Flash Reports on Labour Law March 2021

Summary and country reports

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

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Contact: Marie LAGARRIGUE

E-mail: Marie.LAGARRIGUE@ec.europa.eu

European Commission

B-1049 Brussels

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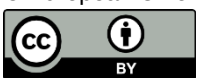

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Country	Labour Law Experts
Austria	Martin Gruber-Risak Daniela Kroemer
Belgium	Wilfried Rauws
Bulgaria	Krassimira Sredkova Albena Velikova
Croatia	Ivana Grgurev
Cyprus	Nicos Trimikliniotis
Czech Republic	Nataša Randlová
Denmark	Natalie Videbaek Munkholm Mette Soested
Estonia	Gaabriel Tavits Elina Soomets
Finland	Ulla Liukkunen
France	Francis Kessler
Germany	Bernd Waas
Greece	Costas Papadimitriou
Hungary	Tamás Gyulavári
Iceland	Leifur Gunnarsson
Ireland	Anthony Kerr
Italy	Edoardo Ales
Latvia	Kristīne Dupate
Liechtenstein	Wolfgang Portmann
Lithuania	Tomas Davulis
Luxemburg	Jean-Luc Putz
Malta	Lorna Mifsud Cachia
Netherlands	Hanneke Bennaars Suzanne Kali
Norway	Marianne Jenum Hotvedt Alexander Næss Skjønberg
Poland	Leszek Mitrus
Portugal	José João Abrantes Isabel Valente Dias
Romania	Raluca Dimitriu
Slovakia	Robert Schronk
Slovenia	Barbara Kresal
Spain	Joaquín García Murcia Iván Antonio Rodríguez Cardo
Sweden	Andreas Inghammar Erik Sinander
United Kingdom	Catherine Barnard

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Executive Summary

National level developments

In March 2021, extraordinary measures associated with the COVID-19 crisis continued to play a 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, while 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

States of emergency and lockdowns have been extended in several countries, including the **Czech Republic**, **Norway**, **Portugal**, **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, e.g. in the **Czech Republic**, whereas in **Finland**, a proposal to temporarily restrict freedom of movement has been withdrawn following a negative review by the Constitutional Law Committee.

However, a few countries such as **Cyprus**, **Denmark** and the **United Kingdom** have announced comprehensive reopening plans and have gradually been lifting pandemic restrictions.

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. In **Portugal**, the measures mandating the adoption of the teleworking regime when compatible with the activity to be performed have been extended until 31 December 2021 for municipalities with a high risk of contagion. To enforce the obligation to telework, in **Belgium**, all employers are required to report, on a monthly basis, the number of workers teleworking as well as those for whom teleworking is impossible.

In **Austria**, the legislation regulating the labour law aspects of teleworking has been passed, following the adoption of the legislation on taxation issues in February 2021. Moreover, due to the increased prevalence of teleworking, courts have started addressing controversies related to equal treatment of teleworkers and on-site workers, such as in **France**, where two High Courts adopted different decisions on whether teleworkers are entitled to meal vouchers.

Specific health and safety measures for workplaces to reduce the risk of contagion remain in place in many states. In **Spain**, the public health rules that have been applicable in the workplace since June 2020 have been extended. Moreover, in **Austria,** large employers are required to establish new safety and health measures to limit infections, whereas in the **Czech Republic,** the government has introduced the obligation for employers to regularly test their employees for COVID-19.

Finally, in the context of the ongoing COVID-19 vaccination campaign, a judge in **Italy** ruled for the first time that employees of a health facility can be legitimately forced to take leave if they refuse to get vaccinated against COVID-19.

Measures to alleviate the financial consequences for businesses and workers

In light of the continuing COVID-19 crisis, state-supported short-time work, temporary layoffs or equivalent wage guarantee schemes remain in place in many countries, such as in **Bulgaria**, **Denmark**, **Estonia**, **Hungary**, **Italy**, **Portugal**, **Slovenia** and **Sweden**.

State financial aid for employers and companies have been extended in the **Czech Republic**, the **Netherlands**, and in **Norway**, where existing measures for the self-employed have been extended as well until 01 October 2021**.**

A compensation bonus for workers working under a zero-hours contract has been adopted in the **Czech Republic**. Likewise, a special allowance for seasonal workers who have lost their job has been introduced in **Italy**.

Moreover, in **Italy**, the government has extended the prohibition of dismissal until 30 June 2021, as well as the possibility to renew and extend fixed-term contracts without having to provide a justification or reason until 31 December 2021.

Leave entitlements and social security

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

In the **Czech Republic**, an additional payment for employees in quarantine has been introduced.

In **Italy**, due to renewed school closures, the government has re-introduced the right to work from home and a special parental leave scheme for parents. Likewise, temporary rules on family leave are expected to be extended in **Luxembourg**.

Finally, in **Denmark,** accrued annual leave funds may extraordinarily be paid out early upon application.

Measures to ensure the performance of essential work

In **Iceland**, a temporary clause allowing the reassignment of public sector employees has been extended until 01 January 2022.

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

Topic	Countries
State of emergency	CZ PT SK SI
Restrictions of free movement/ travel ban	CZ CY FI NO
Easing of COVID-19 restrictions	CY DK UK
Benefits for workers / self-employed prevented from working	BG DK EE HU IT NO PT SI SE
Employer subsidies	CZ HU NL NO PT SI
Teleworking	AT BE FR PT
Health and safety measures	AT CZ ES
Refusal to vaccinate against COVID-19	IT
Dismissal ban	IT
Fixed-term work	IT
Special care leave / parental leave	IT LU
Other leave entitlements	CZ
Temporary reassignment of public sector employees	IS

Other developments

The following national developments in March 2021 were particularly relevant from an EU law perspective:

Posting of workers

In **Austria**, Parliament has adopted amendments to the rules on the posting of workers in the construction sector pursuant to Directive 2018/957/EU.

In **Lithuania**, a decision of a regional court held that a worker specifically recruited to work abroad for a foreign client did not meet the criteria to be qualified as a posted worker on the ground that his/her habitual place of work was not in Lithuania.

Atypical work

In **Denmark**, the Supreme Court held that fixed-term workers in a professional choir were not performing work comparable to that of permanent choir members.

In **Luxembourg**, the Court of Appeal has upheld the termination of employment of a worker who refused to perform full-time work after a unilateral transformation from a part-time to a full-time position. Moreover, the Court of Appeal ruled that the suspension of the trial period during maternity leave does not apply to fixed-term contracts.

In **Germany**, a motion has been presented to improve the legal protection of so-called gig-, click- and crowdworkers.

Occupational safety and health

In **Liechtenstein**, the government incorporated Directive (EU) 2019/1831 on occupational exposure limit values (chemical agents) into the EEA Agreement. In **Luxembourg**, the government implemented Directive (EU) 2020/739 on biological agents, Directive 2019/1832 on personal protective equipment, Directive (EU) 2019/983 on exposure to carcinogens or mutagens, and Directive 2013/35/EU.

In the **United Kingdom**, draft legislation has been proposed to extend health and safety rights to ensure that workers will not be subjected to a detriment from 31 May 2021.

Social policy implications of Brexit

Following the withdrawal of the UK from the EU, it has been reported that many European Works Councils have migrated to **Ireland**, a move that has highlighted Irish trade union concerns about the available dispute resolution process.

In the **United Kingdom**, two decision of the Employment Appeal Tribunal (on a transfer of undertakings and on annual paid leave) clarified the effect of CJEU decisions on UK social policy.

Other aspects

In the **Czech Republic**, the Supreme Court ruled on discrimination on grounds of personal belief and on unequal pay.

In **Cyprus**, the government announced the subcontracting of additional inspection services to registered unemployed persons to strengthen controls to limit the spread of the COVID-19 virus.

In **Finland**, the Supreme Court held that a change of an essential term of employment requires the employer to consult the worker representatives with a view to reaching an agreement, pursuant to the Collective Redundancies Directive.

In **France**, a decision of the Labour Division of the Court of Cassation ruled on the validity of a collectively bargained daily flat-rate agreement.

In **Germany**, the new Works Council Modernisation Act clarifies that works councils' rights in the design of the working environment and work processes also apply if Artificial

Intelligence is to be used in the company.

Moreover, the **German** Federal Labour Court delivered an important ruling on whether stand-by time is to be remunerated according to either 'on-call duty' or 'stand-by duty', holding that a decisive element is not only whether the employer requires the employee to remain at a certain location, but also whether the time within which the worker must arrive at the work premises imposes a de facto restriction in terms of location.

In **Hungary**, an act has introduced new rules on employment in the public health care sector from 01 March 2021.

In **Luxembourg,** two rulings held that an employment contract with a monthly salary, which automatically includes a certain amount of overtime, was valid. Another ruling of the Court of Appeal held that an employee is not required to work overtime, if the employer is not able to justify the urgency of the work and give sufficient notice.

Table 2: Other major developments

Topic	Countries
Occupational safety and health	LI LU UK
Posting of workers	AT LT
Fixed-term work	DK LU
Works council	DE IE
Subcontracting of public services	CY
Part-time work	LU
Platform work	DE
Information and consultation	FI
Stand-by duty	DE
Overtime	LU
Reform of employment in the public health care sector	HU

Implications of CJEU Rulings

This Flash Report analyses the implications of three CJEU rulings – Cases C-344/19 and C-580/19 of 09 March 2021, and Case C-585/19 of 17 March 2021 – concerning the interpretation of the Working Time Directive with regard to stand-by time and to rest periods.

Stand-by time

Case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and Case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

In these cases, which concerned a Slovenian technician in charge of a broadcasting station and a German firefighter, respectively, the CJEU ruled that a period of stand-by time is not, in its entirety, working time, unless it follows from an overall assessment of all the circumstances of the case (i.e. response time limit and the average frequency of activity) that the constraints imposed on the worker very significantly affect his or her ability to manage his or her free time during that period. Moreover, the Court added that the organisational difficulties that a period of stand-by time may entail for the worker and which are the result of natural factors or free choice are not relevant.

All national reports indicate that these judgments provide further clarity for national courts on the regulation of stand-by time.

Most national reports, such as for **Austria**, **Croatia**, **Cyprus**, **Estonia**, **Hungary**, **Italy**, **Liechtenstein**, **Norway**, **Portugal**, **Slovakia**, **Spain**, indicate that the national legislation or the established case law follows the principle of the CJEU as established in case C-518/15, *Matzak*. In most of these countries, the legislation qualifies stand-by time spent at the employer's premises or in a location determined by the employer (on-call time) as working time, whereas stand-by time that is not spent in a location determined by the employer is normally not regarded as working time. However, there is a possibility for the latter to be considered working time in consideration of the significant constraints imposed on the employee to freely manage this free time. In particular, it is reported that the CJEU's doctrine in case C-518/15, *Matzak* has been followed by the **Spanish** Supreme Court in several cases.

Conversely, a few country reports (for **France**, **Lithuania**, the **Netherlands**, and **Sweden**) mention that stand-by time spent at home does not qualify as working time, regardless of whether there are significant constraints for the employee to freely manage their free time.

Thus, it can be expected that these judgments will have implications for several Member States.

In **Denmark**, a specification of the circumstances under which stand-by time outside the employer's premises may count as a daily rest period is expected. In **Germany** and in **Romania**, where the essential criterion according to which the national courts qualify stand-by periods as working time is the frequency with which the employee can be requested to perform work during stand-by time, it can be assumed that the importance of this criterion will diminish in favour of an overall evaluation of the constraints imposed on the worker. As a result, a modification of the legal concept of on-call duty is to be expected in **German** civil service law. In the **UK**, it is expected that a more nuanced approach to qualifying stand-by time as working time will be adopted.

In the case of **Ireland**, the judgment seems to clarify the ongoing controversy on the qualification of the stand-by time of firefighters, which has been referred to the CJEU in case C-214/20, *MG v Dublin City Council*. These judgment clarifies that it is for the national court to carry out a detailed factual analysis of the extent to which each firefighter's

ability to pursue his or her own private interests is 'objectively or very significantly affected'. In **Slovenia**, where 'stand-by time' is not explicitly regulated in legislation, more precise regulations on stand-by time in line with the requirements clarified by the CJEU would be welcome. Finally, in the **Czech Republic**, the judgments may contribute to the related controversial case law on whether work breaks may be regarded as working time.

Rest periods

Case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

In this case, referred by a Romanian court, the CJEU ruled that when a worker has concluded more than one employment contract with the same employer, the minimum daily rest period applies to the contracts taken as a whole and not to each of the contracts taken separately.

Some national reports indicate that national legislation or the established legal practice is compatible with the judgment. In many countries, such as in **Bulgaria**, **Finland**, **France** and **Ireland**, **Italy**, **Latvia**, **Netherlands**, **Poland** and **Slovenia**, the working time of a worker with more than one contract has to be taken into account cumulatively.

Conversely, in the majority of countries, e.g. in **Belgium**, **Croatia**, the **Czech Republic**, **Estonia**, **Lithuania**, **Liechtenstein**, **Portugal** and **Spain**, the specific situation of multiple contracts concluded with the same employer is not expressly regulated and has not been dealt with in national case law, either. However, various national reports indicate that the circumvention of the rules on rest periods would, in practice, not be admissible (**Austria**, **Denmark**, **Germany**, **Hungary**, **Spain**, **Sweden**).

The situation is less clear in countries such as the **Czech Republic**, where it is reported that the rule expressed by the CJEU is not observed in practice.

The judgment has implications for **Romania**, which will have to introduce changes to working time legislation in order for all of an employee's employment contracts to be considered cumulatively as a reference for the application of the minimum rest period.

Austria

Summary

(I) An amendment to the COVID-19 Emergency Measures Ordinance requires large employers to establish new safety and health measures to limit SARS CoV-2 infections.

(II) Parliament passed the proposed Home Office legislation, which regulates teleworking.

(III) Parliament has adopted amendments to the rules on the posting of workers in the construction sector pursuant to Directive 2018/957/EU.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Occupational safety and health

The 4th COVID-19 Emergency Measures Ordinance (*4. COVID-19-Notmaßnahmenverordnung*, BGBl. II No. 58/2021 as amended by BGBl. II No 111/2021) replaced the 3rd COVID-19 Emergency Measures Ordinance (see January 2021 Flash Report) in February 2021. The regulations on the workplace initially remained unchanged.

The amendment of 12 March 2021 now requires employers employing more than 51 workers as of 01 April 2021 to establish and impose a COVID-19 Risk Prevention Concept to minimise the risk of infection, specifically by establishing specific regulations on hygiene, having procedures on how to react in case of a SARS CoV-2 infection, risk analysis, etc. (see § 6 (8) of the Ordinance).

For further information, see Press Release Red Cross Vienna.

1.1.2 Teleworking

As announced in the January and February 2021 Flash Reports, the social partners and the government reached an agreement on Home Office legislation. The legislative proposal (Federal Act Amending the Employment Contract Law Amendment Act, the Labour Constitution Act, the Employee Liability Act, the Labour Inspectorate Act 1993, the General Social Insurance Act and the Civil Servants' Health and Accident Insurance Act (256/BNR)) was discussed in Parliament on 24 February 2021, and the proposal relating to tax issues was passed by the National Assembly on 24 February 2021, and by the Federal Assembly on 11 March 2021 as part of the 2nd COVID-19 Tax Measures Act (see February 2021 Flash Report).

The main and remaining parts of the Home Office legislation was passed by the National Assembly on 25 March 2021, and by the Federal Assembly on 30 March 2021.

It will enter into force on 01 April 2021.

The legislation is not a coherent Act on Working From Home. Instead, amendments to various existing acts have been made, which are listed below.

Amendment of the Employment Contract Law Amendment Act (Arbeitsvertragsrechts-Anpassungsgesetz – AVRAG)

§ 2h AVRAG entitled 'Home office' was added to the Employment Contract Law Amendment Act.

- According to § 2h AVRAG, 'working in a home office' within the meaning of the provision occurs when a worker regularly works in an apartment, e.g. the private home of the worker or in the home of a close relative, a partner, or a holiday home (§ 2h (1) AVRAG). Mobile work or working from a coworking space is not covered by this definition;
- Home office is subject to an agreement, and not subject to a unilateral decision by either the employer or the worker. The agreement must be concluded in writing for reasons of proof, other agreements remain valid and binding (§ 2h (2) AVRAG);
- The employer must provide the worker with the necessary digital equipment if he/she regularly works from home. Deviations from this obligation is only possible if the employer carries the reasonable and necessary costs for the digital work equipment provided by the worker; a lump sum for those costs may be agreed on (§ 2h (3) AVRAG);
- An agreement on home office may be terminated by either party for good cause with a notice period of one month at the end of each month. A home office agreement may also contain a time limit or a termination clause (§ 2h (4) AVRAG).

Amendment of the Labour Constitution Act (Arbeitsverfassungsgesetz – ArbVG)

§ 97 para 1 ArbVG contains an exhaustive list of legal grounds for voluntary works council agreements. With the new legislation, No. 27 was added to that list, providing the legal grounds for the conclusion of a works council agreement, namely the 'definition of framework conditions for work performed in the home office' (§ 97 (1) 27 ArbVG, translation by the author).

The new legal ground provides the opportunity to regulate framework conditions on working from home that are not yet covered by other legal grounds for work council agreements; e.g. § 97 (1) 2 ArbVG allows for a works council agreement on a general framework on working time, the Working Time Act allows for works council agreements on flexitime, § 97 (1) 12 ArbVG allows for a works council agreement on the regulation of/ framework conditions of allowances, etc. It may contain regulations on the provision of work equipment and private use, regulations on returning to the work premises or regulations on allowances for home office.

Amendment of the Employee Liability Act (Dienstnehmerhaftplichtgesetz – DHG)

The Employee Liability Act, in general, states that any damages a worker causes to the employer when working are limited, and in some cases are even zero. The Employee Liability Act has now been amended to include the damages caused to the employer not by the employee, but by people living in the same household as the employee: § 2 (4) now regulates that "*if the employer suffers damages caused by persons living in the same household with the employee in connection with home office work, the provisions of this Act shall apply mutatis mutandis*" (§ 2 Abs 4 DHG, unofficial translation by the author).

Amendment of the Labour Inspectorate Act 1993 (Änderung des Arbeitsinspektionsgesetz 1993 ArbIG)

The newly added § 4 (10) of the Labour Inspectorate Act regulates the labour inspectorate, which is 'not authorised to enter the homes of workers when carrying out their duties within the scope of home office' (§ 4 (10) ArbIG, unofficial translation by the author). This regulation was added to ensure the right to privacy (Right to respect for private and family life, home and correspondence, Art. 8 ECHR, Art. 7 EU-CFR, Inviolability of the domiciliary right, Art 9 *Staatsgrundgesetz*). Labour inspectors may enter the homes of workers if the workers agree to it.

Amendment of the General Social Insurance Act and the Civil Servants' Health and Accident Insurance Act

As certain costs in relation to home office are now exempt from taxes (see February 2021 Flash Report), legislation has been amended to ensure that these same costs are also exempt from social security contributions.

The fact that a legislative framework on working from home has been passed in Parliament is generally widely welcomed. The legislative framework has, however, also been criticised for not regulating home office enough / broadening the scope. Criticism has been voiced over the fact that mobile working is not part of the new regulation, and that merely 'regular work from home' is covered.

Additionally, it has been criticised that the working time legislation has not been addressed or amended: the current regulation in the Working Time Act (§ 26 para 3 AZG) allows for 'reduced' working time records when primarily working from home. Such working time records only contain the number of hours worked ('*Saldenaufzeichnung*') without recording the beginning or end of working time, nor rest breaks. Such reduced working time records are generally perceived to not be compliant with the Working Time Directive (see CJEU case C-55/18, *CCOO*). Also, the lack of duty to document the beginning and end of working time represents an obstacle to control whether adequate rest periods have been taken in compliance with the Working Time Act. Given the numerous additional requirements of workers with care obligations who are currently working from home during the current pandemic, the issue of rest times is of considerable practical significance. The question of the right to disconnect has also not been addressed.

For more information, see this press article of 25 March 2021, as well as the Information by the social partners (Federation of Trade Unions) of 24 March 2021 and the Information by the Chamber of Commerce of 25 March 2021. From a doctrinal perspective, see Gruber-Risak, M., *Homeoffice-Maßnahmenpaket 2021 (Stand IA 1301/A), Eine erste Einschätzung der arbeitsrechtlichen Inhalte*, CuRe 2021/5.

1.2 Other legislative developments

1.2.1 Posting of workers

The various amendments of the Construction Workers' Leave and Severance Pay Act concern construction workers' entitlement to the bridging allowance, which is a form of early retirement for persons employed in the construction industry, involving the payment of severance pay upon retirement, the expiry of holiday entitlements and measures aiming to enable better control over wage and social dumping by ensuring access/sharing of certain documents between the financial and tax authorities, health insurers and the labour market authorities and the Construction Workers' Leave and Severance Pay Fund.

Most importantly, the amendment transposes the new Directive on Posted Workers (Directive 2018/957/EU amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services) – § 33j BUAG now regulates 'long-term postings' in line with the requirements of the Directive:

> "*If a worker's actual posting or transnational temporary agency work exceeds the duration of twelve months, the labour law standards laid down in the collective bargaining agreement shall apply 'in full' to such employment relationships from that time onwards, insofar as they are more favourable for the worker than the respective measures in her/his home state. The applicable collective bargaining agreement shall be that which applies to the respective place of work for comparable workers of comparable employers. The procedures, formalities and conditions for the conclusion and termination of the employment contract, including post-contractual non-competition clauses, are excluded from these obligations. If the employer submits a notification in German or English with a statement of reasons, the period of time under the first sentence of this provision shall be extended to 18 months. For the purpose of calculating the*

period of the posting, the duration of a posting of a replaced worker shall be taken into account." (unofficial translation by the author)

With this amendment, the Directive's requirement that Member States must guarantee additional terms and employment conditions for workers on long-term postings, which are mandatory for workers in the Member State where the work is being carried out, is complied with – albeit in the construction industry only. Also, the Construction Workers' Leave and Severance Pay Act frequently refers to the Act Against Wage and Social Dumping (*Lohn- und Sozialdumpinggesetz, LSD-BG*), which has not yet been amended.

The draft transposition of the Directive in the Act Against Wage and Social Dumping, which covers all other sectors, is expected to be discussed in Parliament in the coming weeks. For more information, see the Parliamentary Press Release of 25 March 2021.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

The Austrian Act on Working Time (*Arbeitzeitgesetz*, AZG) and the Austrian Act on Rest Periods (*Arbeitsruhegesetz*, ARG) do not contain definitions on working time or rest periods. The Austrian Working Time Act refers to the term 'stand-by duty' or 'readiness to work' ('*Arbeitsbereitschaft'*, § 5 AZG), which are considered working time, and allows for the extension of daily working time when the worker's working time substantially consists of 'stand-by duty' instead of actual work performed. Also, there is a limit to on-call duty: § 6a of the Act on Rest Time regulates that on-call duty outside of working hours may only be agreed during two weekly rest periods per month.

The Austrian Supreme Court differentiates between on-call and stand-by duty as follows: during on-call duty, the worker only has to be available for the employer. In this case, the employee can choose where to stay and can essentially decide freely on how to use such times, whereas in the case of stand-by duty, the worker has to stay in a location determined by the employer and must be at the employer's disposal the entire time. The worker must be ready to work within a minimum of about 30 minutes – if the worker is required to be ready to work in less than 30 minutes, he or she will be considered to be on stand-by duty according to the Supreme Court, and hence this time will be calculated as working time.

The CJEU rulings provide further clarity for national courts on how to deal with on-call duty. The general notion, namely that the strong focus on the worker's ability to freely manage his or her time while being on on-call duty and devote that time to his or her own interests, is a decisive factor both for the Austrian High Court as well as for the CJEU. The average frequency of activity during the employee's on-call duty is a factor that the CJEU has specifically pointed out, but has not yet specifically been highlighted by the Austrian High Court.

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

In the present ruling, the CJEU held that Articles 2(1) and 3 of Directive 2003/88/EC must be interpreted as meaning that, where an employee has concluded several employment contracts with the same employer, the minimum daily rest period provided

for in Article 3 thereof applies to those contracts taken as a whole and not to each contract taken separately.

In Austria, daily rest period is regulated in the Working Time Act (*Arbeitszeitgesetz*). The relevant provisions read as follows (unofficial translation by the author):

> *"§ 2 (2) (…). If employees are employed by several employers, the individual employment relationships taken together may not exceed the statutory maximum working hour limits.*
>
> *…*
>
> *§ 12 (1) At the end of the day's work, employees shall be granted an uninterrupted rest period of at least eleven hours."*

The first two questions of the Romanian court concerning the notion of working time and the weekly maximum working time, which the CJEU did not answer, is actually addressed in the Austrian working time legislation. The working time of a worker with more than one contract is clearly not taken into account separately, but cumulatively. Although the Working Time Act only refers to multiple employers, it is clear that multiple employment contracts with the same employer are also to be treated in the same way (*Auer-Mayer* in *Auer-Mayer/Felten/Pfeil*, AZG (2019) § 2 recital 43).

