are at least 20 dismissals over a period of three months. Neither the Act nor parliamentary history address the question of when the 3-month period commences or how the reference period should be calculated. It has been pointed out in academic literature that the starting point of the reference period is—of course—key and that various interpretations are possible: the moment of the first request for prior permission to dismiss employees, the moment the employer contemplates a collective dismissal or the actual moment of dismissal.

The Dismissal for Commercial Reasons Decree issued by UWV (UWV is the Dutch public employment service responsible for issuing prior permission for individual and collective dismissals due to economic reasons) provides some guidance. It states on page 90 that the moment the employer expects to terminate the employment contracts of 20 employees or more is decisive. The 3-month period during which the employer's plan is realised is of relevance. The reference period thus starts when the employer starts to take action to terminate employment contracts (i.e. filing a request for permission to dismiss; signing a termination agreement or giving notice in case of prior permission is not required) The date of actual termination or the date on which the prior permission is issued are not of relevance.

There is, to our knowledge, no published case law on the issue of the reference period.

The first observation with respect to the Marclean decision is that the Dutch regulation is so broad that interpretation in conformity with the Directive is possible. Secondly, the way the reference period is calculated in the Netherlands at first glance does not seem to be fully in line with how the CJEU establishes the reference period. The period in which the highest number of dismissals takes place is not a relevant factor in Dutch law. However, the rather harsh sanction of not complying with the Act (the employee can apply for nullification of the termination of the employment relationship) indicates that even in cases of doubt, the consultation and information obligation is generally fulfilled.

4 Other relevant information

4.1 Recommendations on the labour market

In January 2020, the government received two recommendations on the future of the labour market: the advice of the Commission Regulation of Work and the advice of The Netherlands Scientific Council for Government Policy. In its letter of 11 November 2020, the government issued a comprehensive response to both reports. Most of the recommendations in the two reports are endorsed by the government, however, given the upcoming elections in spring 2021, no legislative measures will be announced.

The proposal of creating a legal presumption of an employment contract for platform workers is of interest. The government will start developing this idea in greater detail. The government will furthermore continue to elaborate an invalidity insurance for self-employed persons.

Norway

Summary

(I) The existing COVID-19 relief measures have been adapted, while some new ones have been proposed.

(II) The Norwegian Supreme Court has interpreted the principle of equal treatment for temporary agency workers in terms of 'pay' to include results-based bonus schemes, whether for individuals, groups or at company level.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Restrictions to freedom of movement

Norwegian society was partially locked down by the government in March 2020 due to the COVID-19 outbreak. A number of measures were introduced to prevent the virus from spreading and to mitigate the pandemic's effects on society (see May 2020 Flash Report). The gradual reopening of society started in April, and by June, virtually all business activities had been reopened (see June 2020 Flash Report).

Infection rates started increasing in August, and in October, the number of daily reported infections had reached the same level as in March. From 05 November, stricter national measures were reintroduced. The municipalities with particularly high infection rates have introduced even stricter local measures. For example, in Oslo, a 'social lockdown' has been effective from 09 November, and additional restrictions were added from 16 November.

Due to increasing infection rates in other countries, the Ministry of Foreign Affairs reintroduced a general recommendation against non-essential travel abroad as of September, and quarantine was once again imposed on travellers from nearly all countries in the Schengen area/EEA15 (see September 2020 Flash Report). In November, additional requirements related to testing and quarantine accommodation were introduced. Information on travel restrictions can be found here.

1.1.2 Relief measures

The unemployment rate rose sharply during the lockdown, but has been declining since the reopening started. However, in November, the unemployment rate is once again rising. By the end of November, there were 196 300 unemployed persons, amounting to 6.9 per cent of the workforce. The number is 9 300 higher than at the end of October (see the statistics here).

In November, the government adapted the existing measures to respond to the COVID-19 outbreak, most importantly:

- Regulations (FOR-2020-11-04-2250) on a temporary compensation scheme related to cancellations, closure or postponement of cultural events as a result of the COVID-19 outbreak, planned to be held in September 2020;
- Regulations (FOR-2020-11-04-2245) on a temporary compensation scheme related to cancellations, closure or postponement of cultural events as a result of the COVID-19 outbreak, planned to be held between October and December 2020.

Furthermore, the government has *proposed* further measures to mitigate the economic effects of the COVID-19 outbreak. The most important proposal is:

- A new compensation scheme for businesses with losses of income as a result of the COVID-19 outbreak. The suggested scheme will cover up to 80 per cent of the fixed, unavoidable costs, depending on the amount of the loss of income (see further here).

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Temporary agency work

Supreme Court Judgement, HR-2020-2109-A*, 02 November 2020*

A temporary work agency had, over a period of four years, hired out workers to an oil company that had a company level bonus scheme for its employees. Two agency workers claimed the same bonus from the temporary work agency as they would have received if they were employed directly by the user company. The claim was based on section 14-12 a (1) f of the Working Environment Act. According to this provision, a temporary work agency shall ensure that the workers it hires out enjoy the same conditions with regard to i.a. 'pay' that workers, who have been recruited directly by the user undertaking to perform the same work, benefit from.

The Supreme Court found that 'pay' in this context must be understood as remuneration for work. The relevant bonus scheme was considered to be results-based and part of the user company's overall system of remuneration for work. The Court, therefore, concluded that the agency workers were entitled to the same results-based bonus as the employees hired directly by the user company.

The judgment clarifies the concept of pay in section 14-12 a (1) f of the Working Environment Act. The principle of equal treatment in terms of pay gives agency workers the same right to a results-based bonus as the employees hired directly by the user company, as long as the bonus is remuneration for work. This applies to individual bonus schemes as well as schemes at group or company level.

The relevant provision implements the principle of equal treatment in Article 5 of Directive 2008/104/EC on temporary agency work. In the preparatory works to the implementation act and previous case law, it was assumed that the Directive leaves it to the Member States to define the concept of pay in this context, see i.a. HR-2018-1037-A. The current judgment rests on the same assumption. In support of this view, the Supreme Court referred to Article 3, which states that the 'Directive shall be without prejudice to national law as regards the definition of pay'. The Supreme Court also referred to the lack of case law from the CJEU determining the concept of pay in the Directive and the absence of a unitary concept of pay in EU law more generally.

When interpreting 'pay', the Supreme Court referred to the purposes of the Directive. However, additional national considerations were particularly emphasised. According to the preparatory works, the regulations on agency work seek to prevent agency work from undermining a labour market dominated by permanent, direct employment, see Prop.74 L (2011–2012) p. 51. Ensuring real equality between permanent, direct employment and agency work in terms of remuneration was a relevant consideration and supported a broad interpretation of 'pay'.

2.2 Severance pay

Supreme Court Judgement, HR-2020-2202-A, 13 November 2020

Seven older employees in a company, who had been transferred to a new owner after a merger, had signed contracts agreeing to terminations of their employment contracts in return for severance pay. Their former employer had established a scheme that allowed early retirement pension instead of severance pay in case of redundancy. The scheme for early retirement pension was financially more beneficial for the employees than severance pay. The new owner had committed itself to following the redundancy system established by the former employer for a period of two years after the takeover. The employees claimed the right to an early retirement pension, referring to the new owner's commitment and the pressure they were exposed to when the contracts of severance pay were signed.

The Supreme Court ruled in favour of the employer. The Court found that the scheme for early retirement pension was not a legal right of the employees, but an individual benefit granted on a discretionary basis by the company. The new owner's commitment did not give the employees such a right, nor had the employees been given an oral guarantee that the scheme would continue. There was no reason to revise the existing contracts on severance pay under the general revision clause in section 36 of the Contracts Act.

The judgment does not seem to have particular relevance for the implementation of EU law.

3 Implications of CJEU Rulings

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technologies

Directive 98/59 on collective redundancies is implemented in Norwegian law in section 15-2 of the Working Environment Act. A collective dismissal is defined as a 'notice of dismissal given to at least 10 employees *within a period of 30 days* without being warranted by reasons related to the individual employees', cf, section 15-2 (1). The provision also stipulates that other forms of terminations of contracts of employment that are not warranted by reasons related to the individual employee shall be included in the calculation, provided that at least five persons are made redundant.

An employer who is contemplating collective dismissal has the obligation, at the earliest opportunity, to share information and consult with the employees' elected representatives with a view to reaching an agreement to avoid collective redundancies or to reduce the number of persons made redundant, cf. section 15-2 (2) and (3). A corresponding notification shall also be given to the Labour and Welfare Service, cf. section 8 of the Labour Market Act. The collective redundancies will not come into effect earlier than 30 days after the Labour and Welfare Service has been notified, cf. section 15-2 (5).

