Flash Reports on Labour Law June 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

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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 June 2021, extraordinary measures triggered by the COVID-19 crisis continued to play an important role in the development of labour law in many Member States and European Economic Area (EEA) countries.

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

Developments related to the COVID-19 crisis

Measures to lower the risk of infection in the workplace

All countries still have measures in place to prevent the spread of the virus in the workplace. States of emergency have been extended in several countries, including the **Czech Republic**, **Romania** and **Portugal**.

At the same time, due to an overall improvement of the situation, restrictions imposed as a result of the pandemic are progressively being lifted in countries such as **Cyprus**, **Italy**, **Denmark**, **Portugal**, **Norway**, **Slovenia** and the **United Kingdom**.

However, restrictions in connection with travel, as well as with regard to the operation of businesses and other establishments remain in force in countries such as the **Czech Republic**. In **Portugal**, Regulations (EU) 2021/953 and (EU) 2021/954, both related to the EU Digital COVID Certificate, were transposed into the legal system.

In **Belgium**, the rules requiring mandatory teleworking have been slightly relaxed. Similarly, in **Portugal**, teleworking will no longer be mandatory, but remains recommended when practically possible.

Specific health and safety measures for workplaces to reduce the risk of contagion are in place in many states such as **Belgium**, **Luxembourg** and **Denmark**. In **Austria**, employees particularly at risk from COVID-19 may be relieved from their duty to work for the employer while continuing to receive full remuneration.

There has, however, been some easing of workplace restrictions. In the **Czech Republic**, mandatory testing of employees ended in June 2021.

Measures to alleviate the financial consequences for businesses and workers

To alleviate the adverse effects of the COVID-19 crisis, state-supported short-time work, temporary layoffs or equivalent wage guarantee schemes remain in place in many countries. Previously enacted schemes have been extended in **Norway** and **Italy**. In June 2021, short-time work schemes have been adopted, amended or extended in **Austria**, the **Czech Republic**, **Romania**. In **Slovenia**, it is expected that this measure will be extended.

In the **Netherlands**, the emergency package offering employers the possibility to receive compensation for wage costs by means of a subsidy has been extended. Similarly, in **Ireland**, the Employment Wage Subsidy Scheme has been approved by the government to run until the end of 2021.

In **Iceland**, a single payment has been issued to those who have been unemployed for 14 months or longer.

Other developments

In **Luxembourg**, to deal with the shortage of skilled labour in the management of the health crisis, it was decided to temporarily freeze the income of those who took early retirement, so that they would have a financial incentive to return to work.

In **Italy**, workers in the healthcare sector are now liable for the death or personal injury of patients only in case of gross negligence.

Finally, in **Portugal**, the exceptional regime for hiring workers to the National Health Service was extended until 31 August 2021.

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

Topic	Countries
Easing of COVID-19 restrictions	CY DK IT NO PT UK
Benefits for workers / self-employed prevented from working	BE IS IE IT NO SI
Health and safety measures	AT CZ DK LU PT
Short-time work	AT CZ RO SI
Employer subsidies	IE NL SI
Healthcare workers	IT LU PT
State of emergency	PT RO SI
Travel ban / restrictions to free movement	CZ
Teleworking	BE

Other developments

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

Posting of workers

In **Croatia**, a new Ordinance has updated the posting of workers legislation, implementing Directive 2014/67/EU.

Similarly, in **Malta**, the Posting of Workers Regulations have been amended.

In **Romania** as well, new rules on the posting of workers have been approved, transposing Directive (EU) 2018/957 into legislation.

Occupational safety and health

In **Croatia**, an Ordinance implementing Directive 1990/269/EEC, concerning the manual handling of loads, and Directive 1990/270/EEC, concerning work with display screen equipment, have been issued.

In **Estonia**, the Confederation of Trade Unions of State and Local Government Employees and the Ministry of Finance agreed on the recommended principles for maintaining mental health in the work environment, which shall guide both parties in their activities.

In **Spain**, the health and safety regulation on risks of carcinogens was modified to implement Directive (EU) 2019/130 on the protection of workers from the risks related to exposure to carcinogens or mutagens at work.

Atypical Work

In **Finland**, the Seasonal Workers Act has been amended to make it easier for seasonal workers to change employers.

In **Germany**, the Federal Labour Court has made a request for a preliminary ruling of the CJEU regarding the application of the Act on Temporary Agency Work in the Public Service.

In **Greece**, a protective framework has been established for platform workers: trade union rights are now guaranteed for the self-employed. Furthermore, the platform is responsible for the health, welfare and safety of any type of worker.

Similarly, in **Slovenia**, amendments to the Road Transport Act introduced the legal basis for digital platforms in passenger transport, such as Uber.

Fixed-term work

In **Belgium**, according to the Constitutional Court, a worker who has been employed on a succession of fixed-term and replacement contracts for two years or more must be considered as having concluded an employment contract of indefinite duration.

In **France**, the Court of Cassation clarified the method for calculating the back pay corresponding to the period between different fixed-term employment agreements.

In **Ireland**, the High Court has held that a permanent employee, 'acting up' in a higher grade on successive fixed-term contracts is protected by the fixed-term work legislation.

In **Italy**, the Court of Cassation ruled that as publicly owned companies can only hire workers through public competition, an illegitimate fixed-term contract stipulated with such a company cannot be converted into a permanent one.

Working time

In **Finland**, the Labour Court has issued three decisions according to which the standby time of firemen, who were working as unit chiefs, was to be considered working time.

In **France**, the Court of Cassation has ruled on the definition of working time.

In **Greece**, several changes concerning working time have modified the limit of overtime work to 150 hours per year, also allowing for working time flexibility at the request of the employee.

Work-life balance

In **Greece**, Directive (EU) 2019/1158 has been transposed, introducing major changes.

In **Luxembourg**, a new draft bill has introduced changes to parental leave and family allowances, bringing Luxembourg's legislation in line with two recent CJEU decisions in C-802/18 and C-129/20.

Teleworking

In **Greece**, new rules on teleworking have been approved as part of the overarching labour law reform. The right to disconnect in the event of teleworking has been recognised.

In **Latvia**, an amendment to the labour law provides the definition of teleworking and defines the related obligations.

Other aspects

In **France**, A bill authorising the ratification of the Violence and Harassment Convention (No. 190) of the International Labour Conference was adopted. The same convention has also been ratified in **Greece**.

In **Lithuania**, the obligation to inform and consult the works council in case of restructuring has been amended.

In **Spain**, the system of youth guarantee was updated to comply with the relevant Council Recommendation of 30 October 2020. Also, the Supreme Court stated that no transfer of undertaking took place when a hotel, which contracted out the cleaning of its premises to a private company, decided to terminate its contract with that company and to undertake the cleaning of those premises itself using its own staff.

In **Norway**, the Anti-Discrimination Tribunal has been given extended authority in disputes concerning whistleblowing.

In the **Netherlands**, a new National Agreement promoted by the Social Economic Council contains several proposals related to EU labour legislation.

In **Slovenia**, the legislation on regulated professions was amended with the rules on the proportionality assessment, transposing EU Directive 2018/958.

Table 2: Other major developments

Topic	Countries
Occupational safety and health	HR EE ES SE
Fixed-term work	BE FR IE IT
Labour migration	AT BG DE CZ
Transfers of undertakings	FI LU ES
Working time	FI FR EL
Collective bargaining	DE SI SE
Dismissal	FI EL LU
Equal treatment	CZ LU ES
Posting of workers	HR RO
Teleworking	EL LV
Work-life balance	EL LU
Foreign workers	DE SI
Strike	EL SI
Violence and harassment at work	FR EL
Platform work	EL SI
Applicability of collective agreements	FI NO
Supply chains	DE
Temporary agency work	DE
Professional qualifications	SI
Labour Inspectorate	EL
Information and consultation	LT
Youth guarantee	ES
Seasonal workers	FI

Implications of CJEU Rulings

Fixed-term work

This Flash Report analyses the implications of three CJEU rulings on fixed-term work.

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

The CJEU's findings in this case concerned consecutive fixed-term contracts for vacancies in the public sector.

In this regard, a **large majority** of the reports indicate that this case has no implications for national legislation, which adequately addresses the abuse of successive fixed-term contracts of employment in the public sector, where the conversion of fixed-term contracts into the employment contract of indefinite duration in case of abuse is also possible.

In **Portugal**, however, in the case of civil servants, the infraction of the abovementioned measures does not lead to the conversion of the term employment contract into a permanent one: for this reason, it is not clear whether this legal framework is compatible with clause 5 of the Framework Agreement.

Furthermore, the ruling has some implications in **Belgium**, where fixed-term employment contracts are automatically renewed pending the completion of selection procedures to fill vacant posts of public sector employees. However, the regulations do not specify a precise deadline for the completion of such procedures, and this does not seem to suffice as an objective justification.

In **Greece**, the judgment is of relevance as it clarifies that the grounds linked to the state budget do not exclude the need to provide measures to avoid abuses.

In **Spain**, the abusive use of fixed-term contracts in public administration does not lead to the conversion of the temporary work contract into a permanent one. On 28 June, the Supreme Court announced a change of its previous doctrine with the aim of adapting this ruling: from now on, these replacement contracts may not exceed three years. If the selection process does not start then, the replacement worker will become an 'indefinite but not permanent' worker: the worker could lose his/her job if the vacancy is filled in the future, but he/she has the right to severance pay.

CJEU case C-326/19, 03 June 2021, Ministero dell'Istruzione, dell'Università e della Ricerca

This case concerned fixed-term employment contracts of university researchers in the public sector.

In this regard, the **large majority** of reports indicate that this ruling has no implications for national legislation, as there is no national regulation comparable to the Italian one in question (e.g. **Belgium**, **Bulgaria**, **Ireland**), and university research and teaching staff, like all other public servants, enjoy the benefit of all of the provisions on fixed-term work legislation, which provides measures to prevent abuse arising from the use of successive fixed-term contracts (maximum duration or maximum number of renewals).

While **Latvia** does not have a legal regulation similar to that analysed in the present case, Latvian legislation regulating work in academic positions apparently contravenes Directive 1990/70/EC, as rules on fixed-term contracts do not apply to all groups of academic staff.

Similarly, in **Luxembourg**, the conformity of the rules on the conclusion of fixed-term contracts with academic researchers with Directive 1999/70/EC is debated: contracts in Luxembourg may be renewed more than twice, without the Labour Code providing for a maximum number of renewals, and can reach a total duration of 60 months, including renewals.

In **Germany**, there is a debated provision allowing all fixed-term employment contracts concluded for more than one quarter of the regular working hours with a German higher education institution to be counted towards the permissible fixed-term period, as the maximum fixed-term limits applicable under European law can become partially meaningless under certain circumstances.

Other countries, such as the **Czech Republic**, contain measures similar to that applied in Italy, which also seem in line with the ruling. Similarly, in **Iceland**, under special circumstances, temporary employment contracts for academic positions can be extended by up to two years beyond the five-year limit.

CJEU case C-550/19, 24 June 2021, Obras y Servicios Públicos and Acciona Agua

This ruling concerned the conformity of the Spanish regulations on fixed-term *'fijos de obra'* employment agreements (in the field of construction) with the European Framework Agreement on Fixed-term Work.

In **Spain**, the relevant legislation will have to be modified to prevent abuse.

At the same time, a **large majority** of the reports indicates that there is no figure similar to *'fijos de obra'* in their national legislation, which does not contain exceptions such as those provided for in these contracts, nor other sectoral derogations.

In **France**, the *'contrat de chantier'* also allows the employer to recruit an employee for the duration of a construction project or other operation. However, this is a specific employment agreement to which the national provisions on fixed-term agreements do not apply, and there are no rulings on the application of the European Framework Agreement to these contracts.

The Court also held that in case of a transfer of undertaking, the new employer, according to Article 3 of Directive 2001/23/EC, is only required to respect the rights arising from the most recent employment contract entered into with the former employer (not all former fixed-term employment contracts), as long as this does not place the employee in a worse position solely because of the transfer.

In this regard, several reports (e.g. **Norway**, **Latvia**, **Lithuania**) point out that this interpretation will have to be taken into consideration when interpreting the relevant provisions in national legislation.

Austria

Summary

(I) The short-time work scheme has been amended, now running for another year to support businesses that have been hit particularly hard by COVID-19. The provisions on the special treatment of employees who are especially vulnerable to COVID-19 will expire on 30 June 2021.

(II) A decision of the Supreme Court dealt with the transnational mobility of workers and service times to be taken into account for the calculation of an anniversary bonus.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Short-time work scheme

The Austrian Corona Short-Time Work Scheme has been amended by the social partners to adapt to the current, largely positive economic developments. The Corona Short Time Work Scheme Phase 5 applies from 01 July 2021 to 30 June 2022 for short-time work projects of a maximum of 6 months each.

Phase 5 is partially designed to target businesses that have been hit particularly hard (more than 50 per cent drop in turnover in the 3rd quarter of 2020 compared to the 3rd quarter of 2019 or businesses with an entry ban). Businesses that have not been affected particularly hard may continue or introduce short-time work, though in that case, the public subsidy is partly reduced. Minimum working time under the short-time scheme is 50 per cent or 30 per cent (in the case of businesses hit particularly hard), yet exceptions in individual cases are still possible.

See here for information provided by the Chamber of Commerce, here for information by the Chamber of Labour and here for information by the Labour Market Services.

1.1.2 COVID-19 risk group

The current Austrian legislation allows doctors to issue patients a certificate as proof that they belong to a specific risk group of persons who could become seriously ill or potentially face deadly consequences if they contract COVID-19 (§ 735 ASVG). Employees who have been issued such a certificate, may—unless working from home (WFH) or the creation of an extremely low risk working environment is possible—be relieved from their duty to work for the employer while continuing to receive full remuneration. The employer is refunded the costs for the employee's remuneration.

This scheme will currently not be renewed and expires on 30 June 2021 as regulated in § 735 Abs 3 ASVG.

See here for a press article on OTS.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Anniversary bonus and transnational mobility

Austrian Supreme Court of 29 April 2021, 9 ObA 42/21y

The plaintiff worked as a registered nurse at a hospital in the Federal State of Upper Austria. Her employment relationship was regulated by the Lower Austrian Act on State Contractual Employees (*NÖ Landes-VertragsbedienstetenG* – NÖ LVBG) and provides for an anniversary bonus for 30 years of service. According to the Act (§ 54 (3) a NÖ LVBG), however, only the periods spent in a training or employment relationship with the Federal State of Lower Austria have to be taken into account.

The Court of Appeals considered this provision with regard to the CJEU's decision in case C-514/12, 05 December 2013, *SALK*, to be contrary to EU law. However, based on the reference date of 13 February 1979, the plaintiff had already completed her 30th year of service in 2009, so that the claim was time-barred.

The Supreme Court upheld this decision in both points, although the first point was only indirectly upheld. Concerning the second point, i.e. the issue of the claim being time-barred, the Court argued that the plaintiff knew that her employer had not taken all of her previous service times into account as she was informed of this fact in 2007. She therefore had the possibility to raise the claim in due time.

This decision again shows that a number of Austrian federal states have not taken the *SALK* decision of the CJEU into account duly and have not changed their laws on public servants accordingly. The Austrian Supreme Court consistently applies this ruling and takes service times abroad into account as well (see April 2021 Flash Report on the Federal State of Styria). This is not a satisfactory situation, however, as it is not transparent and employees must assert their claims in court.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

This judgment has no implications, as Austrian law is not comparable or similar to the legal provisions discussed before the CJEU: Austrian employment law in the public sector limits the use of fixed-term contracts: the general notion is that a fixed-term contract may only be extended once, for a maximum period of three months (§ 4 Abs 4 VBG). This general rule does not apply in case an employee is hired to replace another employee (§ 4a Abs 2 VBG). In that case, repeated fixed-term contracts are possible for a maximum period of five years (§ 4a Abs 4 VBG). Any fixed-term contract that exceeds these expressly defined limits is understood to be a permanent contract (§ 4 Abs 4 VBG, § 4a Abs 4 VBG).

Austrian employment law in the private sector does not contain an explicit legal regulation on consecutive fixed-term employment contracts. While the conclusion of a first fixed-term contract is permitted, the judiciary deals with consecutive fixed-term employment contracts by referring to § 879 ABGB (Austrian Civil Code), a provision that declares contractual agreements concluded *contra bonos mores* or null and void. Based on this provision, the judiciary concludes that unless a consecutive fixed-term contract is justified in individual cases for special social or economic reasons that lie in the person of the employee(s), a continuous employment relationship exists from the second, unjustified fixed-term contract onwards (e.g. OGH 9 Ob A 118/88).

CJEU case C-550/19, 24 June 2021, Obras y Servicios Públicos and Acciona Agua

Austrian employment law in the private sector does not contain a general explicit legal regulation on consecutive fixed-term employment contracts. Consecutive fixed-term contracts with the same employer are only justified in individual cases by special social or economic reasons that lie in the person of the employee(s). If such justification cannot be provided, a continuous employment relationship exists from the second, unjustified fixed-term contract onwards (e.g. OGH 9 Ob A 118/88).

Yet legislation for certain, specific public entities exists, such as the Austrian Public Broadcast (ORF) or Austrian universities (UG). § 32 ORF-G allows for unlimited consecutive fixed-term contracts, though severance pay must be paid in case the consecutive fixed-term contracts end after more than five years. Moreover, the collective bargaining agreement (CBA) additionally limits fixed-term contracts (§ 4 ORF CBA). § 109 UG (see below for the text in English) allows consecutive fixed-term contacts at universities, with a special provision for employees working externally funded projects. The latter has been under the scrutiny of the CJEU for permitting different maximum limits for full-time and part-time staff under consecutive fixed-term contracts (C-274/18). § 109 UG has recently been extensively amended, entering into force on 01 October 2021 (§ 109 UG nV).

CJEU case C-326/19, 03 June 2021, Ministero dell'Istruzione, dell'Università e della Ricerca

The decision supports the approach the Austrian legislator took in § 109 of the University Act concerning fixed-term employment. It reads as follows (unofficial translation by the author):

> *"(1) Employment relationships may be concluded for an indefinite or definite period. Employment relationships for a definite period shall be limited to a maximum of six years, otherwise the employment contract shall be legally ineffective, unless otherwise provided for in this Federal Act.*
>
> *(2) Multiple fixed-term contracts concluded in immediate succession shall only be permissible in the case of employees employed within the framework of third-party funded projects or research projects, in the case of staff employed exclusively in teaching and in the case of substitute staff. The total duration of such directly successive employment relationships of an employee may not exceed six years, and eight years in the case of part-time employment. A further one-time extension of up to a total of ten years, and in the case of part-time employment of up to a total of twelve years, shall be permissible if objectively justified, in particular for the continuation or completion of research projects and publications.*
>
> *(3) If an employee within the meaning of § 100 changes his/her employment, a single new fixed-term contract of up to a total of six years, and in the case of part-time employment of up to a total of eight years, shall be permissible, notwithstanding para. 2, whereby the fixed terms under para. 1, 2 and 3 shall be added together accordingly. The maximum limits of para. 2 may not be exceeded. Periods of employment as a student assistant shall not be taken into account.*
>
> *(4) Another employment relationship within the meaning of para. 3 shall be deemed to exist, in particular if the change leads to a further career step (e.g. post-doc position) or if the change is made from or to a position within the framework of a third-party funded research project."*
>
> This provision will be amended from 1 October 2021 onwards (BGBl I 93/2021) and will then read as follows:

"(1) Employment contracts may be concluded for an indefinite or definite period. Employment contracts for a definite period shall be limited once up to a maximum of six years, unless otherwise provided for in this Act.

(2) Two extensions or two renewals of fixed-term employment contracts of persons belonging to the academic and artistic staff of universities under § 94 (2) shall be permissible up to a total duration of eight years, taking into account para. 1.

(3) Notwithstanding the permissible total duration under paras. 1 and 2, employment contracts concluded mainly for the purpose of carrying out third-party funded projects or research projects shall not be taken into account when determining the maximum permissible number of fixed-term employment contracts.

(4) If an employee changes to an employment relationship pursuant to § 94 (2) 1, a single new fixed-term contract shall be permissible for a period of up to six years.

(5) In the case of replacement staff, a multiple extension or a multiple renewal of employment contracts shall be permissible up to a total duration of six years.

(6) In the case of staff used exclusively for teaching purposes, a multiple extension or a multiple renewal of employment contracts within eight academic years shall be permissible.

(7) Employment relationships which also involve the completion of doctoral studies shall not be taken into account for the maximum permissible total duration and the maximum permissible number of employment relationships up to a period of four years. Employment relationships as student assistants shall also not be taken into account.

(8) Periods pursuant to § 20(3) 1 of the Collective Agreement for University Employees concluded pursuant to § 108 (3) in the version in force on 1 May 2021 shall not be taken into account.

(9) In determining the maximum permissible total duration of employment relationships pursuant to paras 1, 2, 5 and 6, all employment relationships with the university shall be taken into account, irrespective of whether the employment relationships are immediately consecutive."

Both versions of § 109 contain different measures which correspond to those provided for in Clause 5(1)(b) and (c) of the Framework Agreement, i.e. the maximum total duration of successive fixed-term employment contracts or relationships and the number of renewals of fixed-term contracts. It therefore seems that they include sufficient measures to prevent the abuse of fixed-term contracts in the university context.

4 Other Relevant Information

Nothing to report.

Belgium

Summary

(I) The rules requiring mandatory teleworking have been slightly relaxed.

(II) The draft of a new federal law envisages several measures to mitigate the pandemic's negative fiscal and socio-economic impact.

(III) According to the Constitutional Court, a worker who has been employed on a succession of fixed-term and replacement contracts for two years or more must be considered as having concluded an employment contract of indefinite duration.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Teleworking

The Ministerial Decree of 04 June 2021 amended the Ministerial Decree of 28 October 2020 containing urgent measures to limit the spread of the coronavirus COVID-19 (see *Moniteur belge*, 04 June 2021, p. 56940).

As of 09 June 2021, the applicable rules on teleworking are slightly modified.

This is the result of an amendment to the Ministerial Decree of 28 October 2020, which contains the bulk of preventive measures related to the coronavirus. The 'new' rules apply until 30 June 2021.

Teleworking remains mandatory for all companies. A certificate from the employer is still required for those who cannot perform telework. If the trend remains favourable, teleworking will no longer be compulsory from 01 July 2021. However, it will continue to be recommended. As of 09 June 2021, employers can schedule returns to work for employees and for those employees for whom teleworking was mandatory. This must be mutually agreed, i.e. employees cannot be required to return to work by the employer. It follows that an employee who wants to return to work cannot demand his or her employer to organise returns to the work premises. The decision to organise returns must be made on the basis of social dialogue within the company.

Prevention measures remain mandatory.

The obligation to introduce preventive measures to enforce the rules of social distancing and to offer a maximum level of protection for employees remains in force. Such preventive measures are health and safety requirements of a material, technical and/or organisational nature, as defined in the 'Generic guide for preventing the spread of COVID-19 at work' of the Federal Ministry of Labour.

1.1.2 Relief measures for businesses and workers

A draft law of 28 May 2021 containing a series of new support measures to mitigate the negative fiscal and socio-economic impact of the COVID-19 pandemic is pending in the Federal Chamber of Representatives (Parl. Doc. Chamber of Representatives, 2020_2021, No. 55-2002/001).

The draft law aims to introduce new support measures to mitigate the negative socio-economic impact of the COVID-19 pandemic in the third quarter of 2021.

- Target group reductions of social security contributions:

The emergency 'corona measures' forced many companies to close down temporarily, in whole or in part. This compulsory closure had and continues to have

a severe impact on businesses' turnover, and their viability. Many companies that were not forced to close have, however, also suffered from the corona crisis. Moreover, there is concern about redundancies in some companies once the existing support measures (such as the flexible temporary unemployment measures) are terminated. Therefore, to support the chance of re-employment among workers, it has been decided to grant a flat-rate reduction of companies' social security contributions to (re-)increase their rate of employment.

- Employers in the hotel, restaurant and catering industry who employ manual workers shall contribute 15.84 per cent (of the workers' salary) to the statutory holiday fund of blue collar workers:

A part of that contribution amounting to 10.27 per cent is only due annually on 31 March of the year following the holiday year and is paid to the National Social Security Office no later than 30 April of that same year. The remaining part of the contribution (5.57 per cent) is collected quarterly, together with the other contributions.

To support the hotel and catering industry, which has been hit particularly hard, the contribution has been reduced from 15.84 per cent to 5.57 per cent for the four quarters of 2020 for employers in the hotel and catering industry. The part of the contribution that is paid annually has been set at 0 per cent.

- Extension of possibility of student work in 2021:

Students can work 475 hours per year at reduced social contributions. However, the hours worked by students in the third quarter of 2021 will not be counted against the quota of 475 hours.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Fixed-term work

Constitutional Court, No. 93/2021, 17 June 2021

In a recent judgment, the Belgian Constitutional Court ruled that job stability must also be ensured in case of succession of fixed-term and replacement employment contracts.

The Employment Contracts Law of 3 July 1978 contains two provisions that limit the use of temporary contracts:

According to Articles 10 and 10bis), it is in principle prohibited to conclude several successive fixed-term contracts (exception: if justified by the nature of the work or for other lawful reasons). However, it is possible to conclude up to four successive fixed-term contracts, with each contract lasting at least three months and for a total duration of two years (subject to prior consent of the Labour Inspectorate, this limit is increased to three years for fixed-term contracts with a duration of at least six months each). If one of these restrictions or conditions is not respected, the last contract will be considered to have been concluded for an indefinite period.

On the other hand, replacement employment contracts (Article 11ter), which are concluded to replace a worker whose contract has been suspended, can be fixed or indefinite, with the possibility of providing for more detailed rules which, under certain conditions, can derogate from the rules on the duration of the contract and the notice period. The duration of a replacement contract may not exceed two years, and if the parties have concluded several successive replacement contracts without a break, the total duration of these successive contracts may not exceed two years. If the two-year

period is exceeded, the contract will be deemed to have been concluded for an indefinite period.

The dispute before the Appeal Labour Court of Ghent concerned the conditions of dismissal of an employee who had been employed by the Flemish Community under a replacement contract and subsequently, over several years, under fixed-term and replacement contracts, whereby the limit of each contract type was not exceeded, yet the total duration of temporary contracts exceeded two years. The claimant, who had been dismissed under the derogatory terms of a replacement contract, claimed compensation calculated in accordance with the rules applicable to contracts of indefinite duration.

In this judgment of 17 June, the Constitutional Court pointed out that the legislator's aim was to ensure the employee's job stability and to protect the employee from abuse of successive temporary employment contracts. Taking the objective of these two provisions into account, the Constitutional Court asserted that "*it is not reasonable that the guarantee of job stability laid down in the Constitution should not apply in the case of a succession of fixed-term employment contracts and replacement contracts*". The Constitutional Court thus ruled that the two articles of the Employment Contracts Law referred to above violate the principle of equality and non-discrimination in the law (Articles 10 and 11 of the Constitution), in that they do not apply to a succession of fixed-term and replacement contracts. Pending action taken by the legislator, the Constitutional Court ruled that the Appeal Labour Court must put an end to this unconstitutionality by applying the rules on contracts of indefinite duration in favour of workers who have been employed on a succession of fixed-term and replacement contracts for two years or more.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-326/19, 03 June 2021, Ministero dell'Istruzione, dell'Università e della Ricerca

This CJEU ruling shows the topicality of the problem of successive employment contracts or relationships of university researchers in university education.

The CJEU decided that the Framework Agreement on Fixed-term Employment Contracts must be interpreted

> *"as not precluding national legislation under which provision is made, in respect of the recruitment of university researchers, for the conclusion of a fixed-term contract for a period of three years, with a single possibility of extension, for a maximum period of two years, by making the conclusion of such contracts subject, first, to the condition that resources are available 'for planning for the purposes of carrying out research, teaching, non-curricular activities and student service activities', and, second, that such contracts are extended on condition that there is a 'positive appraisal of the teaching and research activities carried out', without it being necessary for those rules to define objective and transparent criteria making it possible to verify that the conclusion and renewal of such contracts do indeed meet a genuine need, and that they are likely to achieve the objective pursued and are necessary for that purpose".*

This 'Italian' decision is not directly relevant to the Belgian legal system because there is no comparable regulation. Nevertheless, the objective reasons justifying the renewal of fixed-term employment contracts for researchers in universities, such as the financial resources for carrying out research and the positive appraisal of previous teaching and research, are also used in Belgium.