The question answered by the CJEU concerning the rest period is not, however, directly addressed in the Austrian Working Time Act. To the author's knowledge, this issue has not yet been raised in either jurisprudence or in the literature, but it seems clear that the rest period must be observed for all contracts in case of multiple contracts with one employer, i.e. after the working day of one contract ends, the rest period must be observed with regard to the commencement of working time of the other contract. The underlying aim of the rest period seems to require such an interpretation. This is backed up by the provision on the cumulation of working hours with reference to maximum working time limits in § 2 (2) Working Time Act.

The decisions of the CJEU endorse this approach and provide explicit guidelines for this admittedly rather unique constellation.

4 Other Relevant Information

4.1. Successive fixed-term contracts in academia

Austrian Parliament is debating a university reform, which also affects the regulations on successive fixed-term contracts in academia. Currently, § 109 UG allows for successive fixed-term contracts for a protracted period when the respective staff work on projects funded by third parties (*Drittmittelprojekte*). Also, fixed-term contracts can be concluded repeatedly if a 'cooling off' period between the respective contracts is respected. In that case, the contracts are not considered to be successive.

The proposed amendment of § 109 UG would limit fixed-term contracts for all workers employed by the university up to an absolute limit of eight years, taking all employment relationships with the respective university into account, regardless whether these employment relationships were entered into in succession of one another or not.

This proposal has been heavily criticised, as has the university reform as such. The proposal on fixed-term contracts would break with a long-standing tradition of employing (mostly) young professionals in academia on (more or less) successive fixed-term contracts. While supporters argue that the legislation provides clarity for academics on their career path, critics argue that the reform effectively blocks the younger generation from having a career in academia at all.

The proposed amendments were passed by the National Assembly on 24 March 2021, but were rejected by the Federal Assembly on 30 March 2021. It is not yet clear when

the proposed legislation will enter into force, and whether or not it will be amended in some aspects. For more information, see the press article of 31 March 2021.

Belgium

Summary

To enforce the obligation to telework, all employers are required to report, on a monthly basis, the number of workers teleworking as well as those workers for whom teleworking is impossible.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Teleworking

A Ministerial Decree of 26 March 2021 amending the Ministerial Decree of 28 October 2020 on urgent measures to limit the spread of the COVID-19 coronavirus (*Moniteur belge* 26 March 2021) and based on the Civil Security Law of 15 May 2007, requires all employers to register teleworking online as well as the workers for whom teleworking is impossible. To enforce the obligation to telework, employers must now register the total number of employees in the company every month by department and the number of employees who perform a function that cannot be performed through teleworking. It concerns the number of employees on the first working day of the month. The declaration must be made at the latest on the sixth calendar day of the month. Details on the declaration on teleworking can be found on the website of the National Social Security Office. The new Decree came into force on 27 March 2021.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

The CJEU's rulings provide important additional clarifications on the *Matzak* ruling. Unlike in the *Matzak* case, the Court did not expressly rule on the existence of working time. According to the CJEU, the national courts can only consider stand-by time as working time if all the obligations imposed and facilities offered by the employer have the effect of considerably limiting the employee's leisure time. The Court provides useful guidelines in this respect. An assessment must be made whether the employee, on the one hand, is considerably restricted in the use of his/her free time and the timeframe within which he/she must respond to his/her employer's call for work and, on the other hand, the average number of interventions during a shift and the average duration of an intervention. The response time must take the additional obligations imposed into account as well as the facilities offered. For example, the fact that the firefighter always had to carry his equipment was an additional constraint. On the other hand, the fact that he had a company car at his disposal (where he could leave his working clothes)

and that he had special rights of way and priority in traffic were facilities that offered the employee some margin.

On the other hand, the organisational problems of on-call duty are irrelevant. The fact that an employee lives far from his/her regular workplace and cannot therefore stay at home during his/her stand-by duty is the result of personal choice (i.e. distance between home and work) and not a decision of the employer. Similarly, restrictions that are linked entirely to the specific nature of the workplace are not in themselves relevant.

The CJEU pointed out that the Working Time Directive does not prohibit national law—whether by law, collective bargaining agreement or employment contract—from stipulating that periods of on-call time can be remunerated at a lower rate than regular work periods (case C-344/19, para. 58).

These judgments provide important clarifications of the *Matzak* judgment of 21 February 2018 for Belgian case law. Contrary to expectations, the *Matzak* judgment has not resulted in many court rulings (see, for instance, P. Foubert and J. Panis, '*De sirene loeit niet enkel in de brandweerkazerne. Het arrest Matzak van het HJEU en de wachtdiensten van ziekenhuisartsen*', *Journal des tribunaux de travail*, 2019, 257-266). These rulings clarify the boundaries of the margin of appreciation for Belgian labour courts.

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

The WTD requires Member States to take the necessary measures to ensure that 'every worker' is entitled to a rest period of at least 11 consecutive hours per 24-hour period. The use of 'any worker' favours an interpretation whereby that provision applies to each worker in the event that several employment contracts are concluded between a worker and a single employer. The use of the indefinite adjective 'any' places the emphasis on the worker, regardless whether he/she has concluded several contracts with the employer, as regards the entitlement to a rest period of at least 11 consecutive hours per 24-hour period. This is in line with the aim of the Directive: to ensure a better level of protection of workers' health and safety by guaranteeing, *inter alia*, minimum daily rest periods.

However, the hours regarded as rest time under one agreement could constitute working time under another. According to the CJEU, working time and rest periods cannot coincide. Consequently, if an employee has several contracts of employment with the same employer, the working time limits must be applied jointly to the various contracts of employment.

From the perspective of Belgian labour law (Article 38ter of the Labour Code of 16 March 1971), the CJEU's assessment is not surprising, but nevertheless provides a useful clarification. Derogations from the legally stipulated rest period of 11 hours are possible. There is no known Belgian case law that goes against the decision of the Court of Justice (see D. Dejonghe and P. Maerten, *50 jaar Arbeidswet*, Antwerpen, Intersentia; 2021, 295-304).

4 Other Relevant Information

4.1 Injunction to reinforce the legal basis of COVID-19 related measures

In summary proceedings, the President of the Court of First Instance in Brussels ruled on 31 March 2021 that the Belgian government must take initiatives within 30 days to reinforce the law on which the COVID-19 related measures are based. These measures are grounded on the Civil Security Law of 15 May 2007. If the government fails to do so, it must pay a penalty (*astreinte*) of EUR 5 000 per day.

The summary proceedings were initiated by the League for Human Rights. The Belgian State appealed immediately.

Bulgaria

Summary

In light of the COVID-19 situation, a decree has extended wage subsidies until 31 May 2021.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Relief measures

The Council of Ministers adopted Decree No. 93 of 18 March 2021 to amend and supplement Decree No. 151 of 2020 on determining the terms and conditions for the payment of funds to maintain the employment of workers once the state of emergency ends (promulgated in State Gazette No. 24 of 23 March 2021).

It extends the period of payments from 31 March until 31 May 2021.

1.2 Other legislative developments

1.2.1 Posting of officials

The National Assembly (Parliament) adopted a Law for Ratification of the Framework Agreement on the Posting of Officials between the Ministry of Finance of the Republic of Bulgaria and the Organization for Economic Cooperation and Development (promulgated in State Gazette No. 21 of 12 March 2021).

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

Bulgarian labour legislation regulates stand-by time in Art. 139(5) of the Labour Code and Art. 3—5 of Ordinance No. 2 of 1994 on the Procedure for Establishing an Obligation to be on Duty and at the Employer's Availability. The regulation does not contradict the position of the CJEU in the present cases.

When the special nature of the work requires it, the worker can be ordered to be available to the employer outside the premises of the enterprise, if necessary. The location where the employee spends the stand-by time shall be agreed between the worker and the employer, and shall in any case be outside the workplace.

The stand-by time is not included in the employee's working time. This time may not exceed 100 hours per month, 12 hours per working day and 48 hours per weekend. The worker may not be on stand-by over two consecutive working days and on more than two weekends in a calendar month. These restrictions are not applicable in cases of medical necessity.

The actual work performed during the stand-by time is considered overtime work and is paid as such. The stand-by time during which the worker does not work is paid according to the Order for Structure and Organisation of Salaries – BGN 0.25 per hour.

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

Bulgarian labour legislation is in conformity with the interpretation of Article 3 of Directive 2003/88/EC in the present case. The requirements of the Directive are transposed in Bulgarian labour legislation.

Article 152 of the Labour Code stipulates that workers shall be entitled to an uninterrupted daily rest period which may not be shorter than 12 hours.

Pursuant to Art. 113 of the Labour Code, the maximum duration of working time under an employment contract for additional work with the same or another employer, together with the duration of the working time under the basic employment relationship, where working time is calculated on a daily basis, may not exceed 40 hours for workers who have not reached the age of 18 years, and 48 hours for any other workers. In all cases of performance of additional work, the aggregate duration of working time may not interfere with the minimum uninterrupted daily and weekly rest period as established by the Labour Code.

4 Other Relevant Information

Nothing to report.

Croatia

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

In Croatia, working time, including stand-by time, is regulated in Article 60 of the Labour Act. Article 60(1) of the Labour Act states that working time refers to any period during which the employee is required to be at work, at the employer's disposal (on-call) to carry out his/her duties in accordance with the employer's instructions, at his/her workplace or another place determined by the employer. On the other hand, stand-by time, i.e. the period during which the employee is available at the employer's request to perform work, should the need arise, is not considered to be working time, if the employee is neither located at his or her workplace nor at another location determined by the employer (Article 60(2) of the Labour Act). Stand-by time and remuneration for stand-by time need to be regulated in the employment contract or collective agreement (Article 60(3) of the Labour Act). The period during which the employee is at work upon the employer's request is deemed to be working time, notwithstanding whether the work is being performed at a place determined by the employer or a place selected by the employee (Article 60(4) of the Labour Act).

As explained above, the Croatian legislator differentiates between on-call duties (considered to be working time), and stand-by time (not considered to be working time). Based on the facts of case C-344/19, one cannot conclude with certainty whether a period of

> *"stand-by time according to a stand-by system, during which the worker is required only to be contactable by telephone and able to return to his or her workplace, if necessary, within a time limit of one hour, while being able to stay in service accommodation made available to him or her by his or her employer at that workplace, without being required to remain there"*

(para. 66), would be considered stand-by time or on-call duty in Croatian law. That is, the worker is not required to remain in the accommodation provided to him/her, but because of 'the nature of the work, the distance between the work centres and his home and the occasional difficulty to access the centres where the work was to be carried out made it necessary for him to stay in the vicinity of the sites concerned' (para. 10). Therefore, the worker was not able to freely choose where to stay during his stand-by duty. Hence, one cannot conclude with certainty whether the national courts would consider this as working time or not.

The above cited provision of the Labour Act should be interpreted as being in line with the CJEU's judgment in case C-344/19.

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

The Labour Act of 2014 (as amended in 2017 and 2019) does not cover situations in which an employee concludes several contracts of employment with the same employer but does address situations in which employees conclude employment contracts with several different employers (Articles 61(3) and 62(2)). Daily rest periods are regulated in Article 74(1) of the Labour Act, which states that the employee is entitled to a minimum daily rest period of 12 consecutive hours per 24-hour period. The wording of this provision is in line with the judgment in CJEU case C-585/19.

4 Other Relevant Information

Nothing to report.

Cyprus

Summary

(I) From 01 March 2021, Cyprus has gradually eased the pandemic restrictions.

(II) The government announced the subcontracting of additional inspection services to registered unemployed persons to strengthen controls to limit the spread of the COVID-19 virus.

1 National legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Easing of COVID-19 restrictions

In March, the lockdown restrictions, which have affected labour relations following the outbreak of the coronavirus pandemic, have been gradually eased. Most malls and many shops have reopened.

The Ministry of Labour, Welfare and Social Insurance continues to implement various measures to support those working in hotels as well as various pandemic-related schemes where activities have been fully or partially suspended, for self-employed persons, work absence allowance and child care allowance (see here for information on coronavirus schemes provided by the Ministry of Labour, Welfare and Social Insurance).

Cyprus continues to operate a system of large numbers of mandatory rapid testing for those who are working, whilst the vaccination programme is moderately continuing. From 01 March 2021, Cyprus entered a new phase of easing the lockdown measures. Primary schools and the last year of the Lyceum were opened and secondary schools are scheduled to open on 02 April 2020. The same restrictive coronavirus measures in sports and cultural events (theatres and cinemas) that limit access and service were opened. From 16 March, restaurants, bars and cafés and pubs were allowed to operate, but only if they have appropriate outdoor spaces. However, restrictions on gatherings and curfews remained valid throughout March. Primary schools were opened but the opening of secondary schools was postponed until mid-March, in anticipation that the epidemiological situation would improve. The government stated that the situation is improving based on its programme of 'triptych test-surveillance-vaccinations', which will allow the country to 'enter the new phase of the strategic lifting of measures' (see here for the press release of 01 March 2021).

From 16 March 2021, the following easing of restrictions was announced:

- Many retail stores and shopping malls were re-opened;
- A 23:00-05:00 curfew is in place nationwide; essential workers and residents seeking emergency medical attention are exempt. Residents are only permitted to leave their homes twice per day after logging their trip with health authorities via text message;
- Household gatherings are limited to a maximum of 10 people;
- Weddings, baptisms, and funerals may take place in places of worship, but may not exceed 10 attendees;
- Restaurants, cafes, and bars are open for outdoor operations;
- Public gatherings are restricted to no more than two persons, excluding children;
- Facemasks are mandatory on public transport and in all outdoor public spaces, except while exercising, in addition to all indoor public spaces.

It is scheduled that from April onwards, passengers holding a vaccination certificate from the Republic of Cyprus will not be subjected to self-isolation and mandatory testing upon arrival in Cyprus. This was announced by the Ministry of Transport, Communications and Works following a decision by the Council of Ministers that as of 01 April 2021, all passengers who have been vaccinated for COVID-19 and hold a valid certificate from the Republic of Cyprus, upon their arrival in Cyprus, irrespective of the country from which they are travelling, will be exempt, for the purposes of entry into the Republic of Cyprus, from the obligation to undergo laboratory tests and from any obligation for self-isolation / quarantine (see here for the Ministry of Transport, Communication and Works' press release of 31 March 2021).

All international arrivals must register online through the official Cyprus Flight Pass website within 24 hours of departure from their point of origin.

Authorities could reimpose, extend, further ease, or otherwise amend restrictions with little-to-no notice, depending on disease activity over the coming weeks.

1.1.2 Subcontracting of public services

A controversial measure is the announcement by the Ministry of Energy, Trade and Industry to 'buy services' from 260 unemployed persons to strengthen controls to limit the spread of the COVID-19 pandemic. The government purchased services from registered unemployed persons with the aim of strengthening, in terms of human resources, public services that carry out market surveillance of the imposed controls to limit the spread of the COVID-19 coronavirus disease.

The government announced that the programme of inspections will be intensified with the forthcoming easing of measures, which will create an additional need for supervision and surveillance, and even more and systematic inspections with an emphasis on safety and health in the workplace and in retail. To this end, the Ministry of Energy, Trade and Industry, which has been authorised by the Council of Ministers to proceed with a call for interest to purchase such services from unemployed persons. The government claimed that this is part of its 'social goals' to boost the income of the unemployed, where services will be purchased for a period of three months with the possibility of renewal for another three months of 260 unemployed persons, who meet the necessary criteria. The salary is set at EUR 1 000 per month for 40 working hours per week, and will be distributed by each competent Service. The unemployed who will be selected to perform this work will be required to pay contributions to the Social Insurance Fund as self-employed persons. The 260 unemployed persons, who will undergo training on the procedure and on the inspections to be carried out, will assist in monitoring trade and other economic activities.

The minimum criteria that the interested parties must fulfil are to be registered as unemployed in the Register of Unemployed of the Social Security Services, to have a diploma from a recognised secondary school, to have a good command of Greek, a clean criminal record and the male candidates must have a certificate of their military status proving completion of military service or their legal discharge.

The measure met criticism because, according to some commentators, it represent a form of disguised employment rather than the subcontracting of services. Moreover, the very tasks of surveillance in the form of one citizen spying on another is problematic.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

The case involved two claimants who considered that, owing to the restrictions involved, their periods of stand-by time according to a stand-by system had to be considered, in their entirety, as 'working time' and remunerated accordingly, irrespective of whether or not they had actually performed any specific work during those periods.

The Republic of Cyprus has purportedly transposed EU Directive 2003/88/EC in the 'Law on Organisation of Working Time' (*Ο Περί της Οργάνωσης του Χρόνου Εργασίας Νόμος του*, 2002 (63(I)/2002)). For the purposes of this Directive, Article 2.1 defines 'working time' as 'any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice', which was copied verbatim in Article 2 of the Cypriot law.

Cypriot courts have dealt with a few cases involving working time. *Attorney General v Michalis Kongorizi* and *Agapiou* v *Attorney General* (*Πολιτική Έφεση* Αρ. 55/2005) (2006), 1 ΑΑΔ 457, 22 May 2006, dealt with the issue of on-call time, which is a period during which a worker is required to remain at the workplace, ready to carry out his or her duties if requested to do so. On the basis of the contract between the parties, the Supreme Court ruled that on-call time must be counted as working time. The Supreme Court cited relevant CJEU jurisprudence (such as the CJEU cases C-303/98, *Simap* and C-151/02, *Jaeger*), but reached the conclusion that they were not concerned with the issue of remuneration. Thus, the Court ruled that the relevant provisions of the law transposing the Working Time Directive did not impose a duty to remunerate on-call time as equal to working time involving the real execution of the duties of the employee.

Accordingly, the European Commission Report on the implementation of the Working Time Directive unequivocally construed that '*"on-call time" refers to periods where a worker is required to remain at the workplace, ready to carry out his or her duties if requested to do so*', and considered that '*on-call time at the workplace is entirely treated as working time under national law in nine Member States, including Cyprus*'.

The CJEU cases are of relevance to Cypriot law as they clarify the concept of 'working time' more precisely as well as the question of remuneration, contrary to the Cypriot Supreme Court's ruling.

In case 1471/2015, of 15 April 2020, *Nicoli and others v. Republic*, the Administrative Court allowed an appeal by firefighters pertaining to the recognition and compensation for on-call waiting time. On 12 November 2015, the applicants appealed against the decision of the police chief to compensate them for the time they were on-call. The Court also referred to the established practice where on-call duty had been in force for over 20 years, when there was adverse discrimination in the treatment of two different groups of fire brigade officers, i.e. duty officers, on the one hand, and the district/assistant district officers, on the other. Until 29 July 2015, duty officers were not expected to be on duty after completing their service due to a change in their working hours to 11 hours and 24 hours of rest or 13 hours of work and 48 hours of rest, while the district/assistant district officers continued to perform their on-call duties. Furthermore, in addition to the complaint of non-payment of compensation, the court considered the problems created by how the on-call duty was being operated: the maximum average weekly working time of 48 hours concerned firefighters and within this limit, on-call duty is considered overtime, as established by the relevant

jurisprudence. There is no derogation for firefighters. The court referred to the wording of the concept of 'rest time' where the employee has no obligation to his or her employer to prevent him or her from pursuing their interests freely and uninterruptedly in order to neutralise the effects on their safety and health. The court considered the claim by the applicants that non-observance of the obligations and deadlines imposed on a Member State by an EU Directive cannot be justified by any provisions or practices of national law. The Administrative Court decided that the decision of the police chief is insufficiently justified and allowed the appeal.

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

The Cypriot law copies verbatim the definition of 'rest period' as provided by 2.2 'any period which is not working time' (see Article 2 of *Ο Περί της Οργάνωσης του Χρόνου Εργασίας Νόμος του* 2002 (63(I)/2002): *‚περίοδος ανάπαυσης' σημαίνει κάθε περίοδο που δεν είναι χρόνος εργασίας*).

4 Other Relevant Information

Nothing to report.

Czech Republic

Summary

(I) The state of emergency has been re-declared. Likewise, the travel ban has been amended and extended, and an additional travel ban prohibits travel to certain high-risk countries.

(II) The government has introduced the obligation for employers to regularly test their employees for COVID-19. Employees who test positive for COVID-19 have the obligation to immediately notify the employer, leave the workplace, and stay in their place of residence.

(III) State financial aid for employers—the 'Antivirus' programme—has been amended and extended until 30 April 2021.

(IV) A compensation bonus for employees working under a zero-hours contract has been adopted.

(V) An additional payment for employees in quarantine has been introduced.

(VI) The Supreme Court has ruled on discrimination on grounds of personal belief and on unequal pay.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 State of emergency

With effect from 27 February 2021, the government extended the state of emergency in connection with the COVID-19 crisis. The state of emergency will last until 11 April 2021.

The state of emergency was extended by Government Resolution No. 314 of 26 March 2021, published as Resolution No. 146/2021 Coll., which entered into effect on 27 March 2021. The text of the resolution is available here.

Under the state of emergency, the government is authorised to issue extraordinary measures – measures adopted under the state of emergency have been extended until 11 April 2021 as well (see previous Flash Reports).

Further extensions of the state of emergency ae subject to approval by the Chamber of Deputies of the Parliament of the Czech Republic.

The state of emergency has been in force without interruption for a number of months since autumn (see previous Flash Reports). Some of the new measures adopted are not based on the state of emergency, but on the new Pandemic Act (see February 2021 Flash Report).

1.1.2 Travel ban and restrictions to freedom of movement

The protective measure of the Ministry of Health No. MZDR 20599/2020-63/MIN/KAN of 15 March 2021, with effect as of 19 March 2021, re-adopts the restrictions on the entry of persons into the territory of the Czech Republic – with certain amendments. The text of the extraordinary measure is available here.

According to the protective measure of the Ministry of Health No. MZDR 20599/2020-67/MIN/KAN of 30 March 2021, with effect as of 11 April 2021 until 31 May 2021, Czech citizens as well as foreign nationals residing in the territory of the Czech Republic may not travel to certain countries, namely: Botswana, Brazil, Eswatini, South Africa, Kenya,

Colombia, Lesotho, Mozambique, Peru, Tanzania, Zambia, and Zimbabwe – due to the increased COVID-19 risk in those countries. The text of the measure is available here.

1.1.3 Mandatory testing of employees

The government has implemented the obligation of employers to test their employees for COVID-19. With the extraordinary measure of the Ministry of Health No. MZDR 47828/2020-16/MIN/KAN of 01 March 2021, subsequently amended by extraordinary measures of the Ministry of Health Nos. MZDR 47828/2020-22/MIN/KAN and MZDR 47828/2020-26/MIN/KAN of 15 March 2022, employers are prohibited from allowing persons who have not undergone a test for COVID-19 and have a negative result in the past 7 days into the workplace. The text of the measure is available here.

At first, this obligation only applied to employers with more than 250 employees; however, in several stages, the obligation was extended to all employers. Employers must ensure testing of all employees by RT-PCR or antigen tests (either tests for use by lay persons in the workplace or by a provider of medical services).

Employees working exclusively from outside the employer's workplace can get tested at home (business travels, e.g. medical representatives). Employees working from home do not need to be tested.

According to the extraordinary measure of the Ministry of Health No. MZDR 47828/2020-27/MIN/KAN of 22 March 2021, employees who test positive for COVID-19 have the obligation to immediately notify the employer, leave the workplace, stay in their place of residence, and notify the employer's medical service provider or their physician. The text of the measure is available here.

Exceptions apply, especially with respect to persons who have had the COVID-19 disease and recovered (given that no more than 90 days have lapsed since the first positive test) as well as vaccinated persons (who have had the second vaccine dose and when at least 14 days have passed from the administering of the second dose).

Employees who fail to undergo this test cannot enter the workplace and work – if working from home is not possible/allowed by the employer, such workers are not entitled to their salary.

Finally, testing is obligatory at least once a week, but the government has stated they are considering more frequent testing (once in 5 days or twice a week). Testing is obligatory for an indefinite period of time, likely at least until the end of May.

The tests are partly covered by health insurance – employers can apply for financial compensation for testing (up to CZK 60 per test and a maximum of CZK 240 per calendar month).

1.1.4 State financial aid for employers – the 'Antivirus' programme

Information on the 'Antivirus' programme was provided in the March-October 2020 Flash Reports.

Under the 'Antivirus' programme (see previous Flash Reports), employers who provide salary compensations to employees to whom they cannot allocate work due to various obstacles to work (i.e. where employees are not working but remain on the employer's payroll) may apply for state contributions (as a full or partial reimbursement of the related payroll costs). The reason behind the adoption of the programme is to prevent and limit dismissals.

With the Government Resolution No. 186 of 22 February 2021, the government has amended the conditions of the Antivirus programme—specifically, only employees who have been employed for more than 3 months are now eligible—and extended it until 30 April 2021. The text of the resolution is available here.

1.1.5 Financial aid for employees working under zero-hours contracts

A compensation bonus for employees working under a zero-hours contract has been adopted with Act No. 95/2021 Coll., entered into effect on 27 February 2021, and Regulation No. 154/2021 Coll. The text of the Act and the Regulation is available here and here.