The reference period to determine the existence of a collective dismissal is not explicitly defined further than 'a period of 30 days'. There is no clear basis in Norwegian law to restrict the calculation of the reference period, neither to the period prior to the dismissal nor to the period after the dismissal. The calculation of the reference period is not discussed in the preparatory works, and the reporter is not aware of any case law concerning this issue.

Consequently, Norwegian law seems to be in line with the judgment of the CJEU that the reference period is 'any' continuous period (of 30 days) during which the relevant dismissal took place, cf. the judgment, paragraph 37. The Court's conclusion will

therefore have a clarifying effect, but apart from that, no practical implications for Norwegian legislation.

4 Other Relevant Information

4.1 Industrial action

Earlier this year, the social partners postponed the negotiations to revise collective wage agreements to the fall due to the COVID-19 outbreak. Most negotiations have resulted in new agreements without the use of industrial action, while a strike of medical doctors was referred to compulsory arbitration on the grounds of health and safety (see October 2020 Flash Report). Security guards organised by Norsk Arbeidsmandsforbund are still on strike, a strike that started on September 16 and was expanded to November 28 (for further details, see here).

Poland

Summary

The draft on the amendment to the 'anti-crisis shield' restores the competence of the President of Poland to nominate and dismiss the members of the Social Dialogue Council. Moreover, the draft abolishes the prohibition of trade activities on Sundays as of 06 December.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 'Anti-crisis shield' regulations

On 25 November, the government submitted the draft of the amendment to the 'anti-crisis shield' to Parliament. The draft refers i.a. to the Prime Minister's competence to nominate and dismiss the members of the Social Dialogue Council, and to a one-time exception to the ban on trade activities on Sunday. The draft was accepted by the *Sejm* (the lower chamber of Parliament) on 27 November 2020, and on 02 December 2020, the draft was accepted by the Senate (the higher chamber of Parliament). As a next step, it should be signed by the President and be promulgated in order to take effect.

The anti-crisis shield, i.e. the Law of 02 March 2020 on particular measures to prevent, counteract and fight COVID-19, other infectious diseases and crisis situations caused by them (consolidated text Journal of Laws 2020, item 1842) can be found here.

The draft of 25 November 2020 on the amendment to the Law on specific measures to prevent, counteract and fight COVID-19, other infectious diseases and crisis situations caused by them, and its substantiation can be found here. The information on the legislative process can be found here.

Article 3 of the draft repeals Art. 27 item 2a and 27 item 2b of the Law of 24 July 2015 on the Social Dialogue Council, as well as Art. 85 of the original anti-crisis shield.

The Law of 24 July 2015 on the Social Dialogue Council (consolidated text: Journal of Laws 2018, item 2232) can be found here.

The abovementioned provisions gave the Prime Minister the right to nominate and dismiss the members of the Social Dialogue Council. In 'pre-COVID-19 times', this competence belongs to the President of Poland.

For further information and analysis, see the October 2020 Flash Report, section 4.1, and the March 2020 Flash Report, section 1.10.

Article 4 of the draft provides that on Sunday, 06 December, the ban on Sunday trade activities, as provided by the Law of 10 January 2018, does not apply.

The Law of 10 January 2018 on limiting trade on Sundays, public holidays and some other days (consolidated text, Journal of Laws 2019, item 466) prohibits Sunday work in shops, supermarkets, etc. (see January 2018 Flash Report). The Law can be found here.

In practice, the amendment implies that on Sunday, 06 December, shops and supermarkets can be open. This regulation constitutes an additional one-time exception to the general statutory prohibition of trade activities.

The amendment on the Social Dialogue Council restores the regulations that were in force before the pandemic, i.e. the President's prerogative to nominate and dismiss

the members of the Council. The granting of this competence to the Prime Minister in the anti-COVID measures was evaluated negatively by the social partners (the 'Solidarity' trade union even suspended its activities in the Council – see October 2020 Flash Report). It can be expected that the amendment will contribute to the restoration and effectiveness of social dialogue in Poland.

The possibility to open shops and supermarkets on Sundays as of 06 December constitutes a one-time legal solution and does not imply further consequences for national law. The rationale behind this regulation is an improvement of the financial situations of employers in the trade sector (in November, shopping malls were closed due to the COVID-19 pandemic).

It can be expected that the Law will be signed by the President very soon. Subsequently, it should take effect the next day following its promulgation (in practice, without any *vacatio legis*).

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technologies

In Poland, Directive 98/59 was implemented by the Law of 13 March 2003 on particular rules of terminating employment relationships with employees for reasons not related to employees (so-called Law on Collective Redundancies). For the consolidated text in the Journal of Laws 2018, item 1969, see here.

Article 1 of the Law defines the notion of 'collective dismissal'. Article 1.1. provides that the Law applies if an employer, who employs at least 20 employees, must terminate employment relationships for reasons not related to the person of the employee, with notice or upon mutual consent of the parties, and where, over a period not exceeding 30 days, the redundancy affects at least:

- 10 employees, if the employer employs fewer than 100 employees;
- 10 per cent of employees, if the employer employs between 100 and 300 employees;
- 30 employees, if the employer employs 300 employees or more.

Article 1.2 provides that the number of employees mentioned in Art. 1.1. include employees whose employment relationships are terminated at the employer's initiative, but by mutual consent of the parties as part of a collective redundancy, provided that these terminations include at least five individual employees.

Moreover, Art. 10.1 provides that certain provision of the Law (i.e. those concerning protection of certain employee groups against dismissal and the right to severance pay) applies accordingly, if an employer, who employs at least 20 employees, needs to terminate employment relationships for reasons not related to the specific employees, provided that these reasons constitute the only reason justifying the termination of an employment contract or its termination by mutual consent of the parties, and where

the redundancies, in a period not exceeding 30 days, concern a lower number of employees than that indicated in Article 1 of the Law.

Polish law defines collective redundancy against the background of the following criteria:

- necessity to terminate an employment contract;
- reason for dismissal is not related to the person of the employee concerned (in practice, it refers to all employer-related reasons);
- termination of an employment contract by an employer or upon mutual consent of the parties;
- the period of pronouncing dismissals that does not exceed 30 days;
- specific number of dismissed employees, related to the level of employment at the particular establishment.

It should also be emphasised that the Law on Collective Dismissals applies to employers who employ at least 20 employees.

Thus, in Poland, collective redundancies refer to group dismissals 'over a period that does not exceed 30 days'. This 'reference period' should be counted from the date of the first dismissal for reasons not related to the person of the employee(s). While evaluating whether a particular, contested dismissal falls within this timeframe, all the dismissals—prior and subsequent to that period—should be taken into account.

Moreover, the abovementioned Art. 10 of the Law refers to any individual dismissal that is the result of employer-related reasons. In practice, this provision concerns a lower number of dismissals than those provided by Article 1 of the Law.

The *effet utile* of Directive 98/59 is warranted by Polish law. There is no need to introduce any amendments to the definition of a 'collective dismissal' with a view to the CJEU ruling in case C-300/19.

4 Other Relevant Information

Nothing to report.

Portugal

Summary

(I) The state of catastrophe and the state of emergency have been declared and renewed. Measures to implement the state of emergency have been approved.

(II) A new Decree amends the exceptional and temporary measures related to the pandemic, namely those related to the teleworking regime, the organisation of work and prophylactic isolation.

(III) Several relief measures for businesses have been introduced. A new Decree clarifies the regime applicable to absences from work due to the need of providing family care.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 State of catastrophe

The Resolution of the Council of Ministers No. 92-A/2020, of 02 November declares a state of catastrophe until 11:59 p.m. on 19 November 2020 to the entire national mainland territory in response to the COVID-19 epidemiological situation.

The government has adopted additional measures and restrictions in addition to those stipulated in the Resolution of the Council of Ministers No. 88-A/2020, of 14 October (see also October 2020 Flash Report). Specifically, it establishes the criteria for determining which municipalities will be subject to special measures. This list will be reviewed every 15 days.

The most relevant employment-related measures applicable during the state of catastrophe are as follows:

- Employers must provide employees with adequate safety and health conditions to prevent risks of infection with COVID-19, and may, specifically, adopt a teleworking regime;
- Teleworking is mandatory in specific situations and in the municipalities identified in Annex ii of this Resolution;
- A rotation regime between the provision of work under the teleworking regime and at the usual workplace should be implemented;
- Daily or weekly differentiated entry and exit times or differentiated breaks and mealtimes should be adopted in workplaces.

This resolution entered into force on 04 November 2020.