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

The second CJEU decision concerned a Spanish case relating to an ad interim fixed-term contract in the public sector, which was automatically renewed because no candidate passed the competition organised to permanently fill the vacant position. The ruling is of relevance for the Belgian legal order because even an automatic extension of the initial fixed-term employment contract may fall within the scope of the EU Framework Agreement on successive fixed-term contracts, although strictly speaking, it does not constitute a succession of two or more fixed-term employment contracts. Fixed-term employment contracts are automatically renewed pending the completion of selection procedures to fill vacant posts of public sector employees, but the regulations do not specify a precise deadline for the completion of such procedures, and this does not suffice as an objective justification for the European Framework Agreement on successive employment relationships.

CJEU case C-550/19, 24 June 2021, Obras y Servicios Públicos and Acciona Agua

The third CJEU ruling is of relevance for fixed-term employment contracts in case of a transfer of undertaking. In that context, it should be noted that in essence, the fact that employees had been transferred following the re-awarding of a public contract, with the transferee taking over a major part of the staff which the outgoing undertaking had assigned to perform that particular public contract, does not preclude Directive 2001/23 on the transfer of undertakings from being applicable. The fact that the transfer resulted from a unilateral decision of a public authority rather than from an agreement does not render Directive 2001/23 inapplicable. The CJEU clarified that Directive 2001/23 must be interpreted as not precluding national legislation under which, in the event of a transfer of employees under a public contract, the rights and obligations of the transferred worker—which the incoming undertaking is required to respect—are limited exclusively to those arising from 'the last' contract concluded by that worker with the outgoing undertaking, provided that the application of that legislation does not have the effect of placing that worker in a less favourable position solely as a result of the transfer, without the incoming undertaking being bound in principle by any previous employment contract, particularly for the purpose of taking over the years of service completed.

4 Other Relevant Information

Nothing to report.

Bulgaria

Summary

The legal regulation of labour migration and labour mobility in Bulgaria has been amended.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Labour migration and mobility

The Council of Ministers issued Decree No 199 of 17 June 2021 on supplementing and amending the Regulation for Supplementing the Labour Migration and Labour Mobility Act (promulgated in State Gazette No. 52 of 22 June 2021). It includes some documents and requests for information by the Employment Agency.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

As noted in the comments to CJEU case C-760/18, 11 February 2021, *M.V. and Others* (see February 2021 Flash Report), Bulgarian labour legislation explicitly establishes cases of admissibility of fixed-termed employment contracts (Article 68 and 114a of the Labour Code):

- for a definite period which may not be longer than three years, insofar as a law or an act of the Council of Ministers does not provide otherwise;
- until completion of specific work;
- for temporary replacement of a worker who is absent from work;
- for work in a position that is to be filled through a competitive examination;
- for a certain term of office, where such has been specified for the respective body;
- for agricultural or tobacco production for one-day work, but not more than for a total of up to 90 days within one calendar year.

One of the short-term contracts similar to the case C-726/19 is the contract for work in a position that is to be filled through a competitive examination (Article 68, para. 1, item 4 of the Labour Code). This is only one employment contract, and lasts until a worker passes the competitive examination and starts working. The workers under such fixed-term contracts have the same rights and obligations as workers under an employment contract of indefinite duration. They may not be treated in a less favourable manner than comparable permanent workers engaged in the same or similar work at the enterprise solely because of the fixed-term nature of their employment relationship,

unless the law stipulates that certain rights are contingent on the qualifications possessed or the skills acquired. Where no permanent workers are engaged in the same or similar work, they may not be treated in a less favourable manner than the rest of the workers employed under an employment contract of indefinite duration (Article 68, para. 2 of the Labour Code).

This contract is terminated when the worker who has won the competitive examination commences his or her work (Article 325, para. 1, item 8 of the Labour Code). This means that a situation like the one in Spain does not exist in Bulgaria.

CJEU case C-326/19, 03 June 2021, Ministero dell'Istruzione, dell'Università e della Ricerca

There is no position of 'academic researcher' in Bulgaria. According to Article 2, para. 3 of the Development of the Academic Staff in the Republic of Bulgaria Act, the existing academic positions are: assistant professor; chief assistant professor; associated professor; and professor. They are occupied on the basis of a competition and election. Only the academic position of assistant may be filled by a fixed-term employee for a term of 4 years in accordance with the rules of the Labour Code. Such a contract may only be concluded once.

CJEU case C-550/19, 24 June 2021, Obras y Dervicios Públicos and Acciona Aqua

There is no Bulgarian legislation specifying an exception for employment under a fixed-term employment relationship as that analysed in case C-550/19. It is possible to conclude a fixed-term employment contract until the completion of specific work (Article 68, para. 1, item 2 of the Labour Code). Such contracts are terminated upon completion of the relevant assignment (Article 325, para. 1, item 4 of the Labour Code). The Supreme Court of Cassation has ruled that at the conclusion of such an employment contract, the work must be clearly defined in terms of its type and volume. If this is not done, the employment contract will be treated as one of indefinite duration.

Bulgarian labour legislation (Articles 123—123d of the Labour Code) establishes the protection of workers in case of change of the employer:

- due to the formation of a new enterprise;
- acquisition of one enterprise by another;
- distribution of the operations of one enterprise among two or more enterprises;
- transfer of an independent part of one enterprise to another;
- change of the legal form of the business organisation;
- change in ownership of the enterprise or of an independent part thereof;
- cession or transfer of activity from one enterprise to another, including transfer of tangible assets;
- rental or lease of the enterprise or of an independent part thereof.

The rights and obligations of the former employer that arise from the employment relationships existing on the date of the transfer are transferred to the new employer. There are no limitations to workers' rights in relation to the new employer.

4 Other Relevant Information

Nothing to report.

Croatia

Summary

(I) A new Ordinance has updated the posting of workers legislation, implementing Directive 2014/67/EU.

(II) An Ordinance implementing Directive 1990/269/EEC, concerning the manual handling of loads, and Directive 1990/270/EEC, concerning work with display screen equipment, has been issued.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Posting of workers

Based on the Act on Posting of Workers to the Republic of Croatia and Cross-Border Implementation of Decisions on Fines of 2020, the Minister of Labour, Pensions, Family and Social Policy, with the prior consent of the Minister of Foreign and European Affairs, has issued the Ordinance on the procedure for the general assessment of the temporary work of posted workers and the temporary undertaking of economic activities of the employer in the Republic of Croatia (see Official Gazette No 62/2021). The Ordinance transposes Directive 2014/67/EU into Croatian legislation. It stipulates the inspection activities of working conditions and safety at work, carried out by the state administrative bodies that implement special regulations on working conditions in the case of posting of workers to the Republic of Croatia. It regulates, among others, the assessment of whether the posted worker is performing work in the Republic of Croatia for a limited time, i.e. to determine that the Republic of Croatia is not the country in which the worker regularly works. Furthermore, it regulates the assessment of the temporality of economic activities of the employer in the Republic of Croatia.

1.1.2 Occupational health and safety

The Ordinance on protection of workers exposed to statodynamic, psychophysiological and other efforts at work (Official Gazette No 73/2021) implements Directive 1990/270/EEC into Croatian legislation. It regulates the obligations of employers related to assessments of risks in manual handling of loads, performing repetitive tasks and static efforts, psychophysiological risks, as well as risks related to work performed with computers. Furthermore, in the risk assessment, the employer is required to determine the jobs in which the employee is exposed to risks to sight and / or speech.

When this Ordinance enters into force, the Ordinance on occupational safety in manual handling of loads (Official Gazette 42/2005) and the Ordinance on safety and health at work with computers (Official Gazette 69/2005) shall cease to be valid.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-726/19, 3 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

In the public sector, civil servants need to be distinguished from public servants. Fixed-term work contracts of civil servants are regulated in the Civil Servants Act of 2005 (last amended in 2019). This Act contains mechanisms for preventing the abuse of successive fixed-term employment relationships. There must be justified reasons for concluding a fixed-term civil service contract. According to Article 61(1) of the Civil Servants Act, for the performance of temporary jobs or jobs whose scope has temporarily increased, but which are not of a permanent nature, as well as for the purpose of replacing an absent civil servant for a longer period, persons may be admitted to the civil service for a fixed-term period, i.e. until the return of the absent civil servant. Furthermore, the maximum duration of fixed-term civil service for the performance of temporary work or work whose scope has temporarily increased is limited, i.e. it cannot last more than one year (Article 61(5) of the Civil Servants Act). However, there are exceptions specified in Article 61(6) of the Civil Servants Act: a person may be admitted to a fixed-term civil service that lasts more than one year:

- for the purposes of working on a project financed from European Union funds or programmes for the duration of the project;
- for the purpose of performing tasks related to the execution of assumed international obligations of the Republic of Croatia or for performing the tasks of an official who has been temporarily seconded to execute assumed international obligations, until completion of these international obligations;
- for the purpose of performing tasks related to the execution of obligations related to special programmes of the government, until the completion of those obligations.

Although, there is a provision which states that fixed-term civil service cannot be converted into permanent civil service (Article 61(14) of the Civil Servants Act), it seems that there are sufficient mechanisms for preventing the abuse of fixed-term employment relationships, as explained above.

On the other hand, public servants can conclude fixed-term contracts as well. The Labour Act of 2014 (last amended in 2019) applies to their employment contracts, unless otherwise provided by another law. Article 12 of the Labour Act provides for objective reasons for the successive conclusion of fixed-term contracts and their maximum duration. The total duration of all successive fixed-term employment contracts, including the first employment contract, may not last for more than three years, unless this is necessary for the replacement of a temporarily absent worker or is permitted by law or collective agreement for some other objective reason (Article 12(3) of the Labour Act). Furthermore, in case of abuse of successive fixed-term employment contracts, i.e. when the fixed-term contract is concluded contrary to the provisions of the Labour Act or if the employee continues to work for the employer after the expiration of the period for which the contract was concluded, it is deemed to have been concluded for an indefinite period.

The judgment of the CJEU in this case has no implications for Croatian law.

CJEU case C-326/19, 03 June 2021, Ministero dell'Istruzione, dell'Università e della Ricerca

The Act on Scientific Activity and Higher Education of 2003 (last amended in 2018) regulates the fixed-term employment contracts of researchers. With persons elected to

scientific, associate and professional titles, who work on a project of limited duration, the employment contract is concluded for a definite period, namely for the duration of the project or the part the person is assigned to carry out. It is possible to conclude successive fixed-term employment contracts with persons working on a project of limited duration for more than 3 years, if this is justified by objective project reasons, i.e. for reasons of timely and quality implementation of the project or part of the project the person has been assigned to carry out, provided that the total duration of all successive fixed-term employment contracts may not exceed a continuous period of more than 6 years (Article 42(6) of the Act on Scientific Activity and Higher Education). Furthermore, research assistants can conclude a fixed-term employment contact for a duration of 6 years (Article 97(3) of the Act on Scientific Activity and Higher Education). However, the conclusion of successive fixed-term contracts is provided solely for university teachers who have reached pensionable age, i.e. who are 65 years old (Article 102(8) of the Act on Scientific Activity and Higher Education).

The judgment of the CJEU in this case has no implications for Croatian law.

CJEU case C-550/19, 24 June 2021, Obras y Servicios Públicos and Acciona Agua

The Labour Act prevents the abuse of successive fixed-term contracts. Article 12 of the Labour Act provides for objective reasons for successive conclusion of fixed-term contracts, and their maximum duration is specified as well. The total duration of all successive fixed-term employment contracts, including the first employment contract, may not last for more than three years, unless this is necessary to replace a temporarily absent worker or is permitted by law or collective agreement for some other objective reason (Article 12(3) of the Labour Act). Furthermore, in case of abuse of successive fixed-term employment contracts, i.e. when a fixed-term contract is concluded contrary to the provisions of the Labour Act or if the employee continues to work for the employer after the expiration of the period for which the contract was initially concluded, it is deemed to have been concluded for an indefinite period.

Regarding the rights of employees in case of transfers of undertakings, Article 137(2) of the Labour Act of 2014 (last amended in 2019) determines that an employee whose employment contract has been transferred retains all employment rights acquired until the day of the transfer of the employment contract. According to Article 137(3) of the Labour Act, the employer to whom the employment contracts are transferred takes over all rights and obligations from the transferred employment contract in the unchanged form and scope on the day of the transfer.

The judgment of the CJEU in this case has no implications for Croatian law.

4 Other Relevant Information

Nothing to report.

Cyprus

Summary

Nothing to report.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Lifting of lockdown measures

There has been a gradual easement of the restrictions in June, following a decision by the Council of Ministers. There is no curfew and all the shops, restaurants, bars, gyms, etc. are open, but face masks must be worn indoors.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

In the present case, the Court ruled that clause 5 (1) of the Framework Agreement on Fixed-term Work, concluded on 18 March 1999 and contained in the Annex to Council Directive 1999/70 / EC of 28 June 1999 on the framework agreement for fixed-term work concluded by CES, UNICE and CEEP, means that it is contrary to national law, as interpreted by national case law, which, on the one hand, allows for the renewal of fixed-term contracts pending the completion of recruitment procedures for the permanent filling of vacancies in the public sector, without stating a specific deadline for the completion of these procedures, and, on the other hand, prohibits both the assimilation of these employees with 'non-permanent employees' and the payment of compensation. It follows that, without prejudice to the verifications to be carried out by the referring court, that national legislation does not contain any measures to prevent the abusive conclusion of successive fixed-term contracts, as well as the possible imposition of sanctions.

(2) Clause 5 (1) of the Framework Agreement on Fixed-term Work, concluded on 18 March 1999 and contained in the Annex to Directive 1999/70, means that purely economic assessments related to the 2008 financial crisis may not justify the absence from national law of any measure intended to prevent and punish the conclusion of successive fixed-term employment contracts.

CJEU case C-326/19, 03 June 2021, Ministero dell'istruzione, dell'Università e della Ricerca

Clause 5 of the Framework Agreement on Fixed-term Work, concluded on 18 March 1999 which is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, must be interpreted as not precluding national legislation under which provision is made, in respect of the recruitment of university researchers, for the conclusion of a fixed-term contract for a period of three years, with a single possibility of extension, for a maximum period of two years, making the conclusion of such contracts subject, first, to the condition that resources are available 'for planning for the purposes of carrying out research, teaching, non-curricular activities and student service activities', and, second, that such contracts are extended on condition that there is a 'positive appraisal of the teaching and research activities carried out', without it being necessary for those rules to define objective and transparent criteria making it possible to verify that the conclusion and renewal of such contracts do indeed meet a genuine need, and that they are likely to achieve the objective pursued and are necessary for that purpose.

CJEU case C-550/19, 24 June 2021, Obras y Dervicios Públicos and Acciona Aqua

This ruling provides that clause 5(1) of the Framework Agreement on Fixed-term Work must be interpreted as meaning that it is for the national courts to assess, in accordance with all the applicable rules of national law, whether the limitation to three consecutive years, except under specific conditions, of the employment of fixed-term workers under contracts known as *'fijos de obra'* by the same undertaking at different workplaces located within the same province and the grant to those workers of compensation for termination, assuming that that national court finds that those measures are actually taken in respect of those workers, constitute adequate measures to prevent and, where appropriate, to penalise abuse arising from the use of successive fixed-term employment contracts or relationships or 'equivalent legal measures' within the meaning of clause 5(1). In any event, such national legislation cannot be applied by the authorities of the Member State concerned in such a way that the renewal of successive fixed-term *'fijos de obra'* employment contracts is considered justified by 'objective reasons', within the meaning of clause 5(1)(a) of that framework agreement, on the sole ground that each of those contracts is generally concluded for a specific construction project, irrespective of its duration, in so far as such national legislation does not prevent, in practice, the employer concerned from covering, by means of such renewal, fixed and permanent staffing needs.

Also, the Court ruled that the first subparagraph of Article 3(1) of Council Directive 2001/23/EC relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses must be interpreted as not precluding national legislation under which, in the event of a transfer of employees under public contracts, the rights and obligations of the transferred worker that the incoming undertaking is required to respect are limited exclusively to those arising from the last contract concluded by that worker with the outgoing undertaking, provided that the application of that legislation does not have the effect of placing that worker in a less favourable position solely as a result of the transfer, which it is for the referring court to determine.

The cases are relevant for Cyprus in terms of the treatment of fixed-term workers. A distinction must be made for those working in the public sector and those working in the private sector.

Public sector

The Constitution of the Republic of Cyprus prohibits granting the same civil servant or public sector employee status to those who are employed on a temporary fixed-term contract. The employment of workers on fixed-term contract is regulated by the law (FT

Law, Law 98(I)2003, 25 July 2003, *Ο Περί Εργοδοτουμένων με Εργασία Ορισμένου Χρόνου (Απαγόρευση Δυσμενούς Μεταχείρισης) Νόμος του* 2003) purporting to transpose the Directive 1999/70/EC on Employees with Fixed-term Work (Prohibition of Less Favourable Treatment) of 2003, herein referred to as the 'Framework Agreement'. The law entered into force a year prior to EU accession, explicitly stipulating its purpose to harmonise Cypriot law (Law 70(I)2002, 07 June 2002, amending the law on Termination of Employment, published in Cyprus Official Gazette 3610 on 07 June 2002, effective 01 January 2003) with the Directive.

Numerous transposition issues and implementation of FT Law have been raised. See:

N Trimikliniotis and C Demetriou, National Expert Report on Directive 1999/70/EC concerning the Framework Agreement on fixed-term work concluded by UNICE, CEEP and ETUC, Studies on the implementation of Labour Law Directives in the enlarged European Union', 2006, on behalf of human european consultancy, Hooghiemstraplein 155, 3514 AZ Utrecht, the Netherlands, funded by the EU Commission;

P. Polyviou Η Σύμβαση Εργασίας (Chysafinis & Polyviou 2016, Nicosia), pp 509-521;

A Emilianides and C Ioannou, Labour Law in Cyprus (Wolters Kluwer International publications, 2016), pp 59-64; S Yiannakourou, Κυπριακό Εργατικό Δίκαιο, (Nomiki Bibliothiki, 2016), pp 144-153.

Fixed-term workers who work in the public sector do not enjoy the same rights as civil rights or employees covered by public law; instead, their rights are regulated by private law. One worker on a fixed-term contract claimed that she should be entitled to the same rights as public sector employees to preclude the possibility of discrimination. The Supreme Court rejected an appeal against the first instance decision of the Labour Disputes Court regarding the termination of her employment (see here for Christina Laouta v The Republic of Cyprus through the Attorney General, Supreme Court of Cyprus, Appeal jurisdiction, Civil appeal No 60/2010, 14 October 2014). The appellant was initially hired by the government as a legal officer in May 2004, on the basis of a contract ending in December 2004. Thereafter, successive contracts with 15-day durations were signed, lasting until 23 April 2005, upon which a new contract was signed lasting until 31 December 2006. On 04 December 2006, the government informed the appellant that her employment contract would be converted into one of indefinite duration as of 01 December 2006, because she had completed 30 months of employment as foreseen under the FT Law. In May 2007, the government informed the appellant that her services were being terminated because the Public Service Commission had appointed another person in the permanent post of legal officer, a position the appellant had unsuccessfully applied for. The appellant rejected the amount offered to her as compensation for the termination of her contract and applied to the Labour Disputes Tribunal claiming both higher compensation and reinstatement in her position. The Labour Disputes Court decided that the termination of the appellant's services was unlawful under the Law on Termination of Employment (Law 24/1967) and ruled in her favour for compensation in the amount of EUR 3 610. Through this appeal, the appellant sought to challenge the decision of the Labour Disputes Court for having established her dismissal as unlawful without accepting that there was bad faith on the part of the employer, as she was dismissed whilst being pregnant. At the same time, she appealed against the Labour Disputes Court's failure to consider her a government employee, arguing that the FT law required a restrictive interpretation of the terms 'indefinite duration' and 'permanent' so as to safeguard equal treatment between employees of indefinite duration and permanent employees. The Appeal Court rejected this argument, stating that the differentiation between a permanent public employee and a temporary employee with a fixed-term contract or a contract of indefinite duration cannot be abolished, since the employment of the latter is not based on the Constitution or on the Public Service Law of 1/90. The Supreme Court rejected the allegation of bad faith on the part of the employer, which could have justified reinstatement of the appellant to her prior position on the ground that the employment contract repeatedly signed between the parties explicitly provided that the appellant's employment would

continue until her permanent appointment in the specific position, and that the appellant herself had recognised the legitimacy of this procedure by filing an application for the permanent position of her post. The appellant's argument that the compensation awarded to her by the Labour Disputes Court was too low was also rejected by the Supreme Court, which found the compensation to be adequate, given that the aggravating circumstances invoked by the appellant had not been proven. The Labour Dispute Court reiterated this in the case of *Panayides* (Panayides v Attorney General of the Republic of Cyprus, Civil Appeal 132/2009, 19 July 2012), which ruled that employees with fixed-term contracts that had been converted into contracts of indefinite duration do not enjoy the same pension rights as permanent full-time public servants because the correct comparator of an employee with a contract of indefinite duration is not the permanent full-time public servant, as this is not the actual purpose of the FT Law.

In another case (Maria Syrimi V Cyprus Republic, Case No 338/2012, 30 June 2015, Nicosia Labour Disputes Court), the Labour Disputes Court decided that the contract of a research assistant in the Statistics Services, who had been employed on successive fixed-term contracts since 2007, was automatically converted into a contract of indefinite duration based on the Cypriot law transposing the FT Law. Whilst the decisions of the Labour Disputes Court are not binding on superior courts, it is noteworthy that the government decided to not appeal against the decision, which confirms the basic principle that transposes the fixed-term directive. This is a practice extensively used both in the public and the private sector. This issue was taken up by the Pancyprian Union of Nurses (PA.SY.NO), which held a one-day warning strike and raised, inter alia, demands related to the fact that the practice of renewing consecutive fixed-term contracts continues in the public sector without these contracts being converted into contracts of indefinite duration.

In terms of measures introduced to prevent abuse, Article 7(1) of the FT Law provides that where an employer employs an employee under a fixed-term contract, either following a renewal of the contract or otherwise, and the employee had previously worked under a fixed-term contract for a total period of 30 months or more, irrespective of the order of successive fixed-term contracts, the contract shall, for all intents and purposes, be deemed a contract of indefinite duration and any provision in this contract restricting its duration will be void, unless the employer proves that the fixed-term employment of the said worker can be justified on objective grounds.

With regard to fixed-term workers or workers with a successive series of fixed-term contracts, any period of employment before the enactment of the Cypriot Law shall not be taken into account for the purposes of calculating the 30-month period referred to above (Article 7(3) of the Cypriot Law). Only objective reasons justify renewals of fixed-term employment contracts or relationships. The maximum total duration of successive fixed-term employment contracts or relationships is 30 months, irrespective of how many successive terms this is divided into. As stated above, any period worked prior to the enactment of the Cypriot Law is not to be taken into account when calculating the aforementioned 30 months. The Law on Termination of Employment gives the court discretion to decide based on the facts of the case, which constitutes the maximum permitted period between contracts to ensure continuity. The Supreme Court has ruled that in case of an employee who claims rights derived from the fixed-term law which are in fact private law rights, the employee will be required to claim such rights under the IDC, even if the claim is against a body operating under public law (Avraam v Republic 2008, 3 CLR 49; Burston v University of Cyprus, case 847/2012, 04 June 2015; Venizelou v Republic of Cyprus, administrative appeal 67/100, 21 May 2015).

Equal treatment in Cypriot employment law is not only a general principle derived from Article 28 of the Cypriot Constitution, the ECHR and EU law, such as the Charter, it is also enshrined in the legislation on termination of employment. However, the mechanism that effectively implements the principle of non-discrimination is implied by law into contracts of employment, particularly following the enactment of a

comprehensive set of legislation in 2004, transposing the anti-discrimination directives 2000/78/EC and 2000/43/EC.

Fixed-term employees have the right to be treated equally like regular permanent employees. The principle of non-discrimination as enshrined in the Law (Art 5(1) of the Cypriot Law copies verbatim the text of cl 4.1 of the Framework Agreement) provides that with reference to employment conditions, fixed-term workers shall not be treated less favourably than comparable permanent workers solely because they have a fixed-term contract or relationship, unless differentiated treatment is justified on objective grounds. There is no definition of 'employment conditions' in the FT Law.

A ceiling of 30 months is set, irrespective of how many successive terms this is divided into. As stated above, any period worked prior to the enactment of the Cypriot Law is not to be taken into account when calculating the aforementioned 30 months. The Law on Termination of Employment gives the court discretion to decide, based on the facts of the case, what constitutes the maximum period between contracts permitted to ensure continuity.

Article 2 of the FT Law defines the term 'comparable employee with a contract of indefinite duration' as a worker with an employment contract or relationship of indefinite duration, who works in the same establishment, is engaged in the same or similar work/occupation, due regard being given to qualifications/skills. In other words, the wording of Clause 3.2 of the Framework Agreement is copied verbatim. There is an issue as to the meaning of 'comparable permanent worker', a term that has created uncertainty: the Industrial Relations Unit of the Ministry of Labour has apparently failed to properly compare fixed-term workers with 'permanent public or semi-public employees', given that the term falls within the criteria set by clause 3 of the Framework Agreement: they work 'in the same establishment, are engaged in the same or similar work/occupation, due regard being given to qualifications/skills'. Failing such a comparison, the Industrial Relations Unit could have relied on the alternative provided by the Directive that where there is no comparable permanent worker in the same establishment, comparison shall be made by reference to the applicable collective agreement, or where there is no applicable collective agreement, in accordance with national law, collective agreements or practice.

Article 2 of the FT Law repeats the phrase of the Directive 'due regard being given to qualifications/skills', but does not provide any clarifications.

The dispute over the rights of 'temporary employees of indefinite duration' has been a major issue in the public sector: the dismissal of temporary public employees, some of who are temporary employees with a contract of indefinite duration, is a common labour dispute. At the same time, temporary public employees with fixed-term contracts work in the public sector based on Law 108(I)/1995 (Law on the Procedure of Hiring Temporary Employees in the Public and in the Educational Sector (*Ο περί Διαδικασίας Πρόσληψης Έκτακτων Υπαλλήλων στη Δημόσια και την Εκπαιδευτική Υπηρεσία Νόμος*)), which regulates the procedure for hiring public employees and setting the maximum duration of employment of temporary staff in the public sector at two years. There is a long dispute over the rights of temporary public employees. However, this issue became even more controversial in September 2006, when the President of the Republic of Cyprus, acting on the advice of the Attorney General, decided to exercise his right to refer a law back to the House of Representatives under Article 48 of the Constitution on the grounds that the law was unconstitutional. The President argued that the law that would equalise the rights of temporary employees with a contract of indefinite duration in terms of pension rights and retirement age and secure permanent employment would (a) violate the principle of separation of powers and the laws that leave issues related to the appointment of public employees to the executive, and (b) it would involve an increase in budgetary expenditure (Article 80.2 of the Cypriot Constitution. E Soumeli 'Temporary public employees threaten strike action', EurWork, European Observatory of Working Life).

The matter also extends to public secondary education. This is an important case that may have some implications for Cyprus. The Administrative Court decided against the decision of the Director of Social Security Services, who designated a number of part-time teachers on fixed-term contracts in public schools as subcontractors under service contracts (*ΠΑΓΚΥΠΡΙΑ ΣΥΝΤΕΧΝΙΑ ΕΡΓΑΖΟΜΕΝΩΝ ΣΤΙΣ ΥΠΗΡΕΣΙΕΣ Π.Α.Σ.Ε. Υ. - Π.Ε.Ο., ΧΑΤΖΗΑΝΔΡΕΟΥ, ΦΩΤΙΑΔΟΥ, ΧΑΡΙΛΑΟΥ, ΤΣΟΥΚΚΑ ΚΑΙ ΚΥΠΡΙΑΚΗΣ ΔΗΜΟΚΡΑΤΙΑΣ, ΜΕΣΩ ΤΟΥ ΥΠΟΥΡΓΕΙΟΥ ΕΡΓΑΣΙΑΣ ΚΑΙ ΚΟΙΝΩΝΙΚΩΝ ΑΣΦΑΛΙΣΕΩΝ, 8 Οκτωβρίου, 2020*, 1368/2014). In 2013, the Ministry of Education decided to change the status of teachers, who were considered up to that year to be employed as part-time workers, to be designated as self-employed persons. The applicants disagreed and applied to the Director of Social Security Services to declare that their status is that of worker as provided in Cypriot labour law, even though they signed the new contracts for services, albeit under protest. It is estimated that this affects 5 000 teachers. The Director of Social Security Services decided against the applicants on the grounds that the applicants had signed the contracts for services and to be registered as self-employed persons to the Social Security Services. Trade union PASEY-PEO and four teachers applied to the Administrative Court to quash the decision of the Director of Social Security Services as erroneous due to the fact that the decision was not the result of due examination and proper evaluation of the basic elements and characteristics of the services rendered. The applicants claimed the following:

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

The respondents rejected these claims, arguing the following:

- The trade union had no legitimate interest or *locus standi* as the matter does not affect all or a substantial share of their members;
- The applicant teachers have no legitimate interest or *locus standi* because they unreservedly competed in the competitive tenders, accepted their terms and conditions and signed the relevant contracts for service with the Ministry of Education and subsequently unreservedly applied to be registered as self-employed persons to the Social Security Services and paid their social security contributions;
- The decision was not executed in an administrative act.