Under certain conditions (especially if the worker participated in the sickness insurance scheme for at least 3 months during the relevant period and if he or she did not perform any other activities that established participation in the sickness insurance scheme), a compensation bonus is provided to employees working under a zero-hours contract (so-called 'DPP' and 'DPČ'), if they were not working in the relevant period because the employer's activity was affected by the COVID-19 crisis.

The compensation bonus is provided in the amount of CZK 500 (i.e. approx. EUR 19) per day.

Originally, the bonus period was set from 01 February 2021 until 31 March 2021. The regulation extended the bonus period from 01 April 2021 to 30 April 2021.

1.1.6 Extraordinary payment for employees in quarantine

Employees who are ordered to quarantine may not work, but are entitled to compensation of salary by their employer for the first 14 days of quarantine (in the amount of 60 per cent of their reduced average earnings). From the 15th day onward, they are entitled to a sickness benefit provided by the state (60 per cent of their reduced average earnings).

Act No. 121/2021 Coll., which entered into effect on 05 March 2021, introduces an extraordinary payment of CZK 370 (i.e. approx. EUR 14) per day in quarantine to be provided to employees by their employers in addition to the compensation of salary for the first 14 days of quarantine. The amount of the extraordinary payment is capped and may not exceed 90 per cent of the employee's average earnings. The text of the Act is available here.

The extraordinary payment will be provided until 30 April 2021, but this period may subsequently be prolonged.

Employers will be able to reduce the health and social security contributions paid for each employee by the amount of the extraordinary payment.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Discrimination and unequal pay

Supreme Court, No. 21 Cdo 1486/2020, 21 January 2021

A state employee claimed discrimination (based on her personal belief) and unequal treatment in the workplace (in comparison with other comparable employees), in particular as regards her remuneration.

Although personal belief (i.e. worldview) is one of the prohibited reasons that may constitute discrimination, the Supreme Court ruled that it could not be considered discrimination in this case. Personal belief cannot be based only on the employee's other views on the solution of specific problems arising in the performance of her work for the

employer. The concept of personal belief is complementary to the concept of religion/faith and can be considered a set of ideas, opinions and values that relate to the most basic philosophical, ethical, political, social and religious issues.

As regards unequal treatment, the salary (or 'public sector pay') of public sector employees is set based on their categorisation into groups (based on type of work) and degrees (based on experience). The Court ruled that unequal treatment can occur if the employee is placed in a different group/degree than other employees who perform the same work and have the same experience.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

National case law on differentiation between working time and rest time (certain aspects) can be considered problematic in light of the CJEU's case law.

Certain issues arise in connection with the regulation of meal and rest breaks provided to employees. The Czech Labour Code differentiates between 'work breaks for meals and rest' which are provided to employees after a maximum of 6 hours of continuous work, and 'reasonable time for rest and meals' which is provided to employees when their work cannot be interrupted due to the nature of the work being performed by the employee (and where circumstances do not allow for 'ordinary' work breaks for meals and rest periods to be provided to employees). The former shall last for at least 30 minutes and is considered a rest period and is thus not paid; the latter, on the other hand, is considered part of working hours, as the employee is not given any real rest due to the nature of the work (e.g. an employee supervising boilers who cannot leave the boilers' proximity for more than 5 minutes due to the boilers' technical requirements), and is therefore awarded a salary.

In the past, the Supreme Court dealt with a case of a firefighter (No. 21 Cdo 6013/2017), who claimed that his breaks for meals and rest were to be considered rest time (and ought to therefore be paid) since he was considerably restricted in the use of his free time (e.g. he was required to carry a walkie-talkie at all times so he could respond to emergency calls). The Supreme Court held that work breaks were regularly planned, that the work was not of a continuous nature that could not be interrupted, and that while it was possible that the firefighter's breaks might be interrupted by an emergency call, such random events did not constitute working time that could not be interrupted. Furthermore, the Supreme Court added that if such random events were crucial for determining the nature of work (continuous or not), this line of reasoning could be used for other random events as well, e.g. employees' obligation to actively prevent harm to the employer's property in case of impending damage (see Section 249(2) of the Labour Code). The Supreme Court agreed with this opinion in one of its later rulings as well (No. 21 Cdo 3521/2019 - see May 2020 Flash Report).

The Supreme Court's approach was deemed problematic by law academics, mainly because it did not closely follow its previous decisions pointing out the necessity to take the nature of the work, the intensity of the restrictions, etc. into account. Many have pointed out a CJEU ruling (C-518/15, *Matzak*) and its approach to assessing employees' free time and the intensity of restrictions on this free time; many considered it appropriate to assess the free time during work breaks in a similar way, i.e. to consider the degree of an employee's obligations during such a break to determine whether it is still 'free' time or not.

Even though stand-by time and work breaks are two different matters, it must be determined for both how extensive the limitations imposed on the employee are, as mentioned above. The Supreme Court does not seem to consider this sufficiently.

The ruling may have implications on the Labour Code, which in Section 95, para. 3 stipulates that '(3) Stand-by time during which work is not performed is not included in working hours'.

This provision might be deemed problematic as well, given its vague nature, as the CJEU ruled that in some cases, stand-by time can, and must, be considered working hours, even if no work is actually performed.

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

The Czech Labour Code does not address the situation described in the present case (i.e. rest periods in case of multiple employment relationships concluded between the same parties). The question has not been dealt with in national case law either.

A few opinions of law academics can be found on the matter. Generally, it can be said that each employment relationship—and rights and obligations arising from it—should be assessed individually, unless the law states otherwise. For instance, Section 34b(2) of the Labour Code prohibits the parties from concluding multiple employment relationships for an identical type of work. This seems to be the only explicit requirement the parties must meet in order to conclude more than one employment relationship.

In practice, it often happens that multiple employment relationships exist between parties (i.e. a relationship based on a standard employment contract and a relationship based on a zero-hours contract), whilst the rule expressed by the CJEU is not observed.

In conclusion, there is no legislation or case law that would explicitly prohibit an assessment of the limits on rest periods for each employment contract separately in case of multiple employment contracts. It often occurs in practice that the rule expressed by the CJEU is not observed. National provisions can, of course, be interpreted by the authorities in conformity with the CJEU decision, however, in the author's opinion, it should be explicitly stated in the applicable legislation (the Labour Code) as well.

4 Other Relevant Information

Nothing to report.

Denmark

Summary

(I) COVID-19 related restrictions are gradually being lifted in Denmark in accordance with a new comprehensive reopening plan. The use of a digital COVID-19 passport is an essential part of the plan.

(II) Wage subsidies have been extended until 30 June 2021.

(III) As a measure to boost the economy, accrued holiday funds may extraordinarily be paid out early, i.e. as of spring 2021, upon application.

(IV) The Supreme Court ruled on comparable work in the context of fixed-term work.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Reopening plan

On 22 March 2021, Parliament announced a plan to reopen society in response to a steady and relatively low number of infections as well as the ongoing vaccination of the population. Current restrictions are slowly being phased out throughout spring. Once all citizens above the age of 50 have been vaccinated once, it is expected that society can be almost fully reopened, but with restrictions for high-risk events such as large gatherings, travel, etc.

An essential part of the reopening plan is the COVID-19 passport (*coronapas*). The COVID-19 passport indicates whether a citizen has been fully vaccinated, has overcome a COVID-19 infection or has tested negative within the last 72 hours. Children under the age of 15 are exempt. The COVID-19 passport will be implemented as a digital solution (an app), but other documentation possibilities will be made available for people who do not use digital devices.

The first part of the reopening will start on 06 April 2021. From this date onwards, schools as well as youth and adult education facilities will re-open. In schools and secondary education, children in classes 5 to 10 (age 11 to 17) and students (age 18 to 20) shall attend school in person every other week (50 per cent per week). In tertiary education, students may now as a general rule attend 20 per cent of their classes in person.

Service providers such as hairdressers, driving schools, and cosmetologists, may also re-open as of 6 April. Citizens are required to use the COVID-19 passport.

1.1.2 Relief measures

The state-funded salary compensation scheme has been extended until 30 June 2021.

1.1.3 Pay-outs from holiday funds

As of 01 September 2020, a new holiday model of 'concurrent holiday' was introduced in Denmark. Upon the transition to the new model of concurrent holiday, employees may have accrued holiday, but not yet taken it.

The transition could have resulted in up to 10 weeks of un-taken holiday in the first year. Thus, an interim arrangement was introduced. This means that employees' earned holiday funds between 01 September 2019 and 31 August 2020 were put in a fund, and the holiday funds were to be paid out to employees upon retirement.

Due to the extraordinary impact of COVID-19 on the economy, the majority of parties in the Danish Parliament decided to introduce the option of pay-outs of part of the holiday funds to employees (maximum three weeks of holiday funds). The new Act L 164 of 16 March 2021 is a result of Parliament's decision to pay out the rest of the holiday funds (approx. two weeks of holiday funds) to employees during the spring of 2021. The measure has been introduced to boost the economy given the COVID-19 situation.

The pay-out is optional and contingent upon the employee's application.

See here for the Ministry of Employment's press release.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Fixed-term work

Supreme Court, BS-11386/2020-HJR, 24 February 2021

The case examined whether choir assistants at the Danish Royal Theatre were employed on less favourable terms compared to permanent employees of the opera choir contrary to the Act on Fixed-term Work, Art. 4(1).

The Royal Theatre's opera choir consists of 40 permanently employed singers. Choir assistants are employed to supplement opera choir singers in large opera shows on a fixed-term basis. Their employment and salary conditions follow a special protocol for choir assistants. Contrary to permanent choir members, the assistants are not entitled to a pension, pay during sick leave, paid maternity leave, etc.

The employees argued that the two groups of employees did, in fact, perform the same or at least comparable work. There was nothing to indicate that the choir assistants were less qualified or had lower performance levels. The admission requirements cannot be a determining factor for the assessment of comparable work.

The employer argued that choir assistants and permanent opera choir members were not comparable due to significant differences in qualifications and skills, and terms for the performance work.

The Supreme Court found that the artistic nature of the work, where the employees' qualifications and skills are of particular significance, must be given decisive weight in the assessment of 'comparable work'. The Court emphasised the witness statements from the choir leader and theatre director, who explained that the opera choir's permanent members were the 'backbone of choir work', that 'all singers could be used for all styles', 'they are the best and most versatile singers', etc. The Supreme Court concluded that the choir assistants as a group did not have the same qualifications and skills as the choir's permanent employees. This was supported by the fact that the permanent employees had been chosen by auditions, where particularly high requirements must be met.

As the two groups of employees were not comparable, the terms set out in the protocol for choir assistants could not be considered differential treatment as prohibited in the Act on Fixed-term Work. The Supreme Court thus dismissed the appeal of the employees.

The assessment of 'comparable work' in the context of fixed-term work has attracted more attention in case law in recent years. More cases have come before the Supreme Court. Where earlier cases concerned, e.g. academic positions (see case 303/2016), the latest ruling is the first to involve artistic positions.

There does seem to be a consistent line in case law. The group of fixed-term employees must meet 'a high threshold' for what may be characterised as 'comparable work' and the fact that some work may seem identical on the face of it does not suffice. The Danish courts closely examine all relevant facts of the case. There are not many cases in which fixed-term employees have successfully argued that the work performed by permanent staff was indeed comparable work.

The ruling is in line with the EU *acquis*.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

The rulings may have implications for Danish law, as they clarify the assessment of stand-by time in terms of the working time regulations.

In the two rulings, the CJEU clarifies and exemplifies the distinction between working time and rest periods with regard to 'stand-by time'. The criteria listed by the CJEU do not conflict with existing Danish case law, which has been interpreted, particularly in cases on working time and stand-by time, expressly in conformity with CJEU case law.

The Working Time Directive 2003/88 has been transposed in Denmark in three different statutory acts as well as in collective agreements.

Danish case law on the concept of working time and rest periods, which is a core element of protection in the Working Time Directive, has so far focused on maximum weekly working hours, implemented in the Working Time Act. The classification of stand-by work has been addressed in recent case law concerning maximum weekly working hours, e.g. Western High Court ruling of 26 August 2019, U 2019.4136 V (the ruling concerned a paid driver and the interpretation of how to asses on-call time in the private home in terms of working time) which was modelled after the CJEU's reasoning in the *Matzak* case. The Working Time Act is a private law act enforced by the individual employee, often backed by their unions.

The new CJEU rulings concern the calculation of daily and weekly rest periods, which are implemented in the Work Environment Act. The rulings will have an impact on the future cases before Danish courts, if parties disagree on the appropriate classification of the stand-by time in question. The classification has implications on the appropriate calculation of maximum daily and weekly rest periods as laid down in the Work Environment Act. The Work Environment Act is enforced by the public Danish Work Environment Authority (DWEA), also concerning daily and weekly rest periods. The Minister of Employment issued an Executive Order on Daily and Weekly Rest Periods in 2002, with amendments in 2003. In the Executive Order, section 15, on-call duty at the workplace is not considered a rest period. In section 16, on-call duty outside the workplace, on the other hand, counts as the daily rest period. If the employee is called to work, the daily rest period is interrupted and can only be resumed when the employee returns home. On-call duty at the workplace or outside the workplace cannot be counted as the weekly rest period, cf. section 16 and the DWEA Guideline on Weekly Rest Periods (see also the DWEA Guideline on Daily Rest Periods and the DWEA Guideline on On-call Duty). The DWEA monitors and enforces the Work Environment Act provisions, including daily and weekly rest periods. The DWEA may issue orders and penalties for breaches of the provisions. An employer who disagrees may submit a complaint before the ordinary courts to have the order or penalty of the DWEA assessed. No cases have yet been tried by the courts regarding the assessment of the DWEA on the understanding of the calculation of daily and weekly rest periods. Also, no cases have been dealt with by the court for breach of the provisions on daily or weekly rest periods. The Executive

Order provides that the daily and weekly rest periods can be derogated from to a certain degree by collective agreement, but this was not the issue at hand.

It is expected that the new CJEU rulings could result in an adjustment or clarification of how to calculate daily rest periods in the Executive Order, specifying the circumstances in which on-call duty outside the employer's premises may count as daily rest periods.

The CJEU also reiterated that 'remuneration' for stand-by time does not fall within the scope of Directive 2003/88. The Court stated that the Directive does not preclude provisions on remuneration, distinguishing between time periods during which real work is performed, and time periods during which no real work is being performed, even though the latter may fall within the Directive's definition of working time. In many Danish collective agreements, working time and stand-by time is remunerated differently. The CJEU rulings thus confirm that the classification of working time in the understanding of the Working Time Directive does not impact any provisions on remuneration.

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

The ruling may have implications for Danish law.

The CJEU stated that a worker's minimum daily rest period is calculated in its entirety, if the worker has concluded several employment contracts with the same employer.

The Danish Work Environment Act does not address situations in which an employee has concluded multiple contracts with the same employer. It is, however, clear that 'the employer' bears the ultimate responsibility for the employee's working time and rest periods for work performed for that employer. The employer is responsible according to the Work Environment Act and concerns all of the work performed for the employer, cf. section 2. The organisation of working time and daily and weekly rest periods does not depend on the contract of employment but on the work performed for the employer in its entirety, cf. section 50-58. Concluding multiple contracts with the same employer does not circumvent the employer's duty to protect the daily and weekly rest periods under the Work Environment Act. Concluding several contracts with the same employer is generally not viewed as representing several separate employment relationships. The Danish Courts always take a realistic approach to the employment relationship, and several contracts will not constitute several separate employment relationships between the same parties, with the effect that certain protections do not apply or are circumvented.

Danish law is expected to be in accordance with the CJEU ruling on the issue of conclusion of several contracts with the same employer.

The CJEU ruling did not address the issue of the overall working time versus rest time, when an employee has several employment contracts with different employers. The Danish Working Time Act specifically states that the rules on maximum weekly working hours apply in relation to the individual employer, cf. preparatory works at *Til § 4.*

4 Other Relevant Information

4.1 Retention of pension benefits

Since the COVID-19 pandemic broke out, all persons—including pensioners and retirees—have been asked to return to work in areas requiring an increase in demand for labour due to COVID-19 .

Usually, pensioners who receive public benefits and whose additional income exceeds certain thresholds, will have their pension benefits adjusted against their income.

As of February 2021, the Danish Parliament entered into a broad political agreement, which ensures that the public pension benefits of public pensioners and retirees, who earn an additional income from COVID-19-related work, will not be adjusted against that extra income. The new agreement intends to prevent 'punishing' pensioners, who have contributed extraordinary work capacity since March 2020, when the COVID-19 pandemic broke out in Denmark.

The new scheme covers recipients of disability pension benefits (*førtidspension*), senior pension benefits (*seniorpension*) and state retirement pension benefits (*folkepension*). It also applies to any extra income earned by the pensioner's spouse, which otherwise can also affect the pensioner's pension benefits.

The work must be related to COVID-19. The agreement does not define 'extra income' but refers to any work beyond any existing part-time employment agreement that is remunerated. Although not specified, it is likely that staff in the health care sector, in particular, will benefit from the new scheme.

Pensioners must report the extra COVID-19-related income digitally to the relevant authority in charge of public pension payments (*Udbetaling Danmark*) to ensure that the pension benefits are not adjusted against the income. The pensioners must submit pay slips and a declaration of the work from the relevant employer.

The political agreement will soon be adopted as legislation based on the emergency legislative procedure.

See here for the Ministry's press release.

Estonia

Summary

The Estonian government has adopted an additional wage subsidy to cover costs in light of the COVID-19 situation.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Additional wage subsidy

The Estonian government has adopted additional measures for employers to compensate losses in revenue due to COVID-19.

A temporary subsidy is paid to employees of employers whose activities have been significantly disrupted due to restrictions imposed to prevent the spread of COVID-19.

An employer can apply for the temporary subsidy for employees, if:

- the company's revenue for the calendar month for which the temporary subsidy is being claimed has dropped by at least 50 per cent in comparison with the average revenue for the period from December 2019 to February 2020; or the average revenue for the period from July 2020 to December 2020;
- the employer can no longer provide employees with work in the agreed volume (§ 35 of the Employment Contracts Act) or they have to reduce the employees' remuneration (§ 37 of the Employment Contracts Act);
- they are not the subject of compulsory dissolution, liquidation or bankruptcy proceedings and at the time of application, they have no tax arrears or these have been deferred.

A temporary subsidy is paid for March and April 2021 to employees:

- for whom work in the agreed volume cannot be provided or whose salary has been reduced; and
- whose date of commencement of employment with the employer claiming the benefit is 01 January 2021, at the latest, and the employment relationship continues.

Compensation is not paid for an employee who was on sick leave or unpaid leave for the entire calendar month for which the benefit is being claimed.

The Estonian Unemployment Insurance Fund pays employee compensation in the amount of 60 per cent of the employee's average monthly salary, but not more than EUR 1 000 (gross). Prior to applying for the benefit, the employer is required to pay the employee at least EUR 200 (gross) for the month for which compensation for the employee's remuneration is being requested. The compensation paid by the Estonian Unemployment Insurance Fund and the full salary paid by the employer guarantee that a full-time employee will earn at least the minimum wage, i.e. EUR 584.

Self-employed persons whose revenue in 2020 was 50 per cent lower than in 2019 can also apply for compensation. The amount of compensation is EUR 584 per month.

An employer may not lay-off employees who have benefitted from the subsidy during the calendar month for which compensation is being claimed, nor during the following two calendar months. A self-employed person may also not suspend or terminate his/her activities.

For further information (in Estonian), see here.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

The CJEU cases deal with the question of working time and so-called 'stand-by' time. The cases and the position of the CJEU are important for Estonian labour law. The Estonian Employment Contracts Act (ECA) provides specific regulations on on-call time. According to the ECA § 48, if an employee and his/her employer have agreed that the employee must be available to the employer for the performance of duties outside of working time (on-call time), remuneration that is not less than one-tenth of the agreed wages must be paid to the employee. An agreement on the application of on-call time which does not guarantee the employee the possibility to make use of his/her daily and weekly rest period is void. The part of on-call time during which the employee is in subordination to the management and control of the employer is considered working time.

According to Estonian labour law, on-call time is not viewed specifically as either working time or as a rest period. Generally, on-call time does not require the employee to remain at the workplace, though he or she must be ready to start his or her activity as required by the employer. Based on the interpretations of the CJEU, this can either be considered working time or rest time. Depending on the circumstances, so-called on-call time according to the Estonian Employment Contracts Act can also be treated as working time.

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

The present case addresses working time and rest periods in cases in which a worker has concluded several employment contracts with the same employer. In case several employment contracts have been concluded, the minimum daily rest period applies to these contracts as a whole and not to each of those contracts individually.

The CJEU's interpretation is important for Estonian labour law. The Estonian Employment Contracts Act (ECA) stipulates that the minimum rest period between working days must be at least 11 hours. The ECA does not contain any specific regulations and there is no case law on employees who have concluded several employment contracts with the same employer. Therefore, the CJEU ruling provides the necessary interpretation for such situations.

4 Other Relevant Information

4.1 Average wage in 2020

According to Statistics Estonia, the average monthly wage in 2020 was EUR 1 448 (gross). Compared to 2019, the average wage increased by 2.9 per cent. The highest average wage was registered in the information and communication sector (EUR 2 574), finance and insurance sector (EUR 2 461) and in the energy sector (EUR 2 118); the lowest average wage was reported in the real estate sector (EUR 1 050) and in the accommodation and catering sector (EUR 860). The monthly minimum wage (gross) was EUR 584.

For further information (in Estonian), see here.

4.2 Use of teleworking in Estonia

In 2020, 163 700 people were engaged in teleworking, which is 40 400 more than in the previous year. Teleworking was very widespread in the second quarter of 2020, when as many as 198 700 people were engaged in teleworking due to the COVID-19 pandemic.

The largest share of teleworkers was in information and communication (70.5 per cent), financial and insurance activities (63.7 per cent) and professional, scientific and technical activities (57.9 per cent). The lowest share was in health care and social work (8.9 per cent), accommodation and food service activities (9.5 per cent) and manufacturing (13.1 per cent).

Fifty-one per cent of top management, 49 per cent of managers, 35 per cent of middle management, 23 per cent of office workers and only 2 per cent of unskilled workers could afford to telework. Compared to men, the share of female teleworkers increased significantly more during the year. According to level of education, the majority of teleworkers had completed higher education.

For further information (in Estonian), see here.

Finland

Summary

(I) The government proposal to temporarily restrict freedom of movement to limit the spread of COVID-19 has been withdrawn following a negative review by the Constitutional Law Committee.

(II) According to the Supreme Court, a change of an essential term of employment requires cooperation negotiations to be held pursuant to the provisions of the Act on Cooperation within Undertakings on dismissals of employees.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Temporary restrictions

The government submitted a proposal to Parliament (Government Proposal 39/2021) that would have introduced temporary restrictions to the freedom of movement and to close contacts between individuals and introduced a mask mandate in the areas worst affected by COVID-19. The main objective was to reduce the number of encounters and close contacts between people residing in areas where COVID-19 is spreading rapidly and uncontrollably. The aim was to protect people from the dangerous infectious disease and to safeguard the capacity of the health care system. Essential movement would have been permitted, for example, to perform work duties or to pursue trade or business activities. The government submitted the proposal to Parliament on 25 March 2021.

On 31 March 2021, Parliament's Constitutional Law Committee submitted a statement on the Government Proposal (PeVL 12/2021 vp), according to which the government's proposal to fully prohibit movement contradicts the requirement of proportionality, given the epidemiological reasons presented in the Government Proposal, and it cannot be considered necessary in accordance with Article 23 of the Constitution.

The government subsequently withdrew its proposal on 31 March 2021.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Change of an essential term of the employment relationship

Supreme Court, KKO:2021:17, 11 March 2021

An employer who changed an essential term of the employment relationship for which a grounds for dismissal was required and who had not negotiated this change in cooperation negotiations, had to pay compensation to the affected employees in accordance with paragraph 62 of the Act on Cooperation within Undertakings (334/2007), although the employment relationships of the employees had not actually been terminated as a result of the change.

The Court also referred to the Directive on Collective Redundancies and related CJEU case law according to which a unilateral change of an essential part of the employment relationship can, under certain circumstances, be comparable with the employee's dismissal, and the employer must thus enter into the consultations referred to in Article 2 of the Directive on Collective Redundancies.

2.2 Working time

Labour Court, TT 2021:24, 24 March 2021

The collective agreement for the stevedoring sector, which entered into force on 01 February 2019, contains a new provision according to which the working hours of portal crane drivers in ship works shall be a maximum of six hours per work shift.

The dispute concerned the question whether the above-mentioned provision only applied to regular work shifts or to both regular work shifts and overtime work. The Labour Court determined that the provision's wording supported an interpretation according to which the provision only applied to regular work shifts.

3 Implications of CJEU rulings

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

The Finnish Act on Working Hours (872/2019) was amended in 2019. The CJEU's case law was taken into account, in particular with regard to the meaning of working time and rest periods as well as stand-by time as working time.