Resolution of the Council of Ministers No. 96-B/2020, of 12 November extends the declaration of the state of catastrophe to the entire national mainland territory, until 11:59 p.m. on 23 November 2020 to respond to the COVID-19 pandemic. This Resolution amends the list of municipalities in which special rules apply. In addition, the government has created new rules that are applicable to the referred municipalities (identified in Annex ii of this Resolution), namely (i) the suspension of activities of certain establishments located in those municipalities on Saturdays and Sundays, outside the period between 8:00 a.m. and 1:00 p.m..

This Resolution entered into force on 13 November 2020.

1.1.2 State of emergency

Decree of the President of the Republic No. 51-U/2020, published on 06 November declares a state of emergency due to the public catastrophe which has affected the entire national territory, starting at 00:00 a.m. on 09 November 2020 and ending at 11:59 p.m. on 23 November 2020, without prejudice to any renewals, in accordance with the law.

This Decree establishes that the following rights may be partially limited, restricted or conditional:

- Rights to the freedom of movement: necessary restrictions may be imposed by the competent authorities to reduce the risk of infection and to implement measures to prevent and fight the pandemic, in particular in municipalities with a higher level of risk of infection from COVID-19, as well as to the extent that this is strictly necessary and proportionate, the prohibition of movement on public roads during certain periods of the day or certain days of the week;
- Private, social and cooperative initiative: the resources, means and healthcare establishments integrated in the private, social and cooperative sectors may be used by the competent public authorities, subject to compensation, if necessary, to ensure the treatment of patients with COVID-19 or to ensure the maintenance of care activities in relation to other pathologies;
- Workers' rights: any employees of public, private, social or cooperative entities, regardless of their type of link or functions, may be mobilised to support health authorities and services, in particular, to carry out epidemiological surveys, to track contacts and to follow up on persons under active surveillance;
- Right to the free development of personality: body temperature checks and diagnostic tests of COVID-19 may be imposed by non-invasive means, in particular, for the purposes of access and permanence in the workplace or as a condition of access to public services and educational and commercial establishments.

This Decree entered into force on 06 November 2020, and is applicable for the specific period referred to above.

With Resolution No. 83-A/2020, of 06 November, Portuguese Parliament authorised the declaration of the state of emergency in the terms contained in the abovementioned Decree No. 51-U/2020.

Following the publication of Decree No. 51-U/2020, which declared the state of emergency, the government approved Decree No. 8/2020, of 08 November, which aims to implement the referred state of emergency.

Among others, this Decree stipulates the following measures which have an impact on labour:

- Prohibition of travel on public roads on a daily basis between 11:00 p.m. and 05:00 a.m., as well as on Saturdays and Sundays between 01:00 p.m. and 05:00 a.m., except for the purposes expressly referred to in this Decree, in the municipalities of the national territory referred to in Annex II of the Resolution of the Council of Ministers No. 92-A/2020, of 02 November;
- Body temperature checks may be carried out by non-invasive means, for instance, to access the workplace;

- Among others, employees, users and visitors to health care facilities, educational establishments, residential homes for the elderly may be subject to SARS-COV-2 diagnostic tests;
- The mobilisation of human resources, in particular for epidemiological surveys, screening of contacts of patients with COVID-19 and following up on persons under active surveillance, may be determined.

This Decree entered into force on 09 November 2020.

On 20 November 2020, the Decree of the President of the Republic No. 59-A/2020, which renews the declaration of the state of emergency for an equal period of 15 days due to the public catastrophe which has affected the entire national territory, starting at 00:00 a.m. on 24 November 2020 and ending at 11:59 p.m. on 08 December 2020, without prejudice to any renewals, in accordance with the law.

The most relevant restrictions to the rights of employees established in this Decree are described below:

- employees of public, private, social or cooperative entities, regardless of their type of contract or functions, and even if they are not healthcare professionals, such as civil servants in prophylactic isolation or covered by the exceptional protection regime for immunosuppressed and chronically ill persons, may be mobilised by the competent public authorities to support healthcare authorities and services, in particular, for carrying out epidemiological inquiries, tracking contacts and following up on persons who are under active surveillance;
- the possibility of terminating employment contracts of employees working for the National Health Service may be limited.

This Decree entered into force on 20 November 2020, and is applicable for the specific period referred to above.

With Resolution No. 87-A/2020, of 20 November, Portuguese Parliament authorised the renewal of the declaration of the state of emergency in the terms contained in the abovementioned Decree No. 59-A/2020, of 20 November.

Decree No. 9/2020, of 21 November contains the necessary measures for the implementation of the state of emergency as renewed by the President of the Republic by Decree No. 59-A/2020, referred to above.

Apart from the measures set forth in Decree No. 8/2020, the following measures that have an impact on labour were approved:

- Applicable to the entire national territory: restrictions to travel between municipalities from 27 November 2020 to 02 December 2020, and between 04 December and 08 December 2020, except in the cases foreseen in this Decree;
- For high-risk municipalities, the daily movement of people on public roads is prohibited between 11:00 p.m. and 05:00 a.m. and a general duty to stay at home is provided for in the remaining hours;
- For municipalities characterised by a very high and extremely high risk, the movement of citizens on public roads is prohibited on Saturdays, Sundays and public holidays, in the period between 01:00 p.m. and 05:00 a.m., the activity of the majority of establishments in the referred period being suspended;
- Day-off for employees who perform functions for the State on 30 November and 07 December;

- Suspension of educational/non-educational and formative activities with the presence of students in public, private and cooperative educational establishments on 30 November and 07 December;
- On the two days referred to in the previous paragraph, the activities of retail and service establishments located in the municipalities with very high and extremely high risk are suspended in the period between 03:00 p.m. and 05:00 a.m.;
- The possibility of terminating employment contracts—either upon the initiative of the employee or upon the initiative of the employer—in case of healthcare professionals linked to the National Health Service can be exceptionally and temporarily be suspended, except in cases duly justified and authorised;
- Employees of public, private, social or cooperative entities, regardless of their type of contract or functions and even if they are not healthcare professionals, such as civil servants in prophylactic isolation or covered by the exceptional protection regime for immunosuppressed and chronically ill persons, may be mobilised by the competent public authorities to support healthcare authorities and services, in particular, for carrying out epidemiological inquiries, tracking contacts and following up on persons under active surveillance.

This Decree entered into force on 24 November 2020.

1.1.3 Teleworking and working time

Decree Law No. 94-A/2020, of 03 November, amends the exceptional and temporary measures related to COVID-19.

In particular, this Decree Law amends Decree Law No. 79-A/2020, of 01 October (see October 2020 Flash Report), and establishes that the following rules shall apply to companies established in territorial areas where the epidemiological situation justifies it, as defined by the government through a resolution of the Council of Ministers, regardless of the number of employees of said companies, as well as to employees residing or working in the areas listed below.

As regards teleworking, the following rules apply in the referred territorial areas defined by the government:

- Teleworking is mandatory, regardless of the nature of the contractual relationship, whenever the employee's functions allow for it and the employee has the means to perform his/her work remotely, without the need of a written agreement between the employer and the employee;
- Exceptionally, if the employer considers that the conditions set out in the previous paragraph are not met, it must notify the employee of such a decision in writing, justifying that the functions performed by the employee are not compatible with the teleworking regime or that there are no adequate technical conditions for its implementation;
- The employee may, within three working days from the employer's communication, request the Authority for Working Conditions to verify the requirements referred to above in paragraph i) ,and the facts invoked by the employer to refuse the adoption of teleworking. The Authority for Working Conditions shall decide within five working days whether the employee's functions can be performed through teleworking;

- The employer must provide the work and communication equipment necessary for teleworking and when such equipment cannot be provided by the employer and the employee consents to it, teleworking can be carried out using means that belong to the employee, with the employer being responsible for the proper programming and adaptation to the needs inherent to the provision of teleworking;
- If the employee does not have the means to perform his/her functions under the teleworking regime, he/she must inform the employer in writing about the reasons for this impediment;
- The employee under the teleworking regime has the same rights and duties as the other employees, namely regarding the limits to the normal period of work and other work conditions, the safety and health at work and the protection in case of labour accidents or occupational disease, also being entitled to receive the meal allowance (if previously granted);
- The teleworking regime is not mandatory for essential employees as well as for employees who work in educational establishments.

The exceptional and temporary regime of the reorganisation of work set out in Decree Law No. 79-A/2020 to minimise the risk of infection from COVID-19 in the context of labour relations, namely the obligation of the employer to establish different entry and exit working hours of employees who are performing work at the company's premises, apply to all companies located in the territorial areas defined by the government, regardless of the number of employees of the same.