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

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

This case is very important not only because it affects 5 000 workers, but because it is a test case for the application of basic labour law on workers in atypical forms of employment under EU directives on part-time work (Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex : Framework agreement on part-time work) and

fixed-term work (Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP). Some teachers have expressed their interest in pursuing their case via the courts as well as placing a complaint with the EU Commission on the ground that they are being discriminated against and that their right to convert their temporary employment status into a permanent one is not respected by the Republic of Cyprus.

Private sector

There have been a number of Labour Dispute Court decisions affirming the right of employees to convert their fixed-term contract into one of indefinite duration. The Court ruled in favour of the plaintiff who sued his former employer in the private sector, a private university (hereinafter 'the University'), for unfair dismissal. The plaintiff had been hired by the university in 2008 as an Associate Professor on the basis of a fixed-term contract that was renewed year after year. In May 2012, the university informed the plaintiff that his services were no longer needed and his employment relationship with the university would end on 31 August 2012. The plaintiff argued that under the FT Law at the time of his dismissal, his fixed-term contract should have been converted into one of indefinite duration, as he had already completed 30 months of service. The university argued that the plaintiff's fixed-term contract was justified by objective reasons, namely the specific circumstances surrounding the operation and nature of services offered by private universities. The university claimed that the course for which the plaintiff had been hired did not attract a satisfactory number of students in spite of the efforts undertaken. Following the relevant provision in the Termination of Employment Law, the Court reversed the burden of proof and called on the university to prove the reasons rendering the dismissal lawful and therefore as not generating any right to compensation. The witness for the university claimed that the number of students enrolling for the course taught by the plaintiff were below the minimum set by university policy. However, upon cross examination, he admitted that the employment contract signed with the plaintiff did not mention that he was specifically being recruited to teach a particular course. The Court found that the circumstances invoked by the university did not meet the 'objective reasons' foreseen in the law to justify the use of repeated fixed-term contracts, because the needs for which the plaintiff had been hired continued to be present four years after his initial recruitment, his position was not abolished and the course continued to be taught following his dismissal. The court stressed that the risk of business activity is borne by the employer and cannot be transferred to the employee by concluding successive fixed-term contracts, pointing out that the plaintiff's actual form of employment was a contract of indefinite duration. The Court awarded the plaintiff damages equal to eight weeks of pay, plus interest (Holger Briel v. EDEX- Educational Excellence Corporation Ltd, Labour Disputes Court, Nicosia, Case No 264/2013, 30 September 2015).

4 Other Relevant Information

Nothing to report.

Czech Republic

Summary

(I) The travel ban has been amended and extended, together with the additional travel ban, preventing Czech citizens and residents from travelling to certain high-risk countries.

(II) Restrictions on businesses and the obligation to wear respiratory protective equipment have been reintroduced and amended. Mandatory testing of employees ended on 01 July.

(III) The short-time work scheme has been adopted and will enter into effect on 01 July 2021.

(IV) The government adopted a regulation on the maximum number of applications for visas and residence permits.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Travel ban

The government has retained and amended the travel ban.

Protective measures of the Ministry of Health No. MZDR 20599/2020-91/MIN/KAN of 29 June 2021 have been adopted with effect as of 01 July 2021.

The text of the protective measures is available here.

The list of countries listed according to risk is available here.

With effect as of 01 July 2021, the restrictions on the entry of persons into the territory of the Czech Republic have been readopted – with certain amendments (see, among others, May 2021 Flash Report).

Moreover, the government has adopted an additional travel ban in connection with the spread of the new variant of COVID-19.

Protective measures of the Ministry of Health No. MZDR 20599/2020-92/MIN/KAN of 29 June 2021 have been adopted with effect as of 01 July 2021.

The text of the measures is available here.

With effect as of 01 July 2021 until 31 July 2021, Czech citizens as well as foreign nationals with residence in the territory of the Czech Republic may not travel to certain countries, namely: Botswana, Brazil, Eswatini, India, South Africa, Colombia, Lesotho, Namibia, Malawi, Mozambique, Nepal, Paraguay, Peru, Russia, Tanzania, Zambia, and Zimbabwe due to increased COVID-19 risk in these countries. With effect as of 05 July 2021, Tunisia is being added to the list.

1.1.2 Restrictions to the operation of businesses

The government has readopted and amended the conditions on the operation of businesses.

Protective measures of the Ministry of Health No. MZDR 14601/2021-21/MIN/KAN of 25 June 2021 have been adopted with effect as of 26 June 2021.

The text of the measures is available here.

With effect as of 26 June 2021, conditions on the operation of businesses have been readopted and amended.

Businesses are allowed to operate as long as they adhere to certain rules. Persons may only enter under certain conditions (they need to have been tested, vaccinated, etc.).

1.1.3 Mandatory respiratory protective equipment

The government has readopted and amended the obligation to wear respiratory protective equipment. There has been some loosening of the restrictions.

Protective measures of the Ministry of Health No. MZDR 15757/2020-55/MIN/KAN of 29 June 2021 have been adopted with effect as of 01 July 2021.

The text of the measures is available here.

With effect as of 01 July 2021, all persons are prohibited from movement and stay without respiratory protective equipment in the following situations:

- inside certain buildings (shops, medical facilities, universities, etc.);
- inside public transportation;
- inside eateries;
- for audiences in concerts, theatres, cinemas, etc.;
- in congresses, educational events, examinations;
- in public and private events where there are more than 10 persons present (in case the event takes place indoors) or more than 30 persons (in case the event takes place outdoors).

The measures also list a number of exceptions from the above rules – e.g. for employees who work in one place and do not move.

According to the measures, employers are required to equip their employees with respiratory protective equipment at their expense.

1.1.4 Mandatory testing of employees

Due to the development in the epidemiological situation, the mandatory testing of employees will end at the end of June 2021.

Measures of the Ministry of Health No. MZDR 20029/2021-3/MIN/KAN of 17 June 2021 have been adopted with effect as of 01 July 2021.

The text of the measures is available here.

With effect as of 01 July 2021, the mandatory testing of employees ends.

1.1.5 Short-time work scheme

Act No. 248/2021 Coll., amending Act No. 435/2004 Coll., on Employment, as amended, and other related legislation, has been adopted and published. The Act enters into effect on 01 July 2021 (with exceptions).

The text of the Act is available here.

The Act was already reported on in the August 2020, September 2020 and May 2021 Flash Reports.

The 'Kurzarbeit' regime which provides support during partial unemployment aims to allow the state to provide employers with flexible support by paying their employees for

a time when they cannot assign work to them during an economic crisis (or risk of economic crisis).

1.2 Other legislative developments

1.2.1 Limits to visas and work permits

Government regulation No. 233/2021 Coll., on the amendment of Government Regulation No. 220/2019 Coll., on the maximum number of applications for visas for stays exceeding 90 days for business purposes, applications for long-term residence permits for investment purposes and applications for employee cards that may be filed with relevant embassies, has been adopted and published. The Regulation entered into effect on 01 July 2021.

The text of the resolution is available here.

The government may set a maximum limit of residence applications that can be filed each year for the following residence applications:

- visas for stays exceeding 90 days for business purposes;
- long-term residence permits for investment purposes;
- employee cards.

With this Regulation, the government sets a limit to the number of abovementioned residence applications that may be filed with embassies in certain countries.

The maximum limit of the above applications in relevant countries is reviewed on a regular basis (depending on the economic and immigration situation).

2 Court Rulings

2.1 Equal treatment

Supreme Court, 16 March 2021, No. 21 Cdo 2410/2020

The Supreme Court has ruled that if an employee is found to be incapacitated for work by a medical professional due to her pregnancy, and if the employer terminates her employment relationship during a probation period solely on the basis of the medical examination, such termination is likely discriminatory. The decision was issued on 16 March 2021 under No. 21 Cdo 2410/2020.

The decision is available here.

The employee-plaintiff performed work for the employer as a forestry worker and was under a probation period. Upon learning that the employee was pregnant, the employer ordered her to undergo a medical examination. The provider of employment health services concluded that the employee was incapacitated for work as a forestry worker for the employer due to her pregnancy (the hard manual labour and use of chemical substances could endanger the unborn child). The employer terminated her employment relationship within the probation period without stating a reason.

While the lower courts found no breach of legal provisions, the Supreme Court ruled that such termination was discriminatory. It ruled that even though it is perfectly in line with the Labour Code to terminate an employee during his or her probation period without stating a reason for such termination, it should still be reviewed bearing in mind the principle of equal treatment and the prohibition of discrimination.

The point of the probation period is to allow the parties to try the employment relationship with the option of terminating it immediately and for any reason or without providing one. Employers may terminate employees even during the so-called 'protection period' – e.g. when an employee is temporarily incapacitated for work

(except for the first 14 days of the temporary incapacity or quarantine), pregnant or on maternity leave.

The Court based its decision on two facts, (1) the only reason for the employee's incapacity for work was her pregnancy, and (2) during the proceedings before the lower courts, the defendant stated that the sole reason for the termination was the result of the medical examination (incapacity for work). Connecting the two facts, it is apparent that the reason for the termination was indeed the employee's pregnancy. The Court deemed this to be discriminatory conduct and annulled the lower courts' decisions.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

The CJEU ruled that:

> *"clause 5 of the framework agreement contained in the Annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work must be interpreted as precluding national legislation, as interpreted by national case-law, which allows for recurrent agreements of fixed-term contracts for vacancies in the public sector without stating any period of time for completing the necessary recruitment procedures, and which prohibits equalization of these employees with the "indefinite employees" and granting of severance pay to these employees. The national legislation does not appear to contain any measure to prevent and, where appropriate, sanction the abuse of successive fixed-term contracts. Clause 5 of the framework agreement must also be interpreted as meaning that purely economic considerations relating to the economic crisis of 2008 cannot justify the absence of any measure in national legislation to prevent and sanction the use of successive fixed-term employment contracts."*

The Czech Labour Code (Act No. 262/2006 Coll., the Labour Code) regulates fixed-term employment contracts in its Section 39:

> *"(1) An employment relationship shall last for an indefinite period unless a fixed term of its duration has been expressly agreed.*
>
> *(2) A fixed-term employment relationship between the same contracting parties may not exceed three years and from the date of the first fixed-term employment relationship, and may be recurrently agreed no more than twice. An extension of an employment relationship shall also be considered as a recurrently agreed employment relationship. After the expiry of a period of three years from the termination of the preceding fixed-term employment relationship between the same contracting parties, the preceding employment relationship shall not be taken into account.*
> *(3) The provision of paragraph 2 shall apply without prejudice to the procedure under other statutory provisions which presume that an employment relationship may only last for a fixed term.*
> *(4) If there are serious operational reasons or reasons based on the special nature of the work, on the basis of which the employer cannot be justifiably required to propose to the employee a conclusion of an employment contract for an indefinite period of time, paragraph 2 shall not apply, provided that a different approach is adequate and a written agreement between the employer and a trade union regulates:*
>
> *a. a more detailed description of these reasons,*
> *b. the rules of the different approach of the employer for agreeing or recurrently concluding fixed-term contracts,*

> c. *the range of the employer's employees to whom the different approach apply,*
> d. *the period for which this agreement is concluded.*
>
> *This written agreement may be replaced by an internal regulation only if there is no trade union at the employer; the internal regulation must contain the particulars referred to in the first sentence.*
>
> *(5) If the employer concludes a fixed-term contract in violation of paragraphs 2 to 4, and if the employee notifies the employer in writing before the expiry of the agreed period that he/she insists on continuing to be employed, the employment relationship is considered to have been concluded for an indefinite period of time. […]"*

Paragraph 1 simply states that all employment contracts are concluded for an indefinite period unless the parties explicitly agree on a fixed duration.

Paragraph 2 contains the limits for concluding fixed-term contracts. Such contracts may be concluded for a maximum period of 3 years and may be recurrently agreed only twice (i.e. 9 years in total). A new such agreement may be concluded again only after 3 years from the termination of the previous fixed-term agreement. This reflects the measures included in clause 5 of the Framework Agreement contained in the Annex to Council Directive 1999/70/EC of 28 June 1999.

Paragraph 3 contains an exception to the rules stipulated in paragraph 2 for work that falls under different legal regulations (e.g. a director of a health insurance company is appointed for a period of 4 years, which would otherwise be in violation of paragraph 2 and the maximum of 3 years).

Paragraph 4 contains an exception to the rules as stipulated in paragraph 2 where certain operational reasons or reasons based on the special nature of the work justify further employment under a fixed-term contract. A collective agreement or an internal regulation containing the above cited particulars is necessary.

Lastly, paragraph 5 states that if the employer breaches the related obligations upon concluding a fixed-term contract, only a written letter from the employee is necessary for the contract to be converted into one of indefinite duration. Any party can take legal action before a court within 2 months from the termination of the period for which the fixed-term contract was concluded to let the court determine whether the obligations were fulfilled.

The CJEU ruled that the measures stipulated in clause 5 of the Framework Agreement contained in the Annex to Council Directive 1999/70/EC of 28 June 1999 must be reflected in national legislation and that even the circumstances of the economic crisis of 2008 do not justify their absence; these measures are provided in Czech law, as described above, as it specifies the maximum total duration of successive fixed-term contracts (para. 2), the number of renewals of such contracts (para. 2) and even the objective reasons justifying the renewal of such contracts for cases where these maximums do not apply (para. 4). Furthermore, it contains an easy way for the employee to transform his or her contract into one of indefinite duration if the employer breaches the related obligations. In conclusion, Czech legislation and case law are in line with this CJEU ruling.

CJEU case C-326/19, 03 June 2021, Ministero dell'istruzione, dell'Università e della Ricerca

The CJEU ruled that:

> *"clause 5 of the framework agreement contained in the Annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work must be interpreted as not precluding national legislation under which provision is made, in respect of the recruitment of university researchers,*

> *for the conclusion of a fixed-term contract for a period of three years, with a single possibility of extension, for a maximum period of two years, making the conclusion of such contracts subject, first, to the condition that resources are available 'for planning for the purposes of carrying out research, teaching, non-curricular activities and student service activities', and, second, that such contracts are extended on condition that there is a 'positive appraisal of the teaching and research activities carried out', without it being necessary for those rules to define objective and transparent criteria making it possible to verify that the conclusion and renewal of such contracts do indeed meet a genuine need, and that they are likely to achieve the objective pursued and are necessary for that purpose."*

As mentioned in the analysis of case C-726/19, the Czech Labour Code contains the measures required by clause 5 of the Framework Agreement. Similarly to Italy, it also contains an exception from these measures (see paras. 3 and 4 and the respective comments). This seems to be in line with the ruling, even more so as paragraph 4 contains numerous requirements for employers to use this exception, often requiring a collective agreement between the employer and trade union.

CJEU case C-550/19, 24 June 2021, Obras y Servicios Públicos and Acciona Agua

With respect to clause 5 of the Framework Agreement contained in the Annex to Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-term Work, the CJEU, in particular, ruled that the recurrent conclusion of fixed-term *'fijo de obra'* contracts cannot be justified solely on the ground that these are concluded for the duration of concrete building projects, regardless of their duration – as this does not prevent the employer from using these fixed-term contracts to ensure the fulfilment of long-term tasks.

As regards the regulation of fixed-term contracts in the Czech Republic, see above. There is no difference between contracts concluded for a specific (predetermined) date, and fixed-term contracts concluded for the time it takes to complete a specific task (project). Both are subject to the rules above, with certain exceptions – such as cases where there are 'serious operational reasons' or 'reasons based on the special nature of the work'.

With respect to Article 3 of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, the CJEU further ruled that national law may allow for the relevant rules of transfer to apply only with respect to the last contract between the employee and the transferor, unless such would lead to the employee being disadvantaged.

Under Czech law, all rights and obligations between the transferor and employee are transferred from the transferor to the transferee – such could conceivably also include rights and obligations arising from preceding contracts, i.e. there is no rule specifically prohibiting this.

4 Other Relevant Information

Nothing to report.

Denmark

Summary

The restrictions caused by the pandemic are progressively being lifted. At the same time, Parliament has adopted two proposals extending legislation relating to COVID-19.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Lifting of restrictions

Danish society has now almost fully re-opened and restrictions are being lifted continuously. As of 11 May 2021, the obligation to wear face masks has been lifted in all areas, except in public transport. The use of a COVID-19 passport continues to apply, but is expected to be phased-out in early fall. Cafés and restaurants are allowed to remain open longer, and from 01 September onwards, night life (bars and discos) may re-open again. Students are encouraged to be tested for COVID-19 on a regular basis. Tests continue to be free of charge for everyone. For further information, see here.

Furthermore, the Danish Health Authority now recommends vaccinating children aged 12 – 15 years. Vaccines will be offered in the fall 2021, once the original vaccination plan has been concluded. For further information, see here.

1.1.2 Expiry date of COVID-19 legislation

Danish Parliament has adopted two legislative proposals extending legislation relating to COVID-19 (L 231, L 235 A and L 235 B):

- The right to enrol in new education while receiving 110 per cent ordinary daily cash benefits has been extended for a year. The scheme now ends ultimo 2022;
- An employer's right to require COVID-19 testing of employees has been extended until 01 November 2021;
- The rules on the prevention of infection, when an employer offers accommodation to the employees, have been extended until 01 November 2021;
- The duty to ensure that incoming cross-border workers are tested for COVID-19 upon and after entry, has been extended until 01 November 2021.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

The ruling does not have implications for Danish law.

Whereas Spanish law did not provide for measures to sanction the abuse of multiple successive fixed-term contracts, the same situation would not arise in a Danish context. As opposed to the Spanish legal framework in question, under Danish law, a temporary employment relationship may only be renewed, if there are 'objective reasons' justifying the renewal of such contracts, cf. Act on Fixed-term Work Article 5(1). This is an implementation of Framework Directive 1999/70/EC Annex, clause 5(1), litra a. The only exception is teaching and research activities in the public sector, where fixed-term contracts can be renewed (only) twice, cf. Article 5(2).

The ruling may contain a contribution for the national courts' interpretation of what may constitute an objective reason. With reference to earlier CJEU case law, the Court reiterated that a temporary replacement of a worker with the intent of filling the temporary need for personnel may, in principle, constitute an objective reason within the meaning of the Directive. To comply with the Framework Directive, a concrete assessment must take place to ensure that successive contracts were indeed (only) used to meet the need for temporary—and not permanent—personnel. This is also assessed as being in line with the existing state of law in the assessment of the Danish courts.

See here for the Danish Act on Fixed-term Work, L 907 of 11 September 2008.

CJEU case C-326/19, 03 June 2021, Ministero dell'Istruzione, dell'Università e della Ricerca

The ruling does not have implications for Danish law.

The case concerned the employment of researchers in Italy. Italian law provides for two different types of fixed-term researcher positions. For the category to which the dispute related, Italian law establishes both a limit on the maximum duration of that contract and a limit on the possible number of renewals of that contract. The law, therefore, contains two of the methods listed in Framework Directive 1999/70/EC Annex, clause 5(1). Therefore, it was irrelevant that the provision did not contain objective and transparent criteria which make it possible to determine, first, whether the conclusion and extension of the contracts are justified by genuine needs of a temporary nature and, second, whether they are such as to meet those needs, and whether they are implemented in a proportionate manner.

In the Danish implementation of the Framework Directive 1999/70/EC, a deliberate choice was made to use another method aside from 'objective reasons' in the public sector on teaching and research activities, i.e. also for university teachers. In this regard, Danish law provides a limit on the possible number of renewals of that contract (twice), cf. Act on Fixed-term Work Article 5(2). The background was that in the educational sector, it may often be difficult to provide objective reasons for the use of successive fixed-term contracts due to this sector's special nature and structure, cf. preparatory works (L 202 of 27 March 2002, spec. comments to Article 5). Hence, instead of requiring objective reasons, the legislator chose to use the method of maximum number of renewals.

In conclusion, the Italian legislation was in conformity with the Directive, and the Italian implementation of the Directive was somewhat similar to the Danish implementation in the sector of teaching and research.

See here for preparatory works on the Danish Act on Fixed-term Work.

4 Other Relevant Information

Nothing to report.

Estonia

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

The case concerned the extension of fixed-term employment contracts in the public sector. The implications of the decision on Estonian labour law is modest. In Estonia, there is a special Act on Civil Service, but it does not specify rules and requirements on fixed-term employment contracts. The general rules stipulated in the Employment Contracts Act (ECA) are applicable. The ECA's section 10 applies. Section 10 states:

> *"If an employee and employer have, on the basis of subsection 9(1) of this Act, on more than two consecutive occasions entered into an employment contract for a specified term for the performance of similar work or extended the contract entered into for a specified term more than once in five years, the employment relationship shall be deemed to have been entered into for an unspecified term from the start. Entry into employment contracts for a specified term shall be deemed consecutive if the time between the expiry of one employment contract and entry into the next employment contract does not exceed two months."*

Taking into account the general situation, fixed term employment contracts in Estonia have limitations. A fixed-term contract can only be extended or concluded two consecutive times. Thereafter, the fixed-term contract will be deemed an open ended employment contract.

CJEU case C-326/19, 03 June 2021, Ministero dell'istruzione, dell'Università e della Ricerca

The case concerned fixed–term employment contracts concluded at universities for specific scientific tasks. The implications of the CJEU's decision for Estonian labour law is modest. In Estonia, the position of scientific professions is regulated in the Higher Education Act. According to this act, the following is regulated in section 34: an ordinary academic staff member who meets the requirements applicable to an academic staff position; an ordinary academic staff member who is elected by way of a public competition or, where justified, assumes the position in another manner on the conditions and in accordance with the procedure established by the employer.

A fixed-term employment contract can be concluded with ordinary academic staff members for up to five years where:

- a competition for filling the academic position has failed, until the position is filled by way of a competition; or
- the nature of the work to be performed is of a fixed term.

The employer has the right to conclude a fixed-term employment contract with an individual for up to five years for the performance of management functions related to the academic activities of the higher education institution.

Where a consecutive fixed-term employment contract is concluded for the performance of management functions related to the academic activities of the higher education institution or with a visiting academic staff member or where such employment contracts are renewed, the employment relationship is not converted into an employment relationship of indefinite duration.

According to these special regulations, there are situations in which the extension of fixed-term employment contracts are possible. In case the special rules do not apply, the general rules of the Employment Contracts Act (ECA) will be applicable. According to the ECA section 10:

> *"If an employee and employer have, on the basis of subsection 9(1) of the Employment Contracts Act, on more than two consecutive occasions entered into an employment contract for a specified term for the performance of similar work or extended the contract entered into for a specified term more than once in five years, the employment relationship shall be deemed to have been entered into for an unspecified term from the start. Entry into employment contracts for a specified term shall be deemed consecutive if the time between the expiry of one employment contract and entry into the next employment contract does not exceed two months."*

Taking into account the general situation, fixed-term employment contracts have limitations. It is possible to extend or conclude a fixed term contract two consecutive times only. Any fixed-term contract that is concluded thereafter will be considered an employment contract of indefinite duration.

CJEU case C-550/19, 24 June 2021, Obras y Servicios Públicos and Acciona Agua

The case concerned fixed-term employment contracts in case of a transfer of an undertaking.

According to Estonian labour law, in case a fixed-term employment contract is transferred, the transferee must continue to fulfil the conditions of the given employment contract. The transfer of an undertaking does not entail the possibility to change the terms of the employment contract. The employment contract can only be changed by mutual consent.

The Employment Contracts Act (ECA) specifies the provisions that apply in cases of transfers of undertakings. The ECA section 112 stipulates:

> *"Employment contracts shall be transferred to the transferee unchanged if the enterprise continues to be engaged in the same or similar economic activities. A transferor and transferee of an enterprise are prohibited from cancelling an employment contract due to the transfer of the undertaking."*

In cases of transfers of undertakings, the terms of the contracts remain unchanged.

4 Other Relevant Information

4.1 Occupational health and safety

The Confederation of Trade Unions of State and Local Government Employees (ROTAL) and the Ministry of Finance have agreed on the recommended principles for maintaining mental health in the work environment, which shall guide both parties in their activities.

It was acknowledged that a large share of civil servants are exposed to work that is mentally and emotionally challenging, and that maintaining mental health in the work environment is therefore a key occupational safety issue.

According to the chairperson of ROTAL, maintaining mental health and supporting people to cope with the corona crisis has become a key issue, and has also been discussed in the media. Employers should tackle mental health risk factors that are directly related to the working environment and work organisation.

Such mitigating activities include, for example, adapting the work organisation and the workplace to the employees, optimising the workload of employees, providing breaks, improving information flow, promoting collaboration, direct manager support, involvement in decision-making and preventing harassment and bullying.

In addition, the employer can support the employees' general mental health through health promotion activities, such as organising joint events, theme days, providing an environment that is suitable for relaxation and sports, providing the services of a psychologist or counsellor, and introducing flexible working hours.

The agreement was drawn up on the basis of an agreement on work-related stress concluded by the social partners at the European level on 08 October 2004.

Finland

Summary

(I) A new Act strengthens the legal status of foreign berry pickers.

(II) The Seasonal Workers Act has been amended to make it easier for seasonal workers to change employers.

(III) The Labour Court has issued three decisions according to which the stand-by time of firemen, who were working as unit chiefs, was to be considered working time.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Foreign berry pickers

A new Act on the legal status of workers who pick nature's products (487/2021), which entered into force on 14 June 2021, strengthens the legal status of berry pickers and lays down the obligations of employers in more detail and in more binding terms. At the same time, the objective is to improve the earning opportunities of foreign berry pickers and for employers to benefit from a more equally competitive environment, which will help the sector grow sustainably and become more international.

1.2.2 Seasonal work

The Finnish Immigration Service has introduced a new function in the service system to make it easier for seasonal workers to change employers. The relevant amendment of the Decree of the Ministry of the Interior on Chargeable Services of the Finnish Immigration Service is based on an amendment to the Act on the Conditions of Entry and Residence of Third-Country Nationals for Seasonal Work (907/2017). Both the amendment to the Seasonal Workers Act and the amendment to the Decree entered into force on 17 June 2021.

2 Court Rulings

2.1 Overtime work

Supreme Court, KKO:2021:52, 23 June 2021

The employer was accused of violating occupational safety and health because the employer had requested employees to substantially work overtime over the maximum permitted by the Working Hours Act (872/2019). The Supreme Court considered that provisions on maximum overtime work could not be regarded as provisions on occupational safety and health referred to in Chapter 47, Sections 1 and 8 of the Penal Code (39/1889). The employer's representatives had breached their obligations based on the Occupational Safety and Health Act (738/2002) to ensure the employees' occupational safety and health as the employees had been required to carry out an excessive and considerable amount of overtime work. On these grounds, they were convicted of violating the employees' occupational safety and health by virtue of the Occupational Safety and Health Act.

2.2 Stand-by time

Labour Court, TT 2021:50, TT 2021:51 and 2021:52, 03 June 2021

The three cases in which interlocutory judgments were issued by the Labour Court explored whether the stand-by time of the firemen who were working as unit chiefs was to be considered working time.

Some of the firemen had a duty to leave the fire station in case of alarm duty within approximately five minutes of the alarm. On the basis of an overall assessment of the circumstances and especially taking into account the short stand-by time, the obligations of the firemen were considered to have objectively and to a considerable extent influenced their possibility to freely use the time between these periods during which they were not required to carry out work-related tasks and the possibility to use that time to pursue their own interests. The stand-by time was to therefore be regarded as working time.

2.3 Transfer of undertaking

Labour Court, TT 2021:53, 04 June 2021

According to the claim brought before the court, a company had violated the shop steward agreement when it transferred an employee, who was a shop steward, to a unit that was transferred to an undertaking. The employee's employment contract was also transferred to the other company.

A provision in the shop steward agreement prohibits the transfer of shop stewards without their consent to work for a lower salary or without the existence of a particularly weighty reason to another workplace other than the one he or she was selected to be a shop steward for. No settlement in the provision was provided, hence the point of departure was the wording of the provision in the agreement.

According to the Labour Court, it was not proven that the employee who had been selected to be the shop steward had been transferred to another unit during the transfer of undertaking or that the shop steward had been transferred in accordance with the provisions of the shop steward agreement to another workplace. The wording of the provision did not provide that the provision was meant to govern situations involving transfers of undertakings. It was not shown that the transfer of the employee, who was also a shop steward, violated the collective agreement.