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

According to the CJEU's judgment, the right of every worker to a limitation of his/her maximum working hours and to daily and weekly rest periods represents a regulation of EU labour law that is of particular importance. The Finnish Act on Working Hours provides for the right to a minimum daily rest period. This right equally applies if the employee has concluded several contracts of employment with the same employer.

4 Other relevant information

4.1 Proposed act on foreign berry pickers

The government has submitted a proposal to Parliament (Government Proposal 42/2021) to improve the legal status and earnings opportunities of foreign berry pickers and adapt the competitive environment to match that of other businesses in the sector. The proposed act lays down provisions on the rights of wild produce pickers, the obligations of operators in the sector, the monitoring of compliance with the obligations as well as sanctions for failure to comply with them. The obligations of companies that purchase natural products would largely remain as currently laid down in the letter of intent. However, the obligations would be specified in more detail and include more binding terms.

The proposed act would also include an absolute ban on charging pickers for recruitment services and training. Operators in the sector would have a cooperation obligation to improve the picking results. According to the proposed act, operators in the natural product picking sector should be reliable, and this reliability would be assessed based on compliance with the act's provisions. In addition, the operator should have paid the respective taxes and fees and should be in the financial position to organise its business activities. If the operator is not reliable, it cannot invite pickers to Finland or offer them accommodation or equipment with the aim of purchasing natural products picked by them.

The occupational safety and health authorities would monitor compliance with the proposed act insofar as monitoring is not the responsibility of another competent authority. The act would apply when the work is not being carried out under an employment relationship.

4.2 Industrial relations

Technology Industries of Finland announced on 25 of March 2021 that its activities will be divided between two associations. Technology Industries of Finland will no longer conclude national collective agreements. The responsibility for collective bargaining will be transferred to a new employers' association, *Teknologiateollisuuden työnantajat ry*. In the future, it will negotiate national collective agreements for companies that want to belong to the scope of the collective agreement services offered by the employers' association. Simultaneously, Technology Industries of Finland will be responsible for lobbying related to the labour market and industrial policies and will provide companies that are not members of the new employers' association with assistance in employment matters and negotiations concerning company-specific collective agreements.

The new arrangement will be in effect in the next round of negotiations. As a result of the arrangement, companies that are not members of Technology Industries of Finland and that do not see a need to be covered by the scope of national collective agreement services will be able to become members of Technology Industries of Finland. Technology Industries of Finland recommends that companies employing at least 50 workers involve a staff representative in the company's decision-making in a manner that is suitable in relation to the company's operations.

4.3 Local bargaining

A report by Jukka Ahtela and Joel Salminen on the current state of local bargaining and the measures for promoting it was published on 01 March 2021. The report describes the current state and practices of local bargaining in different sectors and in companies as well as work communities of different sizes. The report is essentially based on interviews with stakeholders covering different sectors as well as companies and jobs of varying sizes. The interviewees were interest organisations for employers, entrepreneurs and employees; public officials and other experts on working life were also interviewed.

The report includes a compilation of the observations made on the current state of local bargaining, with conclusions and recommendations based on them. Local bargaining continues to have a great potential in the field of so-called normally binding collective agreements. How generally applicable collective agreements can be brought into an equal position as local bargaining remains to be resolved. According to the report, it is essential to make better use of the existing opportunities. Additional measures are proposed to collective bargaining parties and the legislature. The scope for local bargaining must be enhanced in sectoral agreements. The need to develop labour provisions that will allow for local bargaining should be assessed. In addition, training and communication on local collective bargaining should be intensified.

4.4 The impact of the pandemic on teleworking

According to the Working Life Barometer 2020 – preliminary data, published on 22 March 2021, the coronavirus pandemic is strongly reflected in the assessments of wage and salary earners on the labour market, changes in the employer's economic situation and their own labour market position. Compared with 2019, wage and salary earners are less confident about keeping their jobs or finding work that corresponds to their profession or work experience.

The preliminary data shows that the increase in the number of employees at workplaces has slowed and more employees are experiencing the threat of being laid off. As a result of the coronavirus, the workload has increased for about one-third of wage and salary earners and decreased for around one-sixth of them. The workload has increased especially for women, clerical workers and municipal workers.

According to the preliminary data, new working methods were introduced at workplaces in 2020. The number of people using electronic workspaces and instant messaging services in their work has increased significantly since 2019. The epidemic has had a strong impact on remote working. About half of wage and salary earners worked remotely in 2020. Many have also worked remotely more frequently than previously. The Working Life Barometer is a sample study that examines the development of quality of working life from the perspective of Finnish employees. The data for 2020 are based on telephone interviews conducted by Statistics Finland in August and September within the scope of the Labour Force Survey. The data can reliably be generalised to apply to employees across Finland and in all sectors.

France

Summary

(I) Two High Courts adopted different decisions on whether teleworkers are entitled to meal vouchers.

(II) Two decision of the Labour Division of the Court of Cassation ordered an airline company to distribute trade union leaflets to employees on secondment to an external company, and ruled on the validity of a collectively bargained daily flat-rate agreement.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Right of teleworkers

High Court of Nanterre, No. 20/09616, 10 March 2021

The management of two entities of a group decided to allocate meal vouchers to employees assigned to a worksite that did not have an on-site canteen, even if they were teleworking. Due to the state of emergency declared on 17 March 2020, those entities discontinued the allocation of meal vouchers to employees assigned to a site not equipped with an on-site canteen and ordered employees to telework.

The French legislator has put forward a principle of equal treatment between the teleworker and the employee who works at the company's premises. Indeed, Article L. 1222-9 III of the Labour Code clearly states that "*The teleworker has the same rights as the employee who carries out his [or her] work at the company's premises*".

In the present case, the High Court of Nanterre ruled that teleworkers are not in a situation similar to on-site workers and therefore, the employer can grant meal vouchers to on-site workers only. According to the court, the purpose of the employer's meal vouchers is to match the employees' additional costs for eating outside of their homes. As teleworkers can eat at home, they are not in a similar situation as employees working at the company's premises and who have to eat near their workplace.

High Court of Paris, No. 20/09805, 30 March 2021

After a company ordered teleworking and decided to reserve meal vouchers for employees who work on-site only, a staff representative brought a case before the High Court and requested that the meal vouchers be issued to employees who are teleworking on the basis of equal treatment.

The employer argued that teleworkers and on-site workers were not in a comparable situation; teleworkers have the space to prepare his or her meal and does not have to limit himself or herself to immediately consumable food; the teleworker can decide to work from a place other than his or her home without creating a right towards the employer; the regulations on and conditions for meal vouchers are not compatible with the teleworker's situation.

The High Court of Paris rejected the employer's arguments, stating that the legal definition of teleworking (Article L. 1222-9 of the Labour Code) refers to: "*any form of work arrangement in which work, that could have also been carried out at the employer's premises, is performed by an employee outside of those premises*

voluntarily, using information and communication technologies" and does not require the employee to work from home or to be able to prepare a meal in a personal space. Moreover, the allocation of meal vouchers is not linked to the absence of premises for the employee to prepare food. The judges added that the conditions for using meal vouchers are fully compatible with the performance of teleworking duties, since the guiding principle of the vouchers is to provide employee the opportunity to eat when his or her working time includes a meal, and teleworkers are in the same situation as employees who work on-site.

This ruling is in conflict with that of the High Court of Nanterre because it concludes that teleworkers must also receive meal vouchers for each day worked if the meal is included in their daily working hours.

2.2 Collective rights

Labour Division of the Court of Cassation, No. 19-21.486, 17 March 2021

The trade union of an airline company sued the employer for ordering pilots seconded to an external company to be allowed to have access to the trade union leaflets and publications distributed by the latter.

According to Articles L. 2142-3 to L. 2142-7 of the Labour Code, trade union organisations that have formed a trade union section within the company may distribute trade union communications to the company's employees.

According to the Court of Cassation, employees seconded to an external company, who remain attached to their original company, must be able to access that trade union's information.

As a result, it is up to the employer to take all the necessary measures, in agreement with the user company, to ensure that trade union communications are distributed to employees on secondment.

2.3 Daily flat-rate agreement

Labour Division of the Court of Cassation, No. 19-12.208, 24 March 2021

Following a transfer, an employee who had opposed a transfer was dismissed for serious misconduct. The employee raised various claims, including back pay for overtime, compensatory rest and compensation for undeclared work, on the grounds that the provisions of the daily flat-rate agreement did not ensure that the scope and workload of daily flat-rate workers were reasonable.

The Court of Cassation ruled on the validity of the collective agreement and concluded that it was null and void.

The judges of the Court of Cassation based their decision, in particular, on Article L. 3121-39 of the Labour Code, interpreted in the light of Articles 17(1) and 19 of the Working Time Directive (2003/88/EC). They stated that Member States may only derogate from the provisions on working time in accordance with the general principles of protection of the safety and health of workers. Therefore, any collective bargaining agreement on daily flat-rate working time must ensure that reasonable working hours and daily and weekly rest periods are respected.

In this case, the Court noted that the collective bargaining agreement did not provide for effective and regular monitoring allowing the employer to rectify any workload that might be incompatible with reasonable working hours in good time. Therefore, it does not guarantee that the extent and the workload remain reasonable and thus does not ensure a good distribution of the employee's overtime work.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

In the present cases, the CJEU ruled that a period of on-call duty, in its entirety, constitutes working time when the constraints imposed on the worker during that period very significantly affect his or her ability to manage his or her free time freely and to devote it to his or her own interests. The constraints must be caused by the employer, a collective agreement or a national regulation. Organisational difficulties that a period of on-call time may cause for the worker and that are the consequence of natural elements or of his or her free choice are not relevant.

In French law, Article L.3121-9 of the French Labour Code specifies that on-call time is the

> "*period during which the employee, without being at his place of work and without being at the permanent and immediate disposal of the employer, must be able to intervene to perform work for the company*."

It specifies that the duration of the intervention is considered actual working time.

The Court of Cassation includes the travel time to carry out the intervention into this duration of work (Labour Division of the Court of Cassation, No. 06-43.834, 31 October 2007). On the other hand, the time spent on-call, excluding the intervention, which is taken into account for the calculation of the minimum daily and weekly rest periods, is considered as rest time (Article L. 3121-10 of the Labour Code). The European Committee of Social Rights has already had occasion to specify that this approach constitutes a violation of the right to reasonable working hours provided for in Article 2 §1 of the European Social Charter (ECSR, collective complaint No. 16/2003, 12 October 2014, CFE-CGC v. France).

Therefore, the aforementioned Article L. 3121-10 of the French Labour Code appears to contravene Union law as interpreted by the Court of Justice in these decisions.

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

In the present case, the CJEU stated that where a worker has concluded several employment agreements with the same employer, the minimum daily rest period applies to the agreements taken as a whole and not to each one taken separately.

French law appears to be fully in line with this approach. On the one hand, if an employee performs several professional activities for the same or different employers on an occasional or regular basis, it is on the condition that the total duration of his or her paid work does not exceed the maximum working hours (Labour Division of the Court of Cassation, No. 09-40.923, 19 May 2010; No. 16-21.811, 20 June 2018).

On the other hand, regardless of the form of activity carried out, Article L. 3131-1 of the French Labour Code guarantees employees a minimum daily rest period of 11 hours between two working days, subject to the exceptions provided for in the following article and defined by decree. With limited exceptions, this means that the working day is limited to 13 hours, which corresponds to the period between the time when the employee starts work at the beginning of the day and the time when he or she ends work at the end of the day (Labour Division of the Court of Cassation, No. 09-41.277, 28 September 2010).

Case law has had the opportunity to specify that the volume of the work must be calculated over the same day from 0 to 24 hours and may not exceed 13 hours (Labour Division of the Court of Cassation, No. 99-43.351, 18 December 2001). Consequently, regardless whether the employee carries out one or more activities with the same or different employers, he or she must benefit from a daily rest period of at least 11 hours.

4 Other Relevant Information

Nothing to report.

Germany

Summary

(I) The German Cabinet approved the Works Council Modernisation Act.

(II) The Federal Labour Court delivered an important ruling on remuneration of on-call/stand-by duty.

(III) The parliamentary group *Bündnis 90/Die Grünen* presented a motion to improve the legal protection of so-called gig-, click- and crowdworkers.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Works council

On 31 March 2021, the German Cabinet approved the draft of the Works Council Modernisation Act (*Betriebsrätemodernisierungsgesetz*). This is intended to promote the establishment and election of works councils and works council activities.

The bill also aims to respond to the increasing use of artificial intelligence (AI) in the workplace: it clarifies that the works council's rights in the design of the working environment and work processes also apply if AI is to be used in the company. It also ensures that the works council's rights in terms of staff selection guidelines also apply if they have been created by or with the help of AI. If the works council needs to assess the introduction or use of AI to perform its duties under the Works Constitution Act, it is deemed necessary to consult an expert.

Moreover, works councils are given the right of co-determination in the design of mobile work to develop a uniform and binding legal framework for mobile work.

See here for the Ministry of Labour's press release.

2 Court Rulings

2.1 Remuneration for on-call or stand-by duty

Federal Labour Court, 6 AZR 264/20, 25 March 2021

In the present case, the Court held that the question whether so-called medical background duties must be remunerated as on-call duty or as stand-by duty under the relevant collective agreement depends on whether the employer requires the employee to remain at a certain place, in particular with regard to the time between being called upon and the commencement of work, and thus imposes a de facto restriction in terms of location. This also applies if the medical background duty is combined with a telephone stand-by duty.

The case concerned a senior physician, who performed so-called background duties outside his regular working hours. During this time, he had to be reachable by telephone. The defendant had not provided any explicit instructions regarding the location or the period of time within which the plaintiff had to take up work at the clinic.

According to the Court, the plaintiff performed on-call duty. Whether a background duty ordered by the employer was on-call duty or stand-by duty in the sense of remuneration

law is exclusively determined by national law and not by the Working Time Directive 2003/88/EC.

On-call duty and stand-by duty differ according to the applicable collective agreement definitions; in the former case, the employee does not have to remain at a certain location determined by the employer, but can freely choose his/her place of stay. The decisive factor is therefore the extent of the restriction in terms of location determined by the employer. However, even in the case of on-call duty, the employee is not entirely free to choose his/her place of stay. In accordance with the purpose of on-call duty, the employee may only stay so far away from the place of work that he or she can start working there as soon as possible. The obligation to accept a telephone call by the employer and thus to take up work immediately thereafter was not connected with any spatial restriction of location.

The judgment is currently only available as a press release by the court.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

According to the Court, a period of stand-by time according to a stand-by system is not, in its entirety, working time, unless the constraints imposed on the worker very significantly affect his or her ability to manage, during that period, his or her free time.

The German literature (rightly) points out that there is no rigid scheme in EU law of the forms of activity that are either working time or rest periods, but that cases are to be decided according to the circumstances of the individual case (see Winzer, *ArbeitsrechtAktuell* 2021, 187).

So far, the German courts have attached importance to the circumstance of how often an employee can expect to be called upon by the employer (see Federal Administrative Court of 22 January 2009 – 2 C 90/07). It is conceivable that the importance of this criterion will be diminished. This development is already observable in the current case law of the administrative courts; the most recent decision of the Federal Administrative Court referred to the Advocate General's opinion (Federal Administrative Court of 20 October 2020 – 2 B 36/20, para. 22).

This suggests that a certain modification of the legal concept of on-call duty is to be expected in civil service law (see Kohte, *jurisPR_ArbR* 11/2021, 4).

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

According to the Court, Articles 2(1) and 3 of Directive 2003/88/EC must be interpreted as meaning that, where an employee has concluded several contracts of employment with the same employer, the minimum daily rest period provided for in Article 3 thereof applies to those contracts taken as a whole and not to each of those contracts taken separately.

The decision has met with approval in German literature (see Schuster, *Fachdienst-Arbeitsrecht* 2021, 437629). It is argued that the rules on rest periods cannot be circumvented by an employer by concluding several employment contracts with his/her employee. In 1959, the Federal Labour Court had ruled that an additional employment contract was null and void if the rest period could not be observed when adding up the total working time (Federal Labour Court of 19 June 1959 – 1 AZR 565/57:

> "*If, in the case of the double employment relationship, the legally permissible maximum working time is exceeded very considerably in the second employment relationship, taking into account the working time agreed in the first employment relationship, the second employment relationship shall be null and void in its entirety*").

The aggregation of working hours of all employment relationships with different employers has been codified in section 2(1) sentence 1 of the Working Time Act (*Arbeitszeitgesetz*). Section 2(1) sentence 1 of the Working Time Act reads as follows: "*For the purposes of this Act, working time is the time from the beginning to the end of work, excluding rest breaks; working times with several employers shall be added together*".

The CJEU has now also clarified this for several employment contracts with the same employer.

4 Other Relevant Information

4.1 Protection of gig-, click- and crowdworkers

The parliamentary group *Bündnis 90/Die Grünen* aims to improve the legal protection of so-called gig-, click- and crowdworkers. In a recent motion, the parliamentarians argue that platform providers are among the fastest growing companies today. The number of platforms and people working via platforms is also steadily increasing in Germany, with a growing trend that seems to have been intensified by the coronavirus pandemic.

In the view of the Greens, digital platforms tend to monopolise due to network effects, which can have an unfavourable impact on the bargaining position of workers. The Greens therefore are calling for a bill to clarify the status of workers via platforms and to provide better social protection for self-employed gig, click and crowdworkers. The parliamentary group proposes, among others, that solo self-employed persons in the platform economy, who work on the borderline of dependent work, should be subject to similar rules as so-called 'employee-like persons' (*arbeitnehmerähnliche Personen*).

4.2 Extension of majority decisions in EU social policy

The extension of majority decisions in the European Union's social policy proposed by the EU Commission in 2019 has been controversially discussed among experts. In a public hearing of the Europe Committee of the German Parliament on 16 March 2021, some of the invited experts stated that the transition from the unanimity principle to majority decisions would lead to more efficiency and greater social policy convergence in the EU. Critics, on the other hand, warn that more Europe in the area of social policy could endanger competitiveness, weaken the national social partners and mean higher transfer payments. As an alternative path, many advocate the instrument of enhanced cooperation.

See here for Parliament's press release.

Greece

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Ruling

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

This judgment reinforces the case law of the CJEU regarding the concept of stand-by time. After having emphasised that the employee's obligation to remain at the workplace is a crucial element (case C-14/04, *Dellas and Others*), the CJEU then addressed the obligation of the employee to respond to calls from the employer within a very short period of time, even when he or she is not at the workplace (C-518/15, *Matzak*). It is therefore reasonable to now proceed to an overall assessment of all the facts of each individual case, including the consequences of that time limit and particularly the constraints imposed on that worker during that period and whether it affects his or her ability to freely manage the time during which his or her professional services are not required and whether he or she can devote that time to his or her own interests. It is therefore reasonable to take the average frequency of activity during the stand-by period into account.

This teleological approach to the concept of working time is substantial. However, the Court's position creates some legal uncertainty, as the criteria proposed are not sufficiently clear.

This judgment will have implications for Greek labour law as it clarifies an important issue.

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de StudiiEconomice din Bucureşti

The Court's position that employment contracts concluded by a worker with his or her employer must be reviewed as a whole to establish whether the daily rest period corresponds to its definition is important to not undermine the worker's protection. The Court has emphasised once more that the worker must be regarded as the weaker party in the employment relationship.

Therefore, this judgment is of importance for Greek labour law as it clarifies an important labour law issue.

4 Other Relevant Information

Nothing to report.

Hungary

Summary

(I) Government Decree No. 105/2021 has extended the wage subsidy and exemption from payment of social security contributions to include a long list of economic activities.

(II) Act No. 100/2020 introduced new rules on employment in the public health care sector from 01 March 2021.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Extension of wage subsidy

Government Decree No. 485/2020 introduced regulations on wage subsidy in November 2020. The Decree designated economic activities (catering, entertainment, cinema, theatres, sport, museums, gyms, amusement parks, recreation)that can be subsidised. The employer is exempt from the payment of social security contributions, and is entitled to a 50 per cent subsidy for the employees' wages following the subsidised period. This period was extended, and the wage subsidy is still in force.

Government Decree No. 105/2021 has expanded the wage subsidy to include a long list of economic activities that were affected by the closures and restrictions in force from 08 March 2021.

1.2 Other legislative developments

1.2.1 Employment in the public health care sector

Employment in the public health care sector has traditionally fallen under the scope of Act 33 of 1992 on public employees. This has radically changed from 01 March 2021, since all public employees that work in the public health care sector now fall under the scope of the new Act (No. 100 of 2020) on public health service relationships. Thus, from 01 March 2021, Act 100 of 2020 on public health service relationships has replaced Act 33 of 1992 on public employees in the public health care sector. Government Decree 528/2021 contains the rules on the implementation of Act 100 of 2020.

The main reason behind Act 100 of 2020, which introduces a completely new legal employment relationship, is to introduce a drastic increase in the wages of medical doctors from March 2021 in two steps. This historically highest increase of salaries in the health care sector (not for all staff, just for doctors) was certainly welcomed by the Hungarian Chamber of Medical Doctors. However, some provisions of Act 100 of 2020 are intensively debated, such as:

- doctors will, from March 2021 onwards, require a written agreement from their employer to perform a second job, such as a health care or even teaching activity in other institutions, or in the private health care sector (Article 4 of Act 100 of 2020);
- doctors may be required by their employer to work at a place other than their regular workplace (another institution or even in an entirely different town) for up to 24 months (Article 11 of Act 100 of 2020).

Therefore, according to media reports, around 4 000 doctors (3.7 per cent of the 110 000 doctors in the entire health care sector) did not sign the agreement on the new legal relationship with their employers and left the public health care sector.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

Article 110(4) of the Labour Code contains the definitions of 'stand-by' (*'ügyelet'*) and 'stand-by time according to a stand-by system' (*'készenlét'*):

- 'Stand-by' (*'ügyelet'*): the employer is entitled to designate the place where the employee shall spend his/her time while being available (while on-call);
- 'Stand-by time according to a stand-by system' (*'készenlét'*): the employee can choose the place where he/she will spend his/her time to be able to report for work without delay, when called on by the employer (stand-by).

The Hungarian Labour Code is in line with the above-mentioned judgments, since 'stand-by time according to a stand-by system' (*készenlét*) is not considered working time, if the employee can choose the place where he or she spends his/her time to be able to report for work without delay when called on by the employer. It is, however, considered working time, if the employee has to actually perform work in that time, or if the employer designates the place where the employee is required to be available. This national legal framework will provide a solid legal basis for the national courts to comply with the CJEU's judgments mentioned above.

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

There is no explicit provision in the chapter on working time in the Labour Code about whether these regulations shall be applied to individual contracts, or to all contracts concluded with the same employer.

The conclusion of more than one employment contract with the same employer is limited by general principles of the Labour Code, such as the 'prohibition of abuse of law'. The same general labour law principle, namely the prohibition of the abuse of law, applies to the compliance with working time provisions when there are two or several contracts between the same parties. That is, the application of the working time provisions in the judgment is ensured in practice in such a case.

4 Other Relevant Information

Nothing to report.

Iceland

Summary

The temporary clause allowing the reassignment of public sector employees has been extended until 01 January 2022.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Possibility to reassign public sector employees

The temporary clause which was originally added to Act No. 82/2008, on Civil Protection on 30 March 2020, stating that public sector bodies may temporarily reassign employees to other duties and to temporarily transfer employees between establishments and public bodies to carry out priority tasks in crisis situations (see March 2020 Flash Report), was extended until 01 January 2022 by Act No. 16/2021 amending Act No. 82/2008. Employees will retain their regular salaries under such circumstances. Those who cannot be reassigned due to health reasons are exempt.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

Icelandic collective agreements generally define some form of pay for stand-by time, often defining pay when the employee is tied to his or her home, on one hand, and when the employee is not required to respond to the employer's call immediately, on the other (see Article 2.4 of the Collective Agreement between RAFÍS and Business Iceland, Article 2.8 of the Collective Agreement between VR and Business Iceland and Article 2.10 of the Collective Agreement between SGS and Business Iceland).

It would, however, be useful to better define the rest period aspect in collective agreements, as some collective agreements define a specific amount of leave for a certain period for employees who perform regular stand-by time (see, for example, Article 2.5.4. of the Collective Agreement between the Union of University Educated Employees of the Cabinet and others and the Minister of Finance and Economic Affairs) and under what circumstances stand-by time is considered 'working time' with regard to this as well as previous rulings of the CJEU.

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

The ruling will not have any direct implications for Icelandic law, as regulations in Iceland seem to be in line with the CJEU's decision. For more information, see the text on the website of the Icelandic Confederation of Labour here.

4 Other Relevant Information

4.1 Industrial relations

On 05 March 2021, the District Court of Reykjanes in case K-287/2021 confirmed the decision of the District Commissioner of the Capital Area to dismiss an injunction against the work stoppages of the Union of Icelandic Commercial Pilots in their labour dispute against Blue Bird Nordic.

