Flash Reports on Labour Law January 2021

Summary and country reports

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Executive Summary

National level developments

In December 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 the 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 lower the risk of infection in the workplace

All countries still have measures in place to prevent the spread of the virus in the workplace. States of emergency and lockdowns have been extended in several countries, including **Austria**, the **Czech Republic**, **Cyprus**, **Italy**, **the Netherlands** **Portugal**, **Romania**, **Slovakia** and **Slovenia**. Restrictions in connection with traveling, as well as with regard to the operation of businesses and other establishments remain in force in many countries, such as **Croatia**, the **Czech Republic**, **Denmark**, **Finland**, **Portugal** and **Slovakia**.

Companies are required to allow their employees to work from home where possible in **Germany** and **Portugal**, while in the **Netherlands**, the government is considering making teleworking compulsory. Similarly, in **Ireland**, the government plans to give employees the right to request remote working. Employers in **Italy** and **Greece** may now also require employees to telework without having to agree to changes to their contract of employment. The social partners have agreed on a home office scheme to be implemented by legislation in **Austria**. At the same time, a new national collective agreement on recommended or mandatory teleworking due to the coronavirus was concluded in **Belgium**. Furthermore, in **Luxembourg**, the new agreement on teleworking by the social partners has been declared generally applicable by the government.

Specific health and safety measures for workplaces to reduce the risk of contagion are in place in many states. In **Italy**, public and private employers must now guarantee exceptional health surveillance for "fragile" workers. In **Austria**, the social partners concluded an agreement on COVID-19 testing, and an exemption testing scheme was established. Furthermore, certain aspects of the provision of occupational medical services have been modified in response to the epidemiological developments in the **Czech Republic**. Similarly, a decree in **France** has given prerogatives to the occupational physician in the fight against COVID-19.

Measures to alleviate the financial consequences for businesses and workers

To alleviate the adverse effects of the COVID-19 crisis, state-supported short-time work, temporary layoffs or equivalent wage guarantee schemes remain in place in many countries. In December 2020, previously enacted temporary schemes have been provisionally extended in **Greece**, **Romania**, **Spain** and **Norway**. In the **United Kingdom**, the Coronavirus Job Retention Scheme was extended until 30 April 2021. In **Cyprus**, the Ministry of Labour has issued a decree announcing a number of measures to support workers and businesses affected by the lockdown. In **Slovenia**, the eighth anti-corona package, consisting of various measures aimed at mitigating the negative economic and social consequences of the pandemic, is being adopted.

In **Finland**, the temporary extension to entrepreneurs of the right to unemployment benefits has been prolonged until the end of June 2021. Furthermore, in **Portugal**, the conditions that must be fulfilled by companies to be

entitled to this financial support were amended, and a new simplified support procedure for micro-enterprises facing a business crisis situation was introduced. In **Luxembourg**, interests on unpaid employers' social security contributions were suspended. Finally, in **Estonia**, subsidies to provide an income for employees and to help employers overcome the economic hardships are being paid, and specific measures to help employers have been introduced for two regions hit particularly hard by COVID-19.

In **Norway**, financial benefits paid by the employer during temporary layoffs will now be deducted from the unemployment benefits. In **Portugal**, an extraordinary income support aims to ensure the continuity of income for people in a situation of particular economic vulnerability caused by the pandemic. Also, employees who are laid off are guaranteed 100 per cent of their regular pay, up to an amount equal to three times the national minimum wage.

In **Portugal**, extraordinary support in case of a reduction in economic activity of self-employed workers because of the suspension of business activities as a result of a legislative or administrative decision was granted. In **Croatia**, relief measures consisting of financial support to workers in the cultural sectors was introduced.

Leave entitlements and social security

Special rules on entitlements to family- and care-related leave and sick leave continue to apply in many countries.

The payment of sickness benefits has been prolonged in **Estonia**. In the **Czech Republic**, an act on an extraordinary payment for employees during an ordered quarantine is being deliberated at government level.

Government-funded financial support to cover paid leave days taken during a period of partial activity was introduced in **France**. Similarly, in **Denmark**, a new tripartite agreement has extended the state-funded salary compensation model, imposing a maximum of five days of forced leave for employees.

In **Portugal**, the suspension of teaching activities has led to an exceptional and temporary regime of justified leave for family obligations, which applies to workers who have a child under the age of 12 years. At the same time, the legislation of family support leave in **Luxembourg** has been modified, extending the scheme's duration and scope. Finally, in **Romania**, the measures granting days off to parents-employees, whose children have online classes, have been extended.

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

Topic	Countries
Restriction of business activity due to lockdown measures	HR CY CZ DK IT LU NL NO PT SI
Teleworking / working from home	AT BE DE EL IE IT LU NL PT
Benefits for workers / self-employed prevented from working	HR NO PT RO SI ES UK
Employer subsidies	EE FI LU NL NO PT RO
State of emergency	CZ IT PT RO SK SI
Restrictions of free movement/ travel ban	CZ DK FI NO SK SI
Health and safety measures	AT CZ FR DE IT
Special care leave / parental leave	LU PT RO
Wage compensation during quarantine	CZ EE
Other leave entitlements	FR DK

Other developments

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

Posting of workers

Directive 2018/957/EC on the posting of workers within the framework of the provision of services has been transposed in **Bulgaria**.

In **France**, the Ministry of Labour issued an instruction dealing with the labour law aspects of the posting of workers in France and their monitoring. Also, following a preliminary ruling of the CJEU, the Supreme Court ruled that the existence of E101 and A1 certificates does not preclude a conviction for undeclared work for failure to carry out the pre-employment declaration.

Following CJEU case C-815/18, 01 December 2020, *Van den Bosch*, in **Lithuania**, the Vilnius Regional Court decided in favour of the interpretation that long haul drivers working in other Member States do fall under the personal scope of the legislation on posting of mobile workers.

Occupational safety and health

In **Croatia**, an amendment to the Ordinance on the Protection of Workers from Exposure to Hazardous Chemicals at Work, Exposure Limit Values and Biological Limit Values has been issued to transpose Directive (EU) 2019/1831 Directive (EU) 2019/983 and Directive (EU) 2019/130. Furthermore, the Ordinance on the Use of Personal Protective Equipment was amended to transpose Directive 89/656/EEC, as amended by Directive (EU) 2019/1832.

In **Germany**, the Federal Constitutional Court published its written reasons for rejecting several applications for a temporary injunction to prevent parts of the Act to Improve the Enforcement of Occupational Health and Safety, regulating the meat industry, from coming into force.

In **Finland**, the Ministry of Social and Health Affairs has circulated a draft government proposal on legislative changes related to the Market Surveillance Regulation as well as changes to the Occupational Safety and Health Act.

Transfer of undertakings

According to the Federal Labour Court in **Germany**, the acquirer of a business in insolvency is liable for claims of the transferred employees to company pension benefits on a pro rata basis only insofar as the period of service completed after the commencement of insolvency proceedings is concerned.

The **Norwegian** Supreme Court found that the obligation to pay occupational pension premiums can be transferred to the new employer in the event of a transfer of undertaking.

Fixed-term work

In **Austria**, a Supreme Court ruling dealt with the possibility of terminating a fixed-term contract by giving notice, finding that such a clause is permissible if there is a valid reason for it.

In **Spain**, the Supreme Court ruled that the employment contract signed between a worker and a subcontractor company cannot be concluded for a fixed term if no specific and valid reasons exist.

Other aspects

In **Austria**, the Supreme Court dealt with the notion of employment relationship, taking into consideration the reality of the employment relationship type rather than merely its legal arrangements.

In **Bulgaria**, the Maritime Safety Committee of the International Maritime Organization published regulations on

noise levels on board ships and ships operating in polar waters.

In **Belgium**, the paternity leave scheme for fathers has been implemented and extended.

According to the Federal Administrative Court in **Germany**, Sunday work to prevent disproportionate damage may only be authorised in case of a temporary special situation attributable to an external cause.

The **Italian** Parliament has authorised ratification of the ILO Violence and Harassment Convention (No. 190).

Liechtenstein has adopted an amendment to the national law to transpose Regulation (EU) 2016/589, which aims to fundamentally redesign the European Employment Services network (EURES).

In **Luxembourg**, the Supreme Court ruled on a case concerning the dismissal of a pregnant worker during her probation period.

In **Poland**, a new law introduced to bring Polish law in line with Directive 2018/958 amended the Act on the Principles for Recognising Professional Qualifications Acquired in the Member States of the European Union.

In **Spain**, the central state administration published a new gender equality plan. Also, the Supreme Court has decided that the obligation imposed on workers to provide the employer with his/her income tax return violates the worker's right to privacy and the right to protection of personal data.

Table 2: Other major developments

Topic	Countries
Minimum wage	EE HU RO SI
Posting of workers	BU FR LT
Health and safety	HR DE FI
Transfer of undertakings	DE NO
Fixed-term work	AT ES
Seafarers	BU
Parental leave	LU
Sunday work	DE
EURES	LI
Right to privacy	ES
Professional qualifications	PL
Notion of employee	AT
Gender equality	ES

Austria

Summary

(I) The COVID-19 Measures Act and the respective Ordinances were amended to establish an exemption testing scheme following the 3rd lockdown.

(II) The social partners have concluded a General Collective Bargaining Agreement on COVID-19 Testing. Moreover, the Social Partner and Government Agreement on the Home Office Scheme will be implemented in the near future.

(III) A Supreme Court ruling dealt with the possibility of terminating a fixed-term contract by giving notice, while another one dealt with the notion of employee.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 COVID-19 Measures Act

Currently and at least until 07 February 2021, Austria is in its third lockdown. The Austrian legislator amended the Austrian Federal Act on Provisional Measures to Prevent the Spread of COVID-19 ('COVID-19 Measures Act'), which was first enacted at the outbreak of the COVID-19 crisis on 15 March 2020, on 15 January 2021. One of its aims was to provide the legal grounds for the so-called 'Exemption Testing' (*Reintesten*) scheme. The exemption testing scheme is an attempt to allow for a more open society amidst the pandemic while at the same time containing and limiting the spread of the SARS COVID-19 virus. This scheme partially affects workplaces/certain staff.

As part of this scheme, the COVID-19 Measures Act now 'allows' for the enactment of ministerial administrative decrees (ordinances) that:

- make access to facilities/work sites or other areas where interactions of longer duration with others is to be expected, conditional on the provision of proof of a low epidemiological risk (e.g. a negative COVID-19 test result) for customers or visitors;
- make access to certain facilities/work sites conditional on the provision of proof of a low epidemiological risk (e.g. a negative COVID-19 test result) for staff.

'Exemption testing' for staff is only possible for staff in facilities in which client or customer contacts take place, or if the legally prescribed distance cannot be kept as well as in retirement homes, nursing homes, homes for people with disabilities, and in hospitals and sanatoriums.

The required proof of a low epidemiological risk may be substituted by wearing an FFP2 mask (or a mask of a higher standard; masks may not have an exhaust valve) unless the concerned staff work on sites with close contacts to vulnerable groups (such as patients, residents of retirement homes, nursing homes and homes for people with disabilities).

1.1.2 Third Emergency Measures Ordinance

As of 25 January 2021, based on the COVID-19 Measures Act, the third COVID-19 Emergency Measures Ordinance stipulates the following preventive measures for the workplace:

- Extended 'standard' preventive measures: at facilities/work sites, employers must ensure that a distance of at least two metres is maintained between

workers (instead of the previous one metre distance), and a tight-fitting mechanical protective device covering the mouth and nose area (e.g. masks, not shields) must be worn, unless there is no physical contact with others or the risk of infection is minimised by other appropriate protective measures (e.g. installation of partitions or plexiglass walls and, if technical protective measures would make it impossible to perform the work, organisational protective measures such as the establishment of fixed teams), see § 6 (2) of the Ordinance.

- 'Exemption testing': the Ordinance lists a group of employees who may only access facilities/work sites if their SARS COVID-19 test was negative over the past seven days. This group of employees currently includes the following (see § 6 (3) of the Ordinance):
  1. Employees of elementary educational institutions who are in direct contact with children in the context of care and support;
  2. Teachers who are in direct contact with pupils;
  3. Workers in warehouse logistics areas where the minimum distance of two metres cannot be maintained;
  4. Workers with direct contact with customers;
  5. Workers in administrative authorities and administrative courts who are directly in charge of communicating with parties.

1.1.3 Collective Agreement on COVID-19 Testing

In accordance with the exemption testing scheme, the social partners concluded a General Collective Bargaining Agreement on Covid-19 Testing, covering not only specific sectors, but all employees working for employers who are members of the Economic Chamber. The CBA contains regulations on the following three issues:

Working time and SARS COVID-19: when employees are required to present a negative SARS COVID-19 test to enter their workplace, employees shall be released from work (while they continue to receive remuneration) for the time it takes to undergo the testing (including travelling to and from the testing site). If the testing is conducted at the workplace, the test should be done on the way from home to the workplace or on the way from the workplace to home. Employees who are not required to show a negative SARS COVID-19 are encouraged to take a test outside working hours. If this is not possible, paid leave of absence for testing shall be granted at most once a week, and the date of the test shall be mutually agreed.

No discrimination based on testing/positive test results: employees may not be dismissed, terminated or otherwise disadvantaged because they have taken a SARS-CoV-2 or because their test result is positive.

Relief when required to wear a mask permanently ('mask breaks'): employees who are required to wear a mask when working due to laws or regulations in connection with SARS-CoV-2 are entitled to remove their mask in a safe environment for at least 10 minutes after wearing it for three hours. The break from wearing a mask can be a break from working, or the employee can be moved to another task/work site, where possible, to remove the mask because other protective measures have been put in place.

Additional information on the exemption testing scheme is available here, here and here.

The Explanatory Note on the Collective Bargaining Agreement (*Erläuterungen zum Generalkollektivvertrag Corona-Test - WKO*) is available here.

Press on the General Collective Bargaining Agreement is available here and here.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Fixed-term work

Austrian Supreme Court, 9 ObA 101//20y, 25 November 2020

As regards terminations of employment contracts, the law itself does not provide for the possibility to terminate fixed-term employment contracts by giving notice. This possibility can be agreed upon in the contract itself, however, by including a termination clause. The courts have accepted such clauses for 'longer' fixed-term contracts if the possibility to terminate is reasonably proportionate to the length of the fixed term. The jurisprudence thereby also takes the reasons for the fixed term into account as well as the design of the termination clause. It can generally be said that a termination clause is considered acceptable for a one-year fixed-term contract.

This period can be shorter if there is a valid reason for the fixed term (which is not necessary under Austrian law for the first fixed-term contract). The Supreme Court accepted a seasonal position with a fixed term of four months, a notice period of two weeks according to the applicable collective agreement and an exclusion to give notice in the last month. It also permitted a two weeks' notice period for subsidised reintegration jobs with a fixed term of six months. Not accepted were seasonal jobs for approximately 3.5 months or 3 months and a notice period of two weeks.

The present case dealt with a subsidised job for four months and a notice period of two weeks.

The Supreme Court again refined its line of jurisprudence concerning the combination of fixed-term employment and notice clauses. In the present case, it considered such a clause to be permissible based on the existence of a valid reason for it, as the special constellation concerning the subsidy by the public employment service only ran for four months and because the special reason for the employment relationship was to increase the individual's chances of placement by acquiring skills, optimising the individual's work attitude, strengthening self-concept and personal orientation, in a context in which the employer also had to provide training measures and socio-educational support. In such special circumstances, in particular, there is a slightly higher probability—even after the probation period (one month)—that the continuation of the contractual relationship is not suitable for achieving the intended purpose of promoting the reintegration of a transit employee into the general labour market and therefore, the possibility of giving notice, even if the contract was only concluded for a relatively short fixed term, can be justified.

The ruling deals with the conflict between the general principle in Austrian labour law that a fixed term can be agreed upon freely, on the one hand, and the problem that fixed-term employment relationships can be abused, especially when combined with a termination clause, and to thereby have 'the best of both worlds'. The legal permissibility of such a combination with a fixed term below a year is restricted to special reasons (subsidies, seasonal work) and therefore, an abuse of fixed-term employment is not very likely. In practice, it can be expected that such combinations will be even less frequent, as the statutory notice period will be extended to six weeks in general from 01 July 2021 and thus, the flexibility provided by the now still acceptable very short notice periods for blue collar workers will no longer be possible.

2.2 Notion of employee

Austrian Supreme Court, 9 ObA 43/02v, 25 November 2020

Austrian labour law does not include a legal definition of the notion of employee. Therefore, the boundary between an employment contract and a so called 'free service contract' (*freier Dienstvertrag*) not covered by labour and employment legislation is not always that clear in practice. The jurisprudence over decades has developed an understanding that an employment contract differs from a free service contract in that the employee is personally dependent on the employer, i.e. the employee is subject to the functional authority of the employer. However, the various criteria of personal dependence do not all have to be present together, but can exist to varying degrees. The decisive factor is whether the characteristics of personal dependence predominate in terms of their weight and significance when viewed as a whole. The characteristics that speak for the existence of personal dependence are, in general, above all the fact that the individual required to perform work is bound by instructions, in particular with regard to working hours, place of work and work-related conduct, the employee's personal work obligation, external determination of the work, the economic success that is due to the employer, the functional integration of the service into the employer's operational structure, including subjection to control and the provision of work equipment by the employer (Supreme Court of 28 June 2018, 9 ObA 50/18w and many others).