2.4 Applicability of collective agreements

Supreme Court KKO:2021:49, 14 June 2021

A and B had been working as lorry drivers for a company which applied the collective agreement of the civil engineering sector to their employment relationships as the generally applicable collective agreement. A and B argued that the generally applicable collective agreement of the stevedoring sector ought to apply to them because they had mostly been working in harbours/ cargo transport. The Supreme Court considered that on the basis of its main field of operations, the company had been permitted to apply the collective agreement of the civil engineering sector as a generally applicable collective agreement.

2.5 Obligation of re-employment

Supreme Court, KKO:2021:47, 10 June 2021

An employee whose employment contract had been terminated on financial and production-related grounds had not been offered a new job when the employer recruited

new employees after the period for re-employment set out in Chapter 6, Section 6 of the Employment Contracts Act had passed. According to the employee, the employer had breached the obligation of re-employment because the employer was already aware during the re-employment period that there was a need for new employees. The Supreme Court held that the employer had not breached the obligation of re-employment because the employer had only taken measures to recruit new employees after the re-employment period had ended and the decision had not been moved to take place after the re-employment period in order to circumvent the obligation of re-employment of the claimant.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

According to the Employment Contracts Act (55/2001), employment contracts can be concluded for a fixed-term on the initiative of the employer for a justified reason only and fixed-term employment contracts cannot be used to evade the provisions on protection against unilateral termination.

CJEU case C-326/19, 03 June 2021, Ministero dell'Istruzione, dell'Università e della Ricerca

In Finland, consecutive fixed-term employment contracts need to be based on a justified ground. For example, the Labour Court has issued two judgments (TT 2020:117 and TT 2020:116, 28 November 2020) on a fixed-term employment contract of a professor. The decisions were based on similar grounds. The cases examined whether a university had a justified ground to conclude a fixed-term employment contract with a professor for approximately five years. According to the general collective agreement of universities, a fixed-term agreement can be concluded on grounds mentioned in the Employment Contracts Act and legislation on universities. According to the judgments of the Labour Court, not even an established practice in a certain field could set aside the mandatory provisions stipulated in legislation. Case by case assessments must be carried out as to whether the requirement to conclude a fixed-term contract has been fulfilled.

CJEU case C-550/19, 24 June 2021, Obras y Servicios Públicos and Acciona Agua

An employer must treat all employees equally, unless a deviation from this principle is justified in view of the duties and position of the employee. The rules on the use of fixed-term employment contracts are set out in the Employment Contracts Act and also apply to employment contracts concluded for contract work.

4 Other Relevant Information

4.1 Persons with partial work capacity

A state-owned company with a special assignment will be set up to boost the employment of persons with partial work capacity. The company's task will be to recruit such persons for longer-term employment relationships and provide them support to carry out their duties. Another objective is to promote opportunities for employees to advance in their careers and take up employment with new employers.

The new special assignment company will be designed to employ persons with partial work capacity, i.e. persons who are in particularly precarious positions in the labour

market. While an estimated 20 000 – 30 000 people with partial work capacity are outside the labour market in Finland, their employment cannot be significantly promoted through existing services. They can work under an employment relationship in the new company. Work and sufficient support will enable many people with partial work capacity to boost their skills and competence so that they have a better chance of being employed by new employers.

France

Summary

The Court of Cassation has ruled on the definition of working time, and clarified the method for calculating the back pay corresponding to the period between different fixed-term employment agreements.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Moral harassment

Labour Division of the Court of Cassation, No. 20-15.525, 09 June 2021

In the present case, an employee was hired as a director in 2008 by a non-profit organisation. She was dismissed in 2015 on real and serious grounds. She applied to the Employment Tribunal for her dismissal to be declared null and void. The employee argued that she had been dismissed for having reported harassment within the company.

Under the terms of Article L. 1152-3 of the Labour Code, any dismissal of an employee who disregards Articles L. 1152-1 and L. 1152-2 (protection of an employee who reports acts of moral harassment of which he or she considers himself or herself a victim) is null and void.

However, the Court of Appeal noted that the employee had not referred to acts qualified as moral harassment in her letter to the employer. Indeed, the Court of Cassation had already determined that a dismissal is not null and void if the employee does not describe the facts he or she denounces as 'harassment' (Labour Division of the Court of Cassation, No. 15-23.045, 13 September 2017). According to the employee, the terms of her letter referred to repeated acts that had undermined her physical and mental health, so that the employer could not misunderstand the fact that she was reporting acts of moral harassment.

The Court of Cassation reminded that an employee who reports acts of moral harassment cannot be dismissed for this reason, except in bad faith, which cannot result from the mere fact that the reported acts are not established. The Court of Cassation then noted that even if the employee did not qualify the reported facts as constituting moral harassment, the employer expressly mentioned the inaccurate accusations of harassment in the letter of dismissal.

Consequently, the Court of Cassation overturned the appeal decision and tempered its own case law: when the employee does not describe the reported acts as moral harassment but the employer does so in the letter of dismissal, the dismissal is null and void.

Labour Division of the Court of Cassation, No. 19-21.931, 09 June 2021

In the present case, an employee was hired as a cashier in 2000. In 2009, the employee was declared permanently incapacitated for her job by the occupational physician. She was dismissed on 17 November 2009 for her incapacity to work and could not be reclassified. On 10 November 2014 (i.e. nearly 5 years after her dismissal), the employee brought an action before the Employment Tribunal to have her dismissal

declared null and void and to order the company to pay her various sums, in particular for the moral harassment she had suffered.

The company defended itself by claiming that the employee's action was time-barred, since an action for compensation for damage resulting from moral harassment is time-barred at 5 years from the disclosure of the harassment (Article 2224 of the Civil Code). The facts of the case demonstrate that the employee contacted the Labour Inspectorate on 9 September 2009 to indicate that she was on leave due to depression and that she had been subjected to moral harassment at work. According to the employer, the time limit for taking action began to commence from this date onwards.

The Court of Cassation did not follow the employer's reasoning and adjusted the time limit to commence from the date of dismissal, i.e. on 17 November 2019, because the employee had claimed to be subjected to moral harassment even after her visit to the Labour Inspectorate. She stated that the employee therefore had 5 years from that date to bring her case before the Employment Tribunal, which she did in the present case. Moreover, it specifies that judges may take all facts into consideration that are likely to presume the existence of moral harassment, regardless of the date on which they were committed, i.e. even if they were committed during a period exceeding the limitation period.

The Labour Division is thus in line with the case law of the Criminal Division of the Court of Cassation (Criminal Division of the Court of Cassation, No. 18-85.725, 19 June 2019).

2.2 Working time

Labour Division of the Court of Cassation, No. 19-15.468, 02 June 2021

In the present case, employees brought various claims before the Employment Tribunal in 2013. In particular, they requested that break times be reclassified as paid working time. This concerned a compulsory break of 30 minutes, which was identified by a badge to prevent the employees from working more than 6 hours continuously.

The appeal judges ruled in favour of the employees and noted that the employer had required the employees to carry their business telephone with them during all of their movements within the site 'in order to be reachable at all times', to be able to respond to urgent information to be transmitted to the carrier for deliveries.

For the appeal judges, the employees had to remain at the disposal of their employer constantly and comply with his instructions. They could not freely pursue their personal interests, including during their breaks, so that these constituted actual working time.

Nevertheless, the reasoning was considered insufficient by the Court of Cassation, which found that the elements taken into account by the trial judges did not demonstrate how the employees were at the employer's disposal during their breaks and had to comply with his instructions without being able to freely pursue their personal interests. Consequently, the Court of Cassation overturned and annulled the appeal decision on the basis of Articles L. 3121-1 and L. 3121-2 of the Labour Code.

Labour Division of the Court of Cassation, No. 20-12.578, 02 June 2021

The employees of an airline working as cabin crew, brought various claims before the Employment Tribunal concerning the performance of their employment contract, more specifically, their working hours.

The legal duration of flight crews' effective work corresponds to working time expressed in hours (Article L. 6525-3 of the Transport Code). This working time is fixed at 75 hours or 78 hours of flight time, on average, per month, depending on the option chosen by the company (Article D. 422-10 of the Aviation Code).

According to the facts of the case, the company had concluded a collective bargaining agreement in which the monthly flight time was reduced to 55 hours. The employees claimed overtime for the flight hours between the 56th and the 68th flight hour.

For the Court of Appeal, the reduction of the monthly flight time in the company does not allow the hours between the 56th and 68th flight hours to be considered as overtime. Overtime is only counted from the legal duration, unless there are more favourable provisions.

The Court of Cassation confirmed the reasoning of the Court of Appeal, holding that "*the setting by agreement of the working hours applicable in the company at a level lower than the legal working hours does not, in the absence of specific provisions to this effect, entail a corresponding reduction of the threshold for activating overtime*". In the present case, the collective agreement did not contain such provisions and the hours mentioned could not be counted as overtime.

With this ruling, the Court of Cassation confirmed its case law (Labour Division of the Court of Cassation, No. 13-10.721, 13 November 2014) while establishing a general principle with a broader scope that can be applied to any collective bargaining agreement that provides for working hours that are inferior to the legal working hours.

2.3 Fixed-term work

Labour Division of the Court of Cassation, No. 19-16.183, 02 June 2021

In the present case, an employee was hired as a writer under a succession of fixed-term employment agreements between 2002 and 2013. He applied to the Employment Tribunal for the reclassification of the employment relationship as one of indefinite duration, for the reclassification of the termination of the agreement as a dismissal without real and serious cause and for the payment of various amounts.

The Court of Appeal ruled that the employee's claim was well-grounded, considering, in accordance with the Court of Cassation's case law, that the employee had provided proof that he had been at the employer's disposal (Labour Division of the Court of Cassation, No. 15-22.790, 19 October 2016).

However, the Court of Appeal ordered back pay by taking the average monthly working time into consideration obtained by adding the durations of the agreements performed. It is on this point that the Court of Cassation rejected the Court of Appeal's reasoning.

Referring to Articles L. 1245-1 and L. 3121-1 of the Labour Code, the court recalled that the reclassification of a fixed-term employment agreement into one of indefinite duration only concerns the term of the agreement and leaves the contractual stipulations relating to working hours unchanged (Labour Division of the Court of Cassation, No. 16-13.581, 05 October 2017). For the Court of Cassation, the calculation of back pay must be based on the reality of the situation of each interstitial period as resulting from the fixed-term contracts that preceded it. Therefore, for the wage reminder concerning an interstitial period, the working time specific to the fixed-term agreement preceding this period is used as the basis of calculation.

With this decision, the Court of Cassation has clarified the method for calculating the back pay corresponding to the interstitial period between different fixed-term employment agreements.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

In the present case, a person was hired by a Spanish public administration under a contract of *interinidad* pending the organisation of selection procedures to permanently fill the post she occupied. However, even though Spanish law provides for a period of 3 years to organise the selection procedure, it took 13 years to be completed.

After her contract was terminated, the employee requested her employment agreement to be reclassified into one of indefinite duration. The Spanish court referred several questions to the Court of Justice for a preliminary ruling on the conformity of Spanish legal provisions with the European Framework Agreement on Fixed-term Work.

The Court of Justice stated that the national legislation at issue in the main proceedings, as interpreted by national case law does not appear to include measures to prevent the abuse of successive fixed-term employment agreements.

The judges concluded that clause 5(1) of the Framework Agreement must be interpreted as precluding national legislation, as interpreted by national case law, which, pending the outcome of recruitment procedures initiated in order to fill vacant positions of workers in the public sector definitively, allows the renewal of fixed-term agreements, without specifying a precise deadline for the finalisation of these procedures and, on the other hand, prohibits both the assimilation of these workers to non-permanent workers of indefinite duration and the granting of an allowance to these same workers (para. 88). Moreover, purely economic considerations linked to the financial crisis of 2008 cannot justify the absence in national legislation of measures to prevent and sanction the use of successive fixed-term employment agreements.

CJEU case C-326/19, 03 June 2021, Ministero dell'Istruzione, dell'Università e della Ricerca

In this case, the Court of Justice received a request for a preliminary ruling concerning Italian legislation, and more specifically the provisions governing the recruitment of university researchers.

The Court of Justice stated that clause 5 of the Framework Agreement on Fixed-term Work must be interpreted as not precluding national legislation under which provision is made, in respect of the recruitment of university researchers, for the conclusion of a fixed-term contract for a period of three years, with a single possibility of extension, for a maximum period of two years, making the conclusion of such contracts subject:

- first, to the condition that resources are available 'for planning for the purposes of carrying out research, teaching, non-curricular activities and student service activities'; and
- second, that such contracts are extended on condition that there is a 'positive appraisal of the teaching and research activities carried out', without it being necessary for those rules to define objective and transparent criteria making it possible to verify that the conclusion and renewal of such contracts do indeed meet a genuine need, and that they are likely to achieve the objective pursued and are necessary for that purpose.

Under French law, to be valid, a fixed-term employment agreement must satisfy the following two conditions:

- it must have been concluded for the performance of a specific and temporary task;

- it must not, for whatever reason, have the effect or purpose of permanently filling a job related to the normal and permanent activity of the company (Article L. 1242-1 of the Labour Code).

In addition, the fixed-term agreement must have been concluded for one of the cases of recourse listed exhaustively by the law, namely:

- the replacement of an absent employee or company director:
    - to deal with any absence or suspension of an employee's employment agreement;
    - to compensate for any request for a temporary part-time shift by an employee;
    - to cover the period between the final departure of an employee and the effective start of work of the new job holder;
    - to allow the temporary preservation of a position before it is terminated within a certain period of time;
- temporary increase in activity;
- the performance of work that is temporary in nature (seasonal jobs or in certain sectors where it is common practice not to use permanent employment agreements or to carry out harvest work);
- the replacement of a farm or business manager, a family helper, a farm partner or their spouse (Article L. 1242-2 of the Labour Code).

The provisions of the Labour Code relating to the limitation of cases of recourse are of public order. A collective bargaining agreement may not depart, in a manner unfavourable to the employee, from the public policy provisions relating to the conditions of use and form of the fixed-term agreement (Labour Division of the Court of Cassation, No. 11-25.442, 02 April 2014).

However, the right to conclude fixed-term agreements (even in cases authorised by the law) is subject to limitations in certain circumstances. The law expressly prohibits the use of fixed-term agreements in the following situations:

- replacement of striking employees (Article L. 1242-6, 1°, of the Labour Code);
- performance of dangerous work included in a list established by ministerial decree (Article L. 1242-6, 2°, of the Labour Code);
- existence of an economic dismissal in the previous 6 months in the case of recourse to a fixed-term employment agreement for the purpose of a temporary increase in activity (Article L. 1242-5 of the Labour Code).

As regards the duration of the fixed-term agreement, certain contracts must be concluded for a specific period. These are concluded:

- for a temporary increase in activity;
- in the event of the permanent leaving of an employee prior to the end of his or her contract, which must take place within 24 months.

However, other types of fixed-term agreements may be concluded with a precise or imprecise term. This is the case for the following contracts:

- replacement of absent employees or managers;
- seasonal contracts;
- temporary contracts of use (Article L. 1242-7 of the Labour Code).

A contract with a precise term must state the expiry date and the total duration of the contract, otherwise it may be requalified as a contract of indefinite duration and be

subject to criminal sanctions. Therefore, the precise term cannot bear any approximation (Labour Division of the Court of Cassation, No. 13-13.522, 30 September 2014).

For these agreements, the duration is freely determined by the parties, taking into account the purpose of the fixed-term agreement, on the one hand, and the company's needs, on the other, within the limits of the maximum authorised duration. In principle, the maximum duration of fixed-term agreements concluded with a specific term is 18 months, including renewals. By way of derogation, this duration may be reduced to 9 months or increased to 24 months under certain circumstances listed exhaustively in the law, in particular for all types of fixed-term agreements with a specific term carried out in a foreign state (Article L. 1242-8-1 of the Labour Code).

There is no maximum duration for a contract with an unspecified term. It is the achievement of the purpose of the agreement that determines the date of termination of the agreement, provided that the minimum duration has expired. In the case of a fixed-term agreement concluded to replace an employee, the contract ends when the absence of the replaced employee ends, regardless of the duration of the absence, and in other cases, when the purpose of the agreement is met, i.e. the season in the case of a seasonal contract, or when the new holder takes up his or her duties in the case of a fixed-term agreement concluded to replace an employee after the latter has left permanently.

If the maximum duration is exceeded, the initial agreement will be reclassified as one of indefinite duration (Article L. 1245-1 of the Labour Code).

Moreover, when a fixed-term agreement ends, it is not possible, with some exceptions, to have recourse to a new fixed-term agreement for the same job with the same or a different employee before the expiry of a period of time, which differs according to the duration of the initial agreement, renewals included (Article L. 1244-3 of the Labour Code). The waiting period set by the Labour Code is equal to:

- one-third of the duration of the expired agreement if the duration of the initial agreement (including renewal) is 14 days or more;
- half the duration of the expired agreement if the duration of the agreement (including renewal) is less than 14 days (Article L. 1244-3-1 of the Labour Code).

The succession of fixed-term agreements with the same employee is also limited. Indeed, any contractual relationship that continues after the initial contract has expired becomes one of indefinite duration (Article L. 1244-1 of the Labour Code). The duration of the waiting period is not specified by the law if the succession concerns a different position. In order to avoid any risk of subsequent reclassification by the judge, the interruption period should not be too short. It depends on the duration of the expired employment agreement. It must also be free of any fraudulent intent.

Thus, French law, in accordance with the first paragraph of Article 5 of the Framework Agreement on Fixed-term Work concluded on 18 March 1999, provides for the maximum total duration of successive fixed-term contracts as well as for the number of possible renewals. Renewal must also be objectively justified, as it can only take place if the purpose of the contract subsists.

Therefore, the French legislative provisions on fixed-term contracts in the public sector appear to be in line with Article 5 of the Framework Agreement on Fixed-term Work.

CJEU case C-550/19, 24 June 2021, Obras y Servicios Públicos and Acciona Agua

In the present case, the Court of Justice had received a request for a preliminary ruling concerning the conformity of the Spanish regulations on fixed-term *'fijos de obra'* employment agreements (in the field of construction) with the European Framework

Agreement on Fixed-term Work and with Council Directive 2001/23/EC on the transfer of undertakings.

According to the Court of Justice, the evaluation of the national provisions falls within the competence of national courts, but it specifies that, in any event, renewals of fixed-term employment agreements known as *'fijos de obra'* must not be considered to be justified by objective reasons within the meaning of Article 5 of the Framework Agreement, solely on the grounds that each agreement is generally concluded for a single construction project, irrespective of its duration, provided that such national legislation does not prevent the employer concerned from responding, by means of such renewals, to permanent and lasting staff requirements.

In French law, there is a so-called *'contrat de chantier'*. Article 30 of Order No. 2017-1387 of 22 September 2017 introduces a specific type of indefinite term employment agreement in the Labour Code: the operation contract, also known as *contrat de chantier*. The *contrat de chantier* allows the employer to recruit, for an indefinite period, an employee to carry out a task or a specific operation of varying duration, while allowing the duration of the contract to be adjusted to the needs of the operation or project.

Although the nature of the *contrat de chantier* is similar to that of an indefinite term agreement, it is governed by a certain number of specific rules that are distinct from regular agreements of indefinite duration, particularly with regard to the conditions for its termination, which are facilitated. Moreover, its use is limited to certain sectors or even certain activities, which is not the case for the classic contract of indefinite duration.

In France, an employer who wishes to enter into a contract to carry out a project (or an operation) must use an indefinite term agreement rather than a fixed-term agreement. Indeed, case law considers that the *contrat de chantier* is, in principle, a contract of indefinite duration, unless it is concluded in cases of recourse to the fixed-term employment agreement provided for by the law. Thus, for example, it is not possible to conclude a fixed-term agreement for a temporary increase in activity for the completion of a construction project (Labour Division of the Court of Cassation, No. 04-47.059, 07 March 2007).

The *contrat de chantier* should not be confused with the fixed-term agreement limited to engineers and managers governed by Article L. 1242-2, 6° of the Labour Code: the fixed-term agreement with a defined purpose is a fixed-term agreement with an uncertain term signed for the achievement of a defined purpose that can only be signed in the event of an extended company or branch collective bargaining agreement providing for this. It must be terminated when the purpose for which it was concluded is achieved, after a two-month notice period. This fixed-term agreement meets the conditions set out above.

Only an extended collective branch agreement can implement *contrat de chantier*. Article L. 2253-1 of the Labour Code states that it is up to the branch agreement to define the employment and working conditions as well as the guarantees applicable to employees on a *contrat de chantier ou d'opération*.

The duration of the *contrat de chantier* and its term are uncertain because they are linked to the duration of the contract's purpose. It ends when the construction project or operation for which it was concluded is completed. This type of contract concerns cases where the duration of the construction project or operation cannot be defined with certainty. This flexibility allows for the duration of the agreement to be adapted to the needs of the operation.

The Labour Code does not provide for a minimum or maximum duration. However, the branch agreement governing the *contrat de chantier* may set a minimum period.

When the construction project or operation for which the contract was concluded is completed, the employer has the possibility of dismissing the employee. The end of the

construction project or operation is a real and serious reason for dismissal (Article L. 1236-8 of the Labour Code). However, according to established case law, the validity of dismissal due to the end of a construction project is subject to the existence of a clause in the employment agreement or letter of employment specifying that the contract is concluded for one or more specific projects (Labour Division of the Court of Cassation, No. 01-46.891, 02 June 2004). It is up to the employer to take the initiative to initiate the dismissal procedure. If this is not done, the employment agreement must continue.

Dismissal due to the end of the construction project is subject to the procedure for dismissal on personal grounds laid down in Articles L. 1232-2 to L. 1232-6 of the Labour Code and is covered by all the guarantees provided for in this respect (invitation to a preliminary interview, possibility of being assisted by a person of one's choice belonging to the company, preliminary interview, notification of dismissal on personal grounds).

When the contract is terminated, the employer must pay the wages due, holiday allowance and redundancy allowance: the redundancy allowance is that provided for in the collective bargaining agreement or agreement defining the *contrat de chantier*.

In addition, the collective branch agreement may stipulate (but this is not a legal obligation) that an employee who is dismissed at the end of the construction project or operation may benefit from priority for re-employment under a contract of indefinite duration. In this case, the text must set out the timeframe and implementation procedures (Article L. 1236-9 of the Labour Code).

Case law has not yet ruled on the application of the European Framework Agreement to the *contrat de chantier*. However, even if no other provisions relating to the succession of such agreements are provided for, this is a specific employment agreement to which the national provisions on fixed-term agreements do not apply.

4 Other Relevant Information

4.1 Violence and harassment at work

A bill authorising the ratification of the International Labour Organisation Convention No. 190 concerning the elimination of violence and harassment in the world of work was adopted by the French Council of Ministers on 02 June 2021.

French legislation is already in line with the provisions of this Convention according to the bill's impact assessment. Therefore, its ratification does not require any modification of domestic labour law.

Germany

Summary

(I) The *Bundestag* has adopted the Draft Law on Corporate Due Diligence in Supply Chains.

(II) The Federal Labour Court ruled that foreign care workers posted to a private household in Germany are entitled to the statutory minimum wage for hours worked. In another ruling, it held that the union DHV (DHV) does not have collective bargaining capacity.

(III) The Federal Labour Court has also made a request for a preliminary ruling of the CJEU regarding the application of the Act on Temporary Agency Work in the public service.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Corporate due diligence in supply chains

On 11 June 2021, the German Bundestag adopted the Draft Law on Corporate Due Diligence in Supply Chains submitted by the Federal Government. The so-called Due Diligence Act (*Sorgfaltspflichtengesetz*) is intended to improve the international human rights situation by establishing clear and implementable requirements for responsible management of supply chains for certain companies.

2 Court Rulings

2.1 Foreign care workers

Federal Labour Court, 5 AZR 505/20, 24 June 2021

The Federal Labour Court held that foreign care workers posted to a private household in Germany are entitled to the statutory minimum wage for hours worked. This also includes on-call service. According to the Court, such on-call service applies to situations in which the caregiver is contractually required to live in the household of the person he or she is caring for and is generally expected to work all hours of the day and night, if required.

In the present case, the plaintiff, who resided in Bulgaria, was employed by a company based in Bulgaria. Her employment contract stipulated a work week of 30 hours, with Saturdays and Sundays off. The plaintiff was posted to Berlin and worked for a net remuneration of EUR 950.00 per month in the household of the person she cared for, and with whom she also shared a room. In addition to household activities, her tasks included 'basic care' (such as help with hygiene, dressing, etc.) and social tasks. The plaintiff was employed on the basis of a service contract in which the company undertook to provide the listed care services through its employees in the person's household.

In her lawsuit, the plaintiff, with reference to the Minimum Wage Act (*Mindestlohngesetz*, *MiLoG*), demanded additional remuneration. She claimed that she had not only worked 30 hours a week, but had worked around the clock or had in any

event been on standby. The State Labour Court had essentially upheld her claim and, by way of an estimate, calculated a working time of 21 hours per calendar day.

On appeal, the Federal Labour Court held that the State Labour Court was correct in assuming that the obligation to pay the statutory minimum wage pursuant to Section 20 in conjunction with Section 1 of the MiLoG also applied to foreign employers when they post employees to Germany. These were overriding mandatory rules within the meaning of Article 9 (1) of the Rome I Regulation, which apply irrespective of whether German or foreign law is otherwise applicable to the employment relationship. The Federal Labour Court also ruled, however, that the State Labour Court had not sufficiently assessed the defendant's submission on the extent of work performed and had therefore incorrectly assumed that the plaintiff's daily working time, including periods of on-call duty, amounted to 21 hours. This led to the reversal of the judgment of the State Labour Court. The case had to be referred back to the State Labour Court to further clarify the facts of the case, to comprehensively assess the submissions of the parties and to determine the actual working time of the plaintiff, i.e. her full-time or on-call hours, and how many hours of free time she had.

2.2 Collective bargaining

Federal Labour Court, 1 ABR 28/2, 22 June 2021

The Federal Labour Court ruled that the *DHV - Die Berufsgewerkschaft e.V.* (*DHV*) does not have collective bargaining capacity.

Under Section 2(1) of the Act on Collective Bargaining Agreements (*Tarifvertragsgesetz*, *TVG*), collective agreements can only be concluded by organisations that have so-called collective bargaining capacity. Pursuant to case law, this requires a union to have assertive power vis-à-vis the employer and sufficient organisational capacity in at least a not insignificant part of the claimed area of competence. This social power is regularly conveyed by the number of workers organised, without this being conclusive.

The DHV has—by its own admission—66,826 members employed in its area of competence. According to the DHV, this area covers about 6.3 million employees, which corresponds to an overall degree of organisation of about 1 per cent. In individual areas of competence, their degree of organisation varies between about 0.3 per cent (commercial and administrative professions with municipal employers) and 2.4 per cent (insurance industry).

Several competing unions sought judicial determination that the DHV does not have collective bargaining capacity.

The Federal Labour Court held that on the basis of an overall assessment, it could not be predicted, even on the basis of the information provided by the DHV, that it had the necessary member-mediated assertiveness vis-à-vis its social counterparts in its independently determined area of competence. Nor could the DHV derive its social power from its participation in the collective bargaining process so far.

2.3 Temporary agency work

Federal Labour Court, 6 AZR 390/20 (A), 16 June 2021

In the present case, the plaintiff was employed by the defendant GmbH. The defendant operates a hospital, the owner and sole shareholder of which is a public corporation. It does not have a permit to hire out workers. The collective agreement for the public service (TVöD), in the version applicable to municipal employers, applies to the parties' employment relationship.

In June 2018, the defendant spun off various areas of responsibility, including the plaintiff's job, to a newly founded Service GmbH. The spin-off resulted in a transfer of

part of the undertaking. The plaintiff objected to the transfer of his employment relationship to the Service GmbH. However, since June 2018, at the request of the defendant, he had been performing his contractually agreed work at the GmbH by way of provision of personnel pursuant to Section 4 Subsection 3 of the TVöD. His employment there was of a permanent nature. However, the employment relationship agreed between him and the defendant continued with the previous content. The Service GmbH only had the right to issue technical and organisational instructions to the plaintiff.

In his action, the plaintiff claimed that his employment with the Service GmbH was in breach of European Union law. The defendant, on the other hand, argued that the provision of staff was not an unlawful provision of temporary workers on the basis of the exception in Section 1(3) No. 2b of the Act on Temporary Agency Work (*Arbeitnehmerüberlassungsgesetz*, *AÜG*). The conformity of this provision with EU law is highly ambiguous.

The Federal Labour Court asked the Court of Justice of the European Union under Article 267 TFEU to answer two questions on the interpretation of Article 1(1) and (2) of Directive 2008/104/EC. Essentially, the Federal Court wants to know whether the provision of staff as defined in Section 4 (3) TVöD falls within the scope of the Temporary Agency Work Directive. If this were the case, the decision would depend on whether the Temporary Agency Work Directive allows for a sectoral exception such as that provided for in Section 1(3) No. 2b of the AÜG.