1.1.4 Prophylactic isolation

The procedure for the issuance of the statement of prophylactic isolation has been simplified to make it easier to justify absences from work in the referred situations.

Apart from the measures referred to above, Decree Law No. 94-A/2020 also creates an exceptional regime for the hiring of healthcare professionals for the National Health Service by entering permanent employment contracts, which will be in force until 31 December 2020.

Decree Law No. 94-A/2020 entered into force on 04 November 2020.

1.1.5 Relief measures

Decree Law No. 98/2020, of 18 November introduces amendments to the rules applicable to the support measures created to allow for the maintenance of jobs.

The development of the epidemiological situation, which has a direct impact on economic activity, requires these measures to be subject to permanent evaluation with regard to their adequacy and effectiveness, thus justifying adjustments to their legal provisions to ensure that such measures address the real needs of employers. Due to the development of the pandemic situation, exceptional and temporary rules need to be introduced to allow for the sequentiality of the measures.

In this context, Decree Law No. 98/2020 establishes that employers who, by 31 October 2020, have applied for the extraordinary incentive to stabilise the company's activity ('*incentivo extraordinário à normalização da actividade empresarial*') set forth in Decree Law No. 27-B/2020, of 19 June (see June 2020 Flash Report), may, exceptionally, until 31 December 2020, relinquish such support and to have access to the exceptional support for the progressive resumption of companies' activity ('*apoio extraordinário à retoma progressiva*') established in Decree Law No. 46-A/2020, of 30

July (see July 2020 Flash Report), without the necessity to refund the amounts already received.

This Decree Law entered into force on 19 November 2020.

On 20 November 2020, the Council of Ministers approved Resolution No. 101/2020, which introduces certain measures addressed to the companies in the context of the COVID-19 pandemic.

Through this Resolution, the government has launched new instruments to support the cash flow of companies, including direct support in form of subsidies for micro and small companies operating in sectors that have been hit particularly hard by the exceptional measures approved in the context of the COVID-19 pandemic, as well as direct support for highly exporting industrial companies and companies that carry out essential activities in the supply of specific services and goods to support the holding of cultural, festive, sporting or corporate events, in the form of credit guaranteed by the State, with the possibility of partial conversion into non-refundable credit in case of maintenance of jobs to ensure the immediate support for liquidity, operational efficiency and short-term financial health.

The support created under this Resolution is cumulative, with the other measures that have been approved by the government in recent months to support the economy within the context of the COVID-19 pandemic.

This measure shall apply until 31 December 2020.

Decree Law No. 99/2020, of 22 November, amends the exceptional and temporary measures adopted in the context of the COVID-19 pandemic.

The most relevant employment-related measures established in this Decree are described below:

- Teleworking is mandatory in all companies located in the territorial areas in which the epidemiological situation justifies this, as defined by the government through a resolution of the Council of Ministers, as well as in all municipalities that are considered by the Directorate-General for Health (DGS) as being high, very high and extremely high risk areas (as defined by the government in Decree No. 9/2020, of 21 November), regardless of the number of employees of such companies, as well as to employees who reside or work there;
- Healthcare professionals, regardless of the nature of the employment relationship, are entitled to one working day of vacation for every five days of vacation accrued in 2020, or in 2019, that are not taken until the end of 2020 for imperious reasons of service; at the employee's option, these additional vacation days may be replaced with remuneration equivalent to a normal period of work rendered in a working day;
- An extraordinary deferral regime for VAT in November 2020 and for the payment of social security contributions for the months of November and December 2020 was created.

This Decree Law entered into force on 23 November 2020.

Decree Law No. 101-A/2020, published on 27 November 2020, *i)* amends the extraordinary support for the progressive resumption of activities ('*apoio extraordinário à retoma progressiva*') granted to companies in a business crisis situation, and *ii)* clarifies the exceptional and temporary regime applicable to absences related to the need to provide care for a child or other dependent under the age of 12 years or, regardless of age, for persons with a disability or chronic illness, resulting from the suspension of teaching and non-teaching and formative activities between 30 November 2020 and 07 December 2020, in accordance with Decree No. 9/2020, of 21

November, by establishing that such absences are considered justified but, as an alternative, the employee may take vacation days without the need for an agreement with the employer, by means of a written communication.

This Decree Law entered into force on 28 November 2020.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technologies

The recent CJEU ruling, issued in case C-300/19, interpreted Article 1, paragraph 1, subparagraph a) of Directive 98/59/EC of the Council of 20 July 1998 on the approximation of the Member States' legislation relating to collective dismissals (Directive 98/59), which defines 'collective dismissals' for the purpose of this Directive as dismissals effected by an employer for one or more reasons not related to the individual workers where, according to the choice of the Member States, the number of dismissals is:

Either, over a period of 30 days:

- At least 10 workers in establishments normally employing more than 20 and less than 100 workers;
- At least 10 per cent of the number of workers in establishments normally employing at least 100 but less than 300 workers;
- At least 30 workers in establishments normally employing 300 workers or more.

Or, over a period of 90 days, at least 20 workers, regardless of the number of workers normally employed in the establishments in question.

According to the same provision, for the purposes of calculating the number of dismissals referred to above, *"terminations of an employment contract which occur on the employer's initiative for one or more reasons not related to the individual workers concerned shall be assimilated to dismissals, provided that the number of dismissals is at least five".*

In the present case, the CJEU analysed whether the Spanish legislation on collective dismissals, namely '*Estatuto de los Trabajadores*', is in line with EU law. Specifically, Article 51 of '*Estatuto de los Trabajadores*' sets forth that the reference period to determine the existence of a collective dismissal is 90 days. However, the referred rule does not expressly establish how the 90 day-period should be calculated.

Therefore, the CJEU assessed whether Article 1, paragraph 1, subparagraph a) of Directive 98/59, must be interpreted as meaning that in order to determine whether an individual dismissal is part of a collective dismissal, the reference period of 30 or 90 days foreseen in that provision shall be calculated taking into account exclusively the

period prior to such dismissal or also the period subsequent to that period or any period of 30 or 90 days during which the referred individual dismissal has occurred.

According to the CJEU, Article 1, paragraph 1, subparagraph a) of Directive 98/59 does not mention any time limit exclusively before or after the individual dismissal to calculate the number of dismissals that occurred. In this ruling, the CJEU stated that the method according to which the reference period includes any period of 30 or 90 days during which the individual dismissal occurred is the only one which is in line with the purposes of the referred Directive.

The CJEU has ruled that the referred to Article 1, paragraph 1, subparagraph a) of Directive 98/59, must be interpreted as meaning that

> *"in order to assess whether the challenged individual dismissal is part of a collective dismissal, the reference period provided for in this provision for determining the existence of a collective dismissal must be calculated taking into account any period of 30 or 90 consecutive days during which the individual dismissal has occurred and during which the majority of dismissals carried out by the employer has occurred for one or more reasons not related to the person of the workers, within the meaning of the referred provision".*

Under Portuguese labour law, collective dismissal is defined as

> *"the termination of employment contracts upon the employer's initiative, either simultaneously or successively over a period of three months, affecting at least two or five employees, depending on whether they are micro or small companies, on the one hand, or medium-sized or large-scale companies, on the other, where that occurrence is based on the closure of one or more sections or equivalent structure or reduction in the number of employees determined for market, structural or technological reasons"* (Article 359 of the Portuguese Labour Code).

Thus, in accordance with Portuguese law, collective dismissals apply when i) companies with 50 or more employees intend to dismiss five or more employees or ii) companies with fewer than 50 employees intend to dismiss two or more employees, within a three-month period, grounded on market, structural or technological motives. However, Portuguese law does not provide for how the three-month reference period shall be calculated.

Therefore, the CJEU's ruling issued in case C-300/19 is relevant for clarifying the method that should be used for calculating the number of dismissals that occurred during the reference period set forth in Portuguese labour law to comply with EU rules, namely Article 1, paragraph 1, subparagraph a) of Directive 98/59.

4 Other Relevant Information

Nothing to report.

Romania

Summary

According to a new Emergency Ordinance, the employer is required to order its employees to work remotely whenever objectively possible.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Teleworking

Emergency Ordinance No. 192/2020 on the amendment and completion of Law No. 55/2020 on measures to prevent and fight the effects of the COVID-19 pandemic, as well as amending Art. 7 lit. a) of Law No. 81/2018 on the regulation of teleworking, published in the Official Gazette No. 1042 of 06 November 2020, stipulates employers' obligation to order remote working, whenever objectively possible. So far, according to Law No. 81/2018 on the regulation of teleworking, published in the Official Gazette No. 296 of 02 April 2018, remote working could only be carried out upon agreement of the parties. Now, the employee cannot oppose the employer's decision for work to be performed remotely.