The free service contract differs from this in particular by the possibility of the free service provider to arrange the course of the work him-/herself, i.e. without being bound to certain working hours and to instructions that are characteristic for an employment contract, and the possibility to change the self-chosen arrangement at any time. The obligation to provide regular and continuous service does not in itself prevent the assumption of a free employment relationship (Supreme Court of 24 June 2016, 9 Ob A 40/16x).

The present case examined whether a journalist, who had been working as a reporter for a local newspaper since 1997 for about 30 hours a week from Wednesday to Sunday, and had never taken leave of more than the five weeks provided by law, was working under an employment contract or a free service contract. Until September 2018, she worked in the local office of the newspaper and after its closure, from her home office.

The employer claimed she was working under a free service contract based on the formal high flexibility of the contractual arrangement that left a lot of leeway for the journalist. This was also accepted by the Labour Court as well as the Court of Appeal that referred to the peculiarities of journalistic work. The lack of obligation to accept assignments and to be present, the lack of commitment to predefined working times and the voluntary participation in editorial meetings spoke in favour of a freelance employment contract, whereas the obligation to account for absences and to have longer absences approved, for example, would speak in favour of an employment contract in the case of journalists. In this particular case, the contract was considered a free service contract by the lower court. The parties had not reached any concrete agreement on the extent of the plaintiff's presence in the local editorial office. Rather, the plaintiff's working hours were merely determined by the 'printing schedule' or 'printing deadline'. It could not be inferred from the findings that the plaintiff was obligated to be present at the local editorial office, to participate in the editorial meetings, that she was not free to choose her place of work or that she had to agree with the employer on when to take leave. The plaintiff was also not subject to instructions on the content of articles. The plaintiff's Sunday work in the extent of at least six hours due to the editorial deadline, could not constitute a genuine employment contract when the criteria established were considered as a whole. The plaintiff's personal dependence was therefore not considered sufficient to prove the existence of a regular employment contract.

The Supreme Court decided otherwise and considered this constellation to be an employment contract based on the primacy of facts, i.e. the way the parties 'lived' their contractual relationship over more than two decades. It concluded that the plaintiff, who exclusively worked for the defendant, had been intensively involved in the editorial process for many years, so that the possibilities of freely organising the employment relationship as emphasised by the Court of Appeal could only be regarded to be of a purely theoretical nature. In the overall consideration of the contractual relationship actually 'lived' by the parties, the possibilities of freely organising the relationship did not have a decisive impact. Due to the established factual integration of the plaintiff into the company organisation, the defendant could count on the regular presence of the plaintiff, even without a special legal commitment and, accordingly, on the continuation of her activities in the future to the same extent as in the past.

This case is a good example of the different outcomes when taking the factual aspects of a case into account or not. If a court only looks at the mere legal arrangements and not at the contractual relationship actually 'lived' by the parties, the situation appears very different. The first approach very much favours employers who use elaborate contracts that provide a high degree of flexibility for employees but that are not expected to be exercised in practice, and thus the 'lived' relationship is an employment relationship.

This approach is very much in line with the recent decision of the CJEU in *Yodel*, which stressed that contractual discretion can only be decisive provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his or her putative employer. In the present Austrian case, the Supreme Court considered the contractual freedoms to in fact be of 'a purely theoretical nature', and therefore classified the work relationship as one of subordination and consequently as an employment relationship.

3 Implications of CJEU Rulings

Nothing to report.

4 Other relevant information

4.1 Teleworking

Following lengthy negotiations, the social partners and the government have agreed on a home office scheme to be implemented by legislation. The agreement consists of the following main points:

Voluntary agreement: home office—whether partially or fully—remains voluntary, subject to agreement between the employer and employee. The agreement must be concluded in writing and can be terminated by either party for good cause by giving one month's notice.

Works council agreement: establishments with a works council may agree on a works council agreement containing generally applicable rules and regulations for the organisation of home office. There is no recourse to a conciliation board in cases of disagreement.

Labour law regulations remain applicable: all provisions on working and rest periods as well as the regulation on employee liability (de facto limiting employee liability) remain applicable in the home office. As regards employee liability, any damage caused by members of the household (or pets) to work equipment provided by the employer is to be attributed to the employee.

Employee protection: legislation on technical employee protection currently applicable to the home office (e.g. regulation on VDU workstations) remains unchanged. A sample evaluation of home office workplaces will be developed. It will be expressly regulated that the labour inspectorate does not have the right to enter the private homes of workers to inspect home offices.

Work accident insurance: the current extension of coverage of work accidents in the home office during the COVID-19 pandemic will be permanently incorporated into law.

Work equipment: the provision of digital work equipment by the employer is not a taxable benefit in kind. Payments by employers to cover the additional costs of the home office for laptops and mobile devices are tax-free up to EUR 300 annually. In addition, employees can also deduct other expenses up to EUR 300 as income-related expenses. This regulation is already applicable to the 2020 employee tax declaration.

Main points of the Home Working Scheme are available here and here.

Press on Home Office Scheme is available here.

Belgium

Summary

(I) The social partners have concluded a Collective Bargaining Agreement on the modalities of teleworking in situations where it is imposed or strongly recommended by the government to fight the pandemic.

(II) The paternity leave scheme for young fathers has been implemented and extended.

(III) The new regulation on association work regulates paid services provided during an individual's free time for associations in the sports sector during the year 2021.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Teleworking

On 26 January 2021, the social partners concluded a new national intersectoral Collective Bargaining Agreement (CBA) No. 149 in the National Labour Council on recommended or mandatory teleworking due to corona.

The following summarises the main points of the new CBA.

Scope

CBA No. 149 is a supplementary CBA for companies in the private sector.

The CBA only applies to teleworking in an undertaking when:

- it relates to teleworking that has been made compulsory or recommended by the public authorities to prevent the spread of the coronavirus;
- and the undertaking has not, by 01 January 2021, developed a teleworking scheme as provided for in CBA No. 85 of 09 November 2005 on structural teleworking or occasional teleworking, or as provided for by in the Law of 05 March 2017 on Workable and Flexible Work.

The existing agreements remain applicable in situations for which the government strongly recommends or imposes teleworking as part of the measures to fight the coronavirus.

A new and temporary framework for working during the pandemic has now been established by the social partners for those employers who have not yet developed a legal framework on teleworking. These employers must make agreements within this framework.

Clarifying the rules of the CBA at company level

This can be done:

- In a CBA at company level;
- through an amendment to the company's work rules;
- Through individual agreements;
- In a teleworking policy.

Rights and obligations of the employee during the pandemic

CBA No. 149 includes the principle of equal treatment: in principle, the teleworker is entitled to the same rights and obligations in terms of working conditions as those applied in the workplace.

The teleworkers are also entitled to the same collective rights, e.g. the right to communicate with the worker representatives and vice versa.

Specific terms and conditions of employment may be agreed to supplement or derogate from those applied when the employee works at the employer's premises (infra).

Agreements to be made with the employee during the pandemic

Agreements must be made with each employee regarding:

- the equipment and/or the costs thereof. If the employee uses his/her own equipment: the reimbursement the worker receive for this;
- the work schedule; in the absence of specific agreements to the contrary, the worker shall follow the work schedule that he/she would observe if he/she were working at the company's premises. CBA No. 149 also stipulates that the teleworker shall organise his/her work within the framework of the working hours applicable in the company;
- control of the results to be achieved and/or the assessment criteria. CBA No. 149 expressly stipulates that the teleworker's workload and performance standards shall be the same as those applied when he/she works at the employer's premises;
- the times during which the teleworker must be reachable or cannot be reached. Agreements on the accessibility of the worker which aim to reconcile teleworking and the employee's private life.

Monitoring of the worker by the employer

The employer has the possibility of monitoring the results and/or performance of the work. This control cannot be continuous, however. Monitoring must take place in an appropriate and proportionate manner. The employer may check whether the work to be carried out within the context of teleworking has actually been carried out properly.

The worker must be informed about how the employer will monitor him/her, if necessary. Finally, the monitoring must be carried out with respect for the employee's private life.

Well-being during teleworking in times of corona

The employer also has the obligation to ensure the employee's well-being at work during teleworking. These obligations are described in detail in a separate chapter of CBA No. 149.

Among other things, a multidisciplinary risk analysis must be carried out, taking into account the psychosocial dimension as well as the health aspects of teleworking. Teleworkers during the pandemic must be informed about the company's policy on well-being at work, specifically in relation to teleworking.

The employer must take appropriate measures to maintain the teleworkers' attachment to the company and avoid isolation during the pandemic.

Scope ratione temporis of CBA No. 149

CBA No. 149 entered into force on 26 January 2021. It has been concluded for a fixed period of time and will cease on 31 December 2021. The CBA will expire if the obligation or recommendation by the government to implement teleworking is abolished.

Since March 2020, the legislator has not explicitly stipulated which rules apply to teleworking during the pandemic in the successive legal measures in the fight against COVID-19 (for the relevant ministerial decrees, see Flash Report of November 2020), which require or at least recommend teleworking where possible (see Advice of the National Labour Council No. 2195 of 26 January 2021). As a result, it is unclear which regulations apply to teleworking during the pandemic. CBA No. 149 indicates that teleworking during the pandemic could be included in both the existing regulations on structural teleworking and on occasional teleworking.

Companies that have already developed a teleworking policy under one of these two regulations on teleworking are not affected.

Companies that have not yet developed an occasional or structural teleworking scheme and have introduced teleworking due to COVID-19, however, must now develop such a policy on the basis of CBA No. 149. The commentary on Article 3 of CBA No. 149 states, however, that CBA No. 149 does not prevent the development of an open-ended scheme, e.g. with a view to introducing structural teleworking within the framework of CBA No. 85.

There is limited overlap with occasional teleworking as regulated in the Law of 5 March 2017 on Workable and Flexible Work CBA No. 85. This Law in Article 26 stipulates that the employee is entitled to teleworking if, due to force majeure, he/she cannot perform his/her work at the employer's premises. The fact that the government has made teleworking compulsory in times of corona constitutes force majeure and the employee can therefore not carry out his/her work at the employer's premises.

1.2 Other legislative measures

1.2.1 Paternity leave

The Royal Decree of 10 January 2021 amending the Royal Decree of 03 July 1996 implementing the Law on compulsory insurance for medical care and benefits, coordinated on 14 July 1994, has been introduced (*Moniteur belge* of 18 January 2021; available here).

The Programme Law of 20 December 2020 extended birth leave for employees who have become fathers (see December 2020 Flash Report). For births from 01 January 2021 onwards, the 10-day birth leave has increased by five days to a total of 15 days. For births from 01 January 2023 onwards, this number shall be increased by an additional 5 days, bringing the total to 20 days. During the first three days of absence, the employee will receive his full wages, and for the following days, he will receive a social security allowance within the framework of sickness and invalidity insurance. The amount of the benefit is 82 per cent of the employee's gross salary, which is capped. The monthly limit is EUR 3 600.

This Royal Decree is an implementing measure of a law previously drawn up in Parliament. It is typical for Belgian social law that the loss of income due to inactivity because of the birth of a child is shared between the employer, who continues to pay the employee's wages for part of the period of inactivity, and that the social security system subsequently provides a replacement income.

1.2.2 Association work

The Law on Association Work (*Wet op het verenigingswerk*) of 24 December 2020 (*Moniteur belge* 31 December 2020; available here) has been introduced.

It should be noted that the Belgian Constitutional Court nullified the entire Law on Untaxed Additional Income of 18 July 2018 on 23 April 2020 (see August 2018 and May 2020 Flash Reports). That law established an advantageous scheme for association work, as well as for 'occasional services between citizens' and services provided via recognised electronic platforms. According to the Law of 18 July 2018, individuals could earn up to EUR 6 000 per year untaxed in addition to their main activity as employees or self-employed persons. The nullification of this law took effect from 01 January 2021.

At the last moment, Federal Parliament approved a law allowing for association work. The new law, however, only applies to sports clubs or sports activities. Additional work in other associations is not possible for the time being.

The new law will apply from 01 January 2021 and will cease to apply on 31 December 2021. Within that time, Parliament aims to elaborate a definitive regulation for all associations.

With the introduction of the new law, untaxed additional income is also a thing of the past. The clubs must pay social security contributions in the amount of 10 per cent of the total remuneration. The association worker must pay 10 per cent income tax on the remuneration.

The sports association and the association worker must conclude an agreement for association work (see Art. 6-21 of the Law). The association worker must be at least 18 years of age when the work commences. In addition, he/she must also have been employed by one or more employers during the third quarter of the respective year prior to the start of the association work. The work for the employer(s) may not consist of a career break or time credit only.

The association contract is not an employment contract, but a specific contract for the performance of association work. It must be concluded at the latest when the association work commences. It can be concluded in writing or electronically.

Just like an employee, the association worker benefits from a limitation of liability under civil law so that he/she can only be held liable for his/her intentional or serious faults or for his/her habitual less serious faults (Art. 21).

If the sports club employs an association worker, it must provide the association worker with adequate insurance to cover any physical damage suffered by the worker as a result of an accident that occurred during the performance of the association work or on the way to and from these activities (Art. 22).

The sports club must also provide the necessary protection in terms of safety and well-being at work.

The agreement may be entered into for maximum one year. Within a period of one calendar year, a maximum of three contracts, consecutive or otherwise, may be concluded with the same association worker.

An association worker may work a maximum of 50 hours per month on average. That average must be calculated per quarter.

Although an agreement for association work is not an employment contract, certain rules have been adopted from labour law. These are the most important ones:

- A fixed or variable weekly or monthly association work schedule must be drawn up. Deviation from this schedule is possible with written consent;
- During a 7-day period, there must be at least one rest break of 24 hours.

The implementation of the agreement on association work is suspended, among other things, during the period in which the association work cannot be carried out due to illness or accident or during the period in which the association work cannot be carried out due to the application of a regulation issued by the government. During the period of suspension of the association work contract, the association worker shall not be entitled to any compensation.

The agreement may also be terminated prematurely. In doing so, a notice period of at least:

- 7 calendar days must be respected if the contract's duration was less than 6 months;
- 14 calendar days if the contract's duration was at least 6 months.

If this notice period is not observed, dismissal compensation of EUR 159.75 shall be payable if the contract was concluded for less than 6 months. For contracts concluded for more than 6 months, the compensation is EUR 319.5.

Each party may terminate the association work contract without notice or prior to the expiry of the agreed term for gross misconduct.

The association worker must earn a minimum of EUR 5.10 per hour in 2021, with a maximum of EUR 532.50 per month.

This means that an association worker may earn up to a maximum of EUR 6 390 annually.

The criticism of the Constitutional Court focused on the remuneration received by the association worker and the social and fiscal treatment of this remuneration. Indeed, the system of association work in force until 31 December 2020 provided that, under certain conditions, this remuneration was fully exempt from social security contributions and income tax.

The new law offers a solution. Today, income taxes and social security contributions are payable, albeit at much lower rates than the regular ones. The greatest advantage of the new law is the retention of the principle of a separate statute between voluntary work and professional work. This preserves the legal continuum and does not create another grey zone between volunteer work and regular employment.

A disadvantage is the extra administrative burden for organisations as a result of the introduction of social security contributions to be paid by the organisations and the tax burden for the association worker, as well as the failure to take into account the specific sports context. In any case, the new law has been criticised much less than the previous law.

Association work is not voluntary work. Voluntary work is free and does not involve special administrative formalities. It does not require any declaration and is unpaid. Volunteers can only be reimbursed for their expenses. These expenses can be reimbursed via a lump sum of up to EUR 35.41 per day. Association work, however, is paid, and a number of additional formalities must be complied with. A person is not allowed to work for the same association as an association worker and as a volunteer during the same period.

2 National Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other relevant information

Nothing to report.

Bulgaria

Summary

(I) The Maritime Safety Committee of the International Maritime Organization published regulations on noise levels on board ships and ships operating in polar waters.

(II) An act transposing Directive 2018/957 regulates the conditions of posted 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 Maritime safety

The Ministry of Transport, Information Technologies and Communications has published the Code for Noise Levels on Board Ships adopted by the Maritime Safety Committee of the International Maritime Organization (published in State Gazette No. 6 of 22 January 2021).

1.2.2 Polar waters

The Ministry of Transport, Information Technologies and Communications published the International Code for Ships Operating in Polar Waters adopted by the Maritime Safety Committee of the International Maritime Organization (published in State Gazette No. 7 of 26 January 2021).

1.2.3 Posting of workers

With Decree No. 9 of 15 January 2021, the Council of Ministers adopted the Decree for Amendments and Supplements to the Ordinance on the Rules and Procedures for Posting and Secondment of Workers within the Framework of the Provision of Services (promulgated in State Gazette No. 6 of 22 January 2021). This act transposes Directive (EC) 2018/957. The changes concern labour remunerations, financial conditions for posting, travel expenses, financial terms pertaining to the posting outside those for the initial posting as well as construction activities to which the minimum general conditions about workers posted to Bulgaria shall not be applied.

1.2.4 Traineeships

Pursuant to Article 95a of the High Education Act, students may conclude contracts with employers for the purpose of an internship in the respected area for the period of education and on-the-job training after graduation. With Decree No. 12 of 20 January 2021, the Council of Ministers adopted the Ordinance on the Terms and Conditions for Ensuring the Payment of Tuition Fees for Students with Concluded Contracts with an Employer (promulgated in State Gazette No. 7 of 26 January 2021). This Ordinance regulates which employers may conclude such contracts, amend and terminate the contracts and the regulations on compensation to the high schools for the education of the students, which have concluded such contracts and do not pay taxes for certain specialisations.