Ireland

Summary

Following the withdrawal of the UK from the EU, many EWCs have migrated to Ireland, a move that has highlighted trade union concerns about the available dispute resolution process.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-344/19, *09 March 2021, DJ v Radiotelevizija Slovenija,* and Case C-580/19, *09 March 2021, RJ v Stadt Offenbach am Main*

Directive 2003/88/EC has been transposed in Ireland by the Organisation of Working Time Act 1997, section 2(1), which defines 'working time' as any time the employee is at his or her place of work or at his or her employer's disposal and carries out or performs activities or duties related to his or her work.

The CJEU's decision in case C-518/15, *Matzak* has been unsuccessfully relied on by a number of retained firefighters in cases against their local authority employer under the 1997 Act: see, for example, the WRC adjudication officer decision in ADJ-00021548 of 17 December 2019. Although the claimants in all cases had to be able to report for duty at the fire station within a specified time of receiving a call, *Matzak* was distinguished on the basis that the firefighter in that case was required to spend his stand-by time at home, whereas the claimants in the Irish cases were not required to do so and were free to engage in other employment or other activities as long as they could respond to a call within the specified time. They also had the option to decline up to 25 per cent of the calls for work.

These decisions were appealed to the Labour Court which, on 07 May 2020, referred, in case C-214/20, *MG v Dublin City Council,* three questions to the CJEU on the status of time spent on-call by firefighters. These questions appear to have been answered by the decisions of the CJEU in these two cases, thus requiring the Labour Court to conduct a detailed factual analysis of the extent to which each firefighter's ability to pursue his or her own private interests is 'objectively or very significantly affected'.

3.2 Rest period

Case C-585/19, 17 March 2021, Academia de Studii Economice

Article 3 of Directive 2003/88/EC has been transposed in Ireland by section 11 of the Organisation of Working Time Act 1997, which provides that an employee is entitled to a rest period of not less than 11 consecutive hours within each 24-hour period 'during which he or she works for his or her employer'. Accordingly, it makes no difference whether an employee has concluded one or more contracts of employment with his or her employer.

4 Other Relevant Information

4.1 Employment outlook

As of 30 March 2021, 443 247 persons (45.4 per cent of whom are female) were in receipt of the Pandemic Unemployment Payment (PUP). The sectors with the highest number of recipients are accommodation and food services (107 043), wholesale and retail trade (71 099) and construction (54 314). In terms of the recipients' age profile, 24.1 per cent were under 25. Additionally, 2 066 persons were in receipt of the COVID-19 Enhanced Illness Benefit. See here for further information.

The Economic and Social Research Institute (ESRI) has revised its growth forecast for the Irish economy from 4.9 per cent to 4.4 per cent in GDP terms and has warned that unemployment is unlikely to return to pre-pandemic levels until late 2023, at the earliest (see Quarterly Economic Commentary, Spring 2021). The employer organisation, Ibec, however, is more pessimistic, revising its growth forecast from 5.3 per cent to 3.1 per cent (see *Quarterly Economic Outlook*, Q1.2021).

4.2 European Works Councils

One of the many consequences of the withdrawal of the UK from the European Union is that from 01 January 2021, Directive 2009/38/EC no longer applies to that jurisdiction and the role of 'representative agent' for UK-based European Works Councils (EWCs) automatically transferred to the establishment or group undertaking employing the greatest number of employees in a Member State, which then became the 'deemed' central management pursuant to Article 4(3) of the Directive. Consequently, in advance of that date, it is estimated that at least 100 multi-national companies—including Verizon, Adecco, Hewlett Packard, Oracle, Emerson and GE—appointed their Irish subsidiary as their new 'representative agent' and established a new EWC under the Irish subsidiary requirements provided for in the Transnational Information and Consultation of Employees Act 1996 (the 1996 Act).

The current legislative arrangements governing disputes involving Irish-based EWCs are clearly inadequate when compared to the powers of the Central Arbitration Committee (CAC) and the Employment Appeal Tribunal (EAT) when it came to resolving disputes involving those EWCs when they were based in the UK: see, for example, *Verizon European Works Council v Central Management of the Verizon Group* UKEAT/0053/20/DA where, in a decision issued on 01 October 2020, the EAT imposed penalties in the amount of GBP 35 000, in respect of the company's failure to comply with the information and consultation process, and GBP 5 000, for refusing to pay for expert assistance for the EWC. In addition, the CAC had ordered the company to pay GBP 10 000 plus VAT in respect of that assistance.

No comparable provisions are found in the 1996 Act. Section 18 of the 1996 Act (as amended) specifies a number of criminal offences, including failure to comply with the subsidiary requirements, which can be summarily prosecuted by the Workplace Relations Commission (WRC) in the District Court, which is empowered by section 19 to impose a fine not exceeding EUR 4 000 and/or imprisonment for a term not exceeding six months. There is also the possibility of a prosecution on indictment at the suit of the Director of Public Prosecutions, before a judge and jury in the Circuit Court, where the maximum penalty is a fine of EUR 22 219.75 and/or three years imprisonment.

The use of criminal law to enforce and vindicate the rights of Irish-based EWCs is entirely inconsistent with the general approach of the legislature in seeking to resolve industrial relations and employment rights disputes involving the WRC and the Labour Court. In the latter area, criminal law is almost exclusively employed to impose fines on employers who have been found to be in breach of the National Minimum Wage Acts 2000 and 2015, and/or the Employment Permits Acts 2003 to 2020. There is also a much higher

standard of proof in criminal proceedings—beyond a reasonable doubt—than in civil proceedings – balance of probabilities.

Section 20 of the 1996 Act provides for the referral of disputes concerning the withholding by central management of 'commercially sensitive information' to an independent arbitrator appointed by the Minister for Enterprise, Trade and Employment under regulations for the purposes of the section. No such referrals, however, have ever been made and consequently, the section is effectively inoperable. It must again be questioned as to why this role, and indeed the role of determining compliance with the 1996 Act's requirements was not entrusted to the WRC and the Labour Court.

It has been reported that the SIPTU trade union has complained to Commissioner Joost Korte that unless changes are made to the 1996 Act, all these Irish-based EWCs may find themselves in 'a very precarious position' in the event of a dispute arising between an EWC and central management. The union points out that Ireland is an 'attractive option' for these companies because Irish legislation provides no rights for collective bargaining and very limited, if any, legal remedies in matters pertaining to EWCs.

Italy

Summary

(I) To support parents with children under the age of 16 years, whose school have moved online or who have to quarantine, the government has introduced the right to work from home and a new special parental leave scheme.

(II) The government has extended wage subsidies and introduced a special allowance for seasonal workers who have lost their job.

(III) The government has extended the prohibition of dismissal until 30 June 2021, as well as the possibility to renew and extend fixed-term contracts without having to provide the reasons until 31 December 2021.

(IV) An Italian judge ruled that employees of health facility can be legitimately forced to take leave if they refuse to get vaccinated against COVID-19.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Exceptional parental leave

The Law Decree of 13 March 2021, No. 30, Article 2, provides for special measurers for employees whose children attend school online or are in quarantine.

Parent employees of children under the age of 16 years, whose schools have moved online, can apply for 'smart working', that is, working from home, for a period corresponding, in whole or in part, to the duration of school closures. The same right applies to parents of children who have contracted COVID-19 or are in quarantine.

Only one parent can apply for 'smart working' at a time.

If smart working is not possible, the parent of a child under the age of 14 can take parental leave for a period corresponding in whole or in part, for the duration of school closure, the duration of the child's COVID-19 infection, or the duration of the child's quarantine. During this leave, the worker is entitled to an allowance equal to 50 per cent of his/her salary. If the child is between 14 and 16 years of age, a parent can take parental leave without any indemnity, and the prohibition of dismissal applies.

1.1.2 Relief measures

The Law Decree of 23 March 2021, No. 41 has introduced urgent measures to support the Italian economy during the COVID-19 emergency.

According to Article 8, extraordinary wage subsidies (*Cassa Integrazione Guadagni* and *Cassa Integrazione Guadagni in deroga)* are granted for either 13 weeks between 01 April 2021 and 30 June 2021 or for 28 weeks, usable between 01 April 2021 and 31 December 2021. The indemnity for agricultural workers has been extended by 120 days for the period between 01 April 2021 and 31 December 2021.

According to Article 10, a special allowance of EUR 2 400 *una tantum* is provided for seasonal tourism workers who lost their jobs between 01 January 2019 and the entry into force of the Law Decree, provided that they worked for at least 30 days during that period.

According to Article 16, applications for unemployment insurance (*NASpI*) will be accepted even if the worker does not meet the contribution requirements (30 days of paid contributions before the start of unemployment).

1.1.3 Dismissal ban

The Law Decree of 23 March 2021, No. 41 also extends the measures adopted to support employment during the COVID-19 emergency.

According to Article 8, the prohibition of dismissals of employees for economic reasons has been extended until 30 June 2021. The initiation of collective dismissal procedures is prohibited and those implemented after 23 February 2020 remain suspended. Individual dismissals for economic reasons are also prohibited and the related procedures have been suspended. The 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, but only for those employees who join this agreement.

1.1.4 Fixed-term contracts

According to Article 17 of the Law Decree of 23 March 2021, No. 41, the renewal and extension of fixed-term contracts will, for the time being, not require justified reasons until 31 December 2021. Extensions and renewals already concluded will not be taken into account.

1.1.5 Workers with disabilities

According to Article 15 of the Law Decree of 23 March 2021, No. 41, the measures to protect vulnerable workers and workers with severe disabilities have been extended until 30 June 2021.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Refusal to vaccinate against COVID-19

Tribunale of Belluno, No. 12/21, 19 March 2021

In this judgment, the court ruled that employees of health care facilities can legitimately be forced to take leave if they refuse to be vaccinated against COVID-19.

This is the first ruling in Italy involving workers who refuse to get vaccinated against COVID-19. According to the Italian court, if workers who have refused to get the vaccine are in close contact with the public and there is a high risk of contagion, the employer must take all necessary measures to protect occupational safety and health (Art. 2087 Italian Civil Code).

3 Implications of CJEU Rulings and ECHR

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

In Italy, working time is regulated by Legislative Decree 14 April 2003, No. 66.

According to Art. 1, working time refers to 'any period during which the employee is at work, available to the employer using the employer's equipment'. According Italian

jurisprudence, stand-by time can be active or passive. In the former case (active stand-by time), the employee must respond immediately to the employer's call and must travel to the workplace to perform the required service. In the second case (passive stand-by time), the stand-by time is an ancillary performance and requires the employee to be available outside regular working hours, in view of the possibility that he/she might be required to perform work.

Only the active stand-by time is considered to be working time and must be remunerated: in this case, the employee must be at a place designated by the employer and must be available to work in case of need (see *Corte di Cassazione*, case No. 18654/2017).

By contrast, the simple availability of the employee to be called upon to work is not considered to be working time. It is, in fact,

> "*an instrumental and ancillary service, but differs qualitatively from regular work performance, and consists of the obligation of the worker to be in a position to promptly respond, within a certain time period, in view of a possible requirement to perform work, which the employer must compensate through an additional remuneration to the employee's regular salary*" (see *Corte di Cassazione*, case No. 14288/2011; case No. 18654/2017).

That is, the court must verify, on a case-by-case basis, what type of stand-by time applies to the employee, as stated by the CJEU as well.

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

According to Article 3(1) of the Legislative Decree of 14 April 2003, No. 66, normal working time is considered to be 40 hours per week. According to Article 4(2), the average duration of working time may not, in any case, exceed 48 hours for any seven-day period, including overtime hours. The law does not regulate working time with reference to every individual employment relationship, but regulates the working time of each individual employee, because the employee's mental and emotional state may not be compromised by his or her working hours. Consequently, the accumulation of several part-time employment relationships, even when concluded with more than one employer, can only be exclusively carried out in compliance with the applicable working time limits and the worker's right to weekly rest, as stipulated in Legislative Decree No. 66/2003.

The Italian Ministry of Labour confirmed that "*in the event of several part-time employment relationships with several employers, the obligation to comply with working time limits and the worker's right to a weekly rest period, as regulated by Legislative Decree No. 66/2003, remains unchanged*" (Ruling No. 25/I/0004581 of 10 October 2006).

4 Other Relevant Information

Nothing to report.

Latvia

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

Latvian law does not explicitly regulate 'stand-by' or 'on-call' time. This implies that the respective periods are considered 'working time'. The issue whether 'stand-by' or 'on-call' time must be considered 'working time' or 'rest period' has not been addressed by the Supreme Court, corroborating the conclusion that in practice, respective periods are most likely treated as 'working time'.

However, in the light of the CJEU's findings in the case C-518/15, *Matzak* and in the present cases, a Member State cannot define the concept of 'working time' differently. A uniform concept of 'working time' is applicable as defined by the CJEU under Directive 2003/88/EC. In this context, Latvia's legal regulations, which considers all 'stand-by' or 'on-call' periods as 'working time' without an assessment of each particular case (the timeframe within which the worker must be able to return to his/her workplace, the extent of work during the respective periods) might be incompatible with EU law, albeit being more favourable.

It follows that the CJEU's decisions in the present cases may have implications for Latvian law, as it must be further assessed whether Latvian legal regulations comply with the EU requirements requiring classification of 'stand-by' or 'on-call' periods as either 'working time' or 'rest period'.

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

The CJEU's decision in case C-585/19 has no direct implications for Latvian labour law since maximum weekly working time is applicable to specific employment relationships, not to particular employment contracts (Article 130 of the Labour Law (*Darba likums*), Official Gazette No.105, 06 July 2001). What has not been clarified in neither Latvian labour law nor in case law of the national courts whether the conclusion of several separate employment contracts with the same employer is allowed.

4 Other Relevant Information

Nothing to report.

Liechtenstein

Summary

The government incorporated the Directive (EU) 2019/1831 on occupational exposure limit values (chemical agents) into the EEA Agreement.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Occupational Health and Safety

The government has issued Decision No. 226/2020 of the EEA Joint Committee amending Annex XVIII to the EEA Agreement (see Liechtenstein Landesgesetzblatt No. 87 of 4 March 2021).

According to this Decision, Directive (EU) 2019/1831 establishing a fifth list of indicative occupational exposure limit values pursuant to Council Directive 98/24/EC on the protection of the health and safety of workers from the risks related to chemical agents at work and amending Commission Directive 2000/39/EC is to be incorporated into the EEA Agreement. The Directive entered into force in Liechtenstein on 12 December 2020.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Working time and stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

In these two cases, the CJEU clarified that stand-by time is only considered 'working time' if the constraints imposed on the worker during that period are of such a nature as to objectively and very significantly restrict the employee's ability to freely manage his or her time and to devote that time to his or her own interests.

According to Art. 15 of Ordinance I to the Employment Act (*Verordnung I zum Arbeitsgesetz, ArGV* I, LR 822.101.1), stand-by time shall be considered working time if it is performed at the establishment. If the stand-by time is performed outside the establishment, the time made available shall only be counted as working time to the extent that the employee is actually called upon to work.

This provision was adopted from Swiss law. Since Liechtenstein is a small country, comparatively few cases come before the courts, and the Liechtenstein courts generally follow the case law of the Swiss courts, in particular, the Swiss Federal Supreme Court, when it comes to the interpretation and application of a provision adopted from Swiss law.

In judgment 4A_94/2010 of 4 May 2010, the Swiss Federal Supreme Court decided a case involving a medical doctor employed by a hospital, who claimed that the stand-by time he performed constituted working time. The doctor's private apartment was located

100 meters from the hospital. He could stay at home during his stand-by duty, but was required to be ready for work within 15 minutes.

The Swiss Federal Court stated that the employee has more leisure time and recreational opportunities when he or she is based outside the establishment. Therefore, stand-by time performed outside the establishment is only to be used if the employee can actually make use of the aforementioned opportunities. It is to be denied if the employee must intervene during his or her stand-by duty within a very short time, e.g. within 15 minutes after the employer's call, and can therefore hardly leave the establishment under the given circumstances and thus can also not benefit from his or her free time. The situation is different, however, if the employee can actually perform his or her stand-by duty at home, since this offers him/her various possibilities that are excluded when he or she must remain on the company premises, in particular with regard to social contacts and leisure activities. In the present case, therefore, the claimant's stand-by time did not constitute working time.

These statements correspond with the CJEU's judgments C-344/19 and C-580/19. All decisions are essentially based on the same evaluation criteria. In this respect, Liechtenstein law is fully in line with the CJEU's case law.

3.2 Working time and rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

According to Article 15a(1) of the Employment Act (Gesetz über die Arbeit in Industrie, Gewerbe und Handel, Arbeitsgesetz, LR 822.10), employees shall be granted a daily rest period of at least 11 consecutive hours.

The most important elements for the CJEU's decision were in particular:

- The wording linked to the employee and not to the employment contract (para. 41);
- The daily rest period of 11 consecutive hours for each 24-hour period was considered by the EU legislature to enable the worker to be able to recover from the fatigue inherent in daily work (para. 50);
- Whether the provisions of Directive 2003/88 on the minimum daily rest period were to be interpreted as applying separately to each contract of employment concluded by a worker with the same employer, which might expose that worker to the possibility of pressure from his or her employer who intended to split his or her working time into a number of contracts, which would be liable to render those provisions redundant (para. 53).

These reasons—the wording of the legal provision, the purpose of recovery through rest periods, and the risk of circumvention through several contracts—are equally decisive for the interpretation of Liechtenstein law. The national law is thus in line with the case law of the CJEU.

4 Other Relevant Information

Nothing to report.

Lithuania

Summary

A decision of a Lithuanian regional court held that a worker specifically recruited to work abroad for a foreign client did not meet the criteria to be qualified as a posted worker on the ground that his/her habitual place of work is not in Lithuania.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Posting of workers

Klaipeda regional court, Case No e2A-227-513/2021, 4 March 2021

The Supreme Court of Lithuania has taken the position that a worker posted from Lithuania to other EU Member States as temporary workers is only considered a posted worker if he or she was already working in Lithuania, or if his/her habitual place of work is in Lithuania.

In the present case before the Klaipeda regional court, a Lithuanian lorry driver was recruited by a Lithuanian company to work in Sweden for a Swedish client (user undertaking) and the place of execution of his work function was established exclusively for temporary employment. The parties confirmed that the defendant did not work in the Republic of Lithuania, and therefore, the district court as well as the regional court made the decision that the defendant did not meet the criteria to be deemed an 'employee, normally employed territory of the Republic of Lithuania, but temporarily sent abroad to provide services'. In their view, the posted worker did not meet the criteria applicable to the status of posted employee under the Directive. As a consequence, the *per diem* allowances were not to be paid under Lithuanian legislation. In fact, the court recognised the right to a *per diem* allowance as an individually agreed condition of the contract of employment and awarded the amount to the employee, qualifying it as part of the employee's salary and not a per diem allowance.

3 Implications of CJEU Rulings and ECHR

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

The case dealt with stand-by time outside the employer's premises (e.g. at the employee's home), which was included in the new Labour Code for the first time. Article 118 (4) of the Code establishes the notion of 'passive stand-by time at home' (in Lithuanian - *pasyvus budėjimas namie*), i.e. the employee's absence from the workplace, but having to be available to perform certain activities or to come to the workplace when needed during his or her rest period.

The legislator has expressly labelled this time as leisure time, unless work needs to actually be performed during that time, but sets out certain regulations on possible inconveniences on the part of an employee. Such passive stand-by at home, for example, may not occur for more than a consecutive two-week period within a four-week period. An agreement on stand-by duty shall be included in the employment contract, and the employee shall receive additional pay in an amount of no less than 20

per cent of his/her base (rate) wages for each week of stand-by duty. The actual performance of activities during stand-by time shall be paid at the rate for his/her actual time worked, but not exceeding 60 hours per week. A person may not be assigned to passive stand-by at home on a day when he/she has been working for 11 consecutive and uninterrupted hours. Persons under 18 years of age may not be assigned to passive stand-by at home. Pregnant employees, employees who have recently given birth and are breastfeeding, employees raising a child under the age of 14 years or who have a disabled child under the age of 18 years, persons caring for a disabled person may be assigned passive stand-by duty at home only with their consent and if this is not prohibited by the conclusion of the Disability and Working Capacity Assessment Office at the Ministry of Social Security and Labour.

These guarantees seem to be appropriate to balance the employee's and employer's interests, however, Lithuanian law does not provide for the possibility to qualify 'passive stand-by time at home' as working time in case of significant constraints for an employee to freely manage this free time, which was a main principle in the Court's ruling. The legislator's interference (insertion of the principle of rebuttable presumption or amelioration of the definition) could be advised to allow for a dynamic interpretation of existing national provisions in conformity with the CJEU ruling.

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

This practical problem is widespread in Lithuania, as there have always been attempts in practice to increase the nominal number of working hours of persons involved in EU-related projects within their respective institutions, while preserving at least some of their previous workload. The Labour Code of Lithuania strictly complies with the main principles of Directive 2003/88 and does not allow a circumvention of the restrictions to daily working hours. The rules in Lithuania are furthermore more rigid – traditionally, not only daily rest periods, but also daily working hours have been strictly regulated. Article 114 of the Labour Code states that working time, including overtime and working under an agreement on additional work (that is, an agreement between the parties to the contract of employment that correspond to the 'second' or 'another' contract of employment between the same parties, as was the case in the ruling), may not exceed 12 hours, excluding a lunch break, and 60 hours within each seven-day period.

There is no debate whether the said limitation applies to contracts or agreements on work between two parties. However, the question whether it also applies to multiple employers remains open.

4 Other Relevant Information

Nothing to report.

Luxembourg

Summary

(I) A bill is expected to extend the temporary rules on family leave until 17 July 2021.

(II) Luxembourg has implemented technical changes concerning occupational health and safety.

(III) The Court of Appeal has decided various cases on the protection of pregnant workers, overtime work, annual leave, and absenteeism for health reasons.

(IV) The Court of Appeal has upheld a termination of employment for rejecting the unilateral transformation from part-time to full-time work, and denied the possibility to judicially terminate an employment contract for serious misconduct of the employer.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Family leave

As the development of the pandemic remains uncertain and as schools might have to close in Luxembourg or in neighbouring countries, the provisional rules on family leave (*congé pour raisons familiales*), which will expire on 02 April, are projected to be extended until 17 July 2021. It is very likely that this bill (available here) will be adopted in the next few days.

1.2 Other legislative developments

1.2.1 Occupational health and safety

The technical changes introduced by European Directives concerning occupational exposure have been implemented by Grand-Ducal Decrees.

- Directive (EU) 2020/739 on biological agents (including SARS-CoV2) has been implemented by the Grand-Ducal Decree of 17 March 2021 *modifiant le règlement grand-ducal modifié du 4 novembre 1994 concernant la protection des travailleurs contre les risques liés à l'exposition à des agents biologiques au travail* (available here);
- Directive 2019/1832 on personal protective equipment has been implemented by the Grand-Ducal Decree of 17 March *2021 ayant pour objet de modifier le règlement grand-ducal modifié du 14 novembre 2016 concernant la protection de la sécurité et de la santé des salariés contre les risques liés à des agents chimiques sur le lieu de travail* (available here and here);
- Directive (EU) 2019/983 on exposure to carcinogens or mutagens has been implemented by the Grand-Ducal Decree of 17 March 2021 *modifiant le règlement grand-ducal modifié du 14 novembre 2016 concernant la protection des salariés contre les risques liés à l'exposition à des agents cancérigènes ou mutagènes au travail* (available here and here);
- Directive 2013/35/EU on physical agents (electromagnetic fields) has been implemented by the Grand-Ducal Decree of 17 March 2021 *modifiant le règlement grand-ducal du 17 mai 2017 concernant les prescriptions minimales de sécurité et de santé relatives à l'exposition des salariés aux risques dus aux agents physiques* (champs électromagnétiques) (available here and here).

2 Court Rulings

2.1 Fixed-term work and maternity leave

Cour Supérieure de Justice, 8e, 26 November 2020, CAL-2019-00795

The present case (available here) concerned a fixed-term contract with a trial period of three months. During the course of the contract, the trial period had not yet been fully completed and the employee went on maternity leave. On the day of her return to work, the employer notified her of her dismissal with a 15-day notice period, i.e. in accordance with the rules of the trial period.

The employee claimed that the employment contract should have been converted into a permanent contract and that she should be awarded damages for unfair dismissal. In the alternative, she claimed that the termination of the fixed-term contract was unfair and also claimed damages. During the proceedings, the employee withdrew her main claim.

The first instance Labour Court nevertheless considered that the contract had been concluded in violation of the provisions of Article L.122-2(1) of the Labour Code and should be reclassified as a permanent contract. The termination of the contract according to the rules of the trial period was declared regular and well-founded on the basis of Article L. 337-3, which provides that

> *"When a female employee is bound by an open-ended contract including a trial clause, the latter is suspended from the day of delivery to the employer of the medical certificate attesting to the pregnancy until the beginning of the maternity leave. The remaining part of the trial period shall resume at the end of the period during which dismissal is prohibited."*

On appeal, the judges first addressed the issue of the reclassification of the contract. According to Article L. 122-9, a fixed-term contract concluded in violation of certain rules must be reclassified as a permanent contract. This sanction applies to non-compliance with most of the rules governing the use of fixed-term contracts, but Article L. 122-2 on compulsory information is not included. In the present case, the contract stated that the employee was hired for a whole year to work as an accountant, without any other details. The judges confirmed that if the wording in the employment contract does not make it possible to verify the reason why this employment is limited in time and that the contract therefore does not include a definition of its purpose, as required by Article L.122-2 (1) of the Labour Code, it does not follow that it should be requalified as a permanent contract.