In addition, Government Emergency Ordinance No. 192/2020 stipulates that the employer has the obligation to provide information and communication technology means and/or secure work equipment necessary for the performance of work. However, the parties may establish in a written agreement that the employee's own equipment will be used, specifying the conditions of use.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technologies

In Romania, the reference period taken into account when defining collective redundancies is 30 days. If it is claimed that a given dismissal is part of a collective dismissal (i.e. if the individual character of that dismissal is contested), the reference period shall consist of any 30-day period, be it prior to or subsequent to the disputed dismissal.

To calculate the number of redundancies that have taken place, and therefore to assess whether the dismissal in question is part of a collective redundancy, any interval of 30 days during which the highest number of redundancies has been made by the employer for reasons not attributable to the employees is taken into account.

In conclusion, both Romanian legislation and its interpretation in practice are consistent with the provisions of Directive 98/59/EC, in the interpretation given by the Decision of the Court of Justice of the European Union, in case C-300/19.

4 Other Relevant Information

Nothing to report.

Slovakia

Summary

(I) The government amended the Decree on the protection of the health of workers from risks related to the exposure to biological agents at work.

(II) A new act has added a new public holiday, also modifying the Labour Code.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Biological hazards

On 11 November 2020, the Government of the Slovak Republic adopted the Decree of the Government of the Slovak Republic No. 333/2020 Coll. which amends the Decree of the Government of the Slovak Republic No. 83/2013 Coll. on the protection of the health of workers from risks related to exposure to biological agents at work.

With the Decree of the Government No. 333/2020 Coll., two Commission Directives (EU) were transposed into the legal order of the Slovak Republic:

- Commission Directive (EU) 2019/1833 of 24 October 2019 amending Annexes I, III, V and VI to Directive 2000/54/EC of the European Parliament and of the Council as regards purely technical adjustments;
- Commission Directive (EU) 2020/739 of 3 June 2020 amending Annex III to Directive 2000/54/EC of the European Parliament and of the Council as regards the inclusion of SARS-CoV-2 in the list of biological agents known to infect humans and amending Commission Directive (EU) 2019/1833.

This Government Decree entered into force on 24 November 2020.

1.2 Other legislative developments

1.2.1 Public holidays

On 03 November 2020, the National Council of the Slovak Republic (Parliament) approved Act No. 326/2020 Collection of Laws ('Coll.') amending the Act of the National Council of the Slovak Republic No. 241/1993 Coll. on public holidays, non-working days and memorial days as amended, and amending Act No. 311/2001 Coll. Labour Code, as amended

Act No. 326/2020 Coll. added to Article 1 of Act No. 241/1993 Coll. under letter e) a new public holiday – '28 October - Day of the establishment of an independent Czech-Slovak State'. At the same time, in the new paragraph 3 of Article 2, this Act sets down that the said new holiday is not a day of rest or a holiday according to a special regulation. Therefore, a 'technical' change in the Labour Code has taken place.

According to Article 94, paragraph 1 of the Labour Code 'Days of rest are days of continuous rest of the employee during the week and holidays'. Act No. 326/2020 Coll. added at the end of the cited sentence – 'unless a special regulation provides otherwise'.

Act No. 326/2020 Coll. (and amendment of the Labour Code) will take effect on 01 January 2021.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technologies

According to Article 73, paragraph 1 of the Labour Code (Act No. 311/2001 Collection of Laws – 'Coll.', as amended), collective redundancies occur when an employer or part of an employer terminates employment relationships by notice for the reasons stipulated in Article 63, paragraph 1 letter a) and letter b), or if employment relationships are terminated by another method for reasons not relating to the person of the employee within 30 days

- of at least ten employees of an employer who normally employs more than 20 and less than 100 employees;
- of at least 10 per cent of the total number of employees of an employer who normally employs at least 100 and less than 300 employees;
- of at least 30 employees of an employer who normally employs at least 300 employees.

Article 63 paragraph 1 letter a) and letter b):

> *"Article 63 Notice given by the employer*
>
> *(1) An employer may only give notice to an employee for the following reasons:*
>
> *a) if the employer or part thereof*
>
> *1. is wound up or*
>
> *2. is relocated and the employee does not agree with the change in the agreed location for the performance of work,*
>
> *b) if an employee becomes redundant by virtue of the employer or competent body issuing a written resolution on changes in duties, technical equipment or reduction in the number of employees with the aim of securing work efficiency, or on other organisational changes, and an employer who is a temporary employment agency, even if the employee becomes redundant with respect to the termination of the temporary assignment pursuant to Article 58 before the expiry of the period for which the employment relationship has been agreed for a certain period)."*

The Labour Code does not regulate the method of calculation in more detail. There is no decision on this matter in published case law yet. The current legislation is in line with the Court's judgment, and its interpretation must be respected.

4 Other Relevant Information

Nothing to report.

Slovenia

Summary

(I) The sixth anti-corona package (PKP6) entered into force, introducing and extending relief measures for businesses and workers.

(II) New rules on the protection of workers from risks related to exposure to biological agents at work have been introduced.

(III) Rules on part-time work for parents have been amended.

(IV) Several collective agreements have been amended to include more detailed rules on teleworking.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 The sixth anti-corona package

The 'Act Determining Intervention Measures to Mitigate the Consequences of the Second Wave of the COVID-19 Epidemic', i.e. the so-called sixth anti-coronavirus package (PKP6) (*'Zakon o interventnih ukrepih za omilitev posledic drugega vala epidemije COVID-19 (ZIUPODVE)'*, Official Journal of the Republic of Slovenia (OJ RS) No. 175/2020, 27 November 2020), was passed by the National Assembly on 25 November 2020 and entered into force on 28 November 2020.

The sixth anti-corona package is valued at around EUR 1 billion and focuses mainly on mitigating the negative economic consequences of the lockdown, which was imposed in the second half of October 2020 and further tightened during November 2020.

The new key measure in this package is the compensation of fixed expenses to businesses whose revenue declined significantly due to the pandemic (compensation up to a certain percentage, depending on several criteria – Article 109 et subseq. of the ZIUPODVE).

Partial reimbursement of wages for temporarily laid-off workers has been extended, with the possibility for employers to get 100 per cent reimbursement of wages paid, if the total amount received by the company in State assistance does not exceed EUR 800 000; other companies will continue to be entitled to 80 per cent reimbursement. All other measures introduced by previous anti-corona packages aiming to keep workers in employment or to ensure a certain minimum income for those hit hardest by the COVID-19 crisis or to provide for wage supplements for those most affected by the pandemic remain in force, either without or with some minor changes (short-time scheme, wage compensations during a quarantine, basic income for self-employed, special wage supplements for health workers and other employees working in social protection and healthcare institutions who are directly exposed to infected persons, wage compensation during absence from work for those who, due to the closure of schools and family responsibilities in connection with remote schooling (children up to the fifth grade of primary school) or lack of public transport or closure of borders, are unable to perform work, etc.).

Many other measures introduced or extended by *ZIUPODVE* are not directly related to labour law, but are nevertheless of relevance for workers (for instance, additional funds for subsidising protective equipment, co-financing for parents whose children are hospitalised, the guarantee scheme, the moratorium on loans, exemption from payment of kindergarten fees, hot meals provided for children from socially disadvantaged families, etc.).

Two additional measures directly related to labour law have been introduced:

- the possibility of concluding fixed-term contacts of employment without announcing a vacancy, which is applicable in the public sector until 31 August 2021 (Art. 124 of ZIUPODVE);
- a simplified procedure to inform the labour inspectorate in case of home/tele-working, including the possibility of an electronic application (Art. 102 of ZIUPODVE).

Most of the measures that have been extended or reintroduced will remain in force until 31 December 2020, with the possibility of extension by government decree for six months (until 30 June 2021) or even until the end of next year.

1.1.2 Other measures

Slovenia extended the declaration of the state of emergency for an additional month (Government Decree, OJ RS No. 166/20, 16 November 2020, see here).

In response to the deterioration of the epidemic situation in Slovenia during the month of November 2020, the measures continued to be tightened.

The government adopted a new Order on Temporary Measures for the healthcare services in relation to COVID-19, which has already been amended three times (OJ RS No. 164/20, 168/2020, 171/2020 and 173/2020, see here).

The government has also amended the Ordinance to impose and implement measures to prevent the spread of the COVID-19 epidemic at border crossing points at the border and inspection posts within national borders of the Republic of Slovenia (the sources for the three amendments can be found here: OJ RS No. 159/2020, No. 163/2020, No. 169/2020).