2 National Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other relevant information

Nothing to report.

Croatia

Summary

(I) Relief measures consisting of financial support for the cultural sector have been introduced. Other epidemiological measures include the closure of businesses, such as coffee shops, bars, restaurants and gyms.

(II) An amendment to the Ordinance on the Protection of Workers from Exposure to Hazardous Chemicals at Work, Exposure Limit Values and Biological Limit Values has been issued, as well as an Ordinance on the Use of Personal Protective Equipment.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Relief measures for the cultural sector

The Ministry of Finance and the Ministry of Culture and Media are in charge of providing an additional HRK 20 000 000.00 in 2021, in direct support to the cultural sector in the wake of the COVID-19 pandemic, which will be distributed through the crisis fund to support the liquidity of the cultural sector - independent artists, self-employed and independent cultural professionals (Official Gazette No. 5/2021).

1.1.2 Restrictions to business operations

The Civil Protection Headquarters has issued necessary epidemiological measures (Decision on Amendments to the Decision on Necessary Epidemiological Measures Restricting Assemblies and Introducing Other Necessary Epidemiological Measures and Recommendations for the Prevention of Transmission of COVID-19 Diseases through Assemblies, Official Gazette No 8/2021).

It includes, among others, the closure of coffee shops, bars and restaurants, although they are allowed to prepare food and beverages and deliver them. Furthermore, gyms, fitness centres, sports and indoor recreation centres are closed, as are dance schools. Foreign language schools can offer online lessons only.

1.2 Other legislative developments

1.2.1 Occupational health and safety

The table of the indicative occupational exposure limit values for the chemical agents contained in the Ordinance on the Protection of Workers from Exposure to Hazardous Chemicals at Work, Exposure Limit Values and Biological Limit Values of 2018 has been amended (Amendment to the Ordinance on the Protection of Workers from Exposure to Hazardous Chemicals at Work, Exposure Limit Values and Biological Limit Values, Official Gazette No. 1/2021). The purpose of the amendment is to transpose the following Directives: Directive (EU) 2019/1831, Directive (EU) 2019/983 and Directive (EU) 2019/130.

The Ordinance on the Use of Personal Protective Equipment (Official Gazette No 5/2021) has been issued by the Minister of Labour to transpose Directive 89/656/EEC, as amended by Directive (EU) 2019/1832. The previous Ordinance of 2006 has been repealed.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other relevant information

Nothing to report.

Cyprus

Summary

A nationwide lockdown was imposed throughout January. The Ministry of Labour has introduced measures to support workers and businesses affected by the lockdown.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Lockdown and relief measures

The Minister of Health imposed a nationwide lockdown throughout January, following the exceptional but limited easing of measures for New Year's Eve and Christmas. A nationwide curfew has been imposed between 21:00 and 05:00. Bars, restaurants, pubs, cafes, and other hospitality and catering venues must close at 19:00. Only food delivery is permitted after 19:00. Face masks remain compulsory in both indoor and outdoor public spaces and household gatherings, weddings and funerals are limited to ten people.

On 29 December 2020 a new decree by the Minister of Health was issued re-imposing the curfew and extending the restrictions imposed in November 2020 (Republic of Cyprus Public Information Office, Decree Number 5430, 29 December 2020 3523).

Further decrees were issued on

- 08 January 2021 (Republic of Cyprus Public Information Office, the Infectious Diseases (Determination of Measures to Prevent the Spread of COVID-19 Coronavirus) Decree (No. 2) of 2021, R.A.A. 6/2021);
- 15 January (Republic of Cyprus Public Information Office, the Infectious Diseases (Determination of Measures to Prevent the Spread of COVID-19 Coronavirus) Decree (No. 3) of 2021, R.A.A. 11/2021);
- 19 January (Republic of Cyprus Public Information Office, the Infectious Diseases (Determination of Measures to Prevent the Spread of COVID-19 Coronavirus) Decree (No. 4) of 2021, RAA 12/2021);
- 20 January (Republic of Cyprus Public Information Office, the Infectious Diseases (Determination of Measures to Prevent the Spread of COVID-19 Coronavirus) Decree (No. 5) of 2021, RAA 21/2021); and
- 28 January (Republic of Cyprus Public Information Office, the Infectious Diseases (Determination of Measures to Prevent the Spread of COVID-19 Coronavirus) Decree (No. 4) of 2021, RAA 40/2021).

New lockdown measures have been imposed from 10 January 2021 until 01 February 2021, when a gradual easing of the restrictions will occur (Republic of Cyprus Public Information Office 'Revised- Answers to frequently asked questions on what changes as of 01 February within the framework of the strategic lifting of measures to contain the COVID-19 pandemic'). These include the following:

- Closure of retail businesses, e.g., hair salons, beauty parlours and large department stores until 31 January 2021;
- People will be allowed to leave home just twice a day for specific reasons such as buying groceries or medicines and exercising, while a current curfew prohibiting movement between 21:00 and 05:00 daily will remain in force;

- Distance learning has been re-introduced at schools, which were shut for the Christmas and New Year holiday. Kindergartens remained open, except for during the holidays.

The Ministry of Labour has issued a decree announcing a number of measures to support workers and businesses affected by the lockdown (Period 11 All | ΥΕΠΚΑ-CoronaVirus (mlsi.gov.cy)). The measures are similar to those provided for in the previous lockdown.

Cyprus, like most European Union Member States, began inoculating its population on 27 December, starting with the elderly.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implication of CJEU Rulings

Nothing to report.

4 Other relevant information

Nothing to report.

Czech Republic

Summary

(I) The state of emergency has been extended. The travel ban, the restrictions on freedom of movement and to the operation of businesses and other establishments have been readopted and amended.

(II) Special measures on occupational medical services have been adopted.

(III) An act establishing extraordinary payments to employees during quarantine is under deliberation by the government.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 State of emergency

Government Resolution No. 55 of 22 January 2021 has been adopted and published as Resolution No. 21/2021 Coll. It entered into effect on 22 January 2021.

Between 05 October 2020 and 03 November 2020, the government had declared a state of emergency in connection with the COVID-19 crisis – under the state of emergency, the government is authorised to issue extraordinary measures (see some of these measures described below). The state of emergency has been repeatedly extended (see our previous Flash Reports), most recently until 14 February 2021.

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

It is uncertain how long the present state of emergency will last; it depends on the developments of the epidemiological situation in the Czech Republic.

1.1.2 Travel ban

The government has retained and amended the travel ban.

a protective measure of the Ministry of Health No. MZDR 20599/2020-46/MIN/KAN of 04 January 2021 has been adopted with effect as of 05 January 2021. The list of low-risk countries is available here.

With effect as of 05 January 2021, restrictions to the entry of persons into the territory of the Czech Republic have been re-adopted – with some amendments.

1.1.3 Restrictions on freedom of movement

The restrictions on freedom of movement have been readopted and amended, especially in connection with holidays.

Government Resolution No. 79 of 28 January 2021 has been adopted and published as Resolution No. 32/2021 Coll. and entered into effect on 30 January 2021.

With effect from 30 January 2021 (00:00h) until 14 February 2021 (23:59), the restrictions on the free movement of persons in the territory of the Czech Republic have been re-adopted.

1.1.4 Restrictions to the operation of businesses and other establishments

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

Government Resolution No. 78 of 30 January 2021 has been adopted and published as Resolution No. 23/2021 Coll.

With effect as of 30 January 2021 (00:00h) until 14 February 2021 (23:59h), the operation of businesses as well as other establishments continues to be restricted or prohibited.

1.1.5 Occupational medical services

Government Resolution No. 54 of 18 January 2021 has been adopted and published as Resolution No. 17/2021 Coll., and entered into effect on 19 January 2021.

Under normal circumstances, employees must undertake an entry medical examination before commencing work. For employees whose employment began or will begin between 19 January 2021 and the end of the state of emergency (i.e. currently 14 February 2021, unless the state of emergency is extended) and who have not yet undergone the entry medical examination, the certificate of medical fitness may be replaced by an affidavit – only for work performed in the two lowest risk groups. Such an affidavit will be valid for 90 days after the end of the state of emergency.

Employees performing epidemiologically significant activities need to obtain a so-called health card – this health card may also be replaced by an affidavit, if the employee's employment began or will begin between 19 January 2021 and the end of the state of emergency.

Periodical medical examinations for the above period are not required.

The validity of medical certificates issued in connection with entry, periodical and extraordinary medical examinations will be extended for 90 additional days following the day after the end of the state of emergency (if the validity of such certificates end during the state of emergency) – with certain exceptions.

Providers of occupational medical services must, upon the employer's request, issue new medical certificates within the time periods stated above.

Certain aspects of the provision of occupational medical services have been modified in response to the epidemiological developments in the Czech Republic. The measure is essentially identical to the measures reported on in the October 2020 Flash Report.

1.1.6 Wage compensation during quarantine

The Draft of Act on extraordinary payment for employees during an ordered quarantine is being deliberated at the government level. The text of the resolution is available here.

Employees who are ordered to quarantine and cannot perform work for the employer (i.e. cannot be assigned work) are entitled to compensation of the wages paid by the employer in the amount of 60 per cent of their reduced average monthly earnings for the first 14 days of the quarantine. From the 15th day onward, such employees are entitled to sickness benefits paid by the State.

The Act proposes that employees who are ordered to quarantine should be provided an extra daily payment of CZK 250 (or CZK 125 for employees working less than 20 hours per week and employees employed based on zero-hours contracts) for the first 10 days of the quarantine (in addition to compensation of their salary provided by the employer).

The payment is to be paid by the employer in addition to the compensation of the employee's wages. The employer can subtract the payments paid to employees from the social security contributions paid to the State.

The aim of the Act is to motivate employees to get tested. The decrease of income due to quarantine (to 60 per cent of the reduced average monthly earnings) may discourage employees from being tested for coronavirus and from notifying their contacts to the authorities.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other relevant information

Nothing to report.

Denmark

Summary

Restrictive measures continued throughout January 2021. A new tripartite agreement has extended the State-funded salary compensation model, imposing forced holidays on employees.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 General situation and restrictions

In December 2020, the COVID-19 infection rate increases in Denmark, leading to a new partial shutdown of society and the economy. In January 2021, the infection rate has slowly been decreasing, but due to concerns about the highly contagious British COVID-19 mutation, the partial lockdown continues.

The restrictions include the closure of all regular shops, hair salons, shopping malls, restaurants, cafes, cinemas, cultural and athletic activities. Supermarkets, bakeries and pharmacies have remained open. Day care facilities for small children (0-6 years of age) have remained open, while physical attendance in schools, high schools, universities, etc. have been replaced with online teaching. All private employers are continued to be encouraged to let employees work from home. All public employees, who do not perform critical functions, work from home.

The maximum number of people who can gather at one time is still limited to 5 people, and people are required to wear face masks when entering shops, supermarkets, buildings with public access, etc.

Testing is still being carried out with a very high number of free daily tests. Persons working in the health sector have to undergo weekly tests, and all employees who physically perform work at the workplace are encouraged to take weekly tests.

The restrictions have currently been extended to at least 28 February 2021, with a possibility that elementary school children (children aged between 6 and 10 years) will physically return to school earlier.

On 08 January 2021, the Danish government expanded the restrictions for travellers arriving in Denmark. Travellers are now required to present a negative COVID-19 test upon arrival, which is no more than 24 hours old. This requirement also applies to cross-border employees.

In addition, the government intends to propose legislation that will require employers to demonstrate that cross-border employees have been tested (again) for COVID-19 no more than 72 hours after their initial test required for entry. At this point, employers are encouraged to follow this test procedure, but it cannot be legally required before legislation is actually put in place.

The State-funded salary compensation model has been extended by the adoption of a tri-partite agreement in January 2021.

1.1.2 State-funded wage compensation

The government and Danish social partners have agreed to extend a re-introduction of the State-funded salary compensation model. The extension applies as long as the heightened restrictions apply.

According to the agreement, employers can request employees to take one day of annual leave per month, who are sent home with pay but without the option of being able to work. Alternatively, the employer can request employees to take one day of accrued leave in lieu per month, who are sent home with pay. Another alternative is to send employees home with pay even though they have not accrued paid leave days or days in lieu, and they can be forced to take 1 day of unpaid leave per month for the period they are at home with pay without the option of being able to work.

During the first 21 days of wage compensation, the employee can only be requested to take one day of leave, one day off in lieu or one day of unpaid leave.

The maximum annual leave days an employee can be requested to take is five days of annual leave, five days in lieu or five days of unpaid leave for the entire lockdown period.

Employees who have agreed to a reduction of salary because of COVID-19 are exempt from these leave requirements.

The same leave requirements will be introduced in the salary compensation model for businesses that are prohibited from opening.

See here for the Tripartite Agreement of 14 January 2021.

See here for the press release.

The Agreement represents yet another measure to mitigate the financial consequences of COVID-19. Tripartite agreements are the preferred procedure. The Agreement does not entail any EU-law related aspects as the Danish Holiday Act stipulates a right to 5 weeks of paid annual leave, and the fact that a maximum of 5 days of 'forced' leave has to be taken by employees does not contravene with the provision to provide a minimum of 4 weeks of annual leave as regulated in the Working Time Directive.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 'Ne bis in idem' principle

Labour Court, No. 2019-235, 07 January 2021

The present case examined whether the company VSM Contractors A/S was required to pay a contractual penalty/compensation (*bod*) to the Danish Union of Painters for breaching section 10 of the parties' collective agreement for not having complied with the safety provisions in the Danish Act on Occupational Health and Safety.

This ruling was confined to the question whether the case should be 'rejected' by the Labour Court due to lack of jurisdiction. The company argued that only the Danish Working Environment Authority/DWEA (*Arbejdstilsynet*) and the civil courts were competent to rule on non-compliance with the safety provisions in question.

The second question was whether a ruling by the Labour Court would risk a double punishment contrary to the principle of *ne bis in idem*. The DWEA is authorised to issue penalties and criminal sanctions for breaches of the Working Environment Act. The Labour Court is authorised to issue contractual penalties, i.e. a contractual sanction, for breaches of collective agreements. The company argued that if the Labour Court could rule on the same material matter and issue a second penalty, it would be in breach of the principle of '*ne bis in idem*'. The company referred to both ECHR Protocol 7, Art. 4 and the EU Charter of Fundamental Rights, Art 50.

The Labour Court found, first, that section 10 of the collective agreement makes breaches of health and safety provisions *an integral part of the parties' collective agreement*. Assessing breaches of collective agreements is part of the special competence delegated to the Labour Court in the Act on a Labour Court, section 9(1) 2). Non-compliance with health and safety provisions could in this case be pursued as a breach of the collective agreement, irrespective of whether DWEA has made a formal decision on the breach of health and safety rules under their duty of supervision in the Working Environment Act. This result followed from prior Industrial Arbitration Rulings FV 2016.0084 and FV 2019.0145.

Second, the Labour Court found that in situations in which the DWEA has made a decision involving a penalty, a criminal sanction which the DWEA is authorised to issue under the Working Environment Act, is not contrary to the principle of '*ne bis in idem*' to concurrently or subsequently pursue a breach of the parties' collective agreement in front of the Labour Court. An assessment by the Labour Court does not entail criminal law aspects, but private contractual penalties only. A penalty for breaches of a collective agreement issued by the Labour Court is a sanction for breaches of the parties' contractual duties and can be compared to a contract penalty. This penalty is 'not' a sanction for non-compliance with public law rules, and is not a criminal sanction. Therefore, the situation would not be in breach of the principle of *ne bis in idem*.

See here for the Labour Court ruling of 07 January 2021.

See here for the collective agreement between the Danish Construction Association (*Dansk Byggeri*) and the Danish Union of Painters (*Malerforbundet*) 2020.

See here for the Statutory Act on a Labour Court.

The company relied on both the ECHR and the EU Charter of Fundamental Rights in its argumentation on the prohibition of double trial and punishment (*ne bis in idem*).

As the Labour Court found that the criminal sanction decided by the DWEA—and potentially confirmed in the ordinary court system—differed from the contractual sanctions decided in the Labour Court system, there was no issue of double punishment. Accordingly, it was not necessary for the Court to address the relevance or application of international law standards in the specific case.

3 Implications of CJEU Rulings

Nothing to report.

4 Other relevant information

Nothing to report.

Estonia

Summary

(I) The Estonian government has introduced additional measures to support employers, especially in two counties where the number of COVID-19 infections is highest. The payment of sickness benefits has been extended.

(II) The monthly minimum wage in Estonia remains the same as in 2020, namely EUR 584 a month.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Relief measures for employers

Temporary subsidies that were already introduced in April 2020 are being paid out to employees whose employers have been significantly impacted by the current extraordinary circumstances. The main requirements are continued loss of revenue over three months and decreasing wages of employees over the same period. The subsidy provided an income for employees and helped the employers to overcome the temporary economic difficulties without having to lay off their staff or declare bankruptcy.

Specific measures have been introduced for two regions hit by COVID-19 particularly hard. The Unemployment Insurance Fund reimburses the labour costs to employers in Harju County and Ida-Viru County, whose activities have been significantly disrupted in the period from 28 December 2020 to 31 January 2021 due to extraordinary circumstances. The salary grant is generally paid to the undertaking in the amount of 1.5 times of the November 2020 wage costs for employees in Harju and Ida-Viru counties, but no more than EUR 180 000 euros per undertaking.