However, they noted that a requalification can only be pronounced if the employee expressly requests it, since it is a rule that protects the employee, whereas in this case, the employer sought to take advantage of the requalification. Indeed, the employer's request for the reclassification of the contract was not intended to lead to a more favourable regime for the employee, but on the contrary, to justify her dismissal.

The Court thus decided that the employment relationship that existed between the parties was to be qualified as a fixed-term employment contract, clarifying that a requalification was only possible if the employee requested it, and that even if the employee requested it, he or she could still waive it during the proceedings.

Since the contract was therefore to be regarded as a fixed-term contract, the question of the impact of the trial period arose. In accordance with the above-mentioned wording of Article L. 337-3, the Court held that the suspension of the trial period during the protection period for pregnant women only applies to open-ended contracts and does not apply to fixed-term contracts. Since employees on fixed-term and open-ended contracts are not in a comparable situation, the question of the justification for this difference in treatment was not submitted to the Constitutional Court. Consequently, the contract was terminated outside the trial period. As a fixed-term contract cannot be

terminated with notice, the dismissal was unfair and the employee was entitled to the lump sum compensation provided for in Article L. 122-13.

2.2 Termination of pregnant workers

Cour Supérieure de Justice, 3e, ordonnance, 10 December 2020, CAL-2020-00975

The present case (available here) concerned the 'production' of the pregnancy certificate in the context of the prohibition of dismissal on the ground of pregnancy.

Article L.337-1 (1) of the Labour Code prohibits the employer from

> "*notifying the termination of the employment relationship (...) of a female employee when she is in a state of medically confirmed pregnancy*", and specifies that "*in the event of notification of termination before the medical confirmation of the pregnancy, the female employee may, within a period of eight days from the notification of the leave, justify her condition by producing a certificate by registered letter*".

After analysing the parliamentary proceedings and drawing an analogy with the term 'submission' used in Article L. 121-6 (2), the President, hearing an application for annulment, concluded that "*the date of 'production' of the medical certificate attesting to the pregnancy coincides with the date of receipt of this certificate by the employer*". As the certificate had arrived late at its destination, the employee was unable to benefit from the protection linked to her state of pregnancy.

2.3 Overtime

Cour Supérieure de Justice, 3e, 29 October 2020, CAL-2019-00696 and CAL-2019-00697

Two rulings from October 2020 concluded that an overtime agreement with a monthly salary that automatically includes a certain amount of overtime was valid. The employment contract provided that the normal working hours were from 7 a.m. to 12 noon and from 1.30 p.m. to 6 p.m., i.e. 9.5 hours. The contract then provided for a gross salary of EUR 4 200 'for the hours listed ... above'. The judges deduced that the salary of EUR 4 200, therefore, corresponded to a daily working time of 9.5 hours, i.e. 47.5 hours per week. The judges also noted that the salary was higher than that of an employee in the same position who worked only 8 hours a day, and that the employee had not claimed overtime for years. The employee 'who failed to specify how the package in question would be contrary to the law' was therefore not successful with his claim.

Cour Supérieure de Justice, 3e, 10 December 2020, CAL-2019-00540

A decision in December 2020 (available here) ruled on the question of whether or not the employee is required to work overtime at the employer's request. It was decided that while the employer is entitled to ask the employee to come to work on a Saturday (overtime), this right is not discretionary, as the employee does not have to be at the employer's disposal permanently and is entitled to respect for his private and family life. The employer must be able to justify the urgency of the work and give sufficient notice. Since it was not established or even alleged that there was an emergency, the employer's reproach that the employee had not reported to his place of work on a Saturday morning was not accepted as a reason for dismissal.

2.4 Annual leave

Cour Supérieure de Justice, 8e, 17 December 2020, CAL-2019-00423

The Court recalled that, in principle, untaken leave is lost at the end of the year. It is up to the employee to prove either a legal reason for postponement or an agreement by the employer. In this specific case, the pay slips did not mention any postponed leave.

Cour Supérieure de Justice, 8e, 19 November 2020, CAL-2019-00911

In the present case (available here), the Court affirmed that once the leave has been authorised by the employer, it is only with the employer's agreement that the employee can renounce the leave.

2.5 Health and safety - dismissal for absenteeism

Cour Supérieure de Justice, 8e, 27 February 2020, CAL-2019-00067, and 10 December 2020, CAL-2019-00890 ; Cour Supérieure de Justice, 3e, 22 October 2020, CAL-2019-00442

In these cases (available here), the judges confirmed their position that dismissal for habitual absenteeism for health reasons is not justified if the illness that caused the abnormally long or frequent absences originated in the employee's professional activity.

Therefore, absences due to an accident at work cannot be taken into consideration, as this is generally easy to prove.

However, in case No. CAL-2019-00890, *a* nuance has been introduced in the case of travel accidents (*accident de trajet,* to and from work). While these are treated as accidents at work within the meaning of the social security system, the Court does not do the same with regard to dismissal for absenteeism: *"the traffic accident does not originate in the employee's professional activity as such and absences due to this accident may be taken into account in assessing the employee's habitual absenteeism for health reasons".*

2.6 Part-time work - refusal to perform full-time work

Cour Supérieure de Justice, 8e, 15 October 2020, CAL-2019-00889

In an October 2020 judgment, the Court heard the appeal of an employee accountant who worked part-time. The employer unilaterally increased her working hours to a full-time position, citing an increase in activity. The employee refused, however, and claimed that part-time work was an essential part of her employment contract so that she would have the time to look after her three children. As she was unable to accept this change, she considered that her refusal fell under the rules of Article L.121-7 and should be requalified as dismissal.

The judges recalled that this article only applies to unfavourable changes to the employment contract. No procedure is envisaged in case of modification of the employment contract in favour of the employee (promotion, salary increase, etc.). In such a case, the employee can object and the employer has no means of imposing the change he/she considers favourable.

The burden of proof of a substantial unilateral change unfavourable for the employee lies with the latter. It is not enough for the employee to subjectively feel that the change is unfavourable, there must be an objective disadvantage resulting from that change.

The Court noted that an increase in working hours was accompanied by a corresponding increase in salary. Consequently, there was no unfavourable modification of the

employment contract, so that Article L.21-7 did not apply and the employee's refusal did not amount to dismissal. An employee who wishes to refuse a favourable change cannot therefore resign and have this resignation reclassified as a dismissal.

This approach of the Court may be questioned insofar as it adopts an exclusively objective approach to determining whether a change is 'unfavourable'. An increase in working time is automatically considered favourable, regardless of the personal situation of the employee concerned.

2.7 Judicial termination of an employment contract

Cour Supérieure de Justice, 3e, 17 décembre 2020, CAL-2019-00967

Unlike the general contractual regime, an employee cannot apply to the Court for judicial termination of the contract at the employer's expense. This impossibility was confirmed in the case of an employee who had asked *"to have the employment contract terminated for serious misconduct on the part of his two employers, with effect from the date of this judgment or any other date to be determined by the court".*

In the present case (available here), the Court recalled that labour law, which derogates from ordinary law, regulates the various cases in which an employment contract may be terminated and does not provide for the possibility of the Labour Court to terminate an employee's employment contract for serious misconduct on the part of the employer.

3 Implications of CJEU rulings

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

The national definition of working time is in line with the EU definition (L. 211-4). The Labour Code contains no provisions on stand-by periods. These are regulated either in collective agreements or within companies. Extensive research would be required to verify, on a case-by-case basis, whether each of these contractual arrangements complies with the criteria defined by the CJEU.

There is only limited case law on stand-by time. The judges systemically refer to EU case law. There is no doubt that the present cases will be duly considered.

For the moment, there is no case law that has specifically taken the following criteria into consideration:

- the average frequency of activity during stand-by periods;
- the limitation of the opportunities to pursue activities within the vicinity of the place the employee spends his/her stand-by time at.

For example, it has been decided that an employee who is hired to spend the night with an ill person is 'at work' (CSJ, 3e, 28 February 2019, CAL-2018-00155, see July 2019 Flash Report). Furthermore, the Court of Appeal ruled that stand-by duty qualified as 'reserve stand-by' in a collective agreement, which only required pilots to be reachable by telephone for 2.5 hours a day, with the requirement to start working no earlier than 24 hours after the call, does not qualify as working time (CSJ, 8e, 28 November 2019, CAL-2018-00512, see February 2020 Flash Report). These isolated decisions are in line with EU case law.

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

Art. 3 of Directive 2003/88 has been nearly literally transposed in Article L. 211-16 (3) of the Labour Code: "*Tout salarié bénéficie, au cours de chaque période de vingt-quatre heures, d'une période de repos de onze heures consécutives au moins*".

There is no specific case law on the question whether this requirement also applies if an employee has concluded several contracts with the same employer.

In general, it is not very common in Luxembourg to sign two employment contracts with the same employer. It has not been decided yet whether in such a situation there is a single or multiple employment relationships (for example, with regard of contract termination), but it can be expected that a national court would have decided in the same way as the CJEU.

The legal situation in Luxembourg is less clear if the employee has multiple employers. Unfortunately, the CJEU did not address this aspect, as the question was not admissible. There is no legislation and no case law on that issue. The main question would be how employers could exchange and coordinate information on working time. There is only one provision stating that an employee who combines multiple jobs is required to notify the labour inspectorate of the jobs he or she has, where his or her normal working time exceeds 40 hours per week as a result of this combination (Art. L. 213-1).

4 Other Relevant Information

4.1 Industrial relations

There are two important national trade unions in Luxembourg: OGB-L and LCGB. A third union (ALEBA) plays an important role in the banking sector. According to the 1965 legislation on collective agreements, only nationally representative unions were entitled to sign collective agreements. The Minister of Labour thus rejected agreements that were signed with ALEBA because this union was only representative in a specific economic sector. In a first step, this approach was confirmed by the State Council which back then was the only administrative court of Luxembourg.

Things changed, however, when the Administrative Tribunal and Court were implemented and ALEBA brought the case before these new courts and to the ILO Committee on Freedom of Association (Case No. 1980). Both judges and the Committee considered that the law, as applied and interpreted in the past, was excessively restrictive and infringed on trade union freedom.

All this led to a change in legislation in 2004. Trade unions can now be representative at the national level (OGBL and LCGB) or in an 'important economic sector'. To be representative in a specific sector, several criteria must be met, including the requirement to reach 50 per cent of the votes in the social elections (elections for professional chambers) in the given sector (Art. L. 161-7 of the Labour Code).

When this law came into force, ALEBA filed a request at the Ministry and as the union had obtained slightly more than 50 per cent in the banking and insurance sector, it was recognised in 2005 as a representative trade union, and was automatically admitted to sign collective agreements in this sector. The fact of being representative in a specific sector also has some other legal consequences, including the right to present lists on behalf of the trade union in the elections for staff representatives.

During the social elections in 2019, ALEBA only reached 49.22 per cent. In a first step, the other trade unions did not file a request to withdraw its representativeness. As conflicts arose between the trade unions during the renegotiations of collective agreements, OGBL and LCGB ultimately decided to submit a request to the Minister. As ALEBA no longer met the legal requirements for representativeness, it was withdrawn in 2021 (see the Ministerial Decision of 02 March 2021 *portant retrait de la reconnaissance de l'Association luxembourgeoise des employés de banque et*

d'assurance (ALEBA) de la qualité de syndicat justifiant de la représentativité dans un secteur particulier et important de l'économie, available here).

ALEBA considered that this decision violated trade union freedom. It is likely that legal recourse will be taken at the national and international level.

If the decision is confirmed, it represents a major change in the trade union landscape, as only two representative unions will remain.

Malta

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

Under Maltese law, there is no provision that regulates stand-by time in general, but there are specific regulations that address stand-by time in the civil aviation industry.

Subsidiary Legislation 452.90 on the Organisation of Working Time (Civil Aviation) Regulations stipulates that stand-by time shall be considered working time for the purpose of reckoning the amount of working time within a year (Regulation 7: *"It shall be the duty of the employer to ensure that the maximum annual working time, including some elements of standby for duty assignment, shall not exceed 2000 hours, within which, the block flying time shall be limited to 900 hours*").

Regulation 8 also states that crew members shall be given days off, *inter alia*, from stand-by time. Insofar as those regulations are concerned, stand-by time is not considered leisure (non-working) time, irrespective of whether any work is carried out at all during that time.

Malta does not appear to have addressed the issues as arising from the ruling in C-518/15, *Matzak*.

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

The implications of this case for Malta are quite difficult to determine because it is not possible to have concurrent employment agreements with the same employer. Consequently, such a situation would be very difficult to envisage under Maltese law. However, hypothetically speaking, in such a remote case, Maltese law would not consider the agreements as separate contracts and, hence, the application under Maltese law would be identical to that adopted by the CJEU.

The situation addressed in this judgment is extremely rare in the Maltese system.

4 Other Relevant Information

4.1 Employment conditions in the gig-economy

Work performed for many taxi and food delivery services are under review because of a spate of articles in the media insisting that these workers are employed under illegal conditions (see, for example, the recent articles here or here).

The problem, to date, continues to persist and there does not seem to have been any notable effort in this regard.

Netherlands

Summary

The government extended funding for COVID-19-related relief measures for companies and households.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Relief measures

On 16 March 2021, the government announced that the Fixed Cost Allowance (TVL) will be extended from April to June 2021. The TVL arrangement targets companies and self-employed persons and provides a subsidy for their fixed costs if certain conditions are met. The subsidy percentage for the TVL will be increased to 100 per cent for the second quarter of 2021, as opposed to 85 per cent in the first quarter of 2021. To finance this arrangement, an extra EUR 450 million will be made available in the second quarter of 2021 by the Dutch government.

The government also expanded the temporary support for essential costs (TONK), which is aimed at supporting households that have difficulties paying their fixed costs. A total of EUR 130 million was earmarked for this scheme for the first six months of 2021. Due to the ongoing COVID-19 crisis and extended lockdown, the government has now decided to increase this amount to EUR 260 million.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

These rulings further refine the decision in case C-518/15, *Matzak*.

Dutch working time regulations (Working Time Act and Working Time Decree) distinguish between the following three types of stand-by work:

- on-call work (*consignatie*): the worker needs to be available to perform work as soon as possible when called upon between two shifts or during a break in case of unforeseen circumstances (Article 1.7 para. 1 under g WTA);
- stand-by work (*bereikbaarheidsdienst*): over a maximum period of 24 hours, the worker must be available, and if necessary in addition to his or her regular work shift, to carry out additional work if called upon (normal part of the job, no unforeseen circumstances) (Art. 1:1 WTD); and
- stand-by work on site (*aanwezigheidsdienst*): this is the same as stand-by work, but the worker must be available at the workplace (Art. 1:1 WTD).

The work shift in the third category has been considered working time since 2006.

The first two are similar to the stand-by duty in the CJEU cases of 09 March 2021. The second category (stand-by work) is only possible in certain medical professions and can only be agreed upon in a collective labour agreement. On-call work can be applied more broadly. Article 5:9 WTA provides rules on on-call work. When an actual call comes in and the worker must perform work, that time is considered working time from the moment the call comes in until the work ends. The period without a call is not considered working time. Furthermore, Art. 5:9 WTA provides limitations to the frequency and duration of on-call work.

It is contested in literature whether this is sufficient to comply with Directive 2003/88 (see W.L. Roozendaal, Arbeidstijdregulering en oproeparbeid. HvJ EU 21 februari 2018, C-518/15 (Stad Nijvel/Rudy Matzak), *Arbeidsrechtelijke Annotaties* 2019 (13) 1). This question becomes even more pressing with the present decision of the CJEU.

So far, there have been no responses to these decisions in academic or societal debate.

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

This ruling corresponds with legal practice in the Netherlands. The Working Time Act does not specifically address this situation, but does contain a provision on situations in which an employee concludes several contracts with different employers. Article 5:15 Working Time Act stipulates in paragraph 6 that an employee who works for more than one employer is required to provide all his employers all of the information regarding his or her work, which is needed to comply with the Working Time Act. All employers are responsible for compliance with the Working Time Act and it is clear in legal doctrine and case law that the contracts should be taken as a whole for the allowed working time and compulsory rest period. It is indisputable that this is also the case if the contracts are concluded with one employer.

The Working Time Act does not provide a sanction with reference to the employee's obligation to share the necessary information. The employers, however, are subject to the regular enforcement regime of the Working Time Act in case of violation of the Act. There is one example in lower case law of an employee who had two jobs and it was impossible to comply with the Working Time Act. One of the employers requested the court to terminate the employment contract for this reason and this request was awarded (Court of Rotterdam, 09 January 2017, ECLI:NL:RBROT:2017537).

4 Other relevant information

4.1 Workers who reached State pension age

In the Netherlands, there is specific legislation on employees who continue working after they have reached the State pension age. These employees, who are entitled to State pension benefits, receive less protection when they are ill than younger employees.

During the transition phase, they will receive payment of their wages in the event of illness for a maximum of 13 weeks (instead of two years for younger workers). In the future, this will be reduced to six weeks.

Although the transition phase was to end on 01 April 2021, it has been decided to extend it. The reduction deadline will not be implemented before 01 January 2022.

Norway

Summary

(I) Due to the high infection rates, stricter temporary restrictions have been introduced in various municipalities and regions.

(II) The government extended the existing relief measures to compensate employers and the self-employed until 01 July 2021 and 01 October 2021, respectively.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 New temporary restrictions

Strict national infection control measures continued in March, and even stricter regulations were introduced in specific municipalities and regions. Still, infection rates have been high. As a result, the government presented stricter national regulations and recommendations on 23 March 2021 (see here). The regulations include, i.a., a national ban on serving alcohol and a recommendation of maximum two guests in private homes. The norm for social distancing has been changed from 1 to 2 metres.

There are strict rules on foreign nationals who seek entry into Norway. Since January, the general rule is that only foreign nationals who reside in Norway are allowed to enter. In March, the regulations on quarantine have been further tightened (see here).

The unemployment rate has been relatively stable since October 2020, but has been slightly rising since December. By the end of March, there were 211 705 unemployed person, i.e. 7.5 per cent of the workforce (see the statistics here).

1.1.2 Relief measures

The employment and labour law measures introduced in 2020 to mitigate the effect of the COVID-19 crisis have been described in previous Flash Reports. In March 2021, some existing regulations were adapted, most importantly:

- A new temporary act (LOV-2021-03-05-5) on compensation benefits for the self-employed and freelancers, who have lost income as a result of the outbreak of COVID-19, has been passed. The act is in reality a continuation of existing measures for self-employed persons and freelancers. The act entered into force immediately up until 01 October 2021;
- Amendments to the act (LOV-2020-06-23-99) on subsidies for employers who suspend temporary lay-offs, mainly to extend the scheme until 01 July 2021;
- A temporary change in the regulations on benefits for persons working under the scope of active labour market measures (FOR-2013-11-04-1286), to continue the right to benefits where their work has been interrupted due to COVID-19.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

The working time regulations in the Working Environment Act, Chapter 10 build on mutually exclusive definitions of working time and rest periods, cf. section 10-1. The definition of working time is interpreted in accordance with the definition in Directive 2003/88/EC and the case law of the EFTA court and the CJEU, see, for example HR-2018-1036-A.

Stand-by duty outside the workplace is specifically regulated. According to section 10-4 (3), at least one-seventh of time on stand-by duty shall, as a general rule, be included in the employee's ordinary working hours. This calculation rule only applies if the stand-by time is considered to be a rest period. If the stand-by time is considered to be working time, the entire time period will count as working time.

Thus, the regulations on stand-by time take account of, and are aligned with, the definition of working time in EU law. The ruling will affect the interpretation and application of stand-by regulations specifically, and the definition of working time more generally. Apart from that, the ruling is not expected to have any significant implications for Norwegian law.

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

The working time regulations in the Working Environment Act, Chapter 10 apply to work for one employer. The general starting point is that the employer is the legal entity that is party to the employment contract.

It is established in case law that when applying working time regulations, several contracts of employment with the same legal entity are not considered separately. In Rt. 1998 s. 1357, the Supreme Court found that an employee who had a full-time employment contract with one municipal agency and a part-time employment contract with a different agency within the same municipality, was entitled to overtime pay based on the total amount of work. Important premises in the Court's reasoning were that the working time regulations in the WEA applied to the employee's relationship with one employer, and that the employer was the 'legal' entity – the municipality.

Therefore, where an employee has concluded several separate employment contracts with the same legal entity, working time regulations, including requirements of minimum rest periods, will apply to the total amount of work.

Based on this, Norwegian law seems to be in line with the ruling, and it is not expected to have any significant effect.

4 Other Relevant Information

Nothing to report.

Poland

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

Stand-by time (duty hours) is regulated in Art. 151(5) of Labour Code.

In case of duty hours (understood as the employee's readiness to work outside his/her regular working hours at the establishment or at another designated location) during which an employee does not perform work, such time is not considered working time but may not violate the employee's right to daily and weekly rest. The duty hours do not compare with performance of work. It is a period of 'preparedness' – waiting for the need to perform work to arise. Passive waiting during duty hours for a work assignment which may or may not arise does not constitute performance of work during duty hours (judgment of the Court of Appeal (SA) in Białystok of 26 May 2004, V Pa 157/04, OSAB 2004, vol. 3, item 53)

Stand-by duty as a legal construct can be distinguished between two types:

- in-house call duty (*dyżur domowy*). In the past, this required the employee to remain at home the entire time and wait for the employer's phone call. Today, as the use of mobile phones is widespread, in particular business phones, the burden associated with on-call duty has weakened since now it only entails the obligation of the employee to answer calls from the employer, regardless of location, provided that the employee can appear within a specified timeframe at a specified location to perform work;
- a more rigorous duty, whereby the employee must be present at a location precisely indicated by the employer and wait to be called for work.

As regards agreement on duty time, an employee is entitled (except in the case of in-house call duty) to time off corresponding to the period of duty or to remuneration if a day off is not possible. However, this does not apply to employees who manage the establishment in the name of the employer.

On-call time is not clearly defined in Polish regulations. It is not treated as rest time, and it is also not recognised as working time. In the context of the present cases, it should be noted that Polish regulations do not allow on-call time to violate minimum rest standards. Polish regulations are therefore more rigorous than those examined in the analysed ruling. Even without any constraints to the employee during on-call time, which objectively and very significantly affects his/her ability to freely manage the time

during which his/her professional services are not required and during which he/she is free to pursue his or her own interests will not be deemed to be free time.

The respective remuneration is based on different regulations than remuneration for regular working time. As the CJEU has pointed out, however, Directive 2003/88 does not address this issue.

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

Polish law does not regulate the conclusion of several employment contracts with the same employee. Therefore, due to the lack of statutory regulations in this respect, and relying only on Supreme Court case law, it should be pointed out that concluding a second employment contract with an employee is only possible if the type of work performed under the second contract is different to that under the first employment contract. The scope of duties covered by the subsequent employment contract must, therefore, be clearly different from that agreed and performed during regular working hours. When signing a subsequent employment contract with the same employee, the employer must provide precisely formulated content, leaving no doubt as to the scope of employment, because it might otherwise expose itself to liability for breach of labour law.

To support the above statement, it is worth citing the decision of the Supreme Court of 12 March 1969, III PZP 1/69, OSNCP 1969, No. 11, item 197, which indicates that only in exceptional cases does the justice system allow the conclusion of an additional, second employment contract at normal remuneration with one's own employee, and this is when it entails a type of work that clearly differs from the type agreed upon in basic working time. Otherwise, according to the Supreme Court, this would be an attempt to circumvent the provisions on working time and the amount of remuneration for overtime hours (decision of 12 April 1994, ref. I PZP 13/94, OSNAPiUS 1994, no. 3, item 39). In accordance with the ruling of the Supreme Court of 8 January 1981 (ref. II URN 186/80), an employer who concludes a second contract with an employee is required to entrust him/her with work of a different nature than that provided for in the first contract of employment, but must not infringe on the provisions on working time and overtime pay. In addition, the employer must ensure that the standards for daily and weekly rest are observed. Importantly, an employee employed by the same employer pursuant to two parallel employment contracts is required to work separate sets of working hours, as arising from each of the contracts.

Under Polish regulations, an employer may conclude an additional employment contract with an employee if the subject of the contract is different from the type of work specified in the existing employment relationship and its performance does not interfere with the employee's primary employment.

If the parties have concluded a second employment contract, the employer is required to determine the working time for each employment relationship separately, and to account for it separately by keeping two separate working time registers. However, the employer must ensure that the standards for daily and weekly rest are observed. Thus, Polish law is in line with the interpretation of the analysed CJEU judgment.

4 Other Relevant Information

Nothing to report.

Portugal

Summary

(I) The state of emergency has been renewed for two additional periods of 15 days, and has now been extended until 15 April 2021.