Section 4(3) of the TVöD reads as follows:

> *"If the employee's tasks are transferred to a third party, the work agreed under the employment contract shall be performed by the third party at the employer's request while the employment relationship continues to exist (staff secondment). Section 613a of the Civil Code [transfers of undertakings)] and statutory rights of termination shall remain unaffected."*

The so-called Protocol Explanation on Paragraph 3 reads as follows:

> *"Staff secondment is—under continuation of the existing employment relationship—the employment with a third party on a permanent basis. The modalities of the secondment of staff shall be contractually agreed between the employer and the third party."*

Section 1(3) of the AÜG:

> *"With the exception of Section 1b, first sentence, Section 16 (1) No. 1f and (2)-(5), and Sections 17 and 18, this Act shall not apply to the hiring out of workers (…) 2b. between employers if an employee's duties are transferred from the previous employer to the other employer and, on the basis of a collective agreement of the public sector a) the employment relationship with the previous employer continues; and b) the work is to be performed in future by the other employer."*

2.4 Delivery workers

State Labour Court Frankfurt, 1 Sa 306/20 a.o., 12 March 2021

According to the Court, delivery workers who collect orders for food and drinks from restaurants and deliver them to customers can request the delivery service to provide them with a bicycle and smartphone for their work. They are not required to use their own equipment, including the necessary data volume for internet use, while they are working.

According to the Court, the employment contracts of bicycle delivery drivers were to be reviewed as general terms and conditions. The provision that the delivery drivers themselves had to possess a bicycle and smartphone without financial compensation

was unreasonably disadvantageous to the delivery drivers according to the concrete formulation of the contract. Under the law, the employer has to provide the equipment and bear the costs. The employer also bears the risk if the equipment is not operational.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

According to the CJEU, clause 5(1) of the Framework Agreement must be interpreted as precluding national legislation, as interpreted by national case law, which, on the one hand, permits the renewal of fixed-term contracts without specifying a precise period for the completion of the selection procedures for the definitive filling of vacant posts of workers in the public sector and, on the other hand, prohibits both the assimilation of those workers with workers employed for an indefinite period, who are not permanent, and the grant of compensation to those workers.

As far as German law is concerned, it should be noted that, apart from special provisions in collective agreements, the same rules, in principle, apply to employees in the public sector as they do to employees in the private sector. This means that the Part-time and Fixed-term Employment Contracts Act (*Teilzeit- und Befristungsgesetz*, *TzBfG*) applies to both groups of employees, in principle. There are no regulations in Germany similar to the Spanish ones.

CJEU case C-326/19, 03 June 2021, Ministero dell'Istruzione, dell'Università e della Ricerca

According to the CJEU, clause 5 of the Framework Agreement on Fixed-term Work must be interpreted

> *"as not precluding national legislation under which provision is made, in respect of the recruitment of university researchers, for the conclusion of a fixed-term contract for a period of three years, with a single possibility of extension, for a maximum period of two years, making the conclusion of such contracts subject, first, to the condition that resources are available 'for planning for the purposes of carrying out research, teaching, non-curricular activities and student service activities', and, second, that such contracts are extended on condition that there is a 'positive appraisal of the teaching and research activities carried out', without it being necessary for those rules to define objective and transparent criteria making it possible to verify that the conclusion and renewal of such contracts do indeed meet a genuine need, and that they are likely to achieve the objective pursued and are necessary for that purpose."*

The German legal situation is hardly comparable with the Italian one. The matter is regulated in the Act on Fixed-term Contracts in Science (*Wissenschaftszeitvertragsgesetz*, *WissZeitVG*). The main regulation on fixed-term employment contracts at universities, Section 2(1) of the WissZeitVG, reads as follows:

> *"Setting the term of an employment contract of staff (…) who do not hold a doctorate shall be permissible for a period of up to six years if the fixed-term employment relationship is concluded for the purpose of advancing their scientific or artistic qualifications. Upon completing a doctorate, a fixed-term appointment shall be permissible for a period of up to six years, and in the field of medicine for a period of up to nine years, if the fixed-term appointment is concluded for the purpose of advancing the applicant's own academic or artistic qualifications; the permissible fixed-term appointment period shall be extended to the extent that periods of fixed-term employment in accordance with sentence 1 and*

> *periods of doctoral study without employment in accordance with sentence 1 together amount to less than six years. The agreed fixed-term period shall in each case be calculated in such a way that it is appropriate to the qualification sought. The total permissible fixed-term period under sentences 1 and 2 shall be extended by two years per child if the individual provides care for one or more children under the age of 18. Sentence 4 shall also apply if, with regard to the child, the requirements of (…) the Federal Parental Allowance and Parental Leave Act are met. The total permissible fixed-term period in accordance with sentences 1 and 2 shall be extended by two years in case of a disability (…) or a serious chronic illness. Within the respective permissible fixed-term period, extensions of a fixed-term employment contract are also possible."*

The most controversial issue under European law is Section 2(3) sentence 1 of the WissZeitVG, which reads as follows:

> *"All fixed-term employment contracts that are concluded for more than one quarter of the regular working hours with a German higher education institution or a research institution within the meaning of Section 5, as well as corresponding temporary civil service contracts and private service contracts pursuant to Section 3, shall be counted towards the permissible fixed-term period stipulated in Subsection 1."*

The objection raised against this provision is that with this regulation, the maximum fixed-term limits applicable under European law partially become meaningless under certain circumstances (cf., for example, Stumpf: *Befristete Arbeitsverhältnisse im Wissenschaftbetrieb*, in: Neue Zeitschrift für Arbeitsrecht 2019, 326).

Apart from that, there have been repeated calls for changes to the existing law (cf., for example, the motion of the parliamentary group *Die Linke*, which has called for the introduction of a minimum term of 24 months, among other things (cf. German Parliament Printing Matter 19/27963 of 25 March 2021).

CJEU case C-550/19, 24 June 2021, Obras y Dervicios Públicos and Acciona Aqua

The ruling concerned so-called "fijo de obra" contracts which are unknown in Germany.

4 Other Relevant Information

Nothing to report.

Greece

Summary

The regulations of the new Law 4808 of 19 June 2021 introduce important changes on various aspects of both individual and collective labour law.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Labour law reform

The regulations of the new Law 4808/2021 introduce important changes on both individual and collective labour law. This is one of the most important amendments in recent years.

1.2.2 Digital work card

The provisions of Law 3996/2011 initially provided for the introduction of a digital work card, but the envisaged ministerial decision for its implementation was never issued. Its purpose is to monitor the implementation of the legislation on working time as any changes are recorded in real time. The new law provides that the card will be gradually introduced in large companies and has already been implemented in some of them.

A fine of EUR 10 500 per employee will apply for not activating the digital card and a 15-day shutdown of operations will be ordered in case of recurrence after three checks.

1.2.3 Violence and harassment at work

Violence and Harassment Convention (No. 190) of the International Labour Conference has been ratified. The goal is zero tolerance for violence and harassment based on gender or sexual orientation.

The employer's obligation to inform, prevent and cooperate with the authorities has been established.

For companies with more than 20 employees, the company must adopt a policy to prevent violence and harassment at work, which is in compliance with the principles of confidentiality and impartiality, and designate a liaison officer to deal with such cases.

A ban on dismissal or any less favourable treatment of the affected persons shall be enacted and the reversal of the burden of proof shall be imposed in the event of a suspected incident of violence or harassment.

A department of the Labour Inspectorate has been set up to monitor these issues and the Business Equality Mark has been expanded and will be awarded to employers that have adopted policies to prevent violence and harassment in addition to equality policies.

In exceptional cases, the Labour Inspectorate may impose direct administrative measures for the protection of the affected workers, such as removal from work.

1.2.4 Work-life balance

Directive (EU) 2019/1158 has been transposed, introducing significant changes in the Greek legal order.

Paternity leave will now entail 14 days of pay, instead of the currently 2 days.

Parental leave of 4 months is granted for each parent with a subsidy from OAED for 2 months. The right to flexible working arrangements (teleworking, flexible hours) for each working parent is provided to serve the needs of the family.

The right of paid two-day leave per year for reasons of force majeure is provided for.

Fathers cannot be dismissed for a period of 6 months from the birth or adoption of a child. Dismissal is only possible on serious grounds during this period of time.

Workers who provide personal care or support to a relative, or to a person who lives in the same household and who is in need of significant care or support for a serious medical reason will be granted a special leave of five days per year .

Various other types of leave are also provided for family reasons, many of which were already provided for in the EGSSE (National General Collective Labour Agreement).

Finally, the burden of proof is reversed in the event that the employee is likely to have been dismissed for taking leave or requesting flexible working arrangements.

1.2.5 Teleworking

The right to disconnect in the event of teleworking has been recognised for the first time, i.e. the right of every employee to refrain from working by telephone, electronic or digital form outside his or her working hours and during leaves.

It is provided that teleworking shall be implemented on the basis of an employer-employee agreement. Exceptionally, for reasons of public health (or the health of the employee), it may be imposed unilaterally.

The employer bears the cost of any equipment, maintenance and telecommunications. The use of cameras to monitor the performance of employees is prohibited.

Teleworkers have the same rights and obligations as those who work at the company's premises. They must respect the health and safety provisions and shall not work overtime. A presumption of respect for the health and safety provisions is provided.

1.2.6 Dismissal

The distinction between blue collar and white collar employees in terms of the amount of severance pay has been abolished (12-month's salary in both cases).

To date, in case a dismissal was declared unlawful by the competent court, the employer has been deemed liable for payment of all wages from the date of the (unlawful) dismissal until the employee's reinstatement, but the employee's reinstatement is also ordered, if requested by the employee. The employment relationship is thus considered to have never been terminated

The new law provides that in some cases of unlawful dismissal, the requirement of reinstatement is abolished and the Court will only award additional compensation. In particular, additional compensation will be granted instead of reinstatement, which cannot be less than 3 months' salary or more than twice the legal compensation. In other cases, such as in the event of any kind of discrimination, the declaration of the invalidity of the termination implies the employer's liability for payment of all wages from the date of the (unlawful) dismissal until the employee's reinstatement and the employee's reinstatement

1.2.7 Platform work

A protective framework has been established for those employed on such platforms.

Two means of working for such platforms are recognised, namely contracts of employment and contracts of independent services.

Trade union rights are guaranteed for the self-employed. The platform is responsible for the health, welfare and safety of any type of worker.

1.2.8 Working time

New regulations have changed the limits of overtime work. The limit of legal overtime, as the case may be, was 90 or 120 hours per year, and has now been set at 150 hours per year An increase of 40 per cent on the paid hourly wage for each hour of overtime is also provided.

A break is provided after 4 hours (instead of six as was previously the case) of work. This break shall be limited to a maximum of 30 minutes and is not included in the daily working time.

Compensation for overtime, to which the legal procedure does not apply, has been increased. It will be equal to the hourly wage increased by 120 per cent instead of the currently 80 per cent.

Work on Sundays is now legal in additional branches. With permission of the Labour Inspectorate, a number of companies can operate on Sundays for specific activities, such as extracurricular activities of private schools.

Under the current regime, the flexibility of working time is only possible by collective agreement.

The new regulation allows working time flexibility at the request of the employee. The possibility of a four-day work week without a salary cut is provided for in the context of working time arrangements.

It is also provided that the dismissal of an employee who refuses to accept changes in working time arrangements is null and void.

1.2.9 Dismissal of trade unionists

The new regulations have completely changed the protection regime of trade unionists against termination, while reducing the number of protected persons.

The former regime provided that protected executives could only be dismissed for specific reasons as prescribed by law, after prior authorisation by a special committee.

With the new regulations, dismissal is possible not only for the previously specified reasons, but, in general, in any case that constitutes a serious ground. The previous monitoring by the special committee has been abolished and substituted by a posteriori judicial control.

1.2.10 Trade union registry

The new law stipulates that when a trade union does not update the 'electronic registry of trade unions', it will not be able to undertake strike actions, sign a collective labour agreement, and its executives will not be entitled to special protection (serious grounds for dismissal).

1.2.11 Strike

Significant changes apply to the strike process.

Until now, in case of acts of obstruction or violence involving the trade union, the strike could be declared illegal by the competent court. The new provisions stipulate that if a person—not only the organisation itself or its representatives, but third parties as well—block access to the workplace, the trade union organisation that declared the strike may be held responsible.

The issue of electronic voting in case of a strike had already been provided for in Law 4635/2019, but had not been activated, since the planned ministerial decision was never issued. It should also be provided for in the statutes of the trade union. The new provisions provide for an obligation to provide electronic voting, especially in the event of a strike. The provision of the statutes is no longer necessary.

1.2.12 Essential services

Previous regulations provided that trade unions of essential service companies that declare a strike, in addition to the security personnel for the prevention of accidents, must provide personnel who will serve the public's essential needs.

Such personnel were either defined in the collective agreement or in a decision of a Committee chaired by a judge (Article 15 Commission v. 1264/1982) on the basis of 'the nature and social relevance of the goods and services provided by the company and the need to ensure the exercise of the right to strike'.

The new regulation provides a minimum service of 1/3 of the regular service, regardless of the specificities of each case.

1.2.13 Labour Inspectorate

The Labour Inspectorate has been re-established as an Independent Administrative Authority with functional and administrative independence and financial autonomy. It will exercise the responsibilities of SEPE which has been abolished. The selection of its Director will be made through a public open competition.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

Article 5 of Presidential Decree 81/2003 implements clause 5 of the Framework Agreement on Fixed-term Work in the private sector. It also provides that the renewal of such contracts shall be justified by objective reasons. An objective reason exists, in particular, if the renewal is justified by the form, the type or the activity of the employer or undertaking, or by special reasons or needs, provided that those circumstances are (directly or indirectly) apparent in the contract concerned. Where the duration of successive fixed-term work contracts or relationships exceeds three years in total, it will be presumed that they are covering the fixed and permanent needs of the undertaking or operation, and shall consequently be converted into work contracts or relationships of indefinite duration. Where there are more than three renewals of successive work

contracts or relationships, as defined above, within a period of three years, it will be presumed that they are aimed at covering the fixed and permanent needs of the undertaking or operation, and the contracts concerned shall consequently be converted into work contracts or relationships of indefinite duration. Therefore, Greek legislation provides measures to avoid abuses.

It also provides for equal treatment between fixed-term employees and employees with open-ended contracts.

The judgment is of relevance as it clarifies that the grounds linked to the state budget do not exclude the need to provide measures to avoid abuses.

CJEU case C-326/19, 03 June 2021, Ministero dell'istruzione, dell'Università e della Ricerca

This judgment is of relevance as it clarifies that those available resources and positive appraisals for the purposes of carrying out research may justify the extension of the first fixed-term contract.

Greek legislation provides measures to prevent abuse arising from the use of successive fixed-term contracts (maximum duration and maximum number of renewals).

CJEU case C-550/19, 24 June 2021, Obras y Servicios Públicos and Acciona Agua

Greek legislation provides measures to prevent abuse arising from the use of successive fixed-term contracts (maximum duration and maximum number of renewals). It does not contain exceptions such as those provided for '*fijos de obra'* contracts.

Therefore, the above judgment has no implications for Greece.

4 Other Relevant Information

Nothing to report.

Hungary

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

Article 192 of the Labour Code maximizes the period of fixed-term contracts in employment relationships:

> *"(2) The duration of a fixed-term employment relationship may not exceed five years, including the duration of an extended relationship and that of another fixed-term employment relationship concluded within six months of the termination of the previous fixed-term employment relationship.*
>
> *(3) Where an employment relationship is subject to official approval, it may only be concluded for the duration specified in the authorisation. If the authorisation is extended, the duration of the new fixed-term employment relationship may exceed five years together with the duration of the previous employment relationship."*

This provision of the Labour Code shall be applied to employment relationships covered by the scope of Act 33 of 1992 on Public Employees.

The Labour Code and the Act on Public Employees comply with the ruling.

CJEU case C-326/19, 03 June 2021, Ministero dell'istruzione, dell'Università e della Ricerca

Article 192 of the Labour Code maximises the period of fixed-term contracts:

> *"(2) The duration of a fixed-term employment relationship may not exceed five years, including the duration of an extended relationship and that of another fixed-term employment relationship concluded within six months of the termination of the previous fixed-term employment relationship."*

In addition, Article 192 of the Labour Code contains the following provision on renewals of fixed-term contracts:

> *"(4) A fixed-term employment relationship between the same parties may be extended within a period of six months, or another fixed-term employment relationship may be concluded within six months from the time of termination of*

> *the previous one on objective grounds that have no bearing on work organisation, and may not infringe on the employee's legitimate interest."*

The Labour Code complies with the CJEU's ruling.

CJEU case C-550/19, 24 June 2021, Obras y Servicios Públicos and Acciona Agua

Article 192 of the Labour Code contains the above quoted provisions on the maximum duration of fixed-term contracts as well as on the objective reasons required in case of renewal. These provisions comply with the first part of the ruling.

Article 36 of the Labour Code contains the following provision on transfers of undertakings:

> *"(1) The rights and obligations arising from employment relationships that exist at the time of the transfer of an economic entity (organised grouping of material or other resources) by way of a legal transaction are transferred to the transferee employer."*

This guarantees the transfer of rights in accordance with the second part of the judgment.

4 Other Relevant Information

Nothing to report.

Iceland

Summary

(I) A single payment has been issued to those who have been unemployed for 14 months or longer.

(II) The Data Protection Authority has issued three rulings on labour law-related issues.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Relief measures for the unemployed

On 09 June 2021, Parliament passed an Act providing those who have been unemployed for 14 months or longer as of 01 May 2021 a single payment of ISK 100 000.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

The ruling is unlikely to have any direct implications for Icelandic law. A comparable provision as that addressed in the case does not exist in Icelandic law and purely economic considerations have not applied in this context.

The general rule on preventing abuse is based on Article 5(1)(b) of the Framework Agreement and is stipulated in Article 5(1) of Act No. 139/2003, on Fixed-Term Employment, which stipulates that a fixed-term employment agreement cannot be extended or renewed, i.e. the maximum continuous duration is two years, unless otherwise stated in law.

CJEU case C-326/19, 03 June 2021, Ministero dell'istruzione, dell'Università e della Ricerca

There is a similar provision in Icelandic law in Article 17(4) of Act No. 85/2008, on Public Universities, which states that an employment agreement for academic positions can be indefinite or temporary for up to five years. Under special circumstances, temporary employment contracts can be extended by up to two years beyond the five-year limit.

According to the memorandum accompanying the bill, this rule is justified by the special position of university professors as well as scientists and scholars. The time required to prepare for such work in addition to training for the position justifies a longer temporary employment period than is generally assumed in Act No. 70/1996, on Public Sector Employees, which stipulates that a temporary employment agreement cannot last for

more than two years in Article 41(2). This provision, which has *inter alia* been included in the Act on the University of Iceland since 1999, it was proposed that temporary employment can be extended by up to two years beyond the five-year limit. This option is only possible under special circumstances and in cases where the extension of the period of employment generally serves the interests of the school in question.

The provision therefore contains mechanisms from both 5(1)(b) and (c). It does not seem that the ruling will have any implications for Icelandic law.

CJEU case C-550/19, 24 June 2021, Obras y Servicios Públicos and Acciona Agua

The ruling will not have any direct implications for Icelandic law.

4 Other Relevant Information

4.1 Data protection

The Icelandic Data Protection Authority has published several rulings on labour law-related issues in the month of June.

The first ruling examined an employer's monitoring of an employee's Facebook friend list. The DPA stated in its decision that the employer's processing of personal information about employees could be considered a normal part of its operations. The employer could therefore generally have a legitimate interest in processing such information, provided that the principles of the Data Protection Act are followed.

In the second ruling, the DPA considered the information on a municipality's website about the termination of an employment contract concluded with a specific employee to not be in line with the Data Protection Act.

Finally, in the third ruling, the DPA fined an ice cream parlour ISK 5 000 000 for electronic surveillance of a space that employees, many of whom were underage, use to change clothes and put on the parlour's uniform. In the DPA's verdict, the fact that children had been submitted to such surveillance increased the fine against the parlour.

Ireland

Summary

(I) The High Court has held that a permanent employee, 'acting up' in a higher grade on successive fixed-term contracts, is protected by the fixed-term work legislation.

(II) A parliamentary committee has made recommendations addressing bogus self-employment.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Relief measures for businesses and workers

The COVID-19 Employment Wage Subsidy Scheme has been approved by the government to run to the end of 2021. The scheme supports employers who have experienced a reduction in business of at least 30 per cent, through subsidies—ranging from EUR 203 to EUR 350 per week—on wages paid. The scheme is estimated to have cost EUR 3.835 billion to date. Meanwhile, the Pandemic Unemployment Payment (PUP) is to continue at current rates until 7 September 2021, but will close to new entrants from 08 July 2021 onwards. The weekly rates of payment will be gradually reduced over three phases, starting 7 September, 'provided progress on re-opening continues'. Two further phases of changes will take place on 16 November 2021 and 8 February 2022. By this latter date, the payment will level off with the standard jobseekers' weekly rate of EUR 203.

As of 29 June 2021, 227,982 persons (45.6 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 (57 772), wholesale and retail trade (34 539) and administration and support services (24 271). The number in Construction has dropped from 42 333, at the end of April, to 20 033. In terms of the age profile of PUP recipients, 22.9 per cent were under 25. Additionally, 1 012 persons were in receipt of the COVID-19 Enhanced Illness Benefit. In total to date, 156 336 persons have been medically certified for receipt of this benefit, 53.5 per cent of whom were female.

1.2 Other legislative developments

Nothing to Report.

2 Court Rulings

2.1 Fixed-term work

The High Court, [2021] IEHC 346, 15 June 2021

Directive 99/70/EC was implemented in Ireland by the Protection of Employees (Fixed-Term Work) Act 2003 (the 2003 Act). The Labour Court has consistently held that permanent employees, who are 'acting up' in a higher grade or position on a series of temporary fixed-term contracts, are not fixed-term employees for the purposes of the 2003 Act: see, for instance, *Louth County Council v Kelly* FTD1320 and *Health Service Executive v Power* FTD201. The latter decision has now been overturned on appeal by the High Court: [2021] IEHC 346.

In the present case, the claimant had been a permanent employee of the Health Service Executive (HSE) since 1999, and was appointed interim Chief Executive Officer (CEO) of a unit within the HSE in 2014, on a temporary fixed-term basis, pending the

recruitment of a permanent CEO. His appointment was renewed several times until he reverted to his substantive post in 2019, having failed to secure the CEO position on a permanent basis. His claim for relief pursuant to the 2003 Act was dismissed by the Labour Court because he was considered to not be a fixed-term employee. The High Court judge said that the Labour Court had erred in law in so concluding. The judge agreed with the submissions made on behalf of the claimant to the effect that the objective of the legislation would be subverted were an employer to be permitted to utilise successive fixed-term contracts merely because the worker had permanency in respect of a lesser role within the organisation.

The judge emphasised that his decision did not mean that an existing employee, who had been 'acting up' in a more senior role in excess of four years, was 'automatically entitled' to remain in that post. It was perfectly permissible for an employer to fill a vacant post on an interim basis pending the completion of a formal appointment process; but, where a vacant post had been filled by a person under successive fixed-term contracts, with an aggregate duration of in excess of four years, the employer could not avoid the 2003 Act "*by dint of the fact that that individual was an existing employee with a right to revert to their original post*". The existence of a contractual right to revert to one's original position was no more than a factor to be considered in deciding whether the successive use of fixed-term contracts was objectively justified.

The judge also decided that there was no necessity for him to make an Article 267 TFEU reference to the Court of Justice as the issue fell to be resolved as a matter of domestic law. Among the decisions considered by the judge were case C-157/11, *Sibilio*; case C-251/11, *Huet*; case C-302/11, *Valenza*; case C-103/18, *Sánchez Ruiz*; and case C-942/19, *Servicio Aragonés de Salud.*

Part 3 of the Industrial Relations (Amendment) Act 2015 (the 2015 Act) provides for the making of Sectoral Employment Orders (SEO) laying down minimum pay, sick leave and pension entitlements for all workers in a particular sector of the economy. SEOs have been made in the construction (see S.I. No. 455 of 2017 and S.I. No. 234 of 2019), mechanical engineering (see S.I. No. 59 of 2018) and electrical contracting (see S.I. No. 251 of 2019) sectors. The SEO for this last-mentioned sector was set aside by the High Court because of procedural flaws in its making. The judge, however, went on to rule that the entire SEO process was inconsistent with Article 15.2.1 of the Irish Constitution and was thus invalid: see [2020] IEHC 303 and 342.

The Supreme Court has now upheld the High Court's decision to quash S.I. No. 251 of 2019, but has overturned the decision as to the unconstitutionality of the SEO process: see judgment Náisiúnta Leictreach Contraitheoir Eireann v Labour Court [2021] IESC 36. Part of the State's defence was that Part 3 of the 2015 Act was a legislative response to the problem of employers bringing in 'posted workers' from another EU member state and seeking to engage in unfair competition on the basis of lower labour costs. The Supreme Court, having considered *inter alia* Directives 96/71/EC and 957/2018/EU, accepted that the impugned provisions of the 2015 Act sought "*to ensure that, while cross-border provision of services was facilitated, workers' rights had to be protected, based on an internal market legal basis, and reliant on Article 53(1) and 62 TFEU*".

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

There is no legislation in Ireland equivalent to that under consideration in the present case. Clause 5 of the Framework Agreement was transposed by section 9 of the Protection of Employees (Fixed-Term Work) Act 2003 (the 2003 Act) which provides, in relevant part, that, where a fixed-term worker is employed on two or more continuous

fixed-term contracts, the aggregate duration of such contracts shall not exceed four years. Where any term of a fixed-term contract purports to contravene this provision, that term shall have no effect and the contract concerned shall be deemed to be 'a contract of indefinite duration'. Neither of these provisions, however, apply to the renewal of a fixed-term contract where there are 'objective grounds' justifying such a renewal.

Some of the CJEU's rulings in this case have been anticipated in Irish jurisprudence on the 2003 Act. In *Health Service Executive v Umar* [2011] IEHC 146, the High Court held that holding an open competition for a permanent consultant post was a legitimate aim corresponding to a real need of the employer justifying the use of a fixed-term contract to fill the post pending the outcome of the competition. In *Waterford City Council v Kennedy* FTD1235, the issue arose as to whether the claimant's fixed-term contract was renewed or merely continued. The Labour Court found that there was "nothing magical" in the word 'renew'. It was "*a plain and ordinary English word which can properly be used to describe the continuation of something that would otherwise come to an end*". In *Teagasc v McNamara* FTD138, the Labour Court held that the moratorium on recruitment in the public service was not justification for not issuing the claimant with a contract of indefinite duration. The moratorium was of 'general application' and did not relate to the circumstances of the particular work at issue. Accordingly, following case C-212/04, *Adeneler,* the prevailing public interest measures in place for the public service could not be accepted as a ground on which the successive use of fixed-term contracts could be objectively justified.

CJEU case C-326/19, 03 June 2021, Ministero dell'Istruzione, dell'Università e della Ricerca

There is no legislation in Ireland equivalent to that under consideration in the present case. University research and teaching staff, like all other public servants, enjoy the benefit of all of the provisions of the Protection of Employees (Fixed-Term Work) Act 2003.

CJEU case C-550/19, 24 June 2021, Obras y Dervicios Públicos and Acciona Aqua

There is no legislation in Ireland equivalent to that under consideration in this case. According to the jurisprudence of the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (S.I. No. 131 of 2003), a change in contractors similar to that which occurred in this case would be regarded as a transfer of an undertaking.

4 Other Relevant Information

4.1 Bogus self-employment

In its Report on Bogus Self-Employment, the Oireachtas Joint Committee on Social Protection, Community and Rural Development, and the Islands has made a number of recommendations designed 'to create positive change' for those affected by the practice. These include:

- The Code of Practice for Determining Employment or Self-Employment Status of Individuals should be updated and placed on a statutory footing by the end of 2021. The update should address both the use of intermediary arrangements, such as personal service companies and managed service companies, and workers engaged in platform working and the gig economy;

- The Department of Social Protection should examine whether the registration of individuals as self-employed requires greater documentary evidence to be provided by the main contractor or employer;
- A dedicated and appropriately resourced employment status unit should be established in the Workplace Relations Commission to examine and provide determinations on employment status cases, regardless of whether they relate to social insurance, employment rights or tax obligations;
- The Department of Social Protection, in conjunction with the Central Statistics Office, should develop a framework for collecting data on areas of employment where there is a potential or known risk of bogus self-employment.