1.1.2 Sick leave

To guarantee better protection of employees during the COVID-19 crisis, the Estonian legislator has extended the payment of sickness benefit by temporarily changing the Occupational Health and Safety Act Art. § 12. To date, the responsibility for sickness benefits was shared: for Days 1-3, the employee was not compensated (so-called employee liability); for Days 4-8, the employer paid compensation equal to 70 per cent of the employee's wages. From Day 9, the Health Insurance Fund would pay compensation. According to the temporary rules that are valid until the end of the April 2021, the employee will receive compensation from Day 2 until Day 8 and from Day9 onwards, the Health Insurance Fund will pay the necessary compensation.

1.2 Other legislative developments

1.2.1 Liability of the employer

Amendments to the Employment Contract Act regarding the employer's liability in case of violation of the law entered into force on 08 January 2021. The penalty rates are now 300 fine units for the former 100 fine units and up to EUR 32 000 for a legal person instead of previously EUR 1 300. The labour inspectorate supervises compliance with the requirements of the employment relationship. The corresponding amendments to the Act are introduced in §§ 117-129 of the Employment Contracts Act.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other relevant information

4.1 Minimum wage

The monthly minimum wage in Estonia is EUR 584 after 01 January 2021. According to the nationwide agreement between the trade unions and employers, the monthly minimum wage will remain at the same level as in 2020. The monthly minimum wage was not increased in 2021, taking into account the difficult situation of employers due to the COVID-19 impact.

Finland

Summary

(I) The government has issued travel restrictions to fight the pandemic. Moreover, support for entrepreneurs will continue until 30 June 2021.

(II) The Ministry of Social and Health Affairs has circulated a draft government proposal on legislative changes related to the Market Surveillance Regulation as well as changes to the Occupational Safety and Health Act.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Travel restrictions

On 22 January 2021, the government tightened cross-border travel and the recommendations on testing and quarantine related to COVID-19. The aim is to prevent a spike in the epidemic and the spread of the COVID-19 variants in Finland. The new restrictions entered into force on 27 January 2021.

Border control at internal borders will continue until 25 February 2021. Entry into the country based on employment is restricted to essential duties. Within internal borders, essential travel constitutes work that is indispensable with respect to the functioning of society or to secure supply. Moreover, it also extends to certain specifically defined special groups.

The Ministry of Economic Affairs and Employment maintains a list of work that is considered indispensable with respect to the functioning of society or for security of supply. However, any critical task included in the list does not automatically mean that entry into the country is warranted. Employers must use a separate form to justify why the job of the respective worker seeking entry into Finland is essential and why the work must be performed without delay. The worker seeking to enter Finland must present this form at the border control in addition to other documents required for crossing the border.

Certain special groups are permitted to enter the country. These special groups refer to those involved in culture, sports and business, for example. The business group includes individuals carrying out tasks necessary to secure the recovery, new growth, regional economy, or long-term operating conditions of a certain sector.

The Finnish government wants to ensure the entry of workers critical for the security of supply to Finland during the 2021 growing season. The Ministry of Economic Affairs and Employment's list includes of tasks that are indispensable or critical for the security of supply or operations of certain sectors and includes seasonal work in agriculture, forestry, horticulture and fisheries.

1.1.2 Relief measures for businesses

Entrepreneurs have been temporarily entitled to labour market support if full-time work in the company has ceased due to the coronavirus pandemic. The temporary extension to entrepreneurs' right to unemployment benefits currently in force was scheduled to end on 31 March 2021. The government has decided that the right of entrepreneurs to claim labour market support will continue until the end of June 2021.

1.2 Other legislative measures

1.2.1 Market Surveillance Regulation

The Ministry of Social and Health Affairs has circulated a draft government proposal for comments on legislative changes relating to Market Surveillance Regulation (EU) No. 2019/1020 and Directive 2004/42/EC as well as changes to Regulations (EC) No 765/2008 and (EU) No 305/2011. Statements shall be given by 03 March 2021. The draft proposal also includes additional specifications to the Act on Occupational Safety and Health Enforcement and Cooperation on Occupational Safety and Health at Workplaces.

1.2.2 Occupational health and safety

The Ministry of Social and Health Affairs has also circulated a draft government proposal for comments on amendments to the Occupational Safety and Health Act related to taking an employee's travel outside of working hours into account in risk assessments. Statements shall be given by 26 February 2021.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings

Nothing to report.

4 Other relevant information

4.1 Recruitment subsidy

The Ministry of Economic Affairs and Employment commissioned the VATT Institute for Economic Research and Aalto University to draw up a proposal for an experiment on recruitment subsidy that entrepreneurs could use when recruiting employees. The proposal sets out a plan for an experiment based on which the subsidy's impact for hiring the first employee on the company's operations could be assessed. The targets of the experiment would include natural persons engaged in business activities and companies that have not used external labour over the past 12 months preceding the experiment. The objective of the recruitment subsidy would be to set in motion a cycle of positive growth that increases the company's business activities and opportunities to hire employees.

To support decision-making, the purpose of the report published by the VATT Institute was to present conditions that should be met for the experiment to produce reliable results. In addition to financial incentives, the experiment proposes testing the effectiveness of coaching services for companies.

An estimated 13 000 companies would be randomly selected from among the target companies, and offered the possibility to obtain the recruitment subsidy, while approximately 14 700 companies would be selected and offered coaching. As recruitment by companies involves a degree of uncertainty, the report proposes the experiment to be carried out in stages.

France

Summary

(I) The French government has introduced financial aid to cover paid leave days taken during a period of partial activity. Furthermore, a decree gives prerogatives to occupational physicians in the fight against COVID-19.

(II) A ministerial instruction clarifies the system of transnational posting of workers.

(III) The Labour Division of the Court of Cassation has ruled on daily flat rate agreements, on the prohibition of undeclared work in relation to the posting of workers and on the methods of calculating the wages due to employee in the event of a void dismissal. Also, it confirmed the dismissal of an employee who knowingly made false allegations of discrimination.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Paid leave

Decree No. 2020-1787 of 30 December 2020 on the exceptional contribution granted to companies in return for paid leave taken by their employees between 01 and 20 January 2021, Official Journal No. 0316 of 31 December 2020, was introduced.

This decree introduces an exceptional State contribution to cover ten days of paid leave taken by employees of companies most affected by the crisis during a period of partial activity.

1.1.2 Occupational medical services

Decree No. 2021-24 of 13 January 2021, which establishes temporary conditions for the prescription and renewal of sick leave ordered by an occupational physician during the COVID-19 epidemic and the procedures for detecting the SARS-CoV-2 virus by the occupational health services, Official Journal No. 0012 of 14 January 2021, was introduced.

This measure authorises occupational physicians to prescribe or renew sick leave in the event of COVID-19, to issue a medical certificate with a view to placement in partial activity, or to carry out a test for SARS-Cov-2.

1.2 Other legislative developments

1.2.1 Posting of workers

The Ministry of Labour issued a new instruction (Instruction DGT/RT1/2021 of 19 January 2021 on the international posting of workers in France) on 19 January 2021, on the posting of workers in France and the monitoring of such postings.

The instruction repeals the circular of 05 October 2008 to take the new national and European regulations on postings into account that have entered force. The applicable rules have changed considerably since that date, particularly in the context of the transposition of Directives (EU) 2014/67 and (EU) 2018/957, but also due to the continuous rise in postings observed over the last decade.

This instruction only deals with posting in the sense of labour law and does not deal with social security regulations.

After recalling the definition and scope of posting, the Instruction first underlines the provisions of the Labour Code applicable to posted employees (Article L. 1262-4 of the Labour Code: protection against discrimination, maternity protection, guarantees owed to employees by companies engaged in temporary work activity, exercise of the right to strike, working time, compensation, working conditions and occupational health, etc.), but also the exceptions laid down in Articles R. 1262-1 to R. 1262-19 of the Labour Code. These provisions guaranteed to employees posted in France for a maximum duration of 12 months constitute a minimum set of rights, known as the "hard core" entitlements. More favourable provisions can be included in the employment agreement and applied.

Additional rights are implemented for employees posted in France for more than 12. months (the right to vote in professional elections, the right to additional leave, the right to professional training). However, an employer who wishes to derogate from the application of the status of long-term posted employee may benefit from an extension of the application of the rules relating to the 'hard core' entitlements, listed in Article L. 1262-4 I of the Labour Code, for a maximum of 6 additional months. The employer must specify the duration of and the reason for the posting's extensions (the Instruction provides some examples of reasons: delay on the construction site due to bad weather, non-delivery of required materials, illness of an employee): in that case, only the 'hard core' entitlements will apply to the posted employee.

The Instruction also deals with employers' obligations, in particular with regard to the declaration of the posted employee (pursuant to Article L. 1262-2-1, Article R. 1263-3 provides that any undertaking that posts an employee to France is required to send a declaration to the labour inspectorate prior to the commencement of the service, allowing the inspectorate to have access to information on the identification of the posted employees, the undertaking employing them and the conditions under which the service is to be provided) and information on the essential conditions of the working relationship (Article 4, Directive (EU) 2019/1152 of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, 20 June 2019). Finally, it addresses the applicable sanctions in the event of failure to comply with the rules governing postings: administrative fines (Article L. 8115-4 of the Labour Code), suspension of the work's realisation, or even criminal charges (Articles R. 1264-3 of the Labour Code and 131-13 of the Criminal Code).

By publishing this Instruction, the Minister of Labour intends to

> "*facilitate labour inspection controls*", "*better explain the applicable rules and their articulation*" while reminding "*companies posting employees and their principals of their obligations and responsibilities*".

2 Court Rulings

2.1 Daily flat rate agreement

Labour Division of the Court of Cassation, No. 17-28.234, 06 January 2021

A dismissed employee, who was working under a daily flat rate agreement, acted under unenforceability of the agreement because of the employer's failure to comply with the rules on the protection of the worker's safety and health. The judges upheld the non-opposability and granted the employee rest days ('reduced working time' (RTT) days.). The employer then requested reimbursement of those RTT days. The Court of Appeal dismissed the employer's claim.

The Court of Cassation overturned and annulled the ruling. When the employer does not ensure the effectiveness of the rules relating to the health and safety protection provisions laid down in the collective agreement authorising the use of the daily flat rate system, the individual daily flat rate agreement concluded with the employee is suspended (or 'deprived of effect') until the employer complies with the contractual guarantees. The Court of Cassation inferred that if, during this suspension period, the employee has been granted RTT days in execution of the daily flat rate agreement, he/she must reimburse them to the employer.

2.2 Prohibition of undeclared work

Criminal Division of the Court of Cassation, No. 17-82.553, 12 January 2021

A public works company subcontracted part of its work for the construction of a nuclear reactor. One of the subcontracting companies was found guilty of undeclared work for failing to make pre-employment declarations and declarations on the appropriate social protection institutions. The public works company was found guilty of the charge of illegal lending of labour. The companies have appealed against the judgment.

In the present case, the Court of Cassation submitted a request for a preliminary ruling to the Court of Justice of the European Union (Criminal Division of the Court of Cassation, No. 17-82.553, 08 January 2019), which was answered with a judgment of 14 May 2020 (case C-17/19).

In response to this request for a preliminary ruling, the Court of Justice of the European Union ruled that the posting forms, known as E101 and A1 certificates, are binding for the courts of the State in whose territory the workers carry out their activities, solely in matters of social security. It stated that:

> "*E 101 and A 1 Certificates, issued by the competent institution of a Member State, are binding on the competent institution and the courts of the host Member State only in so far as they certify that the worker concerned is subject, in social security matters, to the legislation of the first Member State with respect to the grant of benefits directly linked to one of the branches and schemes listed in Article 4(1) and (2) of Regulation No 1408/71 and Article 3(1) of Regulation No 883/2004*" (§47)

and concluded that:

> "*those certificates therefore have no binding effect with regard to obligations imposed by national law in matters other than social security, within the meaning of those regulations, such as, inter alia, those relating to the employment relationship between employers and workers, in particular their employment and working conditions"* (§48).

With regard to the pre-employment declaration, the Court of Justice stated that it was for the national court to determine the scope of such an obligation.

The Court of Cassation had to then determine

> "*whether the sole purpose of the obligation to make a declaration prior to engagement of employees laid down by the code du travail is to ensure that the workers concerned are affiliated to one or other branch of the social security scheme and, therefore, to ensure only compliance with the legislation in that area, in which case the E 101 and A 1 Certificates, issued by the issuing institution, would, in principle, preclude such an obligation, or, alternatively, whether the purpose of that obligation is also, even in part, to protect the effectiveness of checks made by the competent national authorities in order to ensure compliance with conditions of employment and working conditions imposed by employment law, in which case those certificates would have no*

> *effect on that obligation, given that that obligation cannot, in any event, entail that the workers concerned are affiliated to one or other branch of the social security system*" (§53 of CJEU's judgement).

According to the Criminal Division,

> "*the existence of the declaration prior to engagement of employees creates a presumption of the existence of an employment contract which gives the employee the benefit of all the rights and obligations provided for in the Labour Code*".

The judges deduced that the declaration aims, at least in part, to guarantee the effectiveness of the controls carried out by the competent national authorities to ensure compliance with the conditions of employment and working conditions imposed by labour law.

It must be concluded that the existence of E101 and A1 certificates does not preclude a conviction of the dissimulated work for failure to carry out the pre-employment declaration. The Court of Cassation thus rejected the companies' appeal.

2.3 Employee reintegration

Labour Division of the Court of Cassation, No. 19-14.050, 13 January 2021

An employee dismissed in 2011 for loss of confidence applied to have his dismissal declared null and void for the first time in 2016, to be reinstated and be paid a sum equivalent to the wages he should have received from the date of his dismissal.

The Court of Appeal ordered the employer to pay EUR 1 050 770 in compensation due to the nullity of the dismissal for the period between 2011 and 2018. The employer argued that the commencement point of the period for the payment of wages was the date of his application for reinstatement.

The Court of Cassation overturned the ruling. When a dismissal is deemed null and void, an employee who applies for reinstatement is entitled to payment of compensation equal to the amount of the remuneration he or she should have received between his or her eviction from the enterprise and reinstatement.

However, an employee who wrongfully applies for reinstatement at a later stage of the procedure is entitled, by virtue of the nullity of the dismissal, only to the remuneration he or she would have received from the date of the application for reinstatement to the date of the reinstatement.

2.4 Grounds for dismissal

Labour Division of the Court of Cassation, No. 19-21.138, 13 January 2021

An employee reported that he was discriminated against by the sales manager because of his origin. He also filed a complaint to the Human Rights Defender, who closed the case. He was dismissed for serious misconduct, for denouncing acts of discrimination whose fallacious nature he was aware of. The employee contested his dismissal.

The Court of Appeal rejected his claims and found that his dismissal was due to serious misconduct.

The Court of Cassation rejected the appeal and stated that according to Article L. 1132-4 of the Labour Code, an employee who reports acts of discrimination cannot be dismissed on this ground,

> *"except in bad faith, which can only result from the employee's knowledge of the falsity of the facts he or she reports and not from the sole circumstance that the facts reported are not established*".

Hence, an employee who is aware of the falsity of the alleged facts of discrimination may be dismissed on this ground.

3 Implications of CJEU Rulings

Nothing to report.

4 Other relevant information

4.1 Platform work

The European Affairs Committee of the National Assembly is calling for a European directive on platform workers in a report published on 20 January (Grandjean C., Obono D., Rapport d'information déposé par la Commission des Affaires européennes sur la protection sociale des travailleurs des plateformes numériques, registered at the Presidency of the National Assembly on 20 January 2021, available here), which calls, in particular, for improving their pay levels and access to social protection.

The authors noted that

> *"given the transnational nature of the platforms, it is impossible to provide satisfactory responses at the national level"*. *"Such a directive would also contribute to the realisation of the European social rights base and as such, would be fully in line with the European Union's social agenda"*.

Furthermore, because of the 'imbalance in the relationship between platforms and workers', they recommend the establishment of a social dialogue that would involve greater 'transparency of algorithms'. According to the authors, 'algorithm-based management' translates into a 'reinforced and daily monitoring of workers' activity and a daily evaluation of their performance'. They also regret that 'the use of artificial intelligence [tends] to dehumanise workers' commercial relations'.

According to them, a European Commission initiative to regulate this sector is planned for 'the second half of 2021', which could coincide 'with the French Presidency [of the EU] in the first half of 2022'.

Germany

Summary

(I) Under the Corona Occupational Health and Safety Ordinance, companies are required to allow their employees to work from home, if possible.

(II) According to the Federal Administrative Court, Sunday work to prevent disproportionate damage may only be authorised in case of a temporary special situation attributable to an external cause.

(III) According to the Federal Labour Court, the acquirer of a business in insolvency is liable for claims of the transferred employees to company pension benefits on a pro rata basis only as far as the period of service completed after the commencement of insolvency proceedings is concerned.

(IV) The Federal Constitutional Court published its written reasons for rejecting several applications for a temporary injunction to prevent parts of the Act to Improve the Enforcement of Occupational Health and Safety from coming into force.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Occupational health and safety

On 20 January 2021, the Federal Cabinet passed the Corona Occupational Health and Safety Ordinance (*Corona-Arbeitsschutzverordnung*), which requires companies—initially for a limited period until 15 March 15 2021—to allow their employees to work from home, insofar as this is possible. The Ordinance will come into force on 27 January 2021.

The new Ordinance's key provisions are: employers are generally required to allow their employees to work from home. If office space is used by several employees at the same time, 10 m² must be made available for each worker. In companies with ten or more employees, staff must be divided into fixed working groups that must be as small as possible. Employers must provide employees, who perform their activity at the workplace, with medical face masks.