(II) The exceptional and temporary support scheme for the retention of employment (simplified lay-off) has been extended, and the exceptional support for the progressive resumption of activity has been prolonged until 30 September 2021.

(III) The teleworking regime remains mandatory for municipalities with high risk of contagion until 31 December 2021.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Renewal of the state of emergency

By Decree 25-A/2021, of 11 March, the President of the Republic approved a new renewal of the state of emergency for a period of 15 days, from 17 March to 31 March, which was authorised by the Portuguese Parliament (Resolution no. 77-B/2021, of 11 March).

The referred Decree authorises the adoption by the government of similar restrictions to those envisaged in the previous Decree of the President of the Republic (see February 2021 Flash Report), namely regarding the freedom of movement, international travel, the private, social and cooperative initiative and workers' rights.

The implementing measures for the extension of the state of emergency were regulated by Decree No. 4/2021, of 13 March. In general terms, this decree allows for the reopening and resumption of some activities that have been suspended, such as face-to-face educational and teaching activities in pre-school education and primary education, the activity of hairdressers, barbers, beauty salons and similar establishments, book and music shops, automobile and bicycle shops, and real estate services as well as libraries and archives. Other measures already in place are maintained:

- the mandatory adoption of the teleworking regime, when it is compatible with the activity being performed;
- the imposition of a general duty to stay at home and the prohibition of staying on public roads, except for the purposes expressly authorised by the law (such as to perform work when it cannot be carried out under a teleworking regime); and
- the maintenance of the closure of several commercial and services establishments.

On 13 March 2021, the Council of Ministers approved Resolution No. 19/2021 that establishes a strategy for progressively lifting the confinement measures adopted in the context of the COVID-19 pandemic.

The President of the Republic has extended the state of emergency for an additional period of 15 days, between 01 and 15 April 2021, through Decree No. 31-A/2021, of 25 March, which was approved by Resolution of the Portuguese Parliament No. 90-A/2021, of 25 March. In general terms, the referred Decree maintains the restrictions of rights, namely of workers, already foreseen in the previous Decree.

This renewal of the state of emergency was regulated in Decree No. 5/2021, of 28 March, which extends the applicability of the measures already envisaged in the above-mentioned Decree No. 4/2021 until 05 April 2021.

1.1.2 Relief measures for companies and workers

Given the current situation and the need to maintain and reinforce the support measures for companies and workers, Decree-Law No. 23-A/2021 was published on 24 March 2021 (a summary in basic English (without legal value) of the decree is available here), which introduces amendments to the legal framework of extraordinary support for the retention of employment (commonly referred to as 'simplified lay-off') and to the extraordinary support for the progressive resumption of activities, two of the most important support measures adopted by the Portuguese government to assist workers and employers in the face of the COVID-19 crisis. This Decree-Law entered into force on 25 March 2021.

Specifically, the referred act envisages the following amendments to the regulations previously adopted:

- Apart from employers that must suspend their activities due to a legislative or administrative decision, simplified lay-off is also possible in case of a total or partial stoppage of activity of a company or establishment that is higher than 40 per cent compared to the month prior to the application submitted in March and April 2021, and which is the result of the interruption of global supply chains or the suspension or cancelation of orders, and if more than half of the company's revenue in the previous year was earned through activities or sectors that are currently suspended or closed due to a legislative or administrative decision. In such cases, employers may suspend employment contracts or reduce workers' normal working hours and benefit from a subsidy granted for each worker affected by the measure with the exclusive aim of wage compensation. In addition, employers may benefit from a temporary exemption of the payment of social security contributions for workers affected by the measure;
- The extraordinary support for the progressive resumption of activity—which only allows a temporary reduction of the normal working hours and consists of a subsidy for employers to pay employees' wages—has been extended until 30 September 2021;
- Employers who in the first quarter of 2021 benefited from any of the referred measures are entitled to an extraordinary incentive to normalise their business activity, which will be regulated in an administrative order.

1.1.3 Measures to limit the risks of transmission

Furthermore, on 30 March 2021, Decree-Law No. 25-A/2021 was published, extending the exceptional and temporary measure of reorganisation of work and minimisation of risks of transmission of COVID-19 infections in the workplace until 31 December 2021.

Among others, this Decree Law stipulates that teleworking remains mandatory, if the activities can be performed remotely, for companies located in municipalities that are classified as having a serious, very serious and extreme risk of contagion, regardless of the number of employees.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

In line with Directive 2003/88, Portuguese law only addresses the concepts of 'working time' and 'rest period'.

According to Article 197 (1) of Portuguese Labour Code, approved by Law No. 7/2009, of 12 February, as subsequently amended (hereinafter referred to as 'PLC'), 'working time' is 'any period during which the worker performs an activity or remains attached to the performance of the activity'. The concept of working time also includes certain situations of inactivity which the law describes as interruptions and breaks from work and which are listed in paragraph 2 of the above mentioned Article 197 of PLC.

'Rest period' is understood as any period that is not considered working time (Article 199 of PLC). Thus, under Portuguese law, the concepts of 'working time' and 'rest period' are—as in EU law—mutually exclusive, which means that every period not considered to be working time falls into the concept of rest period. An intermediate category between working time and rest period (*tertium genus*) is not provided for in Portuguese law.

Based on this legal framework, Portuguese case law considers stand-by time to be classified as either working time or a rest period, depending on whether the worker must remain at his or her workplace during this period, as well as whether the constraints imposed on the worker during that time limit his or her leisure time.

This line of reasoning was developed by the Portuguese courts following the guidelines of CJEU case law on this issue, namely in cases C-303/98, *SIMAP* and Case C-151/02, *Jaeger*.

According to Portuguese case law on stand-by time, if the worker remains at the workplace (or any other place determined by the employer) and must be available to work, this time must be considered working time; if the worker only has to be available to work if he or she is called but can spend that time at home or at any other place chosen by him or her, it is presumed that the worker can engage in his or her own interests, despite certain limitations. Hence, this time does not, as a rule, fall within the concept of working time (for example, see ruling of Coimbra Appeal Court of 08 November 2007; ruling of the Supreme Court of 19 November 2008, ruling of Lisbon Appeal Court of 17 December 2014 and ruling of Lisbon Appeal Court of 13 January 2016).

That is, according to Portuguese case law, unless otherwise agreed by the parties or a different rule is established in a collective agreement, the worker is entitled to pay for stand-by time only when this time falls within the concept of working time. Otherwise, the employer only has to pay remuneration for work effectively performed during the stand-by time (if any).

Taking into account the above, Portuguese case law on the classification of stand-by time follows the case law of the CJEU, and is compatible with the interpretation of Article 2 of Directive 2003/88 contained in the two rulings analysed above.

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

Under Portuguese law, the concepts of 'working time' and 'rest period' (see Articles 197 (1) and 199 of PLC) are also mutually exclusive, as explained above in point 3.1). Furthermore, Portuguese law stipulates that the worker is entitled to a rest period of at least 11 consecutive hours between two consecutive daily periods of work (Article 214 (1) of PLC).

There do not seem to be any judgments of Portuguese courts that have analysed an issue similar to the one dealt with in the present case. However, in a similar case, Portuguese labour law, namely Articles 197 (1), 199 and 214 (1) of PLC, would likely be interpreted in line with this CJEU ruling, namely considering working time rendered to the same employer as a whole, regardless of whether the worker has concluded one or more contracts of employment with the same employer.

4 Other Relevant Information

4.1 Social security

On 10 March 2021, Ordinance No. 53/2021 was published, establishing the normal age of access to old age retirement pension of the general social security regime in 2022 at 66 years and 7 months.

Romania

Summary

A new decision of the Constitutional Court offers female civil servants the opportunity to retire at the same age as men.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Equal treatment in social security

Constitutional Court, Decision No. 112/2021, 23 February 2021

In 2018, the Constitutional Court ruled (Decision No. 387/2018, published in the Official Gazette of Romania No. 642 of 24 July 2018) on the unconstitutionality of a text of the Labour Code which provided for the retirement of women at a different age than men. As a result, Government Emergency Ordinance No. 96/2018 amended the text of Article 56 (1) c) of the Labour Code to integrate the Constitutional Court's decision. According to the new text, female employees who fulfil the age and retirement contribution period may request the continuation of the employment contract under identical conditions as men, i.e. until the age of 65 (see November 2018 Flash Report).

By Decision No. 112/2021, the Constitutional Court ruled on a similar text of law, this time regarding civil servants. It stated that in the Administrative Code (Government Emergency Ordinance No. 57/2019, published in the Official Gazette of Romania Bo. 555 of 5 July 2019), the phrase 'standard age conditions' must be interpreted in the sense of not excluding the possibility for women to request the continuation of their employment relationship under identical conditions as men, until the age of 65.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

Until now, the essential criterion according to which the Romanian courts qualified stand-by periods as working time was the frequency with which the employee can be asked to perform work. The Romanian courts continuously rejected the qualification of periods of stand-by duty at home as working time, insofar as the employee had a reasonable amount of time to respond to a possible request to perform work outside regular working hours (for example, Decision No. 41/2021, Bacău Court of Appeal; Decision No. 68/2021, Sălaj Court). The issue of the extent to which other criteria could be taken into account which might constitute 'objective and very significant constraints' that justify the classification of stand-by time as working time, was not raised. However, in one case (Bucharest Court of Appeal, Civil Decision No. 2671/2019), the court rejected the claim of an employee requesting the qualification of the period of on-call duty at home as working time, analysing the entire context of the obligations imposed on the employee to perform work outside of regular working hours, including the frequency of such requests, their urgency, and the severity of the sanctions applicable if the employee refused to perform work outside regular working hours. The fact that two employees were scheduled for stand-by duty was also taken into account, so that if one of them did not want to or could not come to work, the other was requested to

perform the work. The court concluded that the employee was not permanently unable to pursue his personal interests and had the opportunity to manage his time freely without major constraints and that, therefore, that period was considered rest time.

Following the two rulings of the CJEU, it can be assumed that national courts will more frequently consider the full context of the organisation of periods of stand-by duty in which the employee may be required to perform work outside regular working hours, but also the extent to which other constraints imposed on the worker during that period are such as to objectively and very significantly affect the latter's ability to freely manage the time during which his or her professional services are not required and to devote this time to his or her own interests.

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti
Romanian legislation transposed the Working Time Directive's 'per contract' and not 'per person' approach. As a result, the limits on working time and rest time are set by reference to a single employment contract, and not to all of an employee's employment contracts.

The decision of the CJEU will lead to legislative amendments, at least in situations in which the employee has concluded two or more employment contracts with the same employer. Indeed, the Court stated that where a worker has several employment contracts with the same employer, the minimum daily rest period applies to all such contracts taken as a whole and not to each of those contracts taken separately.

The main challenge for the Romanian legislator will be the transposition of this interpretation conferred by the Court of Justice of the European Union in the context of a national legislation that is more protective than the one enshrined by the Working Time Directive. For example, Romanian law provides for a daily rest period of at least 12 hours (Art. 135 (1) of the Labour Code), a weekly rest period of 48 consecutive hours (Art. 137 (1) of the Labour Code) (which, added to the daily rest leads to the employer's obligation to provide the employee with a rest period of 60 consecutive hours), as well as the right of an employee who has worked a 12-hour shift to a 24-hour rest period (according to Art. 115 (2) of the Labour Code, a daily working time of 12 hours shall be followed by a rest period of 24 hours).

The Court did not refer to a situation in which multiple employment contracts have been concluded between a worker and several employers, because the dispute only referred to a situation in which the employee had concluded several contracts with one single employer. The issue of applying working time rules in case of several employment contracts concluded with different employers remains open. The only provisions in the matter, laid down in Art. 35 of the Labour Code, allow the accumulation of employment contracts without any restrictions.

Therefore, the national legislator may have three possibilities:

- To provide for the applicability of the rules on working time and rest time to all contracts concluded with the same employer, leaving the situation of having concluded several contracts with several employers unregulated (however, as the Court stated, the daily rest period is a minimum necessity 'to enable the worker to be able to recover from the fatigue inherent in daily work' (paragraph 50). It will be difficult to argue that such fatigue would only arise if the employee worked for a single employer, and not for several employees);
- To provide for the applicability of the rules on working time and rest time in relation to all contracts of an employee who has concluded several, either with the same employer or with different employers, while maintaining higher protection than stipulated in the Directive, as provided by national law;

- To limit the degree of protection to the minimum allowed by the Directive and to provide for the applicability of the rules on working time and rest time 'per person' and not 'per contract', regardless of whether the employee has concluded several employment contracts with the same employer or with different employers.

4 Other Relevant Information

Nothing to report.

Slovakia

Summary

The state of emergency was extended for an additional 40 days with effect from 20 March 2021.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 State of emergency

On 17 March 2021, the government approved Resolution No. 160 of 17 March 2021 to re-extend the duration of the state of emergency (published in the Collection of Laws No. 104/2021 Coll.), by which the state of emergency is extended for an additional period of 40 days with effect from 20 March 2021.

The Constitutional Court rejected a question concerning the constitutionality of the Resolution of the Government (see the press release No. 12/2021 of 31 March 2021).

According to Article 5, paragraph 2 of the Constitutional Act No. 227/2002 Coll., as amended by Constitutional Act No. 414/2020 Coll., the National Council of the Slovak Republic must consent to repeated extensions of the state of emergency within 20 days from the first day of the newly extended state of emergency.

Therefore, at its meeting on 31 March 2021, the government approved the Resolution of the Government of the Slovak Republic No. 175 of 31 March 2021 to re-extend the state of emergency. At the same time, it instructed the Prime Minister to submit the government's proposal to the President of the National Council of the Slovak Republic for further constitutional discussion.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

In general, the legal regulation in Slovakia is in line with the Directive. It does not, however, go into such detail as the judgment.

The main legal source is the Labour Code (Act No. 311/2001 Collection of Laws – "Coll") as amended. The provisions of the Labour Code are binding for all employers in the private (business) sector and in the public sector. Civil service employment relationships are currently regulated in Act No. 552/2003 Coll. on the performance of work in the public interest and Act No. 553/2003 Coll. on remuneration for certain employees for work in the public interest.

The main legal source is the Labour Code. According to Article 85 paragraph 1, working time refers to the period during which an employee shall be at the employer's disposal,

performs work and carries out obligations pursuant to the employment contract. A rest period refers to any period which is not working time (paragraph 2).

According to Article 96 paragraph 1 of the Labour Code if, in justified cases and to ensure the performance of essential tasks, an employer orders an employee or the employee agrees to remain in a place determined in advance for a period of time outside the scheduled work shift and beyond the set weekly working time and is prepared to perform work duties in accordance with the employment agreement, he or she is considered to be on stand-by duty. The employer may order or the employee may agree to perform stand-by duty outside the workplace outside of regular working hours because it is a holiday, for example, and for which he or she is entitled to wage compensation and his or her monthly wage shall not be reduced pursuant to the conditions stipulated in Article 94; the provision of Article 122 paragraph 3 shall not thereby be affected (paragraph 1). The time during which the employee remains in the workplace and is prepared to perform work duties but does not actually perform any work is considered the inactive part of stand-by duty but is calculated as working time (paragraph 2).

The Labour Code also regulates the remuneration for stand-by duty. According to Article 96 paragraph 3, for every hour of the inactive part of stand-by duty in the workplace as defined in paragraph 2, employees are entitled to pay amounting to a proportionate share of their basic pay, which shall not be less than the minimum hourly wage pursuant to a special regulation. If the employer and the employee agree on alternative free time as compensation for the inactive part of stand-by duty in the workplace, the employee shall be entitled to the pay stipulated in the first sentence, and one hour of alternative free time for every hour of stand-by duty; the employee shall not be entitled to pay while on alternative free time.

The time during which the employee remains at an agreed location outside the workplace and is prepared to perform work but does not perform actual work is the inactive part of stand-by duty but is not considered working time (Article 96 paragraph 4 of the LC). For every hour of the inactive part of stand-by duty outside the workplace, employees are entitled to compensation amounting to at least 20 per cent of the minimum hourly wage pursuant to a special regulation (Article 96 paragraph 5 of the LC).

According to Article 96 paragraph 6 of the Labour Code, the time an employee on stand-by duty performs work is considered the active part of stand-by duty, which is treated as overtime work.

The employer may order an employee to be on stand-by at most eight hours per week and at most 100 hours in a calendar year. Stand-by duty above and beyond these limits is only permitted by agreement with the employee (Article 96 paragraph 7 of the LC). It shall be possible to agree on restrictions to the duration of stand-by duty with the employee in a collective agreement pursuant to paragraph 7 (Article 96 paragraph 8 of the LC).

As regards the public sector, Act No. 552/2003 Coll. does not regulate working time, but Act No. 553/2003 Coll. on remuneration of certain employees for work in the public interest regulates pay for stand-by time.

According to Article 19a of the Act, if an employee is ordered or agrees to perform stand-by duty at the workplace, he or she is entitled to 50 per cent of his or her wages for each hour of the inactive part of stand-by time; if stand-by duty is performed on a day of rest, he or she is entitled to 100 per cent of his or her hourly wage rate. For the inactive part of stand-by time at the workplace, the employee is not entitled to a supplement according to Articles 16 to 18, or salary for overtime work according to Article 19. If the employer and the employee agree on compensatory leave for the inactive part of stand-by time at the workplace, the employee is entitled to financial compensation in accordance with the first sentence, and an hour of compensatory leave

for every hour of stand-by time; the employee is not entitled to any wages when he or she is on compensatory leave.

If an employee is ordered or agrees to perform stand-by duty outside the workplace, he or she is entitled to the following for each hour of the inactive part of stand-by time:

- compensation in the amount of 15 per cent of his or her hourly wage rate or 25 per cent of this amount in case stand-by duty is performed on a day of rest;
- has the possibility of using the allocated mobile means of communication, compensation in the amount of 5 per cent of his or her hourly wage rate or 10 per cent of that amount in case stand-by duty is performed on a day of rest (Article 21 paragraph 1 of the Act).

Compensation for the inactive part of stand-by time is not calculated as regular working time; such performance of work is considered overtime work (Article 21 paragraph 1 of the Act).

The Act also specifically regulates compensation for stand-by time to secure measures in times of crisis (Article 21a of the Act).

According to Article 29 paragraph 4 of the Act, when providing a salary to employees to whom this Act applies, the employer shall not apply, *inter alia*, the provisions of already cited Article 96 paragraphs 3 and 5 of the Labour Code.

In the other acts on the public sector, this issue is regulated very similarly.

In Act No. 154/2001 Coll. on prosecutors and legal trainees, there is no provision that stand-by time at the workplace is fully counted as working time. As regards compensation for stand-by time, the prosecutor is not entitled to it for the time during which he or she performs work. This time is considered overtime (Article 102 paragraph 4 of Act No. 154/2001 Coll.). Compensation for stand-by time is regulated differently in Article 102.

Act No. 35/2019 Coll. on Financial Administration and on Amendments to Certain Acts also regulates stand-by time (Article 143); compensation for stand-by time is regulated differently in Article 179.

It is the same in Act No. 73/1998 Coll. on Civil Service of members of the Police Force, of the Slovak Intelligence Service, of the Prison Wardens and Judiciary Guards Corps of the Slovak Republic and of the Railway Police (stand-by time – Article 69, cash compensation for stand-by - Article 103).

Practically the same regulation is found in Act No. 315/2001 Coll. on the Fire Fighting and Rescue Corps. There is no provision that on-call time at the workplace is fully counted as working time. As regards compensation for on-call time, there is no entitlement to it for the time during which work is performed. This time is considered overtime (Article 122 paragraph 3 of Act No. 315/2001 Coll.). Article 92 paragraph 5 of the Act states that a member who performs an official activity connected with the protection of the interests of the state performs special tasks to ensure the necessary readiness of the corps, and is required, due to his/her inclusion in the plan for indicating levels of readiness, to report to his/her superior his/her place of residence during the time outside the civil service and to be ready to appear when called upon at the specified time, at the designated place to perform tasks. An appeal against a staff order for inclusion in the notification and transport plan or for exclusion from the notification and transport plan shall not have suspensory effect.

Act No. 281/2015 Coll. on Civil Service of Professional Soldiers regulates stand-by time and its duration (Article 105). However, under Article 106 paragraph 1, these provisions do not apply to a professional soldier, inter alia, during the performance of tasks during stand-by time and combat-related stand-by tasks, including preparation and training during stand-by and combat-related stand-by duties (letter a) and military training (letter b).

According to Article 156 paragraph 3 of the Act, the service salary of professional soldiers already takes service stand-by duty into account.

Act No. 55/2017 Coll. on Civil Service (officials of the central authorities and other government bodies exercising state power) defines the term service time (Article 98) as the performance of civil service, and also considers the time of compensatory leave for an inactive part of stand-by time at the place of performance of civil service (Article 101, paragraph 1, letter e). The salary of a civil servant also consists of an inactive part of stand-by time at the place of performance of the civil service (Article 124, letter c).

Under the conditions stipulated in this Act, in addition to the salary pursuant to Article 124, a civil servant is entitled to:

- compensation for the inactive part of stand-by time outside the place of performance of the civil service;
- compensation for stand-by to secure measures for a period during a crisis situation.

The Act further differentiates between the salary for the inactive part of stand-by time (Article 138), compensation for the inactive part of stand-by time (Article 144) and compensation for stand-by time when providing measures for a period during a crisis situation (Article 145).

According to Article 171 of Act No. 55/2017 Coll. on Civil Service Relations the provisions of Article 96 paragraph 1, 2, 4, 6 and 7 of the Labour Code shall apply. Hence, only in this case shall the legal regulations applicable in in the private sector (Labour Code) be relevant for civil servants as well.

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

Legislation on 'rest period' in relation to stand-by duty is minimal in Slovakia.

The Labour Code only includes one sentence in this regard. According to Article 96 paragraph 3, for every hour of the inactive part of stand-by duty in the workplace as defined in paragraph 2, employees are entitled to pay amounting to a proportionate share of their basic pay, which shall not be less than the minimum hourly wage pursuant to a special regulation. If the employer and employee agree on alternative free time in compensation for the inactive part of stand-by duty in the workplace, the employee shall be entitled to the pay stipulated in the first sentence as well as one hour of alternative free time for every hour of stand-by duty; the employee shall not be entitled to pay while taking on alternative free time.

A similar arrangement is also established in Act No. 553/2003 Coll. on remuneration of certain employees for work in the public interest. According to Article 19a of the Act, if an employee is ordered or agrees to perform stand-by duty at the workplace, he or she is entitled to 50 per cent of his/her wage for each hour of the inactive part of stand-by time, and if stand-by is performed on a day of rest, to 100 per cent of his/her hourly wage. For the inactive part of stand-by time at the workplace, the employee is not entitled to a supplement according to Articles 16 to 18 and compensation for overtime work according to Article 19. If the employer and the employee agree to compensatory leave for the inactive part of stand-by time at the workplace, the employee is entitled to financial compensation in accordance with the first sentence and an hour of compensatory leave for every hour of this stand-by time; the employee is not entitled to any financial compensation while on compensatory leave.

Article 138 paragraph 2 of Act No. 55/2017 Coll. on Civil Service stipulates that for the inactive part of stand-by duty at the place of performance of the civil service, the civil servant is not entitled to supplements pursuant to Articles 139 to 141 and for overtime compensation. If the service office agrees on compensatory leave with the civil servant

for the inactive part of stand-by time at the place of performance of the civil service, the civil servant shall be entitled to one hour of compensatory leave for each hour of stand-by duty, for which financial compensation is provided for the inactive part of stand-by time under paragraph 1, letter a) or pursuant to paragraph 1, letter b. A civil servant is not entitled to financial compensation when on compensatory leave.

4 Other Relevant Information

Nothing to report.

Slovenia

Summary

The government extended the state of emergency until 16 April 2021. The various measures introduced by previous anti-corona packages, the so-called PKPs, remain in force.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Extension of the state of emergency

The state of emergency in Slovenia, adopted by the government in January 2021 (see January 2021 Flash Report), expired on 17 March 2021, therefore, the government extended it for an additional 30 days, from 18 March until 16 April 2021 (Ordinance on the declaration of the COVID-19 epidemic in the territory of the Republic of Slovenia, Official Journal of the Republic of Slovenia (OJ RS) No. 35/21, p. 2407).

Various measures aimed at mitigating the negative consequences of the COVID-19 crisis introduced by previous anti-corona packages, the so-called PKPs (see March 2020 Flash Report and ff.), remain in force, including those that are relevant from the labour law perspective, such as: the reimbursement of wage compensation for temporarily laid-off workers, the short-time work scheme, partial reimbursement of fixed operational costs for businesses whose revenue has declined significantly due to the pandemic, wage compensation during quarantine, minimum wage subsidy, monthly basic income for the self-employed and for various other categories of persons, etc. Some of the measures have been extended (see, for example, OJ No. 43/2021, p. 2700), but no major relevant changes have been introduced.