The Irish Congress of Trade Unions, in its response to the draft report, stated that the only effective resolution was the introduction of legislative measures, whereby all workers are classified as direct employees until proven otherwise by the employer; in other words, a presumption of employed status. The difficulty with such an approach, however, is that there are Court of Justice decisions to the effect that such a presumption constitutes a restriction to the freedom to provide services: see, for example, case C-255/04, *Commission v France* ECLI:EU:C:2006:401, albeit that the impugned measure concerned 'performing artists' including those who were classified as 'self-employed' in another EU Member State.

The Economic and Social Research Institute and the Irish Human Rights and Equality Commission have published a Report on Monitoring Decent Work in Ireland. The report finds that young people, people with disabilities and Eastern European migrants are at much higher risk of disadvantage around employment and have less access to decent work. One-third of younger workers (18-24) had a temporary contract compared to 6 per cent of those in the 25-64 age cohort. 22 per cent of employees had low hourly pay—defined as less than EUR 12.16—with low pay rates being much more common among young workers (60 per cent), Eastern Europeans (38 per cent) and single parents (32 per cent).

Italy

Summary

(I) New decrees have established measures to support the Italian economic recovery and introduced a legal protection for healthcare workers during the emergency.

(II) The Court of Cassation ruled that as publicly owned companies can only hire workers through public competition, an illegitimate fixed-term contract stipulated with such a company cannot be converted into a permanent one.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Relief measures for businesses and workers

The Law Decree of 25 May 2021 No. 73 ('*Sostegni bis*') establishes some measures for companies and workers to support the Italian economic recovery.

In particular:

- The extraordinary *Cassa Integrazione* has been extended until 31 December 2021, if the company's turnover decreased by at least 50 per cent compared to 2019. The average reduction in working hours for employees cannot exceed 80 per cent of the working time, and it will not be possible for each worker's working hours to be reduced by more than 90 per cent. For the hours not worked, employees will receive an allowance paid by INPS equal to 70 per cent of their regular salary.
- The *contratto di rioccupazione* (re-employment contract), which contains an individual project for professional integration lasting six months. This project aims to adapt the skills of the worker to a new job. After 6 months, both parties can withdraw from the contract, respecting the notice period, otherwise the employment relationship will continue as a regular permanent contract. Employers hiring workers under a relocation contract are fully exempt from paying social security contributions for 6 months.
- The *contratto di espansione* can be used by companies with more than 100 employees (the previous limit was 250 employees and the initial limit was 1 000).

1.1.2 Healthcare workers

The Act of 28 May 2021 No. 76 converts the Law Decree of 01 April 2021 No. 44 into law with modifications.

During the COVID-19 emergency, as declared by the Italian government, workers of the healthcare sector are liable for the death or personal injury of patients only in case of gross negligence.

To determine the level of negligence, the judge must consider:

- the lack of scientific knowledge about the disease and the most appropriate treatments;
- the shortage of human and material resources compared to the number of cases to be treated;
- the limited knowledge and experience of workers without specialisation employed during the emergency.

1.1.3 Reopening of economic activities

The Act of 17 June 2021 No. 87 converts the Law Decree of 22 April 2021 No. 52 into law, and provides for a gradual reopening of economic activities.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Fixed-term work

Corte di Cassazione, No. 12421, 11 May 2021

An 'in-house' company of a local authority can only hire through a public tender.

A publicly owned company, set up by a local authority, can only hire workers through a public competition. Consequently, it is not possible for an illegitimate fixed-term contract concluded by an employee with this company to be converted into a permanent contract.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

CJEU case C-726/19 concerned the renewal of fixed-term contracts in the public sector, pending completion of the recruitment procedure.

According to the Italian legislation (Legislative Decree of 30 March 2001, No. 165, Article 36), fixed-term contracts in the public sector can only be concluded in case of temporary or extraordinary needs. They can last no more than 36 months, including extensions and renewals. The contract can be extended a maximum of 5 times, only if the initial contract has a duration of less than 36 months.

After the 36-month deadline has been exceeded, the parties can conclude another fixed-term contract, with a duration not exceeding 12 months, at the Territorial Labour Office.

The maximum limit of 36 months in total was recently confirmed by the Court of Cassation, on 04 March 2021, No. 6089.

Specific rules are provided for managers, schools and healthcare workers.

CJEU case C-326/19, 03 June 2021, Ministero dell'Istruzione, dell'Università e della Ricerca

The CJEU case C-326/19, 03 June 2021, *Ministero dell'istruzione, dell'Università e della Ricerca*, recognises the legitimacy of the Italian legislation:

> "*under which provision is made, in respect of the recruitment of university researchers, for the conclusion of a fixed-term contract for a period of three years, with a single possibility of extension, for a maximum period of two years, making the conclusion of such contracts subject, first, to the condition that resources are available 'for planning for the purposes of carrying out research, teaching, non-curricular activities and student service activities', and, second, that such contracts are extended on condition that there is a 'positive appraisal of the teaching and research activities carried out', without it being necessary for*

those rules to define objective and transparent criteria making it possible to verify that the conclusion and renewal of such contracts do indeed meet a genuine need, and that they are likely to achieve the objective pursued and are necessary for that purpose."

CJEU case C-550/19, 24 June 2021, Obras y Dervicios Públicos and Acciona Aqua

According to Article 19, (2), Legislative Decree 15 June 2015 No. 81, "*the duration of fixed-term employment relationships between the same employer and the same employee, in effect a succession of contracts, concluded for tasks of the same level and legal category and independently from the periods of interruption between one contract and another, may not exceed 24 months*". If this limit is exceeded as a result of a single contract or a succession of contracts, the contract becomes a permanent contract *ex nunc*.

According to Article 2112 of the Italian Civil Code, in the event of a transfer of undertaking, the employment relationship with the transferee continues and the worker maintains all of his/her initial rights. In the case of a successive public contract, in compliance with the principles of the European Union, specific social clauses have been included to promote the employment stability of the workers employed (Article 50 Legislative Decree of 18 April 2016 No. 50). In this case, there is no transfer of undertaking, unless there is also a transfer of assets of the company. Only in the latter case does Article 2112 of the Civil Code apply. According to Italian case law, Italian law complies with EU law and CJEU jurisprudence (Court of Cassation, 31 January 2020, No. 2315/2020).

4 Other Relevant Information

Nothing to report.

Latvia

Summary

(I) A new legal regulation in the field of statutory social insurance has entered into force.

(II) An amendment to the Labour Law provides the definition of teleworking and defines the obligations related thereto.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Statutory social insurance

On 01 July 2021, the new legal regulation in the field of statutory social insurance will enter into force stipulating that all employees (23.59 per cent - by the employee; 10.5 per cent - by the employer) must pay insurance contributions in the amount of at least the statutory minimum salary (Amendments to the Law on State Social Insurance (*Grozījumi likumā 'Par valsts sociālo apdrošināšanu'*), Official Gazette No. 240A, 11 December 2020, available here). If an employee is employed part time and his/her part-time salary is not equal to the statutory minimum salary, the remaining part (for attaining the level of minimum contributions, i.e. the amount of statutory minimum pay) of his or her social security contributions must be paid by the employer. The law envisages an exemption of parents who have a child below the age of 3, parents of more than 3 minor children or up to the age of 24 years if the adult child is a full-time student, parents of a child with disabilities, persons who receive old-age pension and full-time students up to the age of 24 years, persons with a group I or group II disability from this obligation. Such exemption does not cover all groups of persons who work part time, for example, persons with a group III disability and persons who care for elderly family members. The same legal obligation applies to self-employed persons. Respective changes were introduced following the line of the decision of the Constitutional Court in 2020 where the Court found that minimum amounts of old-age and disability pensions as well as the minimum subsistence allowance does not comply with the Constitution as those amounts are so low and they would then not be able to provide the financial means to live with dignity.

These legal changes are currently being hotly debated – employers and self-employed persons as well as part-time employees expect many employees and self-employed persons to drop out of the labour market as it will be too costly for employers who employ part-time employees and pay full minimum statutory social insurance contributions to retain such workers.

In light of these legislative changes and their practical effect on an inclusive labour market, there is concern whether the new statutory social insurance regulation complies with the aims set by Directive 97/81, in particular, clause I of the Framework Agreement, which states that one of the purposes is "*to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organisation of working time*".

1.2.2 Teleworking

On 27 May 2021, Parliament adopted amendments to the Labour Law (Amendments to the Labour Law (*Grozījumi Darba Likumā*), Official Gazette No. 110, 06 June 2021, available here). As of 01 August 2021, when the amendments will enter into force, legal regulations on the obligations for remote working will apply. The new legal regulation defines remote working and stipulates the employer's obligation to cover all expenses related to such form of work. The amendment provides that if a general agreement (generally applicable collective agreement) provides for a higher minimum pay than statutory minimum pay, as provided by a general agreement, which has legal consequences equal to statutory minimum pay. As explained in the Explanatory Note (available here), such legal obligation gives competence to the State Labour Inspectorate to apply an administrative fine in case the employer does not pay the employee the higher minimum pay as provided for in a general agreement.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-326/19, 03 June 2021, Ministero dell'Istruzione, dell'Università e della Ricerca

Latvian law does not have a legal regulation similar to that analysed in the present case, thus the respective decision does not have direct implications for Latvian law. However, the Latvian legislation regulating work in academic position contravenes Directive 1999/70/EC. As reported in the June 2019 Flash Report, on 07 June 2019, the Constitutional Court of Latvia delivered a decision (the decision in case No. 2018-15-01, OG No. 116, 10 June 2019) on the constitutionality of the legal norms, providing that only fixed-term contracts, each lasting 6 years, may be concluded with academic staff (professors and associate professors) in establishments of higher education (Article 27(5) and 30(4) of the Law on Higher Education Establishments (*Augstskolu likums*), available here). It found that the respective legal regulation is unconstitutional.

This decision has only to a certain extent put an end to the non-conformity of Latvian law with Directive 1999/70/EC, because the rules on fixed-term contracts still only apply to academic staff members such as lecturers and docents/assistant professors (The Law on Higher Education Establishments (*Augstskolu likums*), available here), as well as directors of state institutions, who are appointed for 5 years (Article 11(2) of the State Civil Service Law (*Valsts Civildienesta likums)*, Official Gazette No. 331/333, 22 September 2000), directors of state agencies, who are appointed for 5 years (Article 9(4) of Public Agency Law (*Publisko aģentūru likums*), Official Gazette No. 199, 18 December 2009, available here). Since the adoption of the respective decision, no legislative changes have been adopted with regard to other groups of academic staff, which is not in line with Directive 1999/70/EC.

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario and

CJEU case C-550/19, 24 June 2021, Obras y Dervicios Públicos and Acciona Aqua

The CJEU decisions in cases C-726/19 and C-550/19 have no direct implications for Latvian labour law, since Latvian law does not include the respective fixed-term employment schemes. Fixed-term employment for all employees (except for civil servants and officials) is regulated in the Labour Law (The Labour Law (*Darba likums*),

Official Gazette No. 105, 06 July 2001, available here). Labour Law provides protection against abuse of successive fixed-term agreements by, first, defining specific jobs and circumstances, where the conclusion of fixed-term contracts is permitted (Article 44(1)) and, second, fixed-term contracts may not last longer than 5 years in total, including renewals. In addition, if a fixed-term contract is concluded for a job or for grounds not listed in Article 44(1), then such contracts must be considered as having been concluded for an indefinite duration. Therefore, the general national legal regulation complies with the requirements of Directive 1999/70/EC and ensures prevention of abuse of fixed-term contracts.

As regards protection of fixed-term employees in case of a transfer of an undertaking, the decision in case C-550/19 has no direct implications for Latvian labour law, however, it has an influence on the interpretation of the concepts implemented in Latvian law under Directive 2001/23/EC.

The concepts, definitions and criteria relevant for establishing the applicability of protection provided by Directive 2001/23/EC are implemented in Latvian law (the Labour Law) in a very generalised manner without detail as follows from the interpretation of the respective concepts, definitions and criteria provided by the CJEU's case law. Such national implementing measures are most likely not very effective for the enforcement of the rights stipulated in Directive 2001/23/EC, as only few cases have been brought before the national courts so far.

4 Other Relevant Information

Nothing to report.

Liechtenstein

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

In Liechtenstein, the regulation of fixed-term employment in the 'private sector' is regulated in the Civil Code (*Allgemeines bürgerliches Gesetzbuch*, LR 210). A fixed-term employment relationship shall end without notice, if a fixed-term employment relationship is tacitly continued after the expiry of the agreed duration, it shall be deemed to be an employment relationship of indefinite duration (Section 1173a Articles 44 (1) and (2) of the Civil Code). A fixed-term employment relationship may be extended a maximum of three times up to a total duration of five years. In the event of a longer duration, it shall be deemed to be an employment relationship of indefinite duration. This regulation does not apply to employment relationships entered into for the purpose of vocational training or as part of state-supported training, integration or retraining measures (Section 1173a Article 44a (1) and (2) of the Civil Code).

Provisions on fixed-term employment in the 'public sector' are found in the State Personnel Act (*Gesetz über das Dienstverhältnis des Staatspersonals, Staatspersonalgesetz*, StPG, LR 174.11). An employment relationship is usually established for an indefinite period (Article 12 of the State Personnel Act). A fixed-term employment relationship shall be established for a maximum period of three years; the government may, in justified cases, extend a fixed-term employment relationship for a maximum of two additional years (Article 13 of the State Personnel Act). Fixed-term employment contracts end without notice upon expiry of the term specified in the employment contract (Article 19 of the State Personnel Act).

The present case concerned a public employment relationship under Spanish law. Accordingly, it was possible for the employee to be employed for more than 13 years under fixed-term employment relationships without the end of the employment being foreseeable (cf. CJEU C-726/19 no. 12 et seq.). This would not be permissible under Liechtenstein law, as explained above. Furthermore, the time of termination of the fixed-term employment relationship must be at least approximately foreseeable. According to the case law of the Swiss Federal Supreme Court in labour disputes, which the Liechtenstein courts generally follow, the duration of the contract must be objectively determined or determinable and may not depend on the will of one party (Swiss Federal Court in ARV 2001, 190). Therefore, Liechtenstein law is in line with CJEU C-726/19.

CJEU case C-326/19, 03 June 2021, Ministero dell'Istruzione, dell'Università e della Ricerca

In case C-326/19, the CJEU (Seventh Chamber) ruled as follows:

> *"Clause 5 of the framework agreement on fixed-term work, concluded on 18 March 1999 which is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, must be interpreted as not precluding national legislation under which provision is made, in respect of the recruitment of university researchers, for the conclusion of a fixed-term contract for a period of three years, with a single possibility of extension, for a maximum period of two years, making the conclusion of such contracts subject, first, to the condition that resources are available 'for planning for the purposes of carrying out research, teaching, non-curricular activities and student service activities', and, second, that such contracts are extended on condition that there is a 'positive appraisal of the teaching and research activities carried out', without it being necessary for those rules to define objective and transparent criteria making it possible to verify that the conclusion and renewal of such contracts do indeed meet a genuine need, and that they are likely to achieve the objective pursued and are necessary for that purpose."*

For the statutory regulation of fixed-term employment in the private sector, see above.

The present case concerned a public employment relationship in the university sector that was subject to Italian law. The employee had a fixed-term employment contract for three years, which was subsequently extended for another two years. Thereafter, the employee demanded continued employment under a permanent employment relationship, which the university refused (CJEU C-326/19 no. 17 et seq.). Both sides invoked very specific provisions of Italian law which have no equivalent in Liechtenstein law. The fundamental provisions of the higher education system are contained in the Act on Higher Education (*Gesetz über das Hochschulwesen, Hochschulgesetz*, HSG, LR 414.0). According to Article 30 of the Act on Higher Education, the teaching staff of the university is composed of university professors and other teaching staff. The employment law applicable to the teaching staff is determined by the university 'within the framework of higher-level law' (Article 33 of the Act on Higher Education). Thus, the principles set out above for fixed-term employment relationships also apply here. The relevant Italian law did not violate European labour law. The same can be said with respect to Liechtenstein law. Overall, case C-326/19 appears to be of no specific relevance for Liechtenstein.

CJEU case C-550/19, 24 June 2021, Obras y Servicios Públicos and Acciona Agua

For the statutory regulation of fixed-term employment in the public sector, see above.

In the present case, the Spanish employer concluded a series of successive fixed-term employment contracts with an employee for a specific full-time job in the construction industry. These were so-called *'fijo de obra'* contracts, which on the employer's side always concerned the same company, yet at different workplaces in the same province. This employment lasted for more than 20 years in total. The CJEU judgment must be fully complied with when it states that such a national regulation cannot be applied by the authorities of the Member State concerned in such a way that the extension of successive fixed-term *'fijo de obra'* employment contracts is considered to be justified by 'objective reasons' within the meaning of Clause 5 No. 1 letter a of the Framework Agreement merely because each of these contracts is usually concluded for a single construction site, regardless of its duration; such a national rule does not, in practice, prevent the employer in question from meeting permanent and ongoing labour needs through such an extension. Such a case could not arise under Liechtenstein law; the latter does not contain any provisions comparable to that of the Spanish case (see the

relevant provisions above). Furthermore, as stated above, the time of termination of the fixed-term employment relationship must be at least approximately foreseeable. According to the case law of the Swiss Federal Supreme Court in labour disputes, which the Liechtenstein courts generally follow, the duration of the contract must be objectively determined or determinable and must not depend on the will of one party (Swiss Federal Court in ARV 2001, 190). Therefore, Liechtenstein law is in line with case C-550/19.

The CJEU's judgment also deserves approval insofar as it is sufficient that the acquirer of an undertaking only has to observe those rights and obligations of the transferred employee that result from the last contract that the employee concluded with the transferring undertaking (provided that the application of this regulation does not lead to a deterioration of the situation of this employee solely due to this transfer). Otherwise, it would constitute an improvement in the working conditions of that employee if, on the occasion of the transfer of personnel, he were granted rights which he did not possess prior to that transfer; this, however, is not provided for in Directive 2001/23/EC. It is also not provided for in Liechtenstein law. The transfer of undertakings is regulated there in the Civil Code *(Allgemeines bürgerliches Gesetzbuch*, LR 210), namely in Section 1173a Article 43. The legal position of the employee remains as it was immediately before the transfer (i.e. according to the last valid employment contract).

4 Other Relevant Information

Nothing to report.

Lithuania

Summary

(I) The legislation on the prohibition of cash payments, and the obligation to inform and consult the works council in case of restructuring have been amended.

(II) The liability of the main contractor for the claims of posted workers has been extended to domestic situations in the construction sector.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Prohibition of wage payments in cash

Parliament passed amendments to the Labour Code, prohibiting the payment of wages in cash (see May 2021 Flash Report). Article 139 (3) of Labour Code will, as of 01 January 2022 (the date of entry into force of the said amendment; Law of 22 June 2021, No XIV-435, Registry of Legal Acts, 2021, No 15520), provide that all salaries and other employment-related benefits, as well as daily allowances and mission expenses, must be paid by electronic transfer to the employee's bank account specified by the employee, with the exception of seafarers, who are subject to a different procedure of salary payment established by the Law on Merchant Shipping of the Republic of Lithuania.

1.2.2 Information and consultation

On 29 June 2021, the Lithuanian legislator amended the Lithuanian Labour Code with the intention of expanding the employer's obligation to conduct information and consultation procedures. Article 208 of Labour Code, which intentionally deals with reorganisations and transfers of undertakings or parts thereof, was expanded to include 'restructuring'. As of 15 July 2021 (the date of entry into force of the aforementioned amendment; Law of 29 June 2021, No XIV-453, Registry of Legal Acts 2021, No 15471), Article 208 (1) of the Labour Code will read as follows:

> *"Before taking a decision on reorganisation, restructuring, transfer of an undertaking or a part thereof and other decisions that may have a significant impact on the organisation of work and the legal status of employees, the employer shall inform and consult the works councils on the reasons and the legal, economic and social consequences for employees, as well as on the measures planned to prevent or mitigate the adverse effects."*

The Law on Insolvency of Legal Entities (Law of 13 June 2019, No XIII-2221, Registry of Legal Acts, 2019, No 10324), in its Article 2 (10), defines restructuring as a set of procedures aimed at overcoming the financial difficulties of a legal entity, preserving its viability and preventing bankruptcy by eliminating the financial difficulties of creditors through economic, technical, organisational and other measures. This process is covered by the already existing notion of "*other decisions that may have a significant impact on the organisation of work and the legal status of employees*", but the legislator has decided to improve transparency and give legal clarity to these institutional changes to guarantee better protection of the affected employees. The scope of the employer's legal obligation in the case of restructuring is the same as in the case of transfers of undertakings or parts thereof.

1.2.3 Chain liability

The provision on subsidiary responsibility for the payment of wages for the subcontractor's employees was introduced in Lithuania with the implementation of Directive 96/71 on the posting of workers. Article 118 (3) of the Labour Code provides that the main contractor is jointly and severally liable for the fulfilment of financial obligations in relation to the wages of the subcontractor's workers if they are posted workers and perform construction work specified in the Construction Act. This provision has never been applied in practice, but the legislator has decided to tighten the legal regime for all employers (domestic and foreign contractors) and for all workers (posted workers and domestic workers) when they work in the construction sector (Law of 29 June 2021, No. XIV-457, Registry of Legal Acts, 2021, No. 15454).

Article 139 (4) and 139 (5) of Labour Code stipulate (from 01 November 2021) that if the employer is a subcontractor, the main contractor is jointly and severally liable for the payment of wages, including overtime pay, night work, work on weekends and public holidays to a worker carrying out construction work. The subsidiary liability of the main contractor provided for in paragraph 5 where the employer is a subcontractor shall be limited to the rights of the worker acquired in the performance of work under a construction contract concluded between the contractor and the subcontractor.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

The legal problem addressed in this case seems to exist in Lithuania as well. Despite the fact that the Labour Code in Article 68 sets limits on the maximum duration of fixed-term employment (usually, two years, but also five years if the employee is hired again at a later point to perform other work functions). There are two exceptions to these general limits: 1) The two-year maximum does not apply if the employee was hired on a temporary basis in lieu of a temporarily absent employee). In a common scenario, these are employees who replace colleagues who are on parental leave, but the legislation does not specify these cases; 2) Pursuant to Article 68(4) Labour Code, special laws may establish special legal regulations for elected or appointed employees, creative professions, educational workers and researchers, employees appointed by collegial electoral bodies or other employees for the protection of the public interest. The Code provides *expressis verbis* that such contracts may be renewed indefinitely for the reasons established by laws, and other provisions of this article do not apply to them. For example, the Law on Science and Studies (Article 68 (1)) provides that research and study institutions may employ lecturers and researchers on a fixed-term contract for a period not exceeding 2 years. According to this regulation, university teachers work for decades under fixed-term employment contracts. In both cases, the economic or financial considerations are not relevant, as the law opens the door to the conclusion of fixed-term contracts without providing a factual reason.

CJEU case C-326/19, 03 June 2021, Ministero dell'istruzione, dell'Università e della Ricerca

The Court's ruling is not relevant for Lithuania, as there is no reference in national law to the need to state the reasons for concluding/not concluding an employment contract (regardless of the type of contract). As mentioned above, the economic or financial considerations are not relevant as the law opens the door to concluding a fixed-term contract without stating any substantial reason.

CJEU case C-550/19, 24 June 2021, Obras y Servicios Públicos and Acciona Agua

In Lithuania, there is no such special type of fixed-term employment contract similar to the '*fijos de obra'*. Invoking objective reasons to justify the conclusion of a fixed-term employment contract is no longer permissible, as the Labour Code sets time limitations to fixed-term employment relationships (see above). There are no alternative provisions that provide for adequate measures to prevent and, if necessary, penalise abuse of successive fixed-term employment contracts or relationships. The interpretation of Directive 2001/23 seems to be relevant in jurisdictions where restrictions to acquired rights by the transferred worker are allowed. It seems that in Lithuania, there is no legal provision regulating this kind of limitation of the employer's (transferor's or transferee's) responsibility. Pursuant to Article 51(4) Labour Code, the transferor is jointly and severally liable for the performance of the employer's rights and obligations that exist at the time of the transfer, if the transferee fails to perform its obligations arising from the transfer. The joint and several liability shall apply for one year after the transfer of the business or part thereof. The transferee and the transferor may agree to settle the transfer of the employee's rights and obligations (unused part of annual leave, outstanding monetary claims and others) to the transferee, but the law does not allow limiting the scope of obligations to the employee.

4 Other Relevant Information

Nothing to report.

Luxembourg

Summary

(I) Two new draft bills are pandemic-related, while a third introduces changes to parental leave and family allowances, bringing Luxembourg's legislation in line with CJEU decisions.

(II) Several Court of Appeal rulings concerned labour law issues.

1 National Legislation

1.1 Measures to respond to COVID-19 crisis

1.1.1 Isolation orders

An employee who is ill must, in principle, inform the employer on the first day of his or her absence and send a medical certificate by the third day of sick leave, at the latest. Isolation orders (*ordonnances d'isolement)* in the context of contact tracing in connection with the pandemic are treated as medical certificates. Since these orders are sometimes issued late, however, the legislator had temporarily derogated from the Labour Code to specify that it suffices to submit them to the employer on the eighth day of absence. Although the figures for COVID-19 are encouraging, this problem remains, hence this temporary legislation will be extended until 31 December 2021.

(Projet de loi n° 7830 portant modification de la loi du 19 décembre 2020 portant dérogation temporaire à l'article L. 121-6 du Code du travail, available here).

1.1.2 Early retirement

To deal with the shortage of skilled labour in the management of the health crisis, it was decided to temporarily 'immunise' the income of those who had taken early retirement, so that they would have a financial incentive to return to work. This measure was later restricted to the health sector, care and medical laboratories.

Since the shortage of qualified personnel is likely to continue and rest periods must be respected, it is planned to extend this measure until 31 December 2021.

(Projet de loi n° 7829 portant modification de la loi modifiée du 20 juin 2020 portant: 1° dérogation temporaire à certaines dispositions en matière de droit du travail en relation avec l'état de crise lié au Covid-19; 2° modification du Code du travail, available here).

1.2 Other legislative developments

1.2.1 Family allowance

The main objective of the new draft bill concerning child and family allowance and parental leave is to bring Luxembourg's legislation into line with decisions of the Court of Justice of the European Union.

As regards family allowances (*allocations familiales*), a subject which is not directly relevant to labour law, the Luxembourg state pays EUR 265 per month for each child (with increases at the age of 6 and 12), regardless of the parents' income and wealth.

Luxembourg was criticised by the CJEU in case C-802/18, 19 June 2020, *Caisse pour l'avenir des enfants* because European law must be interpreted as precluding provisions of a Member State according to which frontier workers are entitled to receive a family allowance on the basis of the fact that they pursue an activity as employed persons in

that Member State, solely for their own children, and not for a spouse's children with whom those workers have no child-parent relationship, but whom those workers support, whereas any child residing in that Member State is entitled to receive that allowance.

Indeed, in Luxembourg, family allowances are due to the child as such and not to the parents in their capacity as workers. The authors of the draft law investigated different solutions to bring Luxembourg's legislation into line with the prohibition of discrimination laid down by the European Court of Justice, while ensuring that the new mechanism is administratively manageable. As they found no such solution, it was decided to link the right to family allowances to the status of worker (more precisely, to the status of insured person in social security) in Luxembourg, and by extension to cross-border commuters fulfilling the same conditions. For Luxembourg residents, some people risk losing the right to family allowances (e.g. those who are not affiliated because they live exclusively on their capital income), but the number of children concerned has been estimated at 340. For cross-border workers, this approach makes it possible to maintain the requirement of a parent-child relationship (biological or adoptive) with the child, so that the case of, for example, the children of the spouse or partner taken care of by the cross-border worker would not be covered.

This solution has been criticised by the political opposition and the trade unions as being dictated by budgetary considerations.

A second important point of the project is to re-index family allowances. All salaries in Luxembourg are linked to the development of the cost-of-living index and are automatically and compulsorily adapted on certain dates. The same applied to family allowances until a reform in 2006. Since then, trade unions have repeatedly denounced the fact that family allowances are being eaten up by inflation. In accordance with the coalition agreement of the current government, the draft provides that child benefits will again be subject to automatic indexation from 1 January 2022. This solution has been criticised by the trade unions, which demand retroactive indexation, or at least a revaluation, and fears that the next indexation bracket will fall before 1 January 2022, which would postpone the law's practical effect.

1.2.2 Parental leave

The second part of the bill concerns parental leave. According to the CJEU judgment in C-129/20, 25 February 2021, *Caisse pour l'avenir des enfants*, the Court of Justice of the European Union ruled that the European Framework Agreement (Directive 2010/18/EU) precludes national legislation, which makes the grant of a right to parental leave subject to the condition that the parent has the status of a worker at the time of the birth or adoption of his or her child.