Section 2(4) of the Ordinance reads as follows: *"In case of office work or comparable activities, the employer shall provide employees the opportunity to perform these activities in their homes if there are no compelling operational reasons to the contrary".*

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Sunday work

Federal Administrative Court, 8 C 3.20, 27 January 2021

According to the Federal Administrative Court, pursuant to section 13(3) No. 2 (b) of the Working Time Act (*Arbeitszeitgesetz*, *ArbZG*), Sunday work to prevent disproportionate damage may only be authorised in case of a temporary special situation that is attributable to an external cause.

The legal dispute concerned a wholly owned subsidiary of an online mail order company. The group was entrusted with the execution of orders received on its website. At the group's request, it was granted permission to employ 800 workers on the 3rd and 4th Sundays prior to Christmas 2015 because special circumstances required the hiring of additional workers to prevent disproportionate damage, namely a risk of a backlog of approximately 500 000 unprocessed orders by Christmas. The plaintiff, a trade union for the service sector, claimed that the authorisation had been unlawful.

According to section 9(1) of the ArbzG, employees shall not be employed on Sundays and public holidays. Pursuant to section 13(3) No. 2 of the ArbZG, the supervisory authority may permit, in derogation of section 9, employees to work a) in a commercial business on up to ten Sundays and public holidays per year due to the existence of special circumstances that require extended business activities, b) on up to five Sundays and public holidays a year, if special circumstances exist requiring such work to prevent disproportionate damage, c) on one Sunday per year for the purpose of carrying out inventory required by law, and to make orders on the hours of employment, taking into account time designated for worship.

'Special circumstances' within the meaning of section 13(3) No. 2b) are temporary special situations attributable to an external cause and not created by the employer. According to the Court, no external cause in this sense existed in the present case as the supply bottlenecks had been intensified considerably by the promise of free delivery on the date of the order, which was announced shortly before the Christmas business in 2015. It was therefore not necessary to decide whether a seasonal increase in incoming orders constituted a special situation that justified the authorisation of Sunday work.

2.2 Transfer of undertakings

Federal Labour Court, 3 AZR 139/17, 26 January 2021

According to the Federal Labour Court, pursuant to section 613a (1) of the German Civil Code (*Bürgerliches Gesetzbuch*, *BGB*), the acquirer of a business (i.e. part of a business) in insolvency is liable for claims of the transferred employees to company pension benefits on a pro rata basis only as far as the period of service completed following the commencement of insolvency proceedings is concerned. The employer is not liable for benefits relating to periods up to the commencement of insolvency proceedings. This is true even if the pension benefit guaranty association (*Pensions-Sicherungs-Verein*, *PSV*)—the legally designated insolvency insurance provider—does not fully cover this part of the company pension in accordance with the German Company Pensions Act (*Betriebsrentengesetz*).

In its decision, the Federal Labour Court referred to the fact that, according to its case law, the acquirer of an undertaking in insolvency is not liable for occupational pension entitlements that arose during the period prior to the commencement of insolvency proceedings. This case law is compatible with CJEU decisions (CJEU C-674/18 and C-675/18, 09 September 2020, *TMD Friction*) and Union law. It is justified under the general rule of Art. 3(4) of Directive 2001/23/EC, which also remains applicable in addition to the provisions in Art. 5 thereof, which only apply in insolvency. The prerequisite is that a minimum protection corresponding to Art. 8 of Directive 2008/94/EC is guaranteed. This minimum protection required under EU law is guaranteed in the Federal Republic of Germany by a claim against the PSV arising directly from EU law. Liability on the part of the acquirer is therefore excluded.

The Senate confirmed the dismissals of the rulings of the lower courts in 20 further—essentially similar—legal disputes.

2.3 Occupational health and safety

Federal Constitutional Court, 1 BvQ 152/20 et al., 29 December 2020

On 29 December 2020, the Federal Constitutional Court rejected several applications for a temporary injunction to prevent parts of the Act to Improve the Enforcement of Occupational Health and Safety (*Gesetz zur Verbesserung des Vollzugs im Arbeitsschutz – Arbeitsschutzkontrollgesetz*), which was promulgated on 30 December 2020, from coming into force on 12 January 2021. Under the new law, companies in the meat industry will be prevented from using external workers on the basis of civil law contracts (so-called contracts for work) for slaughtering, cutting and meat processing. Moreover, temporary employment of external workers is only permitted under special conditions and until 01 April 2021 only, after which date it will be prohibited in this sector altogether (see December 2020 Flash Report).

In its reasoning, the Federal Constitutional Court, among other things, stated the following:

> *"aa) If the temporary injunction is granted and the constitutional complaint is ultimately unsuccessful, the objectives pursued by the legislator would not be achieved during this period. External workers would continue to be employed in the core area of the meat industry. Where subcontractors are continued to be used, responsibility under the occupational health and safety law would continue to be divided locally. The legislator understandably assumes that this would make it more difficult for the occupational health and safety authorities to carry out inspections. It also stands to reason that the divided responsibility on site would make it more difficult for the employees themselves to assert their claims for protection and fair working conditions. Furthermore, employees with contracts for work and services and temporary workers would be working side by side, which in practice leads to confusing conditions and a lack of accountability, as well as to violations of labour protection regulations due to competition with very high work pressure, unsecured technical qualifications and training, and to the above-average frequency of occupational accidents in this sector. bb) If the temporary injunction is not granted, but the constitutional complaint later proves to have been well-founded, the contracting companies would certainly suffer significant disadvantages. They would not be prohibited from operating, but their activities would be restricted sectorally, because they would no longer be permitted to operate in the core area of the meat industry in the previous form. However, the goal of the legislature, namely to ensure greater occupational safety in the meat industry, clear responsibilities on site and transparent contractual arrangements with employees, carry more weight. It must be taken into account that those who have so far been employed in the meat industry via contracting companies will not be adversely affected by the sectoral ban on external workers, but that there now are realistic prospects of concluding an employment relationship directly with the companies in the meat industry. In addition, it must be considered that the applicants are not banned from conducting their profession in these proceedings, only a certain legal arrangement in a market segment will be inadmissible in the future".*

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Minimum wage

In an expert opinion commissioned by the Confederation of German Employers' Associations (*Bundesvereinigung der Deutschen Arbeitgeberverbände – BDA*), Professor Martin Franzen (University of Munich) concluded that the Commission's minimum wage proposal violates Article 153 TFEU, because it seeks to link the minimum wage, for example, to the development of purchasing power, productivity, wages and income distribution. In addition, the reference to internationally common indicators, such as 60 per cent of the gross median wage and 50 per cent of the gross average wage, indirectly establishes a link with income levels, according to Franzen. The expert also argued that the promotion of collective bargaining is not possible on the chosen legal basis. In his opinion, this would require a unanimous decision by the Member States.

Greece

Summary

The emergency measures have been extended. Employers may now require employees to work remotely.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Emergency measures

Ministerial Decisions 4492/2021 (Official Journal, B/186 of 23 January 2021) and 3297/110 of 22 January 2021 (Official Journal, B/240 of 25 January 2021) provide for the continuation of the work contract suspension mechanism in various fields of economic activities (tourism, transportation, cultural activities, etc.) for an additional two months. The mechanism referred to as 'Co-operation' is also applicable to workers hired until 10 August 2020.

Until 28 February 2021 (previously 31 December 2020), employers may require employees to telework (work remotely) without having to agree changes to their contract of employment.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings

Nothing to report.

4 Other relevant information

Nothing to report.

Hungary

Summary

The social partners have agreed on the amount of the minimum wage, which will increase by 4 per cent from 01 February 2021.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Minimum wage

Government Decree No. 731/2020 on the minimum wage was passed on 31 December 2020. The Government Decree states that the negotiations between the social partners had not been concluded by the end of 2020. Therefore, the minimum wage and the guaranteed minimum wage (so-called 'qualified minimum wage') have not been set for 2021. The negotiations continued in January 2021 in the Permanent Consultation Forum between the government and the private sector.

The social partners finally agreed on the amount of minimum wage and the guaranteed minimum wage on 25 January 2021. As of 01 February 2021:

- the minimum wage will be HUF 167 400; and
- the guaranteed minimum wage will be HUF 219 000;

which is an increase of 4 per cent. See here for Government Decree No. 20/2021, in: *Magyar Közlöny* 2021/13.

It must be noted that the government is not bound to the agreement of the social partners, and this was the first time that the government waited for the social partners' agreement and delayed the raise. In previous years, the government had set the minimum wage in its decree, irrespective of the agreement or the lack of such an agreement between the social partners.

It should also be noted that one trade union association (*Magyar Szakszervezeti Szövetség*) insisted on a 5 per cent raise, therefore, it refused to sign the agreement.

It is furthermore important to emphasise that the real value of the minimum wage in EUR decreased compared to 2020 due to the devaluation of the Hungarian currency. The value of the minimum wage in EUR will be:

- 2021: EUR 309
- 2020: EUR 317
- 2019: EUR 311
- 2018: EUR 298

The value of the guaranteed minimum wage will be EUR 404. Both the minimum wage and the guaranteed minimum wage are considerably lower than the minimum wage in other countries in the region (e.g. Poland, Slovakia, Czech Republic, etc., see here for further information).

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other relevant information

Nothing to report.

Iceland

Summary

Nothing to report for January 2021.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other relevant information

Nothing to report.

Ireland

Summary

The government plans to legislate to give employees the right to request remote working.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other relevant information

4.1 COVID-19 impact

As of 26 January 2021, 475 364 persons (44.8 per cent of whom are female) were in receipt of the Pandemic Unemployment Payment, a 71.2 per cent increase over the numbers in receipt the week before Christmas 2020. The sectors with the highest number of recipients are accommodation and food services (111 569 up from 74 101), wholesale and retail trade (75 801 up from 40 406) and construction (61 159 up from 21 086). In terms of the recipients' age profile, 23.8 per cent were under 25 years of age. See here for further information.

4.2 Teleworking

The Minister for Enterprise, Trade and Employment has launched the government's National Remote Work Strategy, the objective of which is 'to ensure that remote working is a permanent feature in the Irish workplace in a way that maximises economic, social and environmental benefits'. The Strategy sets out plans to strengthen the rights of employees and responsibilities of employers, by giving employees a right to request remote working and the employer being required to facilitate the request or provide reasons for declining, and to provide clear guidance on how employees can be empowered to work remotely.

There will also be a legally admissible Code of Practice on the Right to Disconnect, covering phone calls, emails and 'switch off' time. The Workplace Relations Commission (WRC) has been tasked with carrying out a public consultation on the issue to inform the drafting of a code intended to set out best practice and approaches to employee disengagement from work-related technical devices outside normal working hours.

In the meantime, a WRC adjudication officer has ruled that an employee was entitled to resign and treat herself as having been unfairly dismissed, when her employer refused her request to work from home on a rotational basis. The adjudication officer was satisfied that her request was reasonable, given her and her colleagues' concern as to

the wellbeing of 'at risk' family members in light of the pandemic. He was also satisfied that no adequate explanation had been provided by the employer as to why it did not accede to the proposal, even on a trial basis. See here for the decision in ADJ-00028293, *An Operations Coordinator v A Facilities Management Service Provider.*

Italy

Summary

(I) The state of emergency was extended until 30 April 2021.

(II) Public and private employers must now guarantee exceptional health surveillance for 'fragile' workers.

(III) The Italian Parliament has authorised the ratification of the ILO Violence and Harassment Convention (No. 190).

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 State of emergency

The state of emergency has been extended until 30 April 2021 by Law Decree 04 January 2021 No. 2. The division of the Italian territory into 3 areas is based on the severity of the spread of the virus.

1.1.2 Relief measures for businesses and workers

With Act 30 December 2020 No. 178, the Italian Parliament approved the State budget for the financial year 2021 and the multi-year budget for the period 2021–2023. The Act contains provisions that extend temporary measures to limit the negative economic impact of the COVID-19 pandemic:

- A fund for income support of workers in areas facing severe industrial crises, introduced in para. 290; at the Ministry of Labour, a fund has been created to guarantee the continuation of the *Cassa Integrazione* in derogation (not authorised due to lack of financial coverage) for areas facing a severe industrial crisis, identified by the Regions in 2020;
- A further period of *Cassa Integrazione Guadagni (Covid-19)* has been granted for a maximum of 12 weeks between 01 January and 31 March for ordinary *Cassa Integrazione*, and between 01 January and 30 June for extraordinary *Cassa Integrazione* (paras. 300-306). *Cassa Integrazione Guadagni (Covid-19)* for agricultural workers has also been granted, notwithstanding the limits in force, for a maximum duration of 90 days, between 01 January 2021 and 30 June 2021. These benefits are recognised in favour of workers hired after 25 March 2020 as well;
- A contribution exemption for a maximum of 8 weeks is instead envisaged for employers who do not use *Cassa Integrazione Guadagni (Covid 19)* (paras. 306-308). This exemption does not apply to agricultural employers and is available within the limits of the hours of *Cassa Integrazione Guadagni (Covid-19)* already taken in the months of May and June 2020, until 31 March 2021.

1.1.3 Dismissal ban and fixed-term contracts

The Budget Law also extends the measures on protection of employment to work organisation until 31 March 2021:

- According to para. 279, the renewal and extension of the fixed-term contract will continue to not require justifications until 31 March 2021. The renewal or extension can only take place once for a maximum period of 12 months;
- The prohibition of dismissals of employees for economic reasons continues until March 31 (paras. 309-311). The beginning of collective dismissal procedures is prohibited and any such procedures implemented after 23 February 2020 remain suspended. Individual dismissals for economic reasons are also prohibited and the related procedures have been suspended. This prohibition does not apply in the event of bankruptcy, company closure and in the event of a trade union agreement, signed by the most representative unions, only for those employees who join this agreement.

1.1.4 Occupational safety and health

Measures to protect fragile workers and workers with severe disabilities have been extended until 28 February 2021 (para. 481). The period of absence from the service is equivalent to hospitalisation. Work can be carried out remotely, also through the assignment to different tasks included in the same category or field of employment or through the performance of specific professional training activities, even remotely.

Also, Law Decree No. 183 of 31 December 2020, s.c. 'Milleproroghe', introduces some measures on health at work and on social security. According to Art. 19, public and private employers must guarantee exceptional health surveillance of 'fragile' workers until 31 March 2021. Moreover, private employers can apply smart working to any subordinate employment relationship, even in the absence of individual agreements as provided for in Act No. 81, 22 May 2017.

1.2 Other legislative developments

1.2.1 Promotion of employment

Act 30 December 2020 No. 178, which approves the State budget for financial year 2021 and the multi-year budget for the period 2021–2023, provides for the following measures:

- Paras. 10-19 regulate the contribution exemption for permanent employment for young people and women. Employers who hire employees under the age of 35 years under a permanent contract are exempt from paying social security contributions in 2021 and 2022. This exemption is admitted for a maximum period of 36 months and a maximum amount of EUR 6 000. The exemption also applies in the event of converting a fixed-term contract into a permanent one. The exemption shall apply for 4 years for companies located in southern Italy. A similar incentive is envisaged for the hiring of women which entails a net increase in employment;
- Paras. 20-22 regulate the partial exemption from social security contributions for self-employed workers and professionals. A fund has been set up at the Ministry of Labour for the partial exemption in 2021 of the payment of social security contributions for self-employed workers and professionals who earned a total income of less than EUR 50 000 in the 2019 tax period and who registered a loss of revenue or fees in the year 2020 of 33 per cent or more;
- The expansion contract (para. 349) is extended to companies with more than 500 employees that have dropped to a total of 250 employees if new hires are accompanied by a slide to retirement for older workers, who have no more than 5 years left to retire.

- For companies that employ over 1 000 employees, against a commitment to hire one worker for every 3 outgoing workers, the cost of early retirement has been further eased;
- Para. 160 regulates the contribution exemption for southern Italy. To contain the extraordinary impacts on employment caused by the COVID-19 epidemic in areas affected by serious socio-economic hardship, and to guarantee the protection of employment, a contribution exemption of 30 per cent is provided for until 31 December 2025, of 20 per cent for the years 2026 and 2027, and of 10 per cent for the years 2028 and 2029;
- An extraordinary indemnity scheme (I.S.C.R.O.) has been created for the self-employed with a VAT number for the last 4 years (paras. 386-401). This benefit can apply for up to 6 months. This is an experimental measure for 2021–2023.

1.2.2 Work-life balance

Paras. 23-26 regulate support for working mothers. The Fund has been increased with the aim of supporting the return to work of working mothers after childbirth and to finance associations that deal with psychological assistance for parents suffering from serious social and psychological hardships following the death of their child. For working fathers, a 1-day compulsory leave has been introduced not only for the birth of the child, but also in case of perinatal death.

1.2.3 ILO Convention No. 190

The Italian Parliament has authorised (Act of 15 January 2021 No.4) the President of the Italian Republic to sign International Labour Organization (ILO) Convention No. 190 on the elimination of violence and harassment in the workplace in accordance with the rules of the Italian Constitution on the ratification of international treaties (Arts. 80 and 87 of the Italian Constitution).

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings

Nothing to report.

4 Other relevant information

Nothing to report.

Latvia

Summary

Nothing to report for January 2021.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings

Nothing to report.

4 Other relevant information

Nothing to report.

Liechtenstein

Summary

Liechtenstein has adopted an amendment of the national law to transpose Regulation (EU) 2016/589, which aims to fundamentally redesign the European Employment Services network (EURES).