It has adopted the Ordinance on the temporary prohibition, restrictions and manner of conducting public passenger transport on the territory of the Republic of Slovenia (OJ RS No. 165/20, 03 November 2020, see also here), the Ordinance on temporary suspension of the sale of goods and services to consumers in the Republic of Slovenia (OJ RS No. 163/2020, 12 November 2020, see here); amended the Ordinance on the temporary, partial restriction of movement of people and that on the restriction or prohibition of gathering of people to prevent the spread of COVID-19 twice (OJ RS No. 159/20, 05 November 2020 and No. 163/20, 12 November 2020), and many other measures.

Many of these measures have a significant impact on workers. Home/teleworking is very widespread, many working parents are facing problems in reconciling work and family responsibilities (with children being at home), whereby women are carrying the disproportionate share of this burden, workers in healthcare and social institutions, especially those working with COVID-19 patients and in residential homes for the elderly, are working under extreme pressure and are overburdened, also due to the shortage of qualified personnel, etc.

1.1.3 Health and safety at work

On the basis of the Safety and Health at Work Act, the Minister of Labour, Family, Social Affairs and Equal Opportunities has issued the new 'Rules on the protection of workers from risks related to exposure to biological agents at work' (*'Pravilnik o varovanju delavcev pred tveganji zaradi izpostavljenosti biološkim dejavnikom pri delu'*, OJ RS No. 168/20, 20 November 2020), replacing the previous regulations. The rules cover biological agents at work and, within this general framework, are relevant

with respect to SARS-CoV-2 as well, as this new coronavirus has been included in the list of biological agents known to infect humans.

The rules lay down minimum requirements for the protection of workers against risks to their health and safety, including the prevention of such risks, arising or likely to arise from exposure to biological agents at work in line with Directive 2000/54/EC (seventh individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ L 262, 17 October 2000, p. 21), the Commission Directive (EU) 2019/1833 of 24 October 2019 (OJ L 279, 31 October 2019, p. 54) and the Commission Directive (EU) 2020/739 of 03 June 2020 amending Commission Directive (EU) 2019/1833 (OJ L 175 of 04 June 2020, p. 11). There is an explicit reference to these Directives in Article 1 of the Rules.

In addition, the Minister of Labour, Family, Social Affairs and Equal Opportunities has issued amendments to the 'Rules on regular training in the field of safety and health at work' (OJ RS No. 164/2020, 13 November 2020, pp.7346-7347), mainly to include rules on the possibility of remote training programmes.

1.2 Other legislative developments

1.2.1 Part-time work

Amendments to the Parental Protection and Family Benefits Act (OJ RS No. 158/2020, 02 November 2020, p. 6733) were published at the beginning of November 2020, however, the provisions improving the rights of working parents who work part-time due to childcare responsibilities and who are entitled to partial payment of social security contributions will start to apply as of 01 January 2021.

1.2.2 Performance-related bonuses for public employees

Amendments to the Decree on the performance-related bonus paid to public employees for increased workload (OJ RS No. 175/20, 27 November 2020), which entered into force on 28 November 2020, introduced some minor changes and extended this scheme to public employees in the judiciary, the State Prosecutor's Office and the State Attorney's Office.

1.2.3 Reimbursement of travel expenses

Decree on the reimbursement of travel expenses and the method for calculating the kilometre allowance for officials in State bodies who use their own vehicle for business purposes (OJ RS No. 173/20, 27 November 2020) modified the method for calculating the kilometre allowance following the full deregulation of prices of petroleum derivatives, which has been applied since October 2020.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technologies

The case concerned collective dismissals, more particularly, Article 1(1)(a) of Council Directive 98/59 and the question how the reference period for the purposes of calculating the number of redundancies is to be determined. According to the CJEU, when assessing whether an individual dismissal was actually part of a collective dismissal, the reference period provided under Article 1(1)(a) of Council Directive 98/59 must be calculated in a way that any period of 30 (or 90) consecutive days within which the respective individual dismissal took place and within which the highest number of workers have been dismissed by the employer for one or more reasons not related to the individual worker concerned must be taken into account.

Slovenian law is in line with this judgment. Therefore, no amendments to the legislation or changes in case law is necessary.

Collective dismissals are regulated in the Employment Relationships Act (*'Zakon o delovnih razmerjih (ZDR-1)'*, OJ RS No. 21/13, as amended, see here), in particular, in Articles 98 to 103. The definition of a collective dismissal and the minimal reference period for calculating the number of redundancies can be found in Article 98 of the Employment Relationships Act, which corresponds to Article 1(1)(a) (i) of Council Directive 98/59, i.e. Slovenia decided for the first option – (i).

According to Article 98 of the Employment Relationships Act, a collective dismissal takes place (and consequently, all additional requirements apply in line with Directive 98/59, including the information and consultation with workers' representatives, etc.), when an employer establishes that due to business/economic reasons, the following number of workers are made redundant within a period of 30 days:

- at least 10 workers employed with an employer employing more than 20 and less than 100 workers;
- at least 10 per cent of workers employed with an employer employing at least 100 workers but less than 300 workers;
- at least 30 workers employed with an employer employing 300 workers or more.

This provision is interpreted in line with the CJEU judgment in case *Marclean Technologies* by Slovenian labour courts.

It can be deduced from the relevant case law on collective redundancies that the reference period to determine collective dismissals can be applied fully before, fully after or partly before and partly after the individual dismissal takes place, as long as it is a period of consecutive days and the worker was dismissed within that period. For example, in a case dealt with by the Higher Labour and Social Court (judgment No. Pdp 1006/2016, 20 April 2017, ECLI:SI:VDSS:2017:PDP.1006.2016), which concerned a dismissal that took place on 28 January 2016, the Court checked all relevant consecutive 30-day periods within which workers were dismissed, before and after the individual dismissal, and even longer consecutive periods of 30 days to determine whether the employer attempted to circumvent the requirements, i.e. the Court checked consecutive periods between 01 December 2015 and 01 March 2016. In the same sense, see also: judgments of the Supreme Court No. VIII Ips 249/2017, 16 January 2018 and VIII Ips 290/2016, 09 May 2017; judgments of the Higher Labour and Social Court, Nos. Pdp 873/2016, 20 April 2017; Pdp 522/2017, 10 January 2018; Pdp 431/2018, 07 November 2018, ECLI:SI:VDSS:2018:PDP.431.2018 and No. Pdp 439/2019, 10 October 2019, ECLI:SI:VDSS:2019:PDP.439.2019).

4 Other Relevant Information

4.1 Collective bargaining

Several collective agreements have been amended (annexes have been agreed upon by the social partners). More detailed provisions as regards home/teleworking have been included, for example, in Annex No. 3 to the Collective Agreement for the Graphics Sector (OJ RS No. 175/20, 27 November 2020, see here, pp.8428-8429) and the Annex to the Collective Agreement for the Newspaper, Publishing and Bookselling Sector (OJ RS No. 173/20, 27 November 2020, see here), minimum basic wages have been raised, for example, in the Annex to the Collective Agreement for Postal and Courier Services (OJ RS No.173/20, 27 November 2020) and Annex No.4 to the Collective Agreement for the Paper and Paper-converting Industry (OJ RS No.168/20, 20 November 2020 , see here, pp. 7545-7546), etc.

Spain

Summary

(I) The Spanish government has approved the Annual Employment Plan for 2020, the objectives of which have been adapted due to the COVID-19 pandemic.

(II) The Supreme Court has issued two rulings on the subject of transfers of undertakings, and one on the subject of temporary agency work.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Employment Plan

After a substantial delay due to the developments in 2020, the government has approved the Annual Employment Plan for 2020. The Plan contains an analysis of the context and situation of the labour market in Spain, a strategic framework for action, a list of objectives and the identification of services and programmes that will be part of employment policy. This Plan connects to the Spanish Activation Strategy for Employment 2017-2020 (see December 2017 Flash Report).

The Plan has been approved in accordance with the provisions of the Spanish Employment Law and the guidelines of the European Union. Decision No 573/2014/EU of the European Parliament and of the Council of 15 May 2014, on enhanced cooperation between Public Employment Services (PES), is expressly mentioned.

The objectives of the Employment Plan are divided into three main types: key objectives (referring to the performance of public employment services), strategic or priority objectives (for a specific moment) and structural objectives (of a stable nature).

Key objectives: the reduction of unemployment, the activation of unemployed to avoid long periods of unemployment, and improvement of the participation of public employment services in the job placement of workers.

Strategic objectives: the improvement of employability of young people, the promotion of employment as a factor of social inclusion, the improvement of trainings offered and collaboration with social agents.