According to § 46 of the decision, excluding parents who were not working at the time of the birth or adoption of their child would have the effect of precluding the possibility for those parents to take parental leave at a later point in time in their lives when they are employed again, parental leave which they would need to take in order to reconcile their family and professional responsibilities. Such an exclusion would therefore be contrary to the individual right of every worker to parental leave.

According to the draft law, this condition will be dropped. The granting of parental leave will only be subject to the condition for the worker to be employed in a workplace and insured in that regard for a continuous period of at least 12 months immediately preceding the commencement of the parental leave. This requirement has been accepted by the European Court of Justice.

Reference: Projet de loi n° 7828 portant sur la modification de: 1° du Code de la sécurité sociale; 2° du Code du travail; 3° de la loi modifiée du 16 avril 1979 fixant le statut général des fonctionnaires de l'Etat 4° de la loi modifiée du 24 décembre 1985 fixant le statut général des fonctionnaire communaux (available here).

2 Court Rulings

As the following decisions are quite recent, they are not yet available in the public database. However, they should be available shortly on this webpage here.

2.1 Dismissal for gross misconduct

CSJ, 3rd, CAL-2018-01030, 28 January 2021

An employer who wishes to dismiss an employee with immediate effect for gross misconduct may only invoke this misconduct within one month of learning about it (L. 124-10 (6)). Many disputes revolve around the question of the circle of persons who are to be qualified as 'employer' and proof of the knowledge obtained by the latter.

For example, in the case of an employee who had power of attorney over a bank account and who was the sole contact of the accountant, the employer not having direct access to the account, it was decided that the employer could invoke serious misconduct, even if the employee had been systematically embezzling for years.

CSJ, 8th, CAL-2019-00982*, 25 January 2021*

More innovative, however, is a judgment which states that it is not necessarily the date on which the employer learned of the facts that is decisive, but the date on which he or she 'should' have become aware of those facts. The reference is to an employer who manages his or her business with diligence. In the present case, the employer accused the employee of having regularly submitted expense claims containing personal expenses for reimbursement. The judges considered that these facts could no longer be invoked, since the employer should have regularly checked the expense accounts and could thus have discovered the fault earlier.

2.2 Transfer of undertaking

CSJ, 3rd, CAL-2019-01075, 25 February 2021

In matters of transfers of undertakings, Luxembourg case law is aligned with European case law.

A judgment of February 2021 is worth noting, as it interpreted the transfer of undertaking broadly to fight abuse. In the present case, the activity of transporting biological material had been transferred, which the Court considered to be a separate economic entity.

However, while the activity and equipment were directly transferred to the transferee, the personnel were only taken over by a subcontractor of the latter. In other words, the transfer of equipment and personnel was made to separate entities. The judges saw this as an attempt to circumvent the rules on transfers of undertakings and confirmed the existence of an employment contract with the transferee of the economic activity. The latter was therefore required to take over the employees, and the letter in which he contested the existence of any transfer of undertaking was requalified as a dismissal.

CSJ, 8th, CAL-2019-01170, 4 March 2021

Another ruling on a transfer of undertaking seems dubious in the light of European criteria. Indeed, the fact that the activity falls within the public sector does not exclude that a transfer of an undertaking occurred if it is an 'economic activity', a notion widely interpreted by case law. In the present case, the judges determined that the notaries

did not carry out an economic activity, but were holders of a dispensary (*officine publique)*. Consequently, there could be no transfer of a business in the event of the takeover of a notary's office.

2.3 Qualification of the employment contract

CSJ, 8th, CAL-2019-00803*, 18 March 2021*

According to legal definition, employment contracts are agreements by which a person (the employee) undertakes to place his or her activity at the disposal of another (the employer), under whose subordination he or she places him- or herself in return for remuneration. This is assessed on a case-by-case basis.

Lawyers can work as self-employed persons or as employees. An associate lawyer who had a self-employed contract took his firm to court in the hope of being considered an employee. However, the court did not follow his reasoning. The clause according to which the associate lawyer undertakes not to advise or represent a party whose interests are contrary to those of a member of the firm does not exclude the existence of his own clientele, but actually even implies the existence of such a clientele, and is also conceivable in a relationship of equals.

The clause obliging the associate lawyer to devote at least 40 hours per week to the firm does not exclude the building up of his own clientele beyond these 40 hours.

Clauses requiring the associate lawyer to give notice in the event of unavailability and to set holidays in agreement with the team do not constitute an indication of subordination, but arise from the need to ensure proper follow-up of cases and stem from the imperatives inherent in the organisation of a firm.

The clause setting the fees as lump sums, including the fees related to the collaborator's own cases, reflects a mode of organisation in which all fees generated are pooled and is not sufficient to characterise a subordinate relationship.

CSJ, 8th, CAL-2020-00181, 18 March 2021

In another case, the Court specified that a single task does not characterise the employment contract. In this case, it was a one-off task of tidying up a garage, paid EUR 400 for 30 hours of work. This type of service may constitute an independent provision of service.

2.4 Parental leave

CSJ, 3rd, CAL-2020-00187, 18 March 2021

According to clause 5 (1) of the European Framework Agreement on Parental Leave (Directive 2010/18/EU), the Luxembourg Labour Code provides that "*During the period of parental leave, the employer is required to keep the employee's job or, if this is not possible, a similar job corresponding to his or her qualifications with at least equivalent pay*" (Article L. 234-47 (9)).

The Court had already decided that this article does not in itself prohibit dismissal on economic grounds immediately after the end of parental leave (see March 2019 Flash Report, Section 2, Case 11). It confirmed this in a decision in which a beauty salon had abandoned a loss-making activity. The employee, who was assigned to this activity, could be validly dismissed on her return from parental leave. For the judges, in the context of the restructuring carried out following the company's proven economic difficulties, the employer was materially unable to keep the claimant's job, the company's sole beautician, whose special professional qualification did not allow her to be assigned to a similar job.

2.5 Seniority clauses

CSJ, 3rd, CAL-2019-00227, 22 April 2021

The Court of Appeal has so far only rarely ruled on seniority clauses. It has had occasion to recognise the validity of such clauses. A clause in the employment contract may stipulate that the employee will enjoy benefits based on a fictitious length of service, greater than the actual length of service within the company. Such a clause is more favourable to the employee than the legal or conventional provisions and is, in principle, lawful.

On the other hand, the judges have also specified that such clauses are to be interpreted restrictively. Thus, unless expressly mentioned, a seniority clause does not require the employer to retroactively affiliate an employee to the company's supplementary pension scheme.

CSJ, 8th, CAL-2020-00144, 4 March 2021

In addition, it is possible to limit the scope of these clauses by agreement. Thus, a clause that provides for fictitious seniority for the sole purpose of calculating the annual bonus has no impact on other rights and obligations linked to seniority, such as the length of the notice period to be respected in case of dismissal or resignation.

2.6 Disciplinary sanctions

CSJ, 3rd, CAL-2020-00347, 29 April 2021

The Labour Code is incomplete with regard to disciplinary sanctions other than dismissal, and case law on the subject is scattered. It is generally accepted that the employer may use warnings (*avertissements*) and reprimands (*blâmes)*, and that this is a disciplinary sanction in itself. However, the judges had not yet ruled on the possibility of appealing against such a reprimand. The Court has just confirmed the Labour Court of First Instance's ruling, which declared that an application for the annulment of a sanction that is not provided for in the Labour Code, such as a reprimand, is inadmissible for lack of a legal basis.

This approach seems questionable, since it deprives the employee of any recourse, which amounts to granting the employer a power that it can exercise at its discretion, not to say arbitrarily.

CSJ, 8th, CAL-2019-00887, 17 June 2021

A discretionary power of decision has also been recognised for the employer when a benefit, such as a bonus, is stipulated to be conditional and subject to the employee's behaviour. In this case, it was agreed between the employer and the employee that the annual bonus could be withdrawn in part or in full in the event of a breach of the internal rules. It was established that the employee had violated the internal rules (regarding the investment policy). Therefore, the employer could decide at his discretion to cancel the entire bonus. The judges thus refused to carry out a proportionality check between the seriousness of the fault and the severity of the sanction.

2.7 Burden of proof

CSJ, 8th, CAL-2019-00966, 07 January 2021

The difficulties employees face in claiming their rights are often related to the burden of proof. Two decisions are noteworthy because they took an employee-friendly approach.

In the first case, the employment contract provided for a bonus linked to targets, but it was not established that targets had been set. In the past, several decisions have held that the employee cannot claim the bonus if he or she cannot prove that he or she has achieved the objectives. However, the Court has held that if neither party proves what targets were set, the employee is presumed to have achieved them, so that the bonus is due.

CSJ, 8th, CAL-2020-00086, 18 February 2021

A second case concerned overtime. Employees' overtime claims very often come up against the fact that the employee fails to establish that he or she has performed overtime work with the employer's consent. In this case, the employee was a truck driver and the employer was ordered to provide the tachograph data. For part of the period in question, however, the employer did not provide the data.

In general, the Court stated that the rule according to which in case of dispute it is up to the employee to prove that he/she worked overtime at the employer's request or with the employer's agreement must be set aside when the employer has, by his/her fault, made it impossible for the employee to have the validity of his/her claims verified.

As a result, the judges awarded an average of overtime for the undocumented period calculated over the other periods.

2.8 Equal treatment

CSJ, 8th, CAL-2019-00802, 21 January 2021

Decisions on gender discrimination are sufficiently rare to be worth noting. In the present case, an employee working as a consultant complained that she had been denied a promotion because she was on maternity leave.

She was aware of an e-mail sent by her employer to one of his clients in which he offered the employee's services in the following terms: "*Here is the profile I recommend, X., Senior Consultant in my team since 2011. (...) X. is at the level of a manager but is still a Senior Consultant due to maternity leave. She therefore has a very good daily cost/experience ratio*".

The judges saw this as sufficient *prima facie* evidence of discrimination, so the burden of proof was reversed and the employer had to justify itself.

The employer succeeded in countering the presumption of discrimination by establishing that the employee's non-promotion was justified by an objective evaluation, based in part on the opinion of the company's customers.

The Court further recalled that while the fact that an employee did not work during maternity leave should not become an obstacle to her advancement and promotion, the employee does not acquire a right to promotion, regardless of her professional qualifications and commitment.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

This case has no implications for Luxembourg, as there is no text allowing the conclusion of fixed-term contracts without a specific time limit pending the completion of a recruitment procedure in the public sector. The conclusion of fixed-term contracts is permitted for the replacement of an employee with an open-ended contract whose post has become vacant, pending the effective entry into service of the employee called to replace the one whose contract has ended (Article L. 122-1 (2) point 1 of the Labour Code). However, this type of contract remains subject to the restriction generally applicable to all fixed-term contracts; these contracts are limited to 24 months (Article L. 122-4 (1)).

There are also no derogatory rules related to a period of economic crisis.

CJEU case C-326/19, 03 June 2021, Ministero dell'Istruzione, dell'Università e della Ricerca

The question as addressed by the judgment does not arise in Luxembourg, since the legislation is different.

Nevertheless, in general, Luxembourg rules on the conclusion of fixed-term contracts with academic researchers may be open to discussion as to their conformity with Directive 1999/70/EC.

For standard fixed-term contracts, the Code, in fact, requires that they be concluded for the performance of a specific and temporary task; their purpose cannot be to provide permanent employment linked to the normal and permanent activity of the company (Article L. 122-1 (1)). Employment contracts concluded with certain academic researchers ((1) employment contracts concluded with the teaching and research staff of the University of Luxembourg; (2) employment contracts concluded between the University of Luxembourg, the public research centres created on the basis of the amended Law of 9 March 1987, respectively, the *Centre d'Etudes de Populations, de Pauvreté et de Politiques Socio-Economiques*, and researchers; (3) training-research contracts concluded by a researcher in training and a host institution as defined in Article 3 of the amended Act of 31 May 1999 on the creation of a national research fund in the public sector), however, may be fixed-term contracts without the need for objective justification according to Article L. 122-1 (3) of the Labour Code.

Ordinary fixed-term contracts may only be renewed twice. Contracts concluded with teaching and research staff of the University of Luxembourg may be renewed more than twice, without the Code providing for a maximum number of renewals.

Finally, for ordinary fixed-term contracts, the maximum duration is 24 months, including renewals. Contracts for the above-mentioned researchers can reach a total duration of 60 months, including renewals (L. 122-4 (4)).

Thus, for these researchers, one or two of the anti-abuse measures provided for in clause 5 (1) are not given, namely the requirement of objective reasons justifying the renewal of such contracts or employment relationships and the number of renewals of such contracts.

It is true that a maximum duration is set. However, it is questionable whether this relatively long duration, compared to other employees, is sufficient to prevent abuses resulting from the use of successive fixed-term contracts, as required by clause 1.

The Luxembourg Constitutional Court (12 April 2013, No. 97) found that this different treatment was justified and thus did not constitute a violation of the principle of equality before the law.

The Court of Appeal (CSJ, 8th, 13 March 2014, 38046) also considers that this exception is in line with the European Directive. However, it reasoned in terms of discrimination and not in terms of compliance with Article 5(1).

CJEU case C-550/19, 24 June 2021, Obras y Dervicios Públicos and Acciona Aqua

The issues raised by this judgment do not directly affect Luxembourg. In Luxembourg legislation, there are no specific contracts in the construction sector corresponding to '*fijos de obra'*; nor is there a specific derogation for other sectors. Moreover, collective agreements cannot derogate from the legal framework for fixed-term contracts, except in a more favourable sense. In practice, collective agreements do not contain clauses on fixed-term contracts.

Reference to a specific construction site may be an objective reason for using a fixed-term contract, provided that the parties detail in a contract clause the reasons why the need for labour is temporary and limited to that site. Successive contracts concluded by the same company for different sites are not accepted in Luxembourg case law; in such a situation, the recruitment would correspond to a permanent need of the company and the contract would be requalified as a contract of indefinite duration.

4 Other Relevant Information

Nothing to report.

Malta

Summary

The Posting of Workers Regulations have been amended.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Posting of workers

The Posting of Workers in Malta Regulations, 2016 (Subsidiary Legislation 452.82) have been amended by means of Legal Notice 232/2021 of 01 June 2021. The main amendments are the following:

The definition of 'foreign service provider' in the Regulations (prior to the amendment) has been now amended to read as follows: 'sending party' means a service provider that is established in a different Member State other than Malta; and any reference to the words 'foreign service provider' therein shall be substituted by the words 'sending party'.

The definition of 'posted employee' in the Regulations (prior to the amendment) has been amended to read as follows: 'posted worker' means a worker who, for a limited period, carries out his or her work in the territory of a Member State other than the state in which he or she normally works; and any reference to the words 'posted employee' therein shall be substituted by the words 'posted worker'.

Regulation 10 dealt with civil proceedings, and now reads as follows:

> *"10. In any civil proceedings instituted by the posted worker where there is a subcontracting chain, when the direct subcontractor is the employer of a posted worker, the contractor and the direct subcontractor are jointly and severally liable to the posted worker with respect to the set of rights granted by regulation 5;*
>
> *Provided that the liability shall be limited to the posted worker's rights acquired under the contractual relationship between the contractor and direct subcontractor."*

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

Under Maltese law, fixed-term contracts are regulated by the Contracts of Services for a Fixed-Term Regulations, 2021 (SL 452.81) and by the Employment and Industrial Relations Act, 2002 (Chapter 452 of the Revised Edition of the Laws of Malta). There

are no provisions similar to the ones at issue in the present case. Furthermore, the successive renewal of such fixed-term agreements for a period exceeding four years is prohibited, unless the employer can provide objective reasons for such renewal (Regulation 7 of the Subsidiary Legislation 452.81 (Contracts for a Fixed Term Regulations)).

CJEU case C-326/19, 03 June 2021, Ministero dell'istruzione, dell'Università e della Ricerca

Clause 5 of the Framework Agreement on Fixed-term Work, concluded on 18 March 1999, which is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, must be interpreted as not precluding national legislation under which provision is made, in respect of the recruitment of university researchers, for the conclusion of a fixed-term contract for a period of three years, with a single possibility of extension, for a maximum period of two years, making the conclusion of such contracts subject, first, to the condition that resources are available 'for planning for the purposes of carrying out research, teaching, non-curricular activities and student service activities', and, second, that such contracts are extended on condition that there is a 'positive appraisal of the teaching and research activities carried out', without it being necessary for those rules to define objective and transparent criteria making it possible to verify that the conclusion and renewal of such contracts do indeed meet a genuine need, and that they are likely to achieve the objective pursued and are necessary for that purpose.

Regulation 7 of SL 452.81 clarifies that there is no possibility of extension, unless the employer can provide objective reasons therefore. Regulation 7 states the following:

> *"7.(1)Without prejudice to regulation 3(2), a contract of service for a fixed-term shall be transformed into a contract of service for an indefinite period if:*
>
> *(a) the employee has been continuously employed under such a contract for a fixed term, or under that contract taken in conjunction with a previous contract or contracts of service for a fixed term in excess of a period of continuous employment of four years; and*
>
> *(b) the employer cannot provide objective reasons as referred to in sub-regulation (4) to justify the limitation of a renewal of such a contract for a fixed term."*

The reasons discussed in the present judgment would amount to 'objective reasons' in accordance with Maltese law in more general terms. More specifically, the validity or otherwise of a teaching or research programme may also be deemed to be 'subjective' in nature. Indeed, the subjectivity does not depend on any inherent characteristic of the worker. However, the quality of his or her work may, in itself, be subjective or, at least, be subject to subjective interpretation. Hence, it is submitted that the CJEU has made a clear distinction between the quality of the work (essentially) and the quality of the employee himself. If not used wisely, this specific characteristic may very well lend itself to abuse. Performance appraisals are, of course, an essential tool to measure worker performance. However, as useful as they may be, they may also be highly subjective, which is why the world is moving towards KPIs that are quantitatively measured as well. The question is: who determines whether the quality of the work (teaching and research activities in this case) merits the renewal of a fixed-term agreement? Hence, it is submitted that it is very important for any employer to ensure that any appraisals (howsoever termed) to really be focused on the 'work', because it may be tempting to turn an objective criterion (the quality of the work) into a subjective one. Hence, as useful as this judgment may be, it is of extreme importance that the quality of the work be the element that is examined as opposed to any subjective element relating to the worker.

4 Other Relevant Information

Nothing to report.

Netherlands

Summary

(I) The 'emergency package jobs and economy' was extended until the third quarter of 2021.

(II) A new National Agreement promoted by the Social Economic Council contains several proposals related to EU labour legislation.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Relief measures for businesses and workers

On 27 May 2021, the government decided to extend the 'emergency package jobs and economy' until the third quarter of this year (letter of government to Parliament). The most important component of the emergency package, the fourth Temporary Emergency Bridging Measure to preserve employment (NOW-4), is very similar to the current NOW-3 package. This measure offers employers the possibility to receive compensation for wage costs, by means of a subsidy. Other elements of the emergency package will also be extended.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

Fixed-term contracts that do not end on a specific calendar date but are concluded for the duration of a specific assignment (which may also, for example, be the replacement of an employee who is on sick leave or maternity leave) are not prohibited, but are very rarely used. When the end date (calendar date or otherwise) of a fixed-term contract is pushed forward, it is considered a new contract. This is in line with the ruling in case C-726/19, i.e. it has no implications for Dutch law.

CJEU case C-326/19, 03 June 2021, Ministero dell'Istruzione, dell'Università e della Ricerca

This case has no implications for the Dutch transposition of Directive 1999/70 nor for Dutch practice.

CJEU case C-550/19, 24 June 2021, Obras y Dervicios Públicos and Acciona Aqua

This case has no implications for the Dutch transposition of Directive 1999/70 nor for Dutch practice.

4 Other Relevant Information

4.1 National Agreement

On 16 June, the members of the largest trade union in the Netherlands, FNV, agreed with the recommendations of the Social Economic Council, which include a mid-term vision for the labour market. Advice 21/08 can be described as a new National Agreement ('*sociaal akkoord*'), which will guide the coalition agreement to be negotiated when the new government is formed. It is noteworthy that the advice has not only been devised by the social partners, but by independent members as well. The Social Economic Council is a tripartite organisation. This is different from earlier National Agreements that were only concluded between social partners.

The advice contains several proposals that are relevant for EU-driven legislation.

For fixed term contracts, it is proposed to amend the 'chain rule' as laid down in Article 7:668a DCC. The number of successive contracts possible remains three, and the total duration will remain three years. However, the interruption period of six months that currently allows revolving door arrangements, where the employee is hired back after six months in a new chain of fixed-term contracts, will be abolished (except for a 6-month interruption period for students and an interruption period for seasonal work of 3 months). These exceptions are laid down by law, without the possibility of derogation by collective agreement.

Zero-hours contracts will be abolished. It will be possible to conclude a contract that implies a quarterly hourly standard that allows for flexibility, but which also provides some certainty at the level of income during the given quarter. Again, an exception for students is envisaged.

As for temporary agency work:

- Return of the licensing for temporary work agencies;
- Shortening of the duration that people can work under a temporary agency contract before concluding a permanent contract with the temporary work agency from 5.5 years to 3 years;
- The current possibility to derogate from the equal treatment rule in collective labour agreements will be abolished.

Outsourcing that is used to circumvent the temporary agency work rules or the applicability of a collective labour agreement will be abolished. Because there are so many forms of outsourcing (including 'genuine' outsourcing), it does not seem feasible to define what is a sham construction and what is not. Therefore, the advice turns to soft law: a Responsible Market Conduct Code will be established.

As for self-employed workers, a rebuttable legal presumption will be introduced in addition to the already existing rebuttable legal presumption in Article 7:610a DCC: *"A person who performs work for another person against remuneration by that other person for three consecutive months on a weekly basis or for at least 20 hours a month shall be presumed to be performing such work under an employment contract."*

The advice proposes to add that there is also a presumption of an employment contract if the self-employed person works for a rate that does not exceed the maximum daily wage used in social security legislation (currently EUR 225.57 gross per day). If the worker is of the opinion that he or she works under an employment contract and his or her salary does not exceed that threshold, the employer must prove that this is not the case.

Again, this advice will have to be implemented by the next government, which has yet to be formed since the March 2021 elections.

Norway

Summary

(I) Some of the employment and labour measures introduced to respond to the COVID-19 crisis have been amended.

(II) A new regulation on criminal and administrative follow-up of work-related crime has been introduced. Also, the Norwegian Anti-Discrimination Tribunal has been given extended authority in disputes concerning whistleblowing.

(III) The Norwegian Supreme Court has recognised a general rule on individual after-effect of collective agreements.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Lifting of lockdown measures

Infection rates have continued to decrease during June. The first step in the government's plan for a gradual reopening of society was enacted in April, the second step was enacted from 27 May 27 onwards and the third step from 18 June. This has implied a further easing of the strict national infection control regulations introduced in May (see April 2021 Flash Report). Some municipalities and regions, i.e. Oslo, still have a few stricter regulations in place.

The request to not travel abroad will be removed from 05 July for countries in the EEA, Schengen and the UK and other countries which are considered safe. There will still be strict rules on foreign nationals who seek entry into Norway. However, foreigners residing in a country or area in the EEA, Schengen or UK that are not covered by the quarantine obligation, will not be refused entry. The regulations on quarantine can be found here.

The unemployment rate has been relatively stable since October 2020, but rose slightly between December and March. Since then, the employment rate has started to decline, and in May, the decline was significant. By the end of May, there were 183 900 unemployed people, i.e. 6.5 per cent of the workforce. The numbers for June have not yet been published.

1.1.2 Relief measures for businesses and workers

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 June 2021, a few new regulations and changes were introduced, most importantly:

- The period employers are exempt from wage obligations during the lay-off period has changed for lay-offs implemented from 01 July 2021 onwards (FOR-2021-06-19-2115). The change implies that employers are now exempt from the wage obligation for up to 26 weeks within an 18-month period, which is the main rule (pre COVID-19) under the Act of June 6 1988 No. 22 relating to the duty to pay wages during a temporary lay-off. The change only applies to new lay-offs. The period is still 49 weeks within an 18-month period for lay-offs implemented before 01 July.
- The temporary scheme with the extension of the benefit period for work assessment allowance has been extended until 30 September 2021. See more information here.
- until 01 October 2021. See more information here (only in Norwegian).

1.2 Other legislative developments

1.2.1 Work-related crime

Changes have been introduced to the Working Environment Act (WEA), the Penal Code and other legislation (LOV-2021-06-11-59). The new regulation will contribute, in particular, to enhanced criminal and administrative follow-ups on work-related crime. The changes comprise, among others, two new provisions in the Penal Code on 'wage theft', raise the penalty limit in connection with the violation of the WEA and a new provision in the WEA stating that the employee's salary, as a main rule, shall be paid from the employer via a bank or company with the right to arrange payment to the employee's account.

The Norwegian Anti-Discrimination Tribunal has been given authority to decide disputes about retaliation after whistleblowing (LOV-2021-06-1893). This also includes authority to determine compensation. This means that an employee (as a first step) does not have to go to court for such disputes. Such a decision by the Anti-Discrimination Tribunal may, however, in the same way as other decisions by the tribunal, be brought before the courts for review. In practice, this occurs rarely.

The obligation according to the Act of 21 December 1956 No. 1 on age limits for public officials to resign from the position at the age limit when this age limit is 60, 63 or 65 was abolished (LOV-2021-06-18-91). Such age limits apply to certain categories of employees in the public sector.

2 Court Rulings

2.1 Individual after-effect of collective agreements

Norwegian Supreme Court, HR-2021-1193-A, 02 June 2021

The question in the present case was whether a collective agreement had so-called individual after-effect, meaning that the provisions on wage and working conditions in a collective agreement become part of the individual agreement and will continue to apply as part of this agreement when the collective agreement no longer applies to the employment relationship.

The question in the specific case was whether some nurses at a nursing home, Grefsenhjemmet, were entitled to retain a stabilisation increment that followed from a special collective agreement under the National Agreement for Health and Social Services between Virke and the Norwegian Nurses' Association after Grefsenhjemmet, as employer, changed employers' association from Virke to NHO, and a new collective agreement between NHO and the Norwegian Nurses' Association came into force at Grefsenhjemmet.

The Supreme Court ruled that, in general, provisions on wage and working conditions in a collective agreement become part of the individual employment agreement and that such terms do not lapse as a direct result of the termination of the collective agreement, meaning that these terms will, as a main rule, continue to apply as part of the individual agreement until the terms are changed, i.e. if a new collective agreement comes into force and the terms in the individual employment agreement are contrary to the new collective agreement. The Supreme Court did not rule on whether the provision on stabilisation increment, considered as part of the nurses' individual employment agreements, was contrary to the new collective agreement that now applies to them. It is up to the Labour Court to rule on this.

The employers argued that the regulations in Directive 2001/23/EC (Transfer of Undertaking Directive, Article 3) and the regulation in the Norwegian Working Environment Act, Section 16-2, second paragraph, implementing the Directive,

contravenes a general rule on individual after-effect. The Supreme Court rejected this and pointed out that the regulation in the Directive only applies in cases of transfers of undertakings, which was not the case when Grefsenhjemmet changed employers association and collective agreements.

The Supreme Court did not state whether the general rule on individual after-effect is also applicable in the case of transfers of undertakings, which is a very practical question. The question is, simply said, what happens when the period in which the transferee must continue to observe the terms and conditions agreed in the transferor's collective agreement according to Article 3 of the Directive lapses.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

The main rule according to Norwegian law, both in the private and public sector, is that an employee shall be employed in a permanent position. The right to hire an employee temporarily is similar for employers in the public and in the private sector. This may, in the private sector and municipalities, be agreed upon a) 'when the work is of a temporary nature' or b) 'for work as a temporary replacement for another person or persons' or c) 'for a maximum period of 12 months' without reason, cf. the Working Environment Act of 17 June 2005 No. 62 Section 14-9 second paragraph (and in some other situations). A and B are the same for employees employed by the state, but there is no general access to temporary appointments. A state employee may, however, be appointed temporarily for a period of six months if an unexpected need arises.

To the author's knowledge, there is no similar arrangement in the Norwegian public sector as that described in the CJEU case. However, if there is a need for employees with special qualifications and no qualified applicants have applied for the position, a person may be hired temporarily. This will, as a general rule, be considered work of a temporary nature. The work has to be of an *actual* temporary nature, where the time employed temporarily will be part of the assessment, and every renewal must fulfil the requirements. The expected duration and the basis for the temporary appointment shall be regulated in the written employment agreement, cf. The Working Environment Act Section 14-6 Paragraph 1 e). The maximum period of temporary appointments is three years for state employees, cf. the Act of 16 June 2017 No. 67 on State Employees Section 9. Employees who have been temporarily employed for more than three consecutive years shall be deemed to have been permanently employed. This implies that the employee will have the protection against dismissal that applies to permanent employees.