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative measures

1.2.1 EURES and national employment services

Regulation (EU) 2016/589 aims to fundamentally redesign the European Employment Services network (EURES). EURES is a cooperation network between the European Commission and the public employment services of the EEA Member States and Switzerland, and has been implemented to facilitate the free movement of workers. Liechtenstein has been participating in EURES since 01 January 2007.

The Member States are required to offer their employment services to everyone across borders. The EURES network's mission is to provide information, advice and placement (job matching and job search) to workers, jobseekers and employers and, more generally, to all persons who wish to exercise their right to free movement. As an instrument of employment policy, the EURES network helps create a common European labour market and an integrated regional labour market in some border regions.

Liechtenstein has adopted an amendment to the national law to implement Regulation (EU) 2016/589 (see below).

The aim of the amended law is to adapt Liechtenstein law in such a way as to ensure the enforcement of rights and obligations in relation with the EURES network.

This is to be achieved as follows:

- The existing provisions in the law on employment services are to be coordinated with the requirements of Regulation (EU) 2016/589;
- The competences of the public employment services are to be expanded;
- The central function in this context will be assigned to the Office of National Economy (*Amt für Volkswirtschaft*).

The changes have been included in the Act on employment services and temporary agency work (*Gesetz über die Arbeitsvermittlung und den Personalverleih, Arbeitsvermittlungsgesetz,* AVG, LR 823.10).

The amendment of this Act also entails a modification of the ordinance law (Ordinance to the Act on Employment Services and Temporary Agency Work (*Verordnung zum Gesetz über die Arbeitsvermittlung und den Personalverleih, Arbeitsvermittlungsverordnung*, AVV, LR 823.101).

On 03 December 2020, the Liechtenstein Parliament (*Landtag*), with approval of the Prince, enacted the amendment of the Act on Employment Services and Temporary

Agency Work (*Gesetz über die Arbeitsvermittlung und den Personalverleih, Arbeitsvermittlungsgesetz*, AVG, LR 823.10).

The amendment can be found in: *Liechtenstein Landesgesetzblatt* of 26 January 2021, No. 25.

The amendment will enter into force on 01 May 2021, at the earliest.

A link to the relevant Regulation (EU) 2016/589 of the European Parliament and of the Council of 13 April 2016 on a European network of employment services (EURES), workers' access to mobility services and the further integration of labour markets, and amending Regulations (EU) No. 492/2011 and (EU) No. 1296/2013 (text with EEA relevance) is available here.

The amendment tackles an important issue for the economy, the labour market, workers and employers. However, it is mainly a technical issue that does not substantially affect the rights and obligations of the parties to the employment contract.

The amendment departs from previous lines of reasoning because no new laws are being created, instead the existing structures are used to implement the changes. Public employment services are already regulated in Liechtenstein law (see Arts. 24–29a of the Act on Employment Services and Temporary Agency Work). These provisions have simply been adapted and expanded.

The purpose of consultation of municipalities, courts, business and employers' associations, the Liechtenstein trade union and other organisations, is to give the government an idea of the likely implications in the legal and political area. For this reason, the government always adapts the original draft law—depending on the outcome—to the results of the consultation process, where necessary, before it is submitted to Parliament.

The main purpose of this amendment is to transpose Regulation (EU) 2016/589. An initial review of the enacted amendment reveals that Parliament is seeking implementation in line with the mentioned Regulation.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings

Nothing to report.

4 Other relevant information

Nothing to report.

Lithuania

Summary

(I) The legislator has used the 'long-term employment' benefit framework to allow employees of businesses affected by the sanctions against Belarus to terminate their contracts of employment.

(II) The Vilnius Regional Court has decided that long haul drivers who work in other Member States fall under the personal scope of the legislation on the posting of mobile 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 Businesses affected by sanctions imposed

Recent demonstrations of private drivers were held in Druskininkai, a resort city close to the Belarus border, where employees of the local sanatorium demanded action be taken by the President, Parliament and government. The sanatorium '*Belorus*' is a Lithuanian entity controlled by the Administration of the Belorussian President, and has been subject to sanctions imposed by the European Union. As the assets and bank accounts were frozen as a result of the sanctions, the sanatorium was unable to meet their obligations towards the employees. The Ministry of Social Security and Labour has proposed—and Parliament adopted—the solution to allow employees to use the existing legal framework of the so-called 'long-term employment benefit' (aka long-term employment severance payment), which is paid by the Guarantee Fund (an institution established for the transposition of the Employer Insolvency Directive). The amendments to the law (Law No. XIV-173 of 14 January 2021, Registry of Legal Acts, No. 842) establish the right of employees of Lithuanian businesses affected by the sanctions to receive 'long-term employment' benefits if their contract of employment ceases to exist. These payments between 1 to 3 annual monthly average wages were initially foreseen for employees with at least 5 years of employment with the same employer if the employer terminated the contract for organisational, economic or similar reasons. The existing model was used here to allow employees of businesses affected by the sanctions to terminate their contract of employment (or for the contract to be terminated by the employer) and to receive those payments ('sanctions-related payments') from the state fund. The employees of the sanatorium '*Belorus*' do not intend to drop their jobs. The financial resources of the guarantee institution, which are reserved for cases of insolvency or to ease the burden of dismissal for employers are planned to be used to resolve the sensitive political question.

2 Court Rulings

2.1 Posting of workers

Vilnius Regional Court, No. e2A-325-852/2021, 19 January 2021

The application of national legislation to the posting of mobile workers is still causing problems of interpretation at the level of the national judiciary. Lithuanian district courts are smoothly changing their previous position (Kaunas Regional Court, case No. 2A-1356-945/2019, 15 October 2019) that mobile road workers (drivers) are not covered by the legislation transposing Directive 96/71/EC. In accordance with CJEU case C-815/18, 01 December 2020, *Van den Bosch*, the Vilnius Regional Court decided in favour of the interpretation that long haul drivers working in other Member States fall under the personal scope of the transposing legislation. However, the outcome of the case remains unclear because it has been transferred back to the district court.

There are several controversial points in the regional court's argumentation. The court applied a rather loose interpretation of the provisions of the applicable law and by referring to foreign law as a source of the employer's obligation. The fact that the third country national was employed on the basis of a work permit raises additional questions on the application of the Labour Code to the posted third-country nationals. Currently, Lithuanian law does not contain a provision that would, for example, require the employer to pay French minimum wages for a posting to France. The directive is not directly applicable (in this regard) to private employment relationships. The judges requested the district court to determine the content of the French law (on minimum wage) ex officio to apply to the employment relationship in question.

3 Implications of CJEU rulings

Nothing to report.

4 Other relevant information

Nothing to report.

Luxembourg

Summary

(I) The legislation on family support leave has been modified, extending the scheme's duration and scope.

(II) The new agreement on teleworking by the social partners has been declared generally applicable by the government.

(III) The Supreme Court ruled on cases concerning co-employment, seniority clauses and the dismissal of a pregnant worker during her probation period.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Emergency measures

A law has passed to extend the various COVID-19 related restrictions by three weeks, i.e. until 21 February 2021. In practice, this law has an important impact on work in the affected sectors.

As far as social legislation is directly affected, this law suspends interest on unpaid employers' social security contributions until 30 June 2021.

The law was adopted on Friday, 29 January and will be published soon. The parliamentary documents can be found here.

1.1.2 Care leave

The December 2020 Flash Report reported a legislative change concerning family leave (*congé pour raisons familiales*). A new amendment was introduced on 22 January 2021, with the following objectives:

- Extension of the duration of the scheme until 02 April 2021. Although schools and childcare facilities in Luxembourg are currently open, the legislator wanted to take account of the situation of cross-border commuters from neighbouring countries;
- Quarantine of children under the age of 13, as well as measures to isolate, evict or to keep children at home for overriding public health reasons are included in the scheme;
- The leave is extended to children who are vulnerable to COVID-19 on the condition that a medical certificate is produced attesting to this vulnerability and the contraindication of attending school or a childcare facility;
- An extension in case of isolated closures of schools or childcare facilities have to be decided.

See here for the legislative text (*Loi du 22 janvier 2021 portant : 1° modification des articles L. 234-51, L. 234-52 et L. 234-53 du Code du travail ; 2° dérogation temporaire aux dispositions des articles L. 234- 51, L. 234-52 et L. 234-53 du Code du travail*). By mistake, the government adopted a Grand-Ducal decree with a similar content, which was repealed two days later.

1.2 Other legislative developments

1.2.1 Teleworking

As announced and reported in detail in the October 2020 Flash Report, the social partners have signed a new agreement on teleworking, implementing substantial changes.

This agreement was concluded under the suspensive condition that it will be declared by the government to be of general application for all employers. This Grand-Ducal decree has now been published, and the agreement has come into force, replacing the former agreements.

See here for the *'Règlement grand-ducal du 22 janvier 2021 portant déclaration d'obligation générale de la convention du 20 octobre 2020 relative au régime juridique du télétravail'*.

1.2.2 Training of staff representatives

Another national agreement between the social partners has been declared to be generally binding. Although it only deals with one point in detail, it is nevertheless worth mentioning, as there are not many national agreements.

To understand the context, it should be noted that a reform of staff delegations (*delegation du personnel*) had taken place in 2015, granting delegates elected for the first time the right to additional training leave (*congé-formation*). However, for the delegates elected in the social elections of 2019, it turned out that the courses were organised with a delay and that they had quickly filled. In addition, the pandemic linked to the COVID-19 virus led to the postponement of courses. As a result, many delegates were not able to take advantage of the training leave entitlement in their first year of office.

The agreement thus provides that for delegates elected in 2019, this additional training leave can be taken until 31 March 2021, at the latest.

The agreement was signed on 20 October 2020, subject to the suspensive condition of its declaration of general obligation, which only occurred on 22 January 2021. Ultimately, the period within which this training leave must be taken is therefore very limited.

See here for the *'Règlement grand-ducal du 22 janvier 2021 portant déclaration d'obligation générale de l'accord en matière de dialogue social interprofessionnel 'première année de mandat' dans le cadre du plan de formation des délégué(e)s du personnel signé en date du 20 octobre 2020'.*

2 Court Rulings

2.1 Co-employment

Cour supérieure de justice, CAL-2019-00422, 06 February 2020

A decision on co-employment (*co-emploi*) is worth mentioning. This French jurisprudential creation has already been taken up in a handful of cases in Luxembourg.

In the present case, an entrepreneur managed two companies, S1 and S2. To carry out a real estate project, company S2 had assigned all its rights to this project to company S1, so that company S2 no longer had any real substance. S2 initially paid the employees' wages. Subsequently, the wages were paid by S1 on behalf of S2 and finally, the wages were no longer paid and S2 went bankrupt.

The employee took legal action against S1, since S1 had been his real employer and liable for the unpaid wages.

The Court of Appeal recalled that according to case law, the remuneration due to the employee may be paid by a third party, without the latter having to fear being substituted for the principal in its obligations as employer, except in the case of 'co-employment'. Co-employment is given for companies whose activities are identical, similar or complementary, if their capital is interweaved and if they have the same directors.

These conditions were met in the present case, so that the employee could, even if there was no subordination to company S1, direct his court action for the payment of wages against S1.

2.2 Seniority clauses

Cour supérieure de justice, CAL-2020-00049, 29 October 2020

Another case concerned the calculation of seniority, and the possibility of taking over seniority from a previous contract. In the present case, the contract did not contain an explicit clause. Nevertheless, the pay slips mentioned a date of entry prior to hiring, which according to the judges is a recognition of seniority by the employer.

2.3 Maternity leave and trial period

Cour supérieure de justice, CAL-2019-00795, 26 November 2020

Another case concerned the dismissal of a pregnant woman under a fixed-term contract during her probation period (*période d'essai*).

The employee had indeed been hired on a fixed-term contract with a probation period and fairly quickly submitted her pregnancy certificate. The employer considered the probation period to be suspended until the end of her maternity leave, and then dismissed her according to the rules applicable to the probation period (i.e. without being required to give reasons).

Article L.337-1 of the Labour Code prohibits the dismissal of pregnant women, regardless of whether they work under a fixed-term or open-ended employment contract.

However, Article L. 337-3 of the Labour Code only provides that the probation period is interrupted and postponed until the end of maternity leave.

The employer attempted to argue that the fixed-term contract should be requalified as a permanent contract since the mandatory rules of form had not been complied with. The judges found that these rules had indeed not been complied with, and that the contract should therefore be reclassified as a contract of indefinite duration. Nevertheless, since the purpose of this reclassification was to protect the employee and not to benefit the employer, they held that if the employee objected, the employer could not invoke the reclassification.

The employer also tried unsuccessfully to invoke unequal treatment contrary to the Constitution. However, the judges considered that employees who have concluded a fixed-term contract are not in a situation similar to that of employees who have concluded an open-ended contract.

Thus, the probation period had not been interrupted, and the employer was not entitled to dismiss the employee at the end of the term. The dismissal was therefore declared abusive.

3 Implications of CJEU rulings

Nothing to report.

4 Other relevant information

Nothing to report.

Malta

Summary

Nothing to report for January 2021.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU

Nothing to report.

4 Other relevant information

Nothing to report.

Netherlands

Summary

(I) The lockdown has been extended. The relief measures for businesses have been extended and adjusted.

(II) A new government decree supports sustainable employability and early retirement.

(III) A first ruling of the highest administrative court on the NOW scheme has been published.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Lockdown measures

In January, additional general measures were issued. The lockdown that started on 15 December 2020 has been extended until 02 March 2021. Furthermore, a curfew was imposed as of 23 January 2021 until 02 March 2021. The curfew applies between 21:00 and 4:30 and residents must stay indoors, with some exceptions such as commuting for work.

1.1.2 Relief measures for employers

The 'Support and Recovery Package for the Economy and Labour Market', which was launched in August 2020, including a third version of the Temporary Bridging Measure Work Retention ('NOW-3') (see October 2020 Flash Report for further details), will be expanded. This was announced in a letter of the government of 21 January 2021. The reason for this is the extension of the lockdown. The government, together with the social partners, has agreed that the compensation for wage costs employers can apply for will be increased from 80 per cent to 85 per cent in the fourth tranche of the NOW support scheme (January-March 2021). The initial plan to gradually phase out the support scheme has been abandoned and modifications of the NOW-3 have been published on 02 February 2021.

1.2 Other legislative developments

1.2.1 Sustainable employment and early retirement

As a result of the previously published Pension Agreements between the government and social partners, the Ministry of Social Affairs and Employment issued a decree on 18 January 2021, *Stcrt.* 2021, 2522. This decree will be in place as of 2021 up to and including 2025. It entails a subsidy for sectoral arrangements that support sustainable employment (EUR 964 million). Furthermore, tax rules that currently discourage early retirement will be eased.

2 Court Rulings

2.1 NOW scheme

Centrale Raad van Beroep, ECLI:NL:CRVB:2021:87, 28 January 2021

This decision of the highest administrative court deals with the Temporary Bridging Measure Work Retention ('NOW') for the first time. One of the requirements to apply for NOW support is a valid comparison between the wages paid in November 2019 or in January 2020. For businesses that were established after January 2020, no subsidy is provided due to this requirement. A restaurant owner claimed that this was unfair. The CRvB ruled that NOW is an emergency fund and not a scheme aimed at saving all businesses suffering because of the COVID-19 measures. The scheme is not contrary to the principle of proportionality or any other general principle of proper administration or general principle of law. The refusal to provide advance payment to the NOW subsidy has been upheld.

3 Implications of CJEU rulings

Nothing to report.

4 Other relevant information

4.1 Teleworking

Since 12 March 2020, the government has urged employees to work from home to the extent possible. Employers are strongly advised to facilitate this. Nevertheless, there are signals that a large share of workers, who could work from home, continue to go to work (e.g. according to a survey of CNV, a large trade union). Workers are either urged by their employer to go to work or it is their own choice. In a recent letter, the government announced that compulsory working from home is being considered. Another measure that is under consideration is the possibility to close down a company in case of non-compliance with the COVID-19 measures, which results in an outbreak of the virus.

Norway

Summary

(I) Rising COVID-19 infection rates have led to very strict control measures. The government has proposed an extension of several measures to mitigate the pandemic's effects up to July 2021, and has presented new financial measures in an amount totalling NOK 16 billion.

(II) The Norwegian Supreme Court found that the obligation to pay occupational pension premiums can be transferred to the new employer in the event of a transfer of undertaking.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Relief measures for businesses and workers

COVID-19 infection rates increased in late December 2020, despite strict national infection control measures and even stricter local measures in some areas. At the beginning of January, additional measures were introduced at the national level and often also at the local level. Even further restrictions were added in the last week of January due to an outbreak of a more contagious variant of the virus in a municipality close to the capital of Norway. The entry restrictions are now the most severe since March 2020. In general, only foreign nationals who reside in Norway are permitted entry, see here.

The unemployment rate has remained relatively stable since October 2020, but has been slightly rising since December. By the end of January, there were 201 400 unemployed persons, i.e. 7.1 per cent of the workforce, see the statistics here.

The employment and labour law measures introduced in 2020 to mitigate the effects of the COVID-19 crisis have been reported in previous Flash Reports. In January 2021, there were only minor adaptions of existing regulations.

- A new provision on deductions has been introduced in the regulations on unemployment benefits (FOR-1998-09-16-890). According to the new section 6-3, financial benefits paid by the employer during temporary layoffs, whether a one-time payment or periodic payments, will be deducted from the unemployment benefit, see FOR-2021-01-25-212.