Structural objectives (six areas of action): guidance for employment, training, promotion of employment, equal opportunities in terms of access to employment, promotion of entrepreneurship and improvement of the institutional framework.

This Employment Plan for 2020 has been completely redesigned as a result of the pandemic and pays special attention to people who lost their job due to COVID-19.

Following the recommendations of the Network of PES created by Decision No. 573/2014/EU, the Plan also aims to strengthen cooperation between the regions' public services and the State Public Employment Service.

1.2 Other legislative developments

1.2.1 Public holidays

The Ministry of Labour has published the list of public holidays for the year 2021.

Spanish labour law establishes that workers are entitled to 14 days of public holidays per year (all paid), some religious and others of a secular or institutional nature. Some

of these public holidays are the same throughout the Spanish territory, and others depend on the region or municipality. The Ministry of Employment has the legal mandate (Article 37.2 of the Labour Code) to develop the full public holiday calendar in advance, a task that has been accomplished for 2021 by this Resolution. The regions can add a 15th public holiday (non-paid). Collective agreements can also increase the number of public holidays.

2 Court Rulings

2.1 Transfer of undertaking

The Supreme Court has issued two different rulings on transfers of undertakings.

Supreme Court, ECLI: ES:TS:2020:3488, 13 October 2020

Transfers of undertakings occur when a subcontractor completes the assigned activity and is assigned a new contractor or by the main undertaking itself, but requires either a transfer of assets or a succession of staff. This ruling of 13 October 2020 provides a more accurate approach to the outsourcing of cleaning services by a public administration. After the end of the subcontracting agreement, the public administration decided to carry out the cleaning using its own resources. There was no transfer of assets nor a succession of staff. In this context, the Supreme Court found that there had been no transfer of undertaking, hence the workers had not been dismissed by the public administration, because it was never their employer.

Transfers of undertakings have been widely covered in Spanish case law in the last few years. The Supreme Court aims to adapt its doctrine to CJEU case law, which is not an easy task. There have recently been many CJEU rulings on transfers of undertakings, and experience shows that the Supreme Court has not always been able to fully comply with these rulings, at least initially.

Over the last two years, however, Spanish Supreme Court doctrine on these issues seems to have been brought into line with CJEU case law. It is likely that new discrepancies will arise in the near future, because the concept of transfers of undertakings seems to be expanding. The Spanish Supreme Court does not want to breach EU law, but it cannot predict future developments. In this case, as usual, the ruling expressly refers to EU case law (CJEU case C-463/09, 20 January 2011, *CLECE*).

Supreme Court, ECLI: ES:TS:2020:3671, 27 October 2020

The rules on transfers of undertakings are also applied when a transfer of assets occurs in the context of bankruptcy proceedings governed by a judge. The new undertaking must respect the rights of workers because this was an actual transfer of undertaking according to Spanish law.

This ruling states that Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, does not include this situation. This is a more favourable provision for employees in accordance with Article 8 of that Directive.

2.2 Temporary agency work

Supreme Court, ECLI: ES:TS:2020:3748, 20 October 2020

According to Article 11 of Act 14/1994, which establishes the principle of equal pay, temporary agency workers have the right to earn as much as the workers directly hired by the user undertaking for the same work. Temporary employees' remuneration

shall include the proportional part for weekly rest time, annual leave and extra pay ('13th month' salary).

The Supreme Court states in this ruling of 20 October 2020 that this principle of equal pay extends to all bonuses that are not paid regularly and, in particular, to profit-sharing.

The Supreme Court states that it is not relevant how the specific bonus was created, even if it is included in a collective agreement which had not been negotiated by the temporary agency work. What is relevant is the fact that a worker hired directly by the user undertaking would have received that salary. This ruling refers to Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work to reinforce its arguments.

3 Implications of CJEU Rulings

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technologies

This ruling will have implications for Spanish legislation, because the CJEU has found that Supreme Court case law is not in conformity with EU law. According to Article 51(1) of the Spanish Labour Code:

> *"For the purposes of the present law, 'collective redundancy' shall mean the termination of employment contracts on economic, technical, organisational or production grounds where, over a period of 90 days, the termination affects at least:*
>
> *(a) 10 workers in undertakings employing fewer than 100 workers;*
>
> *(b) 10% of the number of workers in an undertaking employing between 100 and 300 workers;*
>
> *(c) 30 workers in undertakings employing more than 300 workers.*
>
> *(…)*
>
> *For the purpose of calculating the number of contract terminations in accordance with the first subparagraph of this paragraph, all other terminations of an employment contract during the reference period initiated by the employer for other reasons not related to the individual workers concerned and diverge from the grounds provided for in Article 49(1)(c) of this Law shall also be taken into account, provided that at least five employees are affected.*
>
> *If, in successive periods of 90 days and in order to circumvent the requirements of this article, an undertaking terminates contracts in accordance with Article 52(c) of this Law, the number of terminations being lower than the indicated thresholds, and when there are no new grounds justifying such action, those new terminations shall be deemed to have been effected in circumvention of the law and shall be declared null and void."*

Following the Spanish Supreme Court case law (ruling of 11 January 2017, among others), only terminations of employment contracts that occurred in the 90 days prior to the date of the individual dismissal at issue are taken into account to establish the existence of a collective dismissal. Terminations that take place in the subsequent 90 days from that date can only be considered if the employer has acted abusively.

This CJEU ruling rejects that interpretation, because the Directive refers to any period of 30 or 90 consecutive days, which includes the dismissal of the affected worker. It seems that an amendment of the Labour Code is not necessary, because Article 51

allows for such an interpretation. The Supreme Court will have to modify its case law, however.

4 Other Relevant Information

4.1 Unemployment

Unemployment increased in September by 49 558 people. There are 3 826 043 unemployed people, about 600 000 more than before the outbreak of the COVID-19 pandemic.

Sweden

Summary

(I) The Swedish Labour Court has ruled on a termination of an employment contract on personal grounds relating to the disability of an employee, holding that there were objective grounds and that the termination was not discriminatory.

(II) In another case involving conflicting collective agreements, the Labour Court held that the first collective agreement shall prevail.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Dismissal of a disabled worker

Labour Court Decision, AD 2020 No. 58, 18 November 2020

In its judgment AD 2020 No. 58, the Labour Court ruled on whether the employer had the right to terminate an employment contract on objective grounds relating to the employee personally according to section 7 of the Swedish Employment Protection Act (*Lag [1982:80] om anställningsskydd*). The employee worked as a court clerk. It was proven that her work performance was 30-50 per cent of that of a regular employee, which was a consequence of her diagnosed autism. In addition to her low work performance, the employee had serious collaboration problems. The Court held that autism is a disability and that reasonable accommodations must be taken before a disabled person's employment contract is terminated on objective grounds. In the present case, the employer had accommodated the employee's work tasks in several ways. The employee was allowed to create her own templates, for example, and did not have to rotate as other employees in her position did. The Court held that further accommodations would not have improved the situation. Hence, the termination of the employment contract was lawful and non-discriminatory.

The judgment is of significance for determining what objective grounds relating to employees actually are. As regards reasonable accommodations, it is questionable whether the Court's assessment was in line with EU law. In the October 2020 Flash Report, we referred to decision CPRD/C/23/D/45/2018 of the UN Committee on the Rights of Persons with Disabilities under the Optional Protocol to the UN Convention on the Rights of Persons with Disabilities (CRPD). The CPRD decision criticised the Swedish Labour Court's judgment on reasonable accommodation in another case. That decision held that it must first be assessed what accommodations are possible in order to assess whether these accommodations have been reasonable. In the present case, the Labour Court did not explicitly take the UN Convention and the EU principles of non-discrimination into account. It is debatable whether the Labour Court's judgment is in line with the obligation of reasonable accommodation deriving from both the Convention and from EU law.

2.2 Conflict of collective agreements

Labour Court Decision, AD 2020 No. 66, 25 November 2020

AD 2020 No. 66 concerned the industrial relations in the harbour of Gothenburg. The employer has had a collective agreement with one trade union since 1974, which represents a minority at the worksite but a majority at the national level. In 2019, the employer entered into a collective agreement with the trade union that represents the majority at the worksite. Both collective agreements contained a paragraph stating that the employer must agree with the trade union before planning shift work. When planning shift work, however, the employer only agreed on it with the trade union with which it had concluded the first collective agreement. The Labour Court held that the collective agreements were in conflict with one another. According to the Labour Court's established case law, the first collective agreement concluded shall prevail in matters regarding employment conditions. The conflicting paragraphs were found to cover employment conditions. Therefore, the first collective agreement concluded prevailed.