Measures to contain the spread of COVID-19 virus infections continued to apply during March 2021 (special rules on education (a combination of regular and remote e-learning), special rules on the sale of goods and services, public transport and other sectors of activity, curfew, prohibition of gathering of people, face masks, mass testing, etc.) and have been changing frequently, depending on the assessment of the epidemiological situation. The most recent ones (available in OJ RS, No. 46/2021 and in OJ RS No. 47/2021) introduce a temporary lockdown from 01 to 11 April 2021.

The Act Regulating the Guarantee of the Republic of Slovenia for the Pan-European Guarantee Fund was adopted by the National Assembly on 3 March 2021 (*Zakon o jamstvu Republike Slovenije v Panevropskem garancijskem skladu* (ZJPGS), OJ RS No. 36/2021).

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

The present judgments are of relevance for Slovenian law. The request for a preliminary ruling in case C-344/19 was made by the Slovenian Supreme Court and the decision of the Supreme Court will be reported once it is issued.

As the CJEU explained, according to its well-established case law, it is ultimately for the referring court, i.e. the Slovenian Supreme Court to examine—taking into account the criteria clarified by the CJEU in this judgment—whether stand-by time according to the stand-by system at issue in the main proceedings (concerning a specialist technician responsible for ensuring the operation of a transmission centre situated on a mountain summit, Krvavec and Pohorje) must be classified as 'working time' for the purposes of applying Directive 2003/88. The CJEU judgment in case C-344/19 clarifies certain issues that are relevant for the Slovenian case.

Taking into account the previous CJEU case law on working time and stand-by time, in particular, the decisive factor are the constraints imposed on the worker. A period of time should be considered working time if the constraints imposed on the worker are such as to affect, objectively and very significantly, the possibility for the latter to freely manage the time during which his or her professional services are not required and to pursue his or her own interests; and conversely, is not considered working time if the constraints imposed on the worker during a period of stand-by time do not reach such a level of intensity and allow him or her to manage his or her own time freely, and to pursue his or her own interests without major constraints (in this case, only the time linked to the provision of work actually performed during that period constitutes 'working time' for the purposes of applying Directive 2003/88) (paras. 36-38).

An important clarification of the CJEU in this judgment which the Supreme Court of Slovenia will have to take into account is that

> *"only the constraints that are imposed on the worker, whether by the law of the Member State concerned, by a collective agreement or by the employer pursuant, inter alia, to the employment contract, employment regulations or the system of dividing stand-by time between workers, may be taken into consideration'* (para. 39) and that *'organisational difficulties that a period of stand-by time may generate for the worker, which are not the result of such constraints but are, for example, the consequence of natural factors or of his or her own free choice, may not be taken into account"* (para. 40).

Of particular relevance for the Slovenian case is also the clarification of the CJEU in paras. 41-42, 44, 50-51.

Slovenian labour legislation does not define in detail the concept of working time. According to the *Employment Relationships Act* (*Zakon o delovnih razmerjih (ZDR-1),* OJ RS No. 21/13 et subseq.),

> *"working time shall mean the effective working hours and breaks according to Article 154 of this Act (30 minutes per day for full-time work) and the time of justified absences from work in accordance with the law and collective agreement and/or a general act'* (Article 142, para. 1) and *'effective working hours shall be the hours during which a worker carries out his work, which means that he is at the employer's disposal and fulfils his working obligations under the employment contract*" (Article 142, para. 2).

Therefore, the case law fulfils and concretises the meaning of these rather general provisions on the definition of working time; the guidance provided by the CJEU case

law in this respect is therefore of particular importance for the development of Slovenian case law on this matter.

Another aspect raised by the present cases is also of particular importance for Slovenian law. The CJEU emphasises at the end of the reasoning that:

> *"classification of a period of stand-by time as a 'rest period' for the purposes of applying Directive 2003/88 is without prejudice to the duty of employers to comply with their specific obligations under Directive 89/391 to protect the safety and health of their workers' (para. 61) and that 'having regard to their obligation to protect workers against psychosocial risks that may arise in the their working environment, employers cannot establish periods of stand-by time that are so long or so frequent that they constitute a risk to the safety or health of workers, irrespective of those periods being classified as 'rest periods' within the meaning of Article 2(2) of Directive 2003/88"* (para. 65).

The CJEU is very clear that *'it is for the Member States to define, in their national law, the detailed arrangements for the application of that obligation'* (para. 65).

Slovenian labour legislation, more precisely the ZDR-1 which applies to all employees, does not regulate periods of stand-by time at all. It is quite common that collective agreements regulate periods of stand-by time, but as a rule, they merely regulate the remuneration of stand-by time, not the conditions under which it may be imposed on the worker and limitations in terms of maximum duration and/or frequency or other limitations. It is possible that specific legislation for certain sectors of activity or professions addresses the issue of stand-by time and regulates it in more detail, especially for sectors or professions where stand-by duty is common. For example, the Medical Services Act (*Zakon o zdravniški službi (ZZdrS*), OJ RS No. 89/99 et subseq.) regulates in much more detail specific aspects of doctors' working time than general labour legislation, i.e. the ZDR-1; moreover, there are even certain specific provisions in the ZZdrS which regulate conditions under which the stand-by time can be imposed on the individual doctor as well as limitations in terms of maximum hours and frequency.

According to Article 142.a of the ZZdrS, if a doctor's stand-by duty is imposed by a unilateral act of the employer, it may not be imposed more than eight times per month, calculated as an average within a 6-month period, whereby one stand-by duty may not exceed 16 hours (Monday – Friday) or 24 hours (Saturdays, Sundays and public holidays). On Saturdays, Sundays and public holidays, the doctor may be on stand-by no more than three times per month, calculated as an average in a 3-month period.

The Fire Service Act (*Zakon o gasilstvu (ZGas)*, OJ RS No. 7/93 et subseq.), for example, also regulates various aspects of working time in more detail than the general labour legislation and contains provisions on stand-by time as well (see, in particular, Articles 14.a to 14.c), however, it does not contain similar, more detailed rules than the ZZdrS, which would limit the stand-by time, its frequency and duration. Nevertheless, it does define instances when stand-by duty can be imposed on the worker (Article 14.a of the ZGas).

In this respect, the following part of the CJEU judgment is of particular relevance:

> *"Where such services consisting in stand-by time continue, without a break, over long periods or where they occur at very frequent intervals, such that they recurrently place a psychological burden, even of a low intensity, on the worker, it may in practice become very difficult for the latter to withdraw fully from his or her working environment for a sufficient number of consecutive hours, so as to permit him or her to neutralise the effects of work on his or her safety or health. That is all the more true where services consisting in stand-by time are provided during the night"* (para. 64).

It seems that sufficiently detailed rules on stand-by time (how long, how frequent, other conditions and limitations) which complies with the requirements clarified by the CJEU in its judgment C-344/19, in paras. 61-65, particularly in para. 65, and in its judgment

C-580/19, in para. 60 (concerning the employer's duties as regards the health and safety at work), are missing in the Slovenian labour legislation. These requirements could probably be deduced from the general provisions on health and safety at work, following the interpretation of the CJEU in this respect; however, more precise regulations in the legislation or/and in collective agreements are definitely recommended.

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

In the present case, the CJEU decided that where an employee has concluded several contracts of employment with the same employer, the minimum daily rest period provided for in Article 3 of Directive 2003/88 applies to those contracts taken as a whole and not to each of those contracts taken separately.

Slovenian law and its understanding and interpretation in practice is in line with this judgment (the employment relationship between the employer and the worker is considered in its entirety, as a whole, taking into account all rights and duties of each of the parties – normally, one contract of employment is concluded between the worker and the employer, specifying all tasks and duties of the worker, but even if several contracts would have been concluded between the parties, the employment relationship and rights and duties between the parties would have been considered as a whole; more specifically, the worker's entire working time is taken into account, also for the purposes of determining his or her rest periods; there is no specific provision in this respect, but the very concept of labour law, employment relationship, working time and rest periods as well as the wording of relevant provisions of the ZDR-1 on working time, rest periods and other issues confirm such an understanding), therefore, there are no specific implications of the CJEU's judgment for Slovenian law.

4 Other Relevant Information

4.1 Evaluation rules and promotion of civil servants

The Decree on the Evaluation Procedure for Civil Servants for 2020 due to the consequences of the COVID-19 virus epidemic (*Uredba o ocenjevanju javnih uslužbencev za leto 2020 zaradi posledic epidemije COVID-19*, OJ RS No. 43/2021, p. 2692) was adopted by the government on 24 March 2021. It slightly modifies the evaluation rules on promotions and the remuneration of civil servants to take the effects of the COVID-19 pandemic into account.

4.2 Minimum wage for temporary and occasional work in agriculture

The minimum hourly rate for temporary and occasional work in agriculture has been adjusted by the Minister of Agriculture (Order on the adjustment of minimum gross hourly pay for temporary and occasional work in agriculture, OJ RS No. 38/2021). The minimum hourly rate for occasional and temporary work in agriculture amounts to EUR 5.46 gross (from 01 April 2021 onwards).

The minimum hourly rate for occasional and temporary work of students and the minimum hourly rate for occasional and temporary work of retired persons was adjusted in February 2021 (see February 2021 Flash Report).

4.3 Collective agreements

The Collective Agreement for the Agriculture and Food Processing Industry (*Kolektivna pogodba za kmetijstvo in živilsko industrijo Slovenije*), concluded on 04 February 2021,

was entered into the Registry of Collective Agreements on 4 March 2021 and published in OJ RS No. 40/2021, pp. 2578.

The Chamber of Craft and Small Business of Slovenia (*Obrtno-podjetniška zbornica*, available here) acceded to the already concluded Collective Agreement for Trade Sector (*Pristop h Kolektivni pogodbi dejavnosti trgovine Slovenije*, OJ RS No. 40/2021, p. 2579).

The Ministry of Labour issued a decision on the extended validity of the Collective Agreement on Service Operations in Land Transport (*Sklep o razširjeni veljavnosti Kolektivne pogodbe za storitvene dejavnosti v kopenskem prometu*, PJ RS No. 33/2021, p. 2392). This collective agreement was concluded in December 2020 (see December 2020 Flash Report).

Spain

Summary

A new law extends public health rules that have been applicable in the workplace since June 2020.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

From March to June 2020, the government approved a new package of measures to respond to the COVID-19 crisis. Some of them are still in force, while others have been adapted to the 'new normal'. Royal Decree Law 21/2020 of 09 June 2020 played a key role, as it required people, including workers at workplaces, to observe enhanced hygiene and imposed the use of masks, social distancing and modified behaviour to minimise risks. This provision was adopted before the new state of emergency was declared in October 2020 (already in force), so doubts about its applicability could have been raised.

Law 2/2021 of 29 March 2021 includes these specific public health measures in a legal provision, thereby removing any doubts. No new measures for workplaces and employment relationships have been introduced, i.e. the provision remain the same.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

This case is very similar to C-518/15, *Matzak*, in which the Court stated that Article 2 of Directive 2003/88 must be interpreted as meaning that the stand-by time a worker spends at home with the duty to respond to calls from his/her employer within 8 minutes, thus significantly restricting opportunities to engage in other activities, must be considered 'working time'.

This ruling follows the same guideline, although the time limit to respond to the employer's call was longer (one hour). A case-by case analysis is necessary.

The Spanish legal framework of stand-by time has not changed in Spain in recent years, not even after the *Matzak* ruling. As a general rule, periods of stand-by time are not considered working time when the worker is not at the employer's premises, although the worker is usually entitled to a salary supplement. These CJEU rulings will be implemented through case law and the Supreme Court has followed the *Matzak* doctrine several times in the scope of a case-by-case analysis. The Supreme Court has stated that stand-by time is not working time when the worker:

- has a reasonable amount of time to respond (30 minutes at least);

- can choose where to spend the stand-by time;
- can respond by phone or computer to some of the calls, thus reducing the average frequency of calls that require him or her to physically travel to the undertaking/client premises.

In this regard, see the Supreme Court's ruling of 18 June 2020, case STS 2747/2020 and of 02 December 2020, case STS 4471/2020.

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

As a general rule, Spain applies the Working Time Directive to contracts. As an exception, Article 34.3 of the Labour Code stipulates that people under 18 years may not perform more than eight hours of effective work a day, and when they work for several employers, all hours worked must be computed for this purpose. The rules applicable for night workers (Article 36 of the Labour Code) could be interpreted as limitations for each worker.

The rules on working time are designed to be applied to each contract, even if the Labour Code does not explicitly state this. In a comparable case as the one addressed by this CJEU ruling, a Spanish court might reach a similar conclusion, because the employer is the same. No legal reforms are expected after this ruling and this is not a common situation in Spain (there is no case law on it).

4 Other Relevant Information

4.1 Unemployment data

Unemployment increased in February by 44 436 people; there are already 4 008 789 unemployed people. The impact of the COVID-19 crisis has already been significant and is expected to be overwhelming once the financial support for temporary lay-offs ends.

Sweden

Summary

(I) The Swedish legislator has decided to extend financial support for short-time work during the COVID-19 crisis.

(II) The Swedish Supreme Court and the Swedish Labour Court decided two cases on misconduct in service.

(III) The Swedish Labour Court ruled on the ultra-activity of a collective agreement, and a district court ruled on a trade union's exclusion of a member.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Short-time work

Financial support for short-time work has been extended until June 2021 by the Swedish government in a decision of 25 March 2021. The extension is regulated in the temporary Short-Time Work Act (*Lag 2021:54 om korttidsarbete i vissa fall*).

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Misconduct in service

Supreme Court, B 2179-20, 04 March 2021

The Swedish Supreme Court held in the present case that a district court chief judge was liable for misconduct in service by dealing with cases too slowly. In its judgment, the court argued that both the Swedish Constitution and Article 6 of the European Convention on Human Rights demand that civil cases are dealt with within a reasonable time. Even if the Constitution grants the independence of courts and judges, the Supreme Court found that there must be reasonable arguments for delayed procedures. In the present case, there were three delayed cases that were between five and six years old at the time misconduct in service was established.

The judgment addresses the issue of the delicate balance of imposing sanctions on judges due to the special protection offered to them on the grounds of the principle of fair trial and independent courts. In this particular case, it was clear that misconduct in service was objectively motivated to excessively slow down adjudication.

Labour Court, AD 2021 No. 10, 10 March 2021

in the present case, the Labour Court upheld the summary dismissal of an employee working in the Swedish public employment service, due to the fact that he guaranteed benefits for applicants in exchange for sex.

2.2 Ultra-activity of collective agreements

Labour Court, AD 2021 No. 11, 10 March 2021

In its judgment AD 2021 No. 11, the Labour Court ruled on the modalities according to which an employer who leaves an employer organisation continues to be bound by a collective agreement's after-effects.

According to Section 26 of the Swedish Co-Determination Act (*lag [1976:580] om medbestämmande i arbetslivet*), a person leaving an organisation that is bound by a collective agreement continues to be bound for a certain period by that collective agreement. In the specific case, the employer was not bound by the collective agreement due to the fact that the parties to the collective agreement had entered a new collective agreement after the person left the organisation. In that case, the new collective agreement is not binding.

2.3 Exclusion of trade union member

Stockholm District Court, T 15871-19, 04 March 2021

On 04 March 2021, the Stockholm district court held in its judgment in case T 15871-19 that the decision of the Swedish Transport Workers' Union to exclude a member on the grounds of his political views was wrong. According to the statues, all members should 'participate in societal development founded on the equal value of all human beings'. The court found that the clause in the statutes could not objectively be interpreted as allowing for an exclusion of the member due to his sympathies for Sweden Democrat.

The judgment only dealt with the issue as a matter of statute interpretation. It is unclear whether a trade union has the right to exclude a member for his or her political views.

This particular case has been appealed by the trade union, claiming that the judgment is in breach of ILO Convention 87. The unclarity in Swedish law regarding the exclusion of trade union members means that the case may be appealed to the Supreme Court.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

In its judgments of 09 March 2021, the CJEU clarified that stand-by time shall be considered working time if the time the employee is required to appear at work is short and/or if the frequency that the employee needs to work during stand-by time is high.

In Sweden, stand-by time that the employee can spend at home is not considered to be working time. Thus, the judgments may have an impact e.g. for medical doctors, part-time fire-fighters working in rural areas and for voluntary workers (see Inghammar a., *Den perfekta stormen. Kan EU-arbetsrätten sänka Sjöräddningssällskapet? Om frivilligarbete i EU-rättslig belysning*, in *Festskrift till Rolf Dotevall*, Juristförlaget i Lund, 2020, p 293-306).

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

In its judgment of 17 March 2021, the CJEU held that rest periods must be counted together if several employment contracts between an employer and an employee have been concluded.

In Sweden, it is rare that an employer and an employee conclude several employment contracts simultaneously. In such a situation, it would probably not come as a big surprise to most Swedish employers that rest periods are to be calculated per employee and not per employment contract.

If an employer must take the employment contracts concluded with other employers into consideration, there would be consequences. This question, however, was not answered by the CJEU.

4 Other Relevant Information

4.1 Proposed unemployment insurance for part-time firefighters

An exception for the calculation of unemployment insurance for part-time firefighters has been proposed to the Unemployment Insurance Act (*lag 1997:238 om arbetslöshetsförsäkring*). The purpose of the amendment is to ensure that the service as a part-time firefighter does not reduced the unemployment insurance for part-time firefighters who have other full-time jobs. If the government proposition is passed in Parliament, the act will be enforced on 31 May 2021.

United Kingdom

Summary

(I) The government has adopted a comprehensive plan for gradually lifting the current COVID-19 restrictions.

(II) Draft legislation has been proposed to extend health and safety rights to ensure that workers will not be subjected to a detriment from 31 May 2021.

(III) Two decision of the Employment Appeal Tribunal (on transfer of undertakings and on annual paid leave) clarified the effect of the CJEU decisions in the UK.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Easing of COVID-19 restrictions

On 22 March 2021, the UK government adopted the Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021 (SI 2021/364) (Steps Regulations), which provides for a gradual easing of COVID-19 restrictions.

From Monday 29 March 2021, outdoor gatherings are extended to two households or the 'rule of six' maximum number of people gathering from multiple households, and outdoor sports facilities are allowed to reopen.

From Monday 12 April 2021, non-essential retail may open, including personal care outlets such as hairdressers. Indoor sport and recreation such as leisure centres and gyms can also open, and this also means that larger outdoor settings (e.g. zoos) will also reopen.

From Monday 17 May 2021, most social contact rules will be lifted and mixing indoors to be permitted for a maximum of two households. The hospitality sector will be able to open with the 'rule of six' applying for indoor use. Performance sport and events will also be available with some restrictions placed on maximum attendance and audience.

From Monday 21 June 2021, all legal limits on social contacts are to be removed, with remaining sectors closed before this time allowed to reopen. All restrictions will be lifted for large events as with weddings and other life events. The government will advise nearer the time regarding continued social distancing and the wearing of masks.

They apply in England and come into force on 29 March. The rules for Scotland can be found here and for Wales, here (the Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) (No. 5) Regulations 2021 (Amendment Regulations) 2021 (SI 2021/307)).

For more information on the latest COVID-19 guidance published on 29 March, see here.

1.2 Other legislative developments

1.2.1 Occupational health and safety

Draft legislation has been proposed to extend the rights currently conferred under section 44(1)(d) and (e) of the Employment Rights Act 1996 to ensure that workers will not be subjected to a detriment by his or her employer in certain health and safety cases.

It will apply from 31 May 2021.

2 Court Rulings

2.1 Transfer of undertakings

Employment Appeal Tribunal, McTear Contracts Ltd v Bennett and others, No. UKEATS/0023/19, 25 February 2021

In *McTear Contracts Ltd v Bennett and others*, the question was raised whether the Court of Justice's decision in *Govaerts* applied to service provision changes under regulation 3(1)(b) of the Transfer of Undertakings (Protection of Employment) Regulations 2006. The EAT's summary of the judgment provides:

> *"A client local authority ("N") re-tendered the work for replacement of kitchens within its social housing stock. All of the work under the previous contract had been carried out by a single contractor ("A"). A group of A's employees had worked exclusively on the contract between N and A. Latterly those employees worked in two "teams", each of which was capable of working independently of the other. When the work was re-tendered, it was split by N on geographical lines into two separate contracts which were awarded to two new contractors.*
>
> *The Tribunal's decision that there had been a service provision change under Regulation 3 of TUPE was not challenged on appeal. The Appellants submitted, however, that the Employment Tribunal had erred in its decision as to the allocation of A's employees between the two incoming contractors. It was submitted that the Tribunal had failed to consider the respective positions of the employees individually and had failed to consider that some or all of the employees may not have transferred at all. It was further submitted that the Tribunal had placed undue weight on spreadsheets prepared by A which had not been spoken to in evidence by their author.*
>
> *Between the date of the Tribunal's Judgment and the hearing of the appeal, the Court of Justice of the European Union issued its decision in* Iss Facility Services NV v. Govaerts *[2020] ICR 1115. A further ground of appeal was added by amendment based upon the* Govaerts *decision.*
>
> *Held:*
>
> *Whilst the Tribunal had correctly regarded itself as being bound at the time of its Judgment by* Kimberley Group Housing v. Hambley *[2008] IRLR 682 and* Duncan Web (Offset) Maidstone Limited v. Cooper *[1995] IRLR 633, those cases must now be read subject to Govaerts. The appeal was accordingly allowed to the extent of setting aside paragraphs 2, 4 and 5 of the Tribunal's Judgment and remitting the case to the same Tribunal to consider the application of the decision in* Govaerts *based upon such further evidence and submissions as may be necessary."*

2.2 Annual leave

Employment Appeal Tribunal, Mr G Smith v Pimlico Plumbers Ltd, No. UKEAT/0211/19/DA, 17 March 2021

In the Supreme Court case *Pimlico Plumbers Ltd and Mullins v Smith [2018],* of 13 June 2018, it was unanimously decided that a plumber, said to be self-employed in his contract, was in fact a worker. But other litigation followed on from this: during his engagement, the claimant took periods of unpaid leave. As he was considered an independent contractor by the respondent, he was not paid any holiday pay. He subsequently initiated a claim for, amongst other things, holiday pay, on 1 August 2011. On 01 August 2011, the claimant initiated a claim for, amongst other things, holiday pay. At a hearing in March 2019, the Tribunal dismissed the holiday pay claim on a preliminary jurisdictional point that it was brought out of time.

However, it did not consider that the CJEU's decision in case C-214/16, *King* entitled the claimant to bring a claim in respect of unpaid annual leave that was taken. The claimant appealed, contending that the Tribunal had erred in its interpretation of *King* and in determining that his claim was out of time.

In *Mr G Smith v Pimlico Plumbers Limited* UKEAT/0211/19/DA the EAT, dismissing the appeal, stated that

> *"the Tribunal had not erred in its interpretation of* King*. The CJEU's decision in* King *was not concerned with leave that was taken but unpaid, and there was nothing in it to suggest that the carry-over rights in respect of annual leave that is not taken (because of the employer's failure to remunerate such leave) applied to leave that was in fact taken. The Tribunal had also not erred in determining that it had been reasonably practicable for the Claimant to have brought his claim in respect of holiday pay within the relevant time limits."*

The EAT also added that the wording of Regulation 13 of the WTR 1998 did not currently reflect the position set out by the CJEU in *King*. It therefore proposed additional wording to allow a worker to carry over untaken leave where they are prevented from taking holiday due to their employer's refusal to pay them for it, and to enforce that right in the employment tribunal.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-344/19, 09 March 2021, D.J. v Radiotelevizija Slovenija, and case C-580/19, 09 March 2021, RJ v Stadt Offenbach am Main

For the UK, the present cases represent a useful clarification.

The direction of travel so far has been in favour of finding that all time is working time, so this nuancing of the decision is significant. There has been a recent Supreme Court decision, *Mencap v Tomlinson Blake,* which touched on a similar issue, albeit in the context of the National Minimum Wage. The question was whether time spent on the premises but asleep, although available in the case of an emergency, was time spent working and thus subject to the minimum wage.

As the Court of Appeal put it, sleep-in workers, who were available for work, fell within Regulation 15(1) (Regulation 32(2) of the 2015 regulations) and so their hours only counted for NMW purposes insofar as they were awake for the purposes of working. This was confirmed in the Supreme Court. As Lady Arden asserted:

> *"Be that as it may, it seems to me that, having regard to the purpose of regulation 32(2), which like its predecessors is to implement the [Low Pay Commission] recommendation about sleep-in shifts, the contemplation of the regulations in relation to time work is that a sleep-in worker cannot actually be working for NMW purposes if the arrangement is that he [or she] is to be present and sleep on the premises during his [or her] hours of work subject only to emergency calls."*

3.2 Rest period

CJEU case C-585/19, 17 March 2021, Academia de Studii Economice din Bucureşti

For the UK, this case offers a clarification of the existing rules laid down in the Working Time Regulations, especially Regulation 10.

4 Other Relevant Information

4.1 Platform work

Following *Uber BV v Aslam* [2021] UKSC 5, of 19 February 2021, Uber announced that its drivers will now be receiving the national living wage (NLW), holiday pay and pension contributions, albeit only for the time they are working, meaning the time they are transporting a passenger. This is being challenged by the Independent Workers' Union of Great Britain (IWGB).

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