Furthermore, the government has proposed a number of extensions of existing measures, see in more detail here.

- An extension of the period of temporary layoffs to 01 July 2021, for layoffs that would otherwise exceed the maximum period;
- an extension of the right to unemployment benefits for those who would otherwise lose the right before 01 July 2021, and a right to reapply for unemployment benefits for those who lost this entitlement after 31 October 2020;
- an extension of the higher unemployment benefit rate to 01 July 2021, which was set to be temporary;
- an extension of the end date of the Temporary Act on Compensation Benefit for Self-employed and Freelancers, who have recorded a loss of income due to the COVID-19 outbreak, from 01 March to 01 July 2021.

In addition, the government has presented a broad range of proposals for new and extended financial measures in the total amount of NOK 16 billion. This includes i.a. an extension of the compensation scheme for businesses that have experienced a severe decline in turnover until the end of June 2021, see the details here.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Transfer of undertakings

Supreme Court Judgement, HR-2021-61-A, 18 January 2021

A privately owned kindergarten had an agreement with an insurance company to provide occupational pensions in accordance with the municipal scheme for occupational pensions. This scheme requires the employer to pay a premium for non-insurable benefits (an adjustment premium) that is accrued as long as the employee lives. The agreement was terminated in 2007, and the employees were included in a different occupational pension scheme with defined benefits. The kindergarten was still required to pay the adjustment premiums, but did not do so. From 2011, this premium was instead paid by *Sikringsordningen*, a separate body set up to secure pensions when employers fail to pay premiums. In 2012, the kindergarten was transferred to a new employer. The transfer agreement did not regulate the duty to pay adjustment premiums.

The issue before the Court was whether the new employer was responsible for the adjustment premiums from 2011 onwards according to The Working Environment Act (WEA) section 16-2. The provision regulates the transfer of pay and working conditions when there is a transfer of an undertaking.

The Supreme Court concluded that the obligation to pay adjustment premiums was transferred to the new employer according to the main rule in WEA section 16-2 (1). This provision sets as the main rule that the rights and obligations of the former employer ensuing from the contract of employment or employment relationships are transferred to the new employer. The special rule on transfers of pensions in WEA section 16-2 (3) did not apply, as this provision concerns the right to earn 'further entitlement' to pensions. The precursor of the WEA had set an exception for pensions that corresponded with Directive 2001/23/EF Article 3 No. 4. The Court, however, found that the exception had deliberately been repealed in the WEA.

The new employer was consequently responsible for paying future adjustment premiums for the affected employees. The new employer was also responsible for covering the adjustment premiums already paid according to the general principles of recourse.

The judgment shows that the obligations of the new employer in the event of a transfer of undertaking as regards pension premiums, go beyond the minimum requirements of Directive 2001/23/EF.

3 Implications of CJEU rulings

Nothing to report.

4 Other relevant information

Nothing to report.

Poland

Summary

A new law introduced to bring Polish law into line with Directive 2018/958 amended the Act on the Principles for Recognising Professional Qualifications Acquired in the Member States of the European Union.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Regulation of professions

The Law of 19 November 2020 amending the Act on the Principles for Recognising Professional Qualifications Acquired in the Member States of the European Union was published in the Polish Journal of Laws of 13 January 2021 (item 78) and took effect on 27 January 2021. This Law introduces special rules in the scope of ensuring proportionality, together with a justified and non-discriminatory nature for regulatory rules and requirements concerning the provision of cross-border services.

The text of the Law can be found here.

The substantiation of the draft and the information on the legislative process can be found here.

The new law transposes the Directive of the European Parliament and of the EU Council 2018/958/EC of 28 June 2018 into Polish law on a proportionality test before adopting new regulations on professions (Official Journal of the European Union L 173 of 09 July 2018, page 25). The implementation of the Directive's rules has been achieved, and the purposes arising from the provisions of Directive 2018/958 have been transposed.

The rules introduced intend to ensure proportionality, together with a justified and non-discriminatory nature for regulatory rules and requirements concerning the provision of cross-border services. In accordance with the Act on the Principles for Recognising Professional Qualifications Acquired in the Member States of the European Union, the regulatory rules were specified as being regulations of Polish law specifying the formal qualifications necessary to perform regulated professions or as qualifying requirements, on the fulfilment of which the undertaking or performance of regulated activities depends and, insofar as this is required, the terms and conditions for performing regulated professions, as well as on the undertaking or performance of regulated activities.

The transposition of the new regulations has been achieved. The regulations contribute to rendering objective the process of introducing restrictions in the provision of services by professions subject to regulation.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings

Nothing to report.

4 Other relevant information

Nothing to report.

Portugal

Summary

The state of emergency has been extended until 14 February 2021. Several extraordinary and temporary measures have been approved to support businesses and workers in the wake of the pandemic.

1 National Legislation

1.1 Measures to respond to the COVID-19 pandemic

1.1.1 State of emergency

On 06 January 2021, the President of the Republic, through Decree No. 6-A/2021, approved the extension of the state of emergency for a period of 8 days, from 08 January to 15 January 2021, without prejudice to any renewals, in accordance with the law. Through Resolution No. 1-A/2021 of 06 January, the Portuguese Parliament authorised the renewal of the state of emergency under the terms set forth in the abovementioned Decree No. 6-A/2021.

The Decree authorises the adoption of restrictions to the freedom of movement, with the aim of reducing the risk of contagion, as well as restrictions to private, social and cooperative initiatives, by establishing that *i)* the resources, means and health care establishments integrated into the private, social and cooperative sectors may be used by the competent public authorities, if necessary, to ensure the treatment of patients with COVID-19, subject to compensation, and that *ii)* the competent public authorities may determine the total or partial closure of establishments, services and other means of production.

The Decree also provides that the rights of workers may be restricted, as any worker of a public, private, social or cooperative entity, regardless of his/her link or function, may be mobilised to support the health authorities and services, namely to carry out epidemiological surveys, track contacts and follow-up active surveillance of individuals. In addition, the termination of employment contracts of workers of the National Health Service may be restricted.

Furthermore, the Decree provides that the wearing of masks and conducting body temperature checks may be imposed for the purpose of entering and staying in workplaces.

The implementing measures of the extension of the state of emergency are regulated in Decree No. 2-A/2021, adopted by the government on 07 January 2021, which entered into force on 08 January 2021. The measures provided for in Decree No. 11/2020, of 06 December 2020, amended by Decree No. 11-A/2020, of 21 December (see December 2020 Flash Report), remain in force but will apply to the entire territory of mainland Portugal (and will no longer depend on the risk level in the different municipalities).

Through Decree No. 6-B/2021 of 13 January, the President of the Republic declared a renewal of the state of emergency for a period of 15 days, starting on 16 January and ending on 30 January 2021, without prejudice to any renewals, in accordance with the law. Through Resolution No. 1-B/2021 of 13 January, the Portuguese Parliament approved the extension of the state of emergency declared by the President of the Republic.

In response to the deterioration of the epidemiological situation in Portugal due to a significant increase in the number of new COVID-19 infections, the Decree authorises the government to adopt more restrictive measures under the state of emergency's

framework, namely on the freedom of movement, international travel, private, social and cooperative initiatives and workers' rights.

On 14 January 2021, Decree No. 3-A/2021 was published, containing the implementing measures adopted by the government under the referred Decree of the President of the Republic No. 6-B/2021, which entered into force on 15 January 2021. Among others, this Decree provides for *(i)* the mandatory adoption of a teleworking regime, when compatible with the activity being performed; *(ii)* the imposition of a general duty to remain at home and the prohibition of traveling on public roads, except for purposes expressly authorised by law (such as performing work when it cannot be carried out under a teleworking regime); and *(iii)* the closure of commercial and service establishments, except those providing essential goods. Consequently, Portugal initiated a new lockdown for a period of 15 days. On 22 January 2021, the government approved Decree No. 3-C/2021, which amends the regulation of the emergency state declared by the President of the Republic, providing for the suspension of teaching activities at all levels of education.

Through Decree No. 9-A/2021 of 28 January, the President of the Republic declared another extension of the state of emergency for a period of 15 days, from 31 January to 14 February 2021. This extension of the state of emergency was approved by the Resolution of Parliament No. 14-A/2021, of 28 January. Apart from the restrictions established in the previous Decree issued by the President of the Republic (see above), this Decree also provides for the possibility of prohibiting presence learning and the modification or extension of academic periods.

This Decree was regulated in Decree No. 3-D/2021 of 29 January, approving the implementing measures of the state of emergency as of 31 December 2021. The measures stipulated in Decree No. 3-A/2021 (see above) remain in place. In addition, this Decree establishes that educational and teaching activities will be suspended until 05 February 2021, to be resumed on 08 February 2021 remotely. Moreover, this Decree regulates that Portuguese citizens are prohibited from traveling outside the continental territory by any means, namely road, rail, air, river or sea, with some exceptions, one of them being for the performance of professional activities or similar, duly documented, in the context of activities with an international dimension.

1.1.2 Relief measures for businesses and workers

Decree Law No. 6-C/2021 of 15 January (a summary in English (without legal value) is available here), which entered into force on 01 January 2021, establishes exceptional and temporary measures with the aim of protecting employment within the context of the COVID-19 crisis.

This Decree Law approves the extension of extraordinary support measures for the progressive resumption of businesses' activity ('*apoio extraordinário à retoma progressiva*'), set forth in Decree Law No. 46-A/2020, of 30 July (see July 2020 Flash Report), until 30 June 2021, amending some of the conditions that must be fulfilled by the companies to be entitled to this financial support, and creates a new simplified support procedure for micro-enterprises facing a business crisis situation, with the aim of retaining jobs. In addition, the Decree Law stipulates that employees who are laid off are guaranteed 100 per cent of their regular gross pay, up to a value equal to three times the national minimum wage (currently, EUR 1 995.00).

On the same date, Decree Law No. 6-E/2021 was published, introducing extraordinary measures of support for businesses and workers, in response to the more severe restrictions applicable to business activities within the context of the state of emergency. Among other measures, this Decree determines that a business crisis situation exists when a company or establishment is required to close or to suspend its activity in accordance with a legislative or administrative decision, as had been the case for several

business establishments under Decree No. 3-A/2021, referred to above. Businesses can request the extraordinary support for the retention of employment contracts set forth in Decree Law No. 10-G/2020 of 26 March (see March 2020 Flash Report), and the employer is entitled to suspend or to reduce the normal working hours of their workers through a very simplified procedure (this measure is known as 'simplified lay-off'). This Decree Law also provides for extraordinary support in case of a reduction in the economic activity of self-employed workers or members of the statutory bodies affected by the suspension of business activities or the closure of establishments due to a legislative or administrative decision.

Furthermore, due to the suspension of teaching activities (approved by Decree No. 3-C/2021, referred to above), Decree Law No. 8-B/2021 of 22 January, which entered into force on 22 January, provides for the creation of an exceptional and temporary regime of justified absences due to family obligations, which applies to workers who have a child under the age of 12 years or a child with a disability or chronic disease, regardless of age.

Finally, Ordinance No. 19-A/2021, which was published on 25 January 2021 and will apply from 01 January to 31 December 2021, regulates the procedures for the allocation of workers' extraordinary income support, which aims to ensure the continuity of income for people in a situation of particular economic vulnerability caused by the COVID-19 pandemic.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings

Nothing to report.

4 Other relevant information

Nothing to report.

Romania

Summary

(I) Most of the measures to mitigate the COVID-19 crisis have been extended into 2021.

(II) The government has set a new minimum wage for 2021.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Relief measures for businesses and workers

The state of emergency has been extended for 30 days in Romania by Government Decision No. 3/2021. The state of emergency on Romanian territory started on 13 January 2021, and the measures applied during this situation to prevent and mitigate the effects of the COVID-19 pandemic have been published in the Official Gazette No. 36 of 12 January 2021.

As a result, a number of COVID-19-related measures for employers and employees have been extended until mid-2021.

For this purpose, Emergency Ordinance No. 220/2020 on the application of social protection measures after 01 January 2021 to contain the spread of the coronavirus SARS-CoV-2, as well as to amend some normative acts, was published in the Official Gazette No. 1326 of 31 December 2020.

The following measures have been extended:

- support for employers of unemployed persons over the age of 50 years or those aged 16-29 years, whose employment relationships have ceased for reasons not attributable to them during the state of emergency or alert;
- support for beneficiaries, when hiring day labourers;
- support provided to employers for the employment of employees with a fixed-term contract of maximum 3 months;
- granting days off to parents-employees whose children have online classes;
- the provisions on technical unemployment in restricted areas of activity for those employees whose employment contracts have been suspended will continue receiving 75 per cent of their wages paid by the state;
- the applicability of the *Kurzarbeit* measure.

1.2 Other legislative developments

1.2.1 Minimum wage

According to Government Decision No. 4/2021 which establishes the national guaranteed minimum gross basic wage, published in the Official Gazette No. 40 of 13 January 2021, the national guaranteed minimum gross wage excludes bonuses and other supplements, and has been set at LEI 2 300 per month (EUR 475, i.e. an increase of 3 per cent compared to 2020).

In Romania, there are currently about 1.4 million employees who earn the minimum wage, representing 26.4 per cent of all employed Romanians.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings

Nothing to report.

4 Other relevant information

Nothing to report.

Slovakia

Summary

The state of emergency due to the pandemic has been extended. Several restrictions to the freedom of movement have been adopted, and a curfew has been introduced.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 State of emergency

On 12 January 2021, the National Council of the Slovak Republic adopted Resolution (No. 519) to the proposal of the Government of the Slovak Republic to express the consent of the National Council of the Slovak Republic to the extension of a state of emergency declared due to an endangerment to life and health of persons in causal connection with the emergence of the pandemic (Resolution No. 4/2021 Collection of Laws – "Coll.").

With this Resolution, the National Council approved the extension of the state of emergency declared due to an endangerment to the life and health of persons in causal connection with the occurrence of the pandemic, approved by Resolution of the Government of the Slovak Republic No. 807 of 29 December 2020.

The Resolution is effective from 14 January 2021.

1.1.2 Restrictions to the freedom of movement

During January 2021, the Slovak government adopted three resolutions on free movement and a curfew.

The Resolution of the Government of the Slovak Republic No. 1 of 6 January 2021 to the proposal to amend the measures adopted pursuant to Article 5 paragraph 4 of Constitutional Act No. 227/2002 Coll. on state security in times of war, state of war, an extraordinary state and state of emergency, as amended (Resolution No. 1/2021 Coll.).

The Resolution of the Government of the Slovak Republic No. 30 of 18 January 2021 to the proposal for the adoption of measures to mitigate COVID-19 in the territory of the Slovak Republic and to amend the measures adopted pursuant to Article 5, paragraph 4 of Constitutional Act No. 227/2002 Coll. on state security in times of war, state of war, an extraordinary state and state of emergency, as amended (Resolution No. 8/2021 Coll.).

The Resolution of the Government of the Slovak Republic No. 44 of 22 January 2021 to the proposal to extend the duration of measures adopted by the Resolution of the Government of the Slovak Republic No. 1 of 6 January 2021 pursuant to Article 5, paragraph 4 of Constitutional Act No. 227/2002 Coll. on state security in times of war, state of war, an extraordinary state and state of emergency, as amended, and to change and supplement the Resolution of the Government of the Slovak Republic No. 30 of 17 January 2021 (Resolution No. 14/2021 Coll.).

With these resolutions, the government gradually extended the curfew. The curfew still applies. However, among other exceptions, the following now also apply:

- With effect from 27 January 2021 until the Monday that follows the day on which the Ministry of Health of the Slovak Republic confirms a decrease in the number of hospitalised patients with COVID-19 below 2 500, and when this figure was

not exceeded continuously for 7 consecutive calendar days—this will not apply to the territory of 36 districts in which on the basis of antigen tests performed from 18 January 2021 to 26 January 2021, there was a lower level of positivity than in other districts—the freedom of movement shall be limited and a curfew from 05.00 until 01.00 the following day shall apply, a restriction that will expire on 7 February 2021. This restriction shall not apply, inter alia, from 27 January 2021 to 7 February 2021 for travel to and from the workplace of an employee who, due to the nature of his/her work, cannot, based on the employer's decision, perform the work at home, and return, if that person can present a negative RT-PCR or antigen test, certified in the territory of the European Union carried out from 18 January 2021 onwards, or if this person has already had COVID-19 and can verify this (not older than three months), or if this person has been vaccinated against COVID-19 and has received a second dose of vaccine and at least 14 days have elapsed since this vaccination.

- With effect from 03 February 2021, the government will restrict for the territory of 36 districts in which, based on antigen tests performed from 18 January 2021 to 26 January 2021, there was a lower level of positivity than in other districts, the freedom of movement and a curfew from 03 February 2021 from 05.00 until 01.00 the following day. This restriction shall expire on 07 February 2021, and shall not apply, inter alia, to travel to and from the workplace of the employee who, due to the nature of his/her work and at the employer’s discretion, cannot perform the work at home.
- From 27 January 2021 to 07 February 2021, the restriction of freedom of movement shall not apply to the travel of persons for the purpose of conducting a job interview, selection procedure, recruitment procedure or the conclusion of an employment contract or another similar contract and the return journey, if that person has a negative RT-PCR or antigen test, certified in the territory of the European Union carried out after 18 January 2021 or if this person has already had COVID-19 and can verify this (not older than three months), or if this person has been vaccinated against COVID-19 and has received a second dose of vaccine and at least 14 days have elapsed since this vaccination.