The judgment seems to be in line with previous case law, but it is not clear whether the two collective agreements were really in conflict with one another. It does not seem that the employer's fulfilment of the second collective agreement would have meant a breach of the first collective agreement.

3 Implications of CJEU Rulings

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technologies

In case C-300/19, the CJEU ruled that a reference period in the meaning of the collective redundancies directive does not start or end on a specific date.

The Swedish legislator has not taken any specific measures to implement the collective redundancies directive's reference periods because the Swedish Co-Determination Act's obligation for employers to negotiate before introducing a significant change has already covered the situation of collective redundancies. As a result, the CJEU judgment does not have any implications for Swedish labour law.

4 Other Relevant Information

Nothing to report.

United Kingdom

Summary

(I) Relief measures for employees and the self-employed have been extended.

(II) A Court ruling determined that the UK failed to properly transpose the Framework Directive 89/391/EC and Council Directive 89/656/EC on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Relief measures

The self-employed scheme has been extended.

As the government puts it, if a self-employed person was not eligible for the first and second grant based on the information in their self-assessment tax returns, they will not be eligible for the third grant.

HMRC expects self-employed workers to make an honest assessment about whether they reasonably believe their business will have a significant reduction in profits.

To make a claim for the third grant, the self-employed worker's business must have had a new or continuing impact from coronavirus between 01 November 2020 and 29 January 2021, which the individual reasonably believes will mean a significant reduction in profits.

The third taxable grant is worth 80 per cent of the self-employed worker's average monthly trading profits, paid out in a single instalment covering 3 months' worth of profits, and capped at GBP 7 500 in total.

For details, see here.

A challenge has been brought by 'Pregnant then Screwed' for judicial review of the Self-Employment Income Support Scheme (SEISS). As they say:

> *"We're really pleased to announce that we've been granted permission for judicial review against the Chancellor of the Exchequer for discriminating against women in the implementation of the Self-Employment Income Support Scheme (SEISS).*
>
> *Pregnant Then Screwed are being represented by legal firm Leigh Day, in a case which argues that SEISS discriminates against self-employed women who have taken maternity between 2016 and 2019. This is not taken into account when calculating mothers entitlement under SEISS, and these women therefore have a lower average income.*
>
> *We started legal proceedings after the Chancellor was asked why he had not exempted periods of maternity leave from the self-employed grant calculations. His response was that: "for all sorts of reasons people have ups and down and variations in their earnings, whether through maternity, ill health or others." Pregnant Then Screwed then wrote a pre action protocol letter to the Chancellor and the response from their legal team correlated maternity leave to a sabbatical or any other type of leave. Pregnant Then Screwed felt they had no choice but to issue legal proceedings."*

See here for the press release.

For employees, the furlough scheme has been extended until 31 March 2020. See also here for the Coronavirus Act 2020 Functions of her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Health and safety at work

Administrative Court, [2020] EWHC 3050, 13 November 2020, R (Independent Workers' Union of Great Britain) v Secretary of State for Work and Pensions and another

In this case, the IWU successfully argued that the UK had failed to properly transpose, the Framework Directive 89/391/EC and Council Directive 89/656/EC on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace because the Directive requires Member States to confer certain protections on 'workers', while the UK legislation protects only 'employees'.

3 Implications of CJEU Rulings

3.1 Collective redundancies

CJEU case C-300/19, 11 November 2020, Marclean Technologies

In case C-300/19, the Court ruled:

> *"L'article 1er, paragraphe 1, premier alinéa, sous a), de la directive 98/59/CE du Conseil, du 20 juillet 1998, concernant le rapprochement des législations des États membres relatives aux licenciements collectifs, doit être interprété en ce sens que, aux fins d'apprécier si un licenciement individuel contesté fait partie d'un licenciement collectif, la période de référence prévue à cette disposition pour déterminer l'existence d'un licenciement collectif doit être calculée en prenant en compte toute période de 30 ou de 90 jours consécutifs au cours de laquelle ce licenciement individuel est intervenu et pendant laquelle s'est produit le plus grand nombre de licenciements effectués par l'employeur pour un ou plusieurs motifs non inhérents à la personne du travailleur, au sens de cette même disposition."*

In the UK, if the employer proposes to dismiss 20 or more employees as redundant at one establishment in any 90-day period, the employer must inform and consult with appropriate representatives of the affected employees for a 30-day period (for 20-99 proposed redundancies) or a 45-day period (for 100 or more proposed redundancies) (Trade Union and Labour Relations (Consolidation) Act 1992, section 188, see here). How to calculate this period has not caused any issues. The calculation of the number of days has not proved a problem in the UK. However, there has been much dispute about the UK's interpretation of the word 'proposing', and whether that effectively implements the Directive. One commentator notes:

> *"This important ECJ decision means that employers should be careful and look both back and forward from an individual dismissal to determine whether there are 20 or more proposed dismissals. This will be particularly important where employers are effecting redundancies in batches. For example, an employer may initially propose 15 redundancies and then later, if business has not*

improved, propose a further ten. If the past and proposed redundancies take effect in the same 90-day period the duty to collectively consult over all the proposed redundancies (some of which may already be underway/have happened) could be triggered. This will cause a number of practical difficulties which do not appear to have been considered or addressed by the ECJ.

Careful planning will be required. Employers will need to take into account both past and anticipated staffing reductions across their business, in order to assess whether the duty to collectively consult has been triggered.

The ECJ decision also raises questions over whether TULCRA is compliant with the Directive. Among other things, TULCRA may be inconsistent with the Directive because it states 'in determining how many employees an employer is proposing to dismiss as redundant no account shall be taken of employees in respect of whose proposed dismissals consultation has already begun'."

Another commentator notes:

"The ECJ's decision raises three main specific issues for employers.

First, many have recently made redundancies due to coronavirus. They may not, however, have undertaken a collective consultation process or filed an HR1 on the basis that they were never proposing 20 or more redundancies within a future period of 90 days at one establishment.

The ECJ's decision suggests that, depending on the circumstances, such an approach might have been unlawful. If a legal challenge were made, it could be argued that earlier redundancies predating the later proposal to dismiss should also be counted in determining whether collective consultation was required. This is especially problematic for employers because the starting point for compensation will be a protective award of 90 days' uncapped pay if no consultation was undertaken. Even if employees signed settlement agreements, protective award claims can only be validly settled via an Acas COT3 agreement (albeit it is possible to include strong deterrents to pursuing legal action in settlement agreements).

Employers in the private sector may nevertheless take comfort from the disparity between the wording of TULRCA and the ECJ's interpretation of the Directive, as arguably it is not possible for an Employment Tribunal (ET) to construe TULRCA in a manner consistent with it. If that is correct, unless an employer is an 'emanation of the state' against which the Directive itself can be directly enforced, employees would have to bring what is known as a 'Francovich claim' - legal action directly against the government for its failure properly to transpose the Directive. (However, Francovich claims will not be possible after 31 December 2020 when the Brexit transition period ends - see below.)

Secondly, an employer may be planning future redundancies. A prudent approach to determining whether it needs to undertake a collective redundancy process would now involve counting all dismissals, including all those recently made, those in respect of which consultation has already begun, and those proposed for the future, within the relevant rolling 90-day period, in order to determine whether collective consultation is required. This is despite section 188(3) of TULRCA providing that 'in determining how many employees an employer is proposing to dismiss as redundant, no account shall be taken of employees in respect of whose proposed dismissals consultation has already begun'. (No similar wording appears in the Directive.)

Some employers may feel that the disparity between the ECJ's interpretation of the Directive and the clear wording of TULRCA means that such an approach

would be unduly cautious, given the cost of retaining employees during a consultation process for an extended period who they may feel are clearly and unavoidably redundant due to the impact of Covid-19. They might also consider it somewhat nonsensical to restart the clock on consultation with individuals in respect of whom discussions may already be far advanced or even concluded. Nonetheless, employers should remember that failing to notify the government of a collective redundancy is a criminal offence and the penalties for not undertaking collective consultation are punitive in nature.

Finally, as the ECJ did not refer to Junk v Kühnel, it appears to remain good law. This latest judgment should not affect the continuing importance of the concept of 'proposing' or 'contemplating' redundancies (as referred to in TULRCA and the Directive respectively). This means it is more important than ever for employers accurately to document their processes in order to be able to demonstrate their intentions at any time. They should ensure that they document how and why those intentions may have changed in light of new circumstances, if further redundancies become necessary shortly after others."

4 Other Relevant Information

4.1 Immigration Act

Royal Assent has been given to the Immigration and Social Security Co-ordination (EU Withdrawal) Bill, now Act 2020, which turns off the free movement of persons on 31 December 2020.


Publications Office