The government also recommends that employers ensure that their employees are tested for COVID-19 according to a manual approved by the government on 23 January 2021.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings

Nothing to report.

4 Other relevant information

Nothing to report.

Slovenia

Summary

(I) As Slovenia has extended the state of emergency for two additional months, the government has submitted the eighth anti-corona package of measures (PKP8) to the national assembly for adoption.

(II) The minimum wage has been adjusted.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 The eighth anti-corona package (PKP8)

On 25 January 2021, the government adopted the Draft Act on Additional Measures to Mitigate the Consequences of COVID-19 (PKP8) and submitted it to the national assembly (*'Predlog Zakona o dodatnih ukrepih za omilitev posledic Covid-19 (ZDUOP)'*, see here).

Various measures aimed at mitigating the negative economic and social consequences of the COVID-19 pandemic are envisaged in the PKP8, which include new measures and extend existing ones:

- Among others, the partial reimbursement of wage compensations for temporarily laid-off workers and the short-time work scheme are to be extended, in addition to many other temporary measures;
- As a new measure, the minimum wage subsidy is expected to be introduced in response to the adjustment of the minimum wage (the State would partially cover the employer's higher labour costs associated with the raise in the minimum wage – see below under 1.2.1).

It should be noted that this is the government's proposal, it has not yet been adopted by the national assembly.

1.1.2 Other emergency measures

Slovenia has extended the state of emergency for an additional 60 days, namely from 17 January until 17 March 2021 (see here for Ordinance on the declaration of the COVID-19 epidemic in the territory of the Republic of Slovenia, OJ RS No. 5/21, 14 January 2021, p. 272).

In response to the pandemic, various (temporary) measures will continue to remain in place during January 2021; the regulation of these measures changes very quickly, often also on a weekly or sometimes even on a daily basis.

The most important change has been the partial reopening of schools (on 26 January 2021), which have been closed since mid-October 2020. Only the youngest children (in kindergartens and children attending the first three grades of primary school) have returned to schools, and only in the regions with a slightly better epidemiological situation. For the remaining majority of children in primary and secondary schools and for students, remote schooling and studying has continued. The partial reopening of schools has been accompanied by strict protective measures, including a massive (weekly) testing of teachers (see here for OJ RS, No. 11/21, 22 January 2021, p. 777).

The ban on travel between municipalities with certain exceptions continues to apply, as well as the closure of shops (except those selling essential goods and services), bars, restaurants, etc., the prohibition of gathering of people and a 9 pm curfew, etc.

1.2 Other legislative developments

1.2.1 Minimum wage

On the basis of Article 6 of the Minimum Wage Act (see here for *'Zakon o minimalni plači (ZMinP)'*,OJ RS No. 13/10 et subseq.), the minimum wage has been adjusted (see here for Minimum Wage Amount, OJ RS No. 12/21, 28 January 2021, p. 788).

The minimum wage will amount to EUR 1 024.24 gross (monthly rate for full-time work) from January 2021 onwards. It was EUR 940.58 in 2020 and EUR 886.63 in 2019.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other relevant information

4.1 Constitutionality of PKP7

The trade unions lodged a petition with the Constitutional Court to initiate a procedure to review the constitutionality of two provisions of the seventh anti-corona package (Articles 21 and 22 of the PKP7 – see December 2020 Flash Report). The trade unions allege discrimination and strongly oppose those provisions of the PKP7 that introduced the possibility for employers to dismiss a worker, who has fulfilled the prescribed conditions for the statutory old-age pension, without a valid reason/without justification.

Spain

Summary

(I) The government has extended the temporary measures to protect employment until 31 May 2021.

(II) The central state administration has published a new gender equality plan.

(III) The Supreme Court has ruled that the employment contract signed between a worker and a subcontractor company cannot be concluded for a fixed term if no specific and valid reasons exist.

(IV) The Supreme Court has ruled that the obligation imposed on workers to provide the employer with his/her income tax return violates the worker's right to privacy and the right to protection of personal data.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Relief measures for employees

As reported in previous Flash Reports (March to June 2020 Flash Reports), the government has approved numerous measures to protect workers and businesses from the pandemic's impact. Specifically, layoffs as a result of COVID were prohibited, because the main objective was to overcome the crisis without a huge loss of jobs. The government provides financial assistance to businesses to adopt less damaging measures than the termination of employment contracts, e.g. the suspension of employment contracts, the reduction of working hours or changes to working conditions. Workers affected by such changes are eligible for unemployment benefits, because more flexible rules have been implemented. Dismissal on account of COVID is not permitted, and businesses that receive benefits for the period of temporary layoffs cannot dismiss workers for six months. These temporary measures were extended several times: until June 2020, until 30 September 2020, until 31 January 2021 and now until 31 May 2021.

See here for the Decree of 26 January 2021.

1.2 Other legislative developments

1.2.1 Gender equality plan

The III Equality Plan of the central state administration has been published. Organic Law 3/2007 of 22 March, for effective equality between women and men, requires businesses of a given size to draw up equality plans. The government must approve one of these plans for the central state administration at the beginning of each legislative session. It is part of the Sustainable Development Goals of the 2030 Agenda on gender equality, decent work and the guarantee of equal opportunities set by the United Nations. It is linked to the Pact Against Gender Violence approved by the Spanish Parliament in 2017. The Plan provides for a general framework that must be elaborated with more specific plans in each ministerial department. Trade union organisations participated in the drafting process.

Statistically, an equal amount of men and women work in the central state administration. Despite this overall result, there are differences between ministerial departments. Furthermore, the percentage of women in temporary jobs is higher.

The III Plan aims to build a culture to improve equality and focuses on early detection and a comprehensive approach to particularly vulnerable situations. The Plan establishes six different lines of action (called 'axis'), with up to 68 measures.

Axis 1: organisational transformation. This axis includes measures such as preparing reports and newsletters with a gender perspective, strengthening the Equality Units and their coordination, promoting the gender perspective in the approval of laws and the design of a protocol against sexual harassment and sex discrimination.

Axis 2: awareness, education and training. This requires the design of a Comprehensive Equality Training Plan, the development of methodological tools to fully expand the Plan and raise awareness among staff of the central state administration.

Axis 3: working conditions and professional development. Axis 3 emphasises the recruitment of female talent, the promotion of the development of women's professional careers and the closing of the gender pay gap.

Axis 4: co-responsibility and reconciliation of personal, family and work life. These objectives were included in previous plans, but Plan III promotes the joint responsibility of parents.

Axis 5: violence against women. This axis focuses on training and awareness, as well as on the development of guidelines and measures to support and protect the victim.

Axis 6: transversality and situations that require special protection. It targets other grounds of discrimination, such as disability or sexual orientation.

2 Court Rulings

2.1 Fixed-term work

Supreme Court, No. 1137/2020, 29 December 2020

The Supreme Court stated that an employment contract signed between a worker and a subcontractor company cannot be concluded for a fixed term, unless specific and valid reasons exist in accordance with Article 15 of the Labour Code.

To date, the Supreme Court has deemed that the duration of subcontracts between a subcontractor and the main undertaking was a valid reason for concluding a fixed-term employment contract, so the duration of these two contracts could be linked. As reported in the last Flash Report, the Supreme Court takes a different approach when the employment contract has lasted several years, when it has been renewed several times and, particularly, when the employer was not the same as the initial one.

This new ruling is a breakthrough, because the Supreme Court takes a completely different approach and states that the conclusion of a subcontracting agreement is not a valid reason for concluding a fixed-term contract. Therefore, the employment contract between the subcontractor and the worker must be a permanent one, unless a valid reason exists to conclude a temporary contract (for specific work and services, temporary changes in production, an ongoing process to fill a vacant post or the temporary replacement of a worker who is entitled to return to his/her job).

2.2 Right to privacy

Supreme Court, No. 1.134/2020, 29 December 2020

The Code of Conduct for the staff of the '*Banco de España*' (Bank of Spain) imposes certain obligations on workers:

- They must request authorisation to carry out activities outside of work, such as publishing papers or reports, or giving interviews to the media, to ensure that they do not use or disclose confidential information about the Bank of Spain;
- They must provide the Bank of Spain with income tax returns for previous years.

The Supreme Court stated that the obligation to request authorisation to conduct activities outside of work does not violate any fundamental right, because the special position of the 'Bank of Spain' justifies certain limitations for the workers.

The obligation to submit income tax returns, however, violates the right to privacy and the right to protection of personal data, because the law does not allow the Bank of Spain to require such information and the worker's consent is neither freely given nor required.

As regards authorisation, the Supreme Court stated that these obligations are in line with Guideline (EU) 2015/855 of the European Central Bank of 12 March 2015, laying down the principles of a Eurosystem Ethics Framework and repealing Guideline ECB/2002/6 on minimum standards for the European Central Bank and national central banks when conducting monetary policy operations, foreign exchange operations with the ECB's foreign reserves and managing the ECB's foreign reserve assets (ECB/2015/11).

Regarding the obligation to provide tax information, the Supreme Court reminded that the General Data Protection Regulation protects the workers in such cases.

3 Implications of CJEU Rulings

Nothing to report.

4 Other relevant information

Nothing to report.

Sweden

Summary

(I) The Swedish government has established an institute to monitor the respect of human rights.

(II) The Swedish Labour Court has decided a case on the calculation of damages for trade secrets and intellectual property infringements. It has also decided a case concerning preclusion deadlines to challenge dismissals.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Human rights institute

The Swedish government has decided to refer a proposal to establish a human rights institute to the Swedish Law Council. The proposed human rights institute shall, in line with the United Nations' Paris Principles, monitor and report on the respect for human rights in Sweden. The institute shall not hear individual cases. The institute is expected to be established on 01 January 2022.

2 Court Rulings

2.1 Trade secrets

Labour Court, AD 2021 No. 1, 13 January 2021

In its decision AD 2021 No. 1, the Labour Court found that a former employee had infringed his former employer's protected trade secrets when establishing a competing business. The former employee had previously worked for the (former) employer and worked i.a. with an Excel calculation file. The calculation file was used in the former employer's business to calculate tenders and was based on complex data, and had been developed over several years.

The Labour Court found that the former employee was liable for infringing the former employer's trade secrets and intellectual property by using the calculation file. When determining the damages, the Labour Court applied both the Swedish Trade Secrets Act (*Lag [2018:558] om företagshemligheter*) and the Swedish Copyright Act (*Lag [1960:729] om upphovsrätt till litterära och konstnärliga verk*). The two Swedish acts implement the Trade Secrets Directive (2016/943) as well as the Enforcement Directive (2004/48) (often referred to as IPRED). While the calculation of trade secret damages requires the court to separate general damages from hedonic damages, the copyright act calculates the total of all damages. Although the methods for calculation of damages differ slightly between the two Swedish acts, the Court found that the associated infringements called for a joint damage calculation. It decided that the damages should include lost profits (pure economic loss), condictio indebiti and harm to reputation. Eventually, the Court ordered the defendant to pay damages in the amount of SEK 400 000 (approximately EUR 40 000).

The judgment is particularly notable for the method of calculating damages in trade secrets and intellectual property infringement cases.

2.2 Employment protection

Labour Court, AD 2021 No. 3, 26 January 2021

According to the Swedish Employment Protection Act (*lag [1982:80 om anställningsskydd*), an employee who wants to invalidate an employer's dismissal decision in court must do so within 14 days after the decision has been made. Thereafter, the issue of invalidation is precluded. However, the employee may still seek reimbursement and damages, but the dismissal cannot be invalidated. The 14-day preclusion period is calculated from the day the employer informed the employee of the dismissal. The employee is normally informed in person. If the employee cannot be informed personally, the employer may send the employee a registered letter. The Act prescribes that the employee is to be considered to have been informed of the decision 10 days after the day the employer handed the registered letter to the postal service (no matter the actual circumstances).

In the current case, the employer had informed the employee by registered letter of the dismissal because of the risk that the employee was infected with COVID-19. The employee did not receive the letter because his address had changed. He was subsequently informed too late to be able to invalidate the dismissal decision.

The Labour Court found that the risk that the employee might have been infected with COVID-19 had motivated the employer's use of a registered letter. The Court furthermore deemed that the presumption rule could be used in this specific case. Hence, the employee's claim to have the dismissal decision invalidated was precluded.

It could be argued that the Swedish presumption rule together with the extremely tight preclusion rule of 14 days might not be compatible with the principles of fair trial established in Article 6 of the European Convention on Human Rights and Article 47 of the Charter of the European Union. The Labour Court's decision is formalistic. Even though the COVID-19 pandemic has created special needs, the Labour Court only grants the employer the advantage of using it. It should be noted that the procedure of using a registered letter to inform an employee of his or her dismissal presupposes that the receiver actually collects the letter from the post office. This is normally done in person. If a person wants someone else to collect the letter for him/her, that individual's name must be shared with the Swedish postal service at least one week in advance. This reduces the possibilities for the employee to actually receive the letter if he or she has a contagious disease like COVID-19 and is quarantined. For clarity of the overall picture of employment law, it is worth mentioning that the right to claim damages for unfair dismissal has a preclusion period of four months.

3 Implications of CJEU rulings

Nothing to report.

4 Other relevant information

4.1 Platform work and collective bargaining

Sveriges radio (Radio Sweden) has reported that the bicycle food delivery company Foodora has signed a collective agreement with the Swedish Transport Workers' Union. Foodora has been criticised for its employment conditions and is sometimes referred to

as a gig economy platform employer company. Foodora does not, however, consider itself to be a platform employer.

United Kingdom

Summary

The furlough scheme was extended until 30 April 2021.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Furlough scheme

The Chancellor announced that the furlough scheme, properly known as the Coronavirus Job Retention Scheme (CJRS), will be extended until 30 April 2021. A sixth Treasury direction of 25 January 2021 was published covering the Coronavirus Job Retention Scheme (CJRS) from 01 February to 30 April 2021.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings

Nothing to report.

4 Other relevant information

4.1 Revisions to employment law

The FT reported that, post-Brexit, the UK had launched a review of employment rights. However, the new Business Secretary Kwasi Kwareteng denied it. It then transpired that his predecessor had authorised such a review. Kwasi Kwarteng announced the review would not go ahead. The BBC reports:

> *"A post-Brexit review of workers' rights will not go ahead, Business Secretary Kwasi Kwarteng has said.*
>
> *It was feared the review would lead to an erosion of job protections, such as the 48-hour week, holiday entitlements and overtime pay.*
>
> *He told ITV on Wednesday 'the review is no longer happening', adding in the Commons on Thursday: 'There is no plan to reduce workers' rights.'*
>
> *Union leaders and opposition Labour MPs vowed to fight watering down of rights.*
>
> *They argued that the review confirmed their belief that, outside the European Union, the government would start to erode employment safeguards enshrined in EU law.*
>
> *But Mr Kwarteng told MPs: 'I do not want there to be any doubt about my or the government's intentions in this area.'*

'We will not row back on the 48-hour weekly working limit derived from the working time directive, we will not reduce the UK annual leave entitlement, which is already much more generous than the EU minimum standard, we will not row back on legal rights to breaks at work.'

'I will say it again, there is no government plan to reduce workers' rights." Mr Kwarteng added he had repeatedly said that, outside the EU, Britain had an opportunity to raise standards.'

'Sigh of relief'

News that employment rights were being reviewed were first reported by the Financial Times earlier this month, but initially dismissed by ministers.

The FT claimed changes to rights were being drawn when former business secretary Alok Sharma was in charge of the department. Proposals included not including overtime pay when calculating some holiday pay entitlements and ending the requirement for businesses to log employees' working hours, the FT said.

Shadow business secretary Ed Miliband said on Thursday that it was 'pretty clear' that the government looked at whether to scrap existing rights.

He told the Commons: 'Never denied in this debate [is] that they have spent weeks examining whether to scrap existing workers' rights. We know they planned a consultation, we know they've talked to business about it.'

'The truth is, and of course I welcome this, that they've been forced to climb down today because of the outcry.'

'But this does not merit a pat on the back. The very fact that they were considering taking away vital rights to 40-hour limits, on workers' rights for nurses, ambulance drivers, lorry drivers, supermarket delivery drivers speaks volumes.'

Len McCluskey, general secretary of the Unite union, welcomed Mr Kwarteng's decision, adding that parents and the low paid will 'breathe a sigh of relief'."

In the Commons, Kwasi Kwarteng emphasised the government's pledges to promote flexible working and create a single enforcement body for labour market abuses. He also said that the government had launched an investigation with Acas which would report back in February 2021 on fire and rehire practices. No commitment to support the Employment (Dismissal and Re-employment) Private Members' Bill was made.

4.2 Revisions to the Human Rights Act

The government has decided to undertake a review of the Human Rights Act. The government says:

"The Human Rights Act (HRA) has been in force for 20 years, it is timely to undertake a review into its operation. The UK's constitutional framework has always evolved incrementally over time, and it will continue evolving. We need to make sure that our human rights framework, as with the rest of our legal framework, develops and is refined to ensure it continues to meet the needs of the society it serves. We are committed to remaining a signatory to the European Convention on Human Rights.

The government is establishing an independent review to examine the framework of the HRA, how it is operating in practice and whether any change is required. Specifically, the review will look at two key themes, which are outlined in the Terms of Reference (ToR) as follows:

- *the relationship between domestic courts and the European Court of Human Rights (ECtHR)*
- *the impact of the HRA on the relationship between the judiciary, the executive and the legislature"*

The Review has now launched a public Call for Evidence, details on how to submit a response can be found in the linked document. The Call for Evidence closes on the 03 March 2021.

Publications Office