Norwegian law, consequently, entails several rules that aim to prevent abuse arising from the use of successive fixed-term employment relationships in the public sector. Therefore, the CJEU's interpretation of Article 5 of Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-term Work concluded by ETUC, UNICE and CEEP will have no implications for Norwegian law.

CJEU case C-326/19, 03 June 2021, Ministero dell'Istruzione, dell'Università e della Ricerca

There are different types of academic positions in the Norwegian university and college system. As regard the two main categories of academic positions, associate professor and professor, the ordinary regulation in the Act of 16 June 2017 No. 67 on State Employees Section 9 applies (see the description of the regulation above). An associate professor or professor will, in practice, and as a general rule, have a permanent position

(sometimes combined with a fixed part-time position at other universities or colleges than the one he/she is employed at permanently). The CJEU judgment will not have any implications for the regulation on these two categories.

Doctoral students and scientific assistants can be employed temporarily (and this is the rule in practice), as they hold educational positions, cf. the State Employee Act Section 9 Paragraph 1 d). A doctoral student is part of doctoral training, and the maximum period of employment is three or four years (four if the student also has an obligation to teach), see FOR-2006-01-31-102 Section 1-3 (only in Norwegian). A scientific student can be employed for a maximum of two years with the possibility of renewal of the contract within this two-year period (see Sections 1-4).

Post-docs (Norw. 'postdoktor') are research positions that entail the aim of qualifying for a position as an associate professor or professor. A post doctor does not, however, have a right to a permanent position. He/she will have to apply for vacancies and be part of the normal recruitment process for academic positions. The post doctor position is similar to the Italian research position assessed by the Court in the CJEU case. A post-doctor may be employed temporarily, cf. the State Employee Act Section 10 paragraph 3. This is the rule in practice. A post-doctor can be employed for either two or four years, and there is no possibility for renewal with the same institution, cf. Section 1-2 and 2-1 of FOR-2006-01-31-102.

Neither educational positions nor post-doctor positions entail the right to permanent employment after three years (as is the main rule for other positions), cf. the State Employee Act Section 9 paragraph 3. An unlawful temporary appointment as a post-doctor will, however, as a general rule entail the right to permanent employment, cf. the State Employee Act Section 38 paragraph 1. This is also the case if a post-doctor has been temporarily employed for more than two or four years, or if the employment has been renewed with the same institution.

Consequently, the possibility for successive fixed-term employment relationships is quite limited for academic positions in Norway, and based on the CJEU's assessment of the Italian legislation, the ruling will not have any implications for Norwegian law.

CJEU case C-550/19, 24 June 2021, Obras y Dervicios Públicos and Acciona Aqua

The possibility to deviate from the Working Environment Act's regulation on temporary appointment, as described above, is limited. According to Section 14-9 paragraph 4 of the Act, national unions may enter into a collective agreement with an employer or employers' association concerning the right to conclude fixed-term employment contracts within a specific group of workers employed to perform 'artistic work, research work or work in connection with sport'. In principle, such agreements can regulate that fixed-term contracts, for this type of work, shall be allowed in general, without any time limits and so on. It is, however, unlikely that a national trade union would accept such an agreement, and there is, to the author's knowledge, no collective agreement of this kind. How far the collective parties can deviate from the legislation aiming to prevent abuse of successive fixed-term contracts, will, however, have to be interpreted in accordance with the CJEU judgment.

The Court's interpretation of Article 3 of Directive 2001/23/EC stating that the new employer, according to this provision, is only obligated to respect the rights arising from the most recent employment contract entered into with the former employer (not all former fixed-term employment contracts), as long as this does not place the employee in a worse position than before the transfer, will have to be taken into consideration when interpreting the relevant provisions in the Norwegian Working Environment Act Chapter 16. To the author's knowledge, Norwegian law does not set out better rights on this point.

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 Fixed-term work

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

An essential characteristic of a fixed-term employment contract under Polish law is that its term must be determined at the time of conclusion. The termination of the contract can be specified as a specific period (for example, one year), a calendar date (for example, 31 December 2021) or any other future event. The respective event must be certain and not dependent on the will of the parties to the contract or on third parties (however, this last condition does not apply to substitution contracts (*umowy na zastępstwo*)).

The period of employment under a fixed-term employment contract as well as the total period of employment under several fixed-term employment contracts concluded between the same parties to an employment relationship may not exceed 33 months and the total number of such contracts may not exceed three. If the parties agree on a longer period of work during the execution of the fixed-term employment contract, it is deemed that a new fixed-term employment contract has been concluded with effect from the date following the date when the current contract was to be terminated. If the period of employment under a fixed-term employment contract is longer than 33 months or if more than three contracts are concluded, the employee will be considered to have been employed under a contract of indefinite duration with effect from the following day (*umowa na czas nieokreślony*). However, the presumption of the existence of a contract of indefinite duration referred to in the previous sentence does not arise if the employment contracts were concluded for a fixed term:

- for the replacement of an employee during an excused absence from work;
- for casual or seasonal work;
- for work for the duration of a term of office;
- if an employer specifies objective causes on its part, if the conclusion of such contracts meets actual periodic demands in the individual case and is necessary in light of all circumstances surrounding the contract's conclusion. In such a case, the employer should notify a competent regional labour inspector, in writing or electronically, of the conclusion of such an employment contract and specify within five work days from the date of its conclusion why the contract was concluded.

The judgment rendered in case C-726/19 narrows the definition of objective causes that justify the conclusion of a fixed-term employment contract for a period longer than 33 months. Nevertheless, it is worth noting that Polish regulations introduce certain additional measures preventing the abuse of concluding fixed-term contracts. Specifically, their conclusion is only allowed if such contracts meet actual periodic demand in individual cases and are necessary in this respect. Additionally, this must be reported to the labour inspector.

The position expressed in case C-726/19, nevertheless, shows that these measures may prove insufficient under clause 5 of the Framework Agreement on Fixed-term Work. It therefore cannot be excluded that Polish regulations on the conclusion of fixed-term contracts may be deemed to be in breach of EU law upon analysis by the CJEU on the compliance of Polish law with the ruling.

CJEU case C-326/19, 03 June 2021, Ministero dell'istruzione, dell'Università e della Ricerca

The position expressed in case C-326/19 confirms the compliance of Polish regulations with clause 5 of the Framework Agreement on Fixed-term Work. Polish regulations specify both the maximum length of employment on the basis of a fixed-term contract and the possible number of such contracts. There may be some doubt whether the withdrawal from such limits for objective reasons is consistent with the agreement provisions (see commentary on case C-726/19).

Polish regulations also clearly prohibit differentiation of employee rights on the basis of the employment relationship, i.e. between employees working under a contract of indefinite duration and those with a fixed-term contract (Article 18^{3a} of the Labour Code). Violations of this obligation entail compensation in an amount of at least the minimum wage (Article 18^{3d} of the Labour Code).

4 Other Relevant Information

Nothing to report.

Portugal

Summary

(I) The government has approved a strategy for the lifting of lockdown measures. The state of emergency was extended until 11 July 2021.

(II) Regulations (EU) 2021/953 and (EU) 2021/954, both related to the EU Digital COVID Certificate, were transposed in the national legal system.

(III) The exceptional regime for hiring workers to the National Health Service has been extended until 31 August 2021.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Lifting of lockdown measures

On 04 June 2021, the Resolution of the Council of Ministers No. 70-B/2021, which was subsequently rectified by Declaration of Rectification No. 18-B/2021, of 18 June. This Resolution aims to lift the confinement measures within the context of the COVID-19 pandemic. For that purpose, this Resolution approves a timeline for the lifting of the aforementioned measures, which shall apply until the end of August 2021. The following measures shall be highlighted: (a) teleworking will no longer be mandatory, but is recommended when the functions can be carried out under that regime; (b) the opening hours of restaurants, cafés, pastry shops and cultural facilities will be extended (they can be open until 12 pm to allow customers to enter, and must close at 1 am), and (c) food and non-food retail trade establishments, as well as other shops and shopping centres will be functioning under the respective licensing schedule. These rules will not apply in municipalities with high epidemiologic incidence rates, where teleworking will remain mandatory, if the tasks can be performed under such a regime, and the opening hours of several establishments will be shorter than those mentioned above and will depend on the degree of the epidemiologic risk of each municipality.

1.1.2 State of emergency

By the Resolution of the Council of Ministers No. 74-A/2021, of 09 June, subsequently rectified by Declaration of Rectification No. 18-A/2021, of 14 June, the government has extended, until 27 June 2021, the state of emergency on the Portuguese mainland territory due to the COVID-19 pandemic. This Resolution envisages that based on the determination of health authorities, workers who, regardless of their employment relationship, type or nature of legal relationship, render their functions in workplaces with 150 or more workers, should be tested for COVID-19. The state of emergency was extended until 11 July 2021 by the Resolution of the Council of Ministers No. 77-A/2021, of 24 June, the government determining that the conditions for implementing the strategy of lifting the confinement measures defined in the abovementioned Resolution of the Council of Ministers No. 70-B/2021 were not suitable.

1.1.3 Vaccination, test and recovery certificates

In addition, Decree Law No. 54-A/2021, of 25 June transposes *(i)* Regulation (EU) No. 2021/953 of the European Parliament and of the Council, of 14 June 2021, into the national legal system the issuance, verification and acceptance of interoperable COVID-19 vaccinations, tests and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic, and *(ii)* Regulation (EU) No. 2021/954 of the European Parliament and of the Council, of 14 June 2021, for the

issuance, verification and acceptance of interoperable COVID-19 vaccinations, tests and recovery certificates (EU Digital COVID Certificate) with regard to third-country nationals legally staying or residing in the territories of Member States during the COVID-19 pandemic. This Resolution entered into force on 26 June, with the exception of the rules on air and maritime traffic that apply from 01 July 2021.

1.1.4 Healthcare workers

Moreover, Decree Law No. 54-B/2021, of 25 June extends the exceptional regime of hiring workers for the National Health Service (under an unfixed-term employment agreement), establishing that, until 31 August 2021, the government member responsible for health may authorise the establishment of new employment relationships for rendering tasks directly related to the COVID-19 disease, whenever such hiring is indispensable to deal with an exceptional and temporary increase in activity due to the pandemic. This Resolution took effect on 30 June 2021.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-326/19, 03 June 2021, Ministero dell'Istruzione, dell'Università e della Ricerca

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario and

CJEU case C-550/19, 24 June 2021, Obras y Dervicios Públicos and Acciona Aqua

In case C-726/19, the CJEU interpreted clause 5 of the Framework Agreement on Fixed-term Work, concluded on 18 March 1999, which is annexed to Council Directive 1999/70/EC of 28 June 1999 (the 'Framework Agreement'), concerning the adoption of preventive measures to prevent and penalise the abuse of the fixed-term employment contracts.

In the present case, the worker entered into a so-called '*contrato de interinidad'* with *Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario* in 2003, which was extended in 2008, given that no candidate was selected in the procedure organised in 2005 to fill the position occupied by the worker. This contract ended in 2016, when the position was occupied by a permanent worker. In this case, no strict succession of two or more employment contracts (in the sense of a formal conclusion of two or more separate contracts, one contract succeeding the previous one) occurred, but only an automatic extension of the initial employment contract. Nevertheless, the CJEU stated that the automatic extension of the initial term of the employment contract could correspond to a renewal and, consequently, to the establishment of a distinct separate contract. Therefore, the CJEU considered that the situation at issue could be understood as involving the conclusion of contracts that might qualify as 'successive' for the purposes of application of Clause 5 of the Framework Agreement.

In this ruling, the CJEU concluded that Article 5 (1) of the Framework Agreement must be interpreted as contravening a national law which *(i)* allows the renewal of fixed-term

contracts while the selection procedure (for filling, on a definitive basis, a job position in the public sector) is pending, without indicating a precise deadline for completing these procedures, as well as *(ii)* prohibits equating these workers with 'workers hired for an indefinite period' and the granting of an indemnity to such workers. In the present case, the CJEU found that the national legislation does not appear to contain any measure designed to prevent and, where appropriate, to punish the abusive use of fixed-term contracts.

The CJEU's case C-326/19 also concerned the interpretation of clause 5 (1) of the Framework Agreement. In the present ruling, the CJEU analysed whether the absence of measures to penalise the abuse of fixed-term contracts, such as those at issue in the main proceedings, is compatible with the referred clause 5 and whether such a provision precludes the use of such fixed-term contracts on the grounds that they are abusive.

Regarding the last question raised above, the CJEU stated that clause 5 of the Framework Agreement is solely applicable when there are successive fixed-term employment contracts or relationships and, therefore, the conclusion of a fixed-term contract, such as the Type A contract at stake in the present case, did not fall within the scope of that provision. This means that clause 5 (1) of the Framework Agreement does not require Member States to adopt a measure requiring every first or single fixed-term employment contract to be justified by an objective reason.

However, clause 5 (1) of the Framework Agreement is applicable where the contract is extended for a maximum period of two years (as envisaged in the national law at issue in this case), provided that, in such a case, there are two successive fixed-term contracts. In that regard, the referred clause 5 (1) requires, with a view to preventing the misuse of successive fixed-term employment contracts or relationships, the effective and binding adoption by Member States of at least one of the measures listed in that provision, where their domestic law does not already include equivalent legal measures. In the present situation, the Italian law has adopted two of the measures stipulated in clause 5 (1), as it establishes limits to the maximum duration of fixed-term contracts (3 years) and the number of possible renewals (allowing only one extension, which is limited to a period of 2 years). According to the CJEU, the fact that the national legislation applicable to the dispute does not contain any details as to the genuine and temporary nature of the needs to be met by recourse to fixed-term contracts is irrelevant.

As a result, the CJEU ruled that clause 5 of the Framework Agreement *"must be interpreted as not precluding national legislation under which provision is made, in respect of the recruitment of university researchers, for the conclusion of a fixed-term contract for a period of three years, with a single possibility of extension, for a maximum period of two years, making the conclusion of such contracts subject, first, to the condition that resources are available "for planning for the purposes of carrying out research, teaching, non-curricular activities and student service activities", and, second, that such contracts are extended on condition that there is a "positive appraisal of the teaching and research activities carried out" without it being necessary for those rules to define objective and transparent criteria making it possible to verify that the conclusion and renewal of such contracts do indeed meet a genuine need, and that they are likely to achieve the objective pursued and are necessary for that purpose".*

It should be noted that the Portuguese Labour Code, approved by Law No. 7/2009, of 12 February, as subsequently amended (hereinafter referred to as PLC), provides for adequate measures that aim to avoid misuse of term employment contracts and that are in line with those envisaged in clause 5 of the Framework Agreement, such as:

i) the fixed-term employment contract can only be entered into and renewed where objective reasons set forth in the law (as a rule, related to the temporary needs of the employer) are verified (Articles 140 and 149 (3) of PLC);

ii) the fixed-term employment contracts, including renewals, are subject to a maximum duration period of two years, which is relevant for counting the duration of other fixed-term or temporary work contracts for the same job position, as well as the duration of service contracts for the same task, entered into between the worker and the same employer or companies that have a domain or group relation with the employer or common organisational structures with that same employer (Article 148 (1) and (6) of PLC);

iii) the fixed-term employment contracts can only be renewed up to three times, and the total duration of renewals cannot exceed the initial period of the contract (Article 149 (4) of PLC).

PLC also provides for adequate and effective penalties to be applied in the case of non-compliance with the referred measures. Apart from the potential misdemeanour liability, a contract is converted into a permanent one if its renewal is not justified by a ground admitted by law as well as the one that exceeds the maximum duration or the maximum number of renewals, as foreseen in the law (Article 147 (2) of PLC).

Regarding the legal framework applicable to civil servants (*'Lei Geral do Trabalho em Funções Públicas'*, hereinafter LGTFP, approved by Law No. 35/2014, of 20 June, as subsequently amended), the LGTFP sets forth some measures to avoid abuse through the succession of fixed-term employment contracts. For instance, according to Articles 57 and 61 of LGTFP, the fixed-term employment contract (and any renewal thereof) must be grounded on one of the objective reasons defined therein; in addition, Article 60 of LGTFP establishes a maximum duration of the fixed-term employment contract (three years) and two maximum renewals, except when otherwise established in special rules.

However, it should be noted that in the case of civil servants, the infraction of the abovementioned measures (e.g. exceeding the duration of the contract or the maximum number of renewals) does not lead to the conversion of the term employment contract into a permanent one, but only implies the invalidity of the contract and originates civil, disciplinary and financial responsibility of the directors of the bodies or services that hired the worker (Article 63 of LGTFP). For this reason, it may be disputable whether this legal framework is compatible with clause 5 of the Framework Agreement, i.e. whether the sanctions referred to above are adequate to avoid and, if necessary, to penalise the abusive resource to successive fixed-term contracts, namely considering the CJEU's case law referred to above.

4 Other Relevant Information

Nothing to report.

Romania

Summary

(I) The rules on the short-time work scheme have been amended.

(II) New rules on the posting of workers have been approved, transposing Directive (EU) 2018/957 into Romanian legislation.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 State of alert

The state of alert has again been extended for 30 days, by Government Decision No. 636/2021 (published in the Official Gazette of Romania No. 586 of 10 June 2021), but with a further easing of the distancing measures, introduced by Government Decision No. 678/2021 (published in the Official Gazette of Romania No. 628 of 25 June 2021).

1.1.2 Short-time work scheme

Government Decision No. 677/2021 (published in the Official Gazette of Romania No. 628 of 25 June 2021) amended Government Decision No. 719/2020, on the procedure for settlement and payment of amounts granted in case of reduction of working time and other support measures for employees and employers in the context of the epidemiological situation caused by the spread of the coronavirus SARS-CoV-2, as well as to stimulate employment. New documents are necessary to obtain the allowance from the state budget for the implementation of the flexible work programme (*Kurzarbeit* model). In addition, the support measures have been extended for three months following the cessation of the state of alert.

1.2 Other legislative developments

1.2.1 Posting of workers

Law No. 16/2017 on the posting of employees in the provision of transnational services, which transposed Directive 96/71/EC on the posting of workers in the framework of the provision of services and Directive 2014/67/EU on the enforcement of Directive 96/71/EC and amending Regulation (EU) No. 1024/2012 was modified by Law No. 172/2020 (published in the Official Gazette of Romania No. 736 of 13 August 2020). The aim of the new law is the transposition of Directive (EU) 2018/957, amending Directive 96/71/EC on the posting of workers in the framework of the provision of services (see August 2020 Flash Report).

Recently, the rules for the application of Law No. 16/2017 have been amended accordingly. More specifically, Government Decision No. 654/2021 (published in the Official Gazette of Romania No. 611 of 18 June 2021) amended the Implementing Rules on the posting of employees within the provision of the transnational services on Romanian territory, approved by Government Decision No. 337/2017. The legal act provides for the Labour Inspectorate to require the territorial labour inspectorates to carry out verifications and monitor transnational postings, mainly in terms of non-compliance or abuse regarding the applicable rules on posting, including transnational labour cases of undeclared work and bogus independent activity in the field of posting of employees.

Government Decision No. 654/2021 includes the template of the notification to be sent to the Labour Inspectorate in case the posting of the worker is extended up to 18

months. The notification on the extension of the posting may be drafted and sent in letter format, electronic format or by filling in an online form, accessible on a single platform managed by the Labour Inspectorate, complying with the technical and authentication requirements.

If the employee has been hired out by a temporary work agency to a user undertaking in Romania, but carries out his/her activity in the territory of another Member State, the employee shall be deemed to have been posted to the territory of that Member State by the temporary work agency with whom she/he has an employment relationship. In this case, the user undertaking in Romania has the obligation to inform the temporary work agency hiring out the employee at least 30 days before he or she commences the activity on the territory of the respective state, and to notify the territorial labour inspectorate, at the latest on the day before the employee is posted to the territory of that Member State.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

There is only one situation in the Romanian legislation in which the expiration date of the fixed-term contract may be unpredictable, which is the replacement of another worker whose employment contract has been suspended. Indeed, the suspension may cease or, on the contrary, be extended, for periods that cannot be provided for either by the fixed-term employee or by her/his employer. Thus, the contract of the substitute will continue for as long as the holder's contract remains suspended. According to Article 84 (2) of the Labour Code, "*if the fixed-term employment contract is concluded to replace an employee whose employment contract has been suspended, the duration of the contract will expire upon termination of the reasons that led to the suspension of the contract of the incumbent employee*".

However, those situations are not similar to the ones described in case C-726/19, since the time of termination does not depend on the employer, who could not, by his or her own will, change the duration of the suspension of the incumbent employee's contract. The extension of the fixed-term contract or, on the contrary, its untimely termination is not the consequence of the employer's breach of a legal obligation, and the contract was concluded to meet a temporary need of the employer. Therefore, although in this case there is some uncertainty regarding the date of termination of the contract, the Romanian legislation does not allow abusive recourse to successive fixed-term contracts.

During the recruitment procedures for filling a vacancy, the employer cannot hire a fixed-term employee. The Labour Code lists the reasons for which a fixed-term contract can be concluded, and this situation is not among the legal grounds.

CJEU case C-326/19, 03 June 2021, Ministero dell'Istruzione, dell'Università e della Ricerca

The Romanian legislation does not include regulations that are similar to those considered in case C-326/19. In Romania, teaching staff, including early stage scientific researchers, are employed on open-ended contracts.

Fixed-term contracts can only be concluded with doctoral students for the period of their doctoral studies. These provisions are included in the National Education Law No. 1/2011 (published in the Official Gazette of Romania No. 18 of 10 January 2011). The duration of doctoral studies coincides with the maximum duration for which, according to the Labour Code, fixed-term contracts can be concluded, i.e. 3 years (Article 84 (1) of the Labour Code). However, there is no possibility of extending these employment contracts, therefore clause 5 (1) of the Framework Agreement does not apply.

CJEU case C-550/19, 24 June 2021, Obras y Dervicios Públicos and Acciona Aqua

Romanian legislation limits the number of fixed-term contracts that can be concluded between the same parties to three (Article 82 (4) of the Labour Code). There are no sectors of activity exempt from this limitation. In addition, according to Article 5 (1) of the Law on the protection of employees' rights in case of transfers of undertakings, businesses or parts of undertakings or businesses (published in the Official Gazette of Romania No. 276 of 28 March 2006), "*the rights and obligations of the transferor, arising from employment contracts and from the applicable collective labour agreement existing on the date of the transfer will be transferred in full to the transferee*". Therefore, the rights and obligations of the transferred worker the transferee is required to respect are those resulting from the last contract this worker concluded with the transferor.

4 Other Relevant Information

Nothing to report.

Slovakia

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

The main legal source regulating fixed-term work is the Labour Code, Act No. 311/2001 Coll. adopted in 2001, in force since 01 April 2002. As regards public and civil service, special acts apply.

Act No. 552/2003 Coll. on the performance of work in the public interest (formerly Act No. 313/2001 Coll. on public service) does not regulate fixed-time work of public service employees. It is fully regulated in the Labour Code. The main source regulation civil service is Act No. 55/2017 Coll. on civil service, as amended.

According to Article 1 paragraph 4 of Act No. 552/2003 Coll. on the performance of work in the public interest, the Labour Code applies to employment relationships of employees who perform work in the public interest, unless this Act or a special regulation provides otherwise. (This special regulation is Act No. 131/2002 Coll. on Higher Education, as amended.)

The only Article of Act No. 131/2002 Coll. on Higher Education regarding fixed-term contracts is Article 5 paragraph 9 - the vacancy for a senior employee may only be filled without a selection procedure until the appointment following successful completion of the selection procedure pursuant to this Act, for a maximum period of six months.

As regards the public service, fixed-term work is practically fully regulated in the Labour Code.

According to Article 48 paragraph 1 of the Labour Code, an employment relationship shall be agreed for an indefinite period, if the duration of employment is not explicitly defined in the employment contract or if the legal conditions for the conclusion of the employment relationship for a specific period were not met in the employment contract or upon its modification. An employment relationship shall also be of indefinite duration if the employment relationship concluded for a specific period has not been agreed in writing (written form).

The fixed-term employment relationship can be agreed in a contract of employment not only based on a specific date but also on another event (e.g. completion of a specific assignment, return of a female employee from maternity leave, etc.) without any uncertainty about when the employment relationship will end. According to a court decision (R 67/2003), if the duration of the employment relationship was agreed for the completion of a specific assignment, the fulfilment of the conditions of the Act (i.e. the

Labour Code), according to which employment relationships for a certain period can be negotiated for a maximum of (now) two years, can only be assessed at the time of their termination, at the latest at the end of (now) two years from the start of the employment relationship. If the work was not completed before the expiration of (now) two years from the start of the employment relationship, the employment relationship was deemed to have been concluded for an indefinite period.

According to Article 48 paragraph 2 of the Labour Code, a fixed-term employment relationship may be agreed for a maximum of two years. A fixed-term employment relationship may be extended or renewed at most twice within a two year-period.

To prevent abuse arising from the use of successive fixed-term contracts, Article 48 paragraphs 4 and 6 of the Labour Code specify objective reasons for successive fixed-term contracts.

According to Article 48 paragraph 4 of the Labour Code, a further extension or renewal of the fixed-term employment relationship to two years or beyond two years can only be agreed for the following reasons:

a) substitution of an employee during maternity leave, parental leave, leave immediately linked to maternity leave or parental leave, temporary incapacity for work or an employee who has been given long-term leave to perform a public function or trade union function (these successive contracts are restricted by the duration of such obstacles to work in the relevant special laws governing them).

b) the performance of work for which a significant increase in the number of employees for a temporary period not exceeding eight months of the calendar year,

c) the performance of work that is linked to the seasonal cycle, which repeats every year and does not exceed eight months in the calendar year (seasonal work),

d) the performance of work agreed in a collective agreement.

The reason for an extension or renewal of a fixed-term employment relationship under paragraph 4 shall be stated in the employment contract (Article 48 paragraph 5 of the Labour Code).

According to Article 48 paragraph 6 of the Labour Code, a further extension or renewal of an employment relationship for a fixed term of up to two years or beyond two years can be agreed with a teacher in higher education or a creative employee in science, research or development if there are objective reasons relating to the nature of the activities of the teacher in higher education or creative employee in science, research or development as stipulated in special regulations (Act. No. 131/2002 Coll. on Higher Education, as amended - see comment on C 326/19).

The concept of 'successive' fixed-term employment contracts is defined. According to Article 48 paragraph 3 of the Labour Code, a successive fixed-term employment relationship is an employment relationship that begins less than six months after the end of the previous fixed-term employment relationship between the same parties.

According to Article 48 paragraph 7, an employee in a fixed-term employment relationship may not be given either more or less favourable treatment than a comparable employee with regard to working conditions and the terms of employment pursuant to this Act and the working conditions relating to occupational health and safety pursuant to a special regulation.

(According to Article 40 paragraph 9 of the Labour Code, for the purposes of this Act, a comparable employee shall be an employee, who has agreed an employment relationship for an indefinite period and a determined weekly working time with the same employer or an employer according to Article 58 (temporary assignment), who carries out or would carry out the same type of work or a similar type of work, taking into consideration qualifications and experience in a relevant field.)

The limitations provided for in Article 48 paragraphs 2 to 7 shall not apply to employment with a temporary employment agency (Article 48 paragraph 9 of the LC).

An employment relationship concluded for a fixed period shall terminate upon the expiration of this period (Article 71 paragraph 1 of the Labour Code). If an employee continues to perform work after the agreed period with the employer's knowledge, this employment relationship will be deemed to have been converted into an employment relationship of indefinite duration, unless the employer agrees otherwise with the employee (Article 71 paragraph 2 of the LC).

The above-mentioned provisions are applicable to contracts in the private and public sector, but a special regulation exists for civil servants. There are six separate acts for the civil service in different areas, but the main source in this regard is Act No. 55/2017 Coll. on civil service, as amended.

The Act regulates temporary civil service in detail, and lasts for a definite period (Article 36 paragraph 1). It distinguishes between when it is possible to be accepted to the temporary civil service even without completing the selection procedure (Article 36 paragraph 3 letters a /- e /) and when it is possible only on the basis of a selection procedure (Article 36 paragraph 4 letters a /- c /).

In Article 37 letters a / -j /, the Act determines the duration of the temporary civil service in specific cases. According to letter i/, the duration of the temporary civil service of a civil servant according to Article 36 paragraph 3 letter e/ lasts until the position is filled on the basis of a selection procedure, a maximum of six months,

(Article 36 paragraph 3 letter e / - acceptance of a citizen to a vacant civil service post.)

In conclusion, the provisions cited above demonstrate that the national legislation contains provisions to prevent abuse of the successive conclusion of fixed-term contracts and to penalise it if necessary.

In case of a dispute, the employee may turn to the courts. He or she may also contact the employee representatives who are authorised to monitor the observance of labour law regulations, including wage regulations and any obligations resulting from a collective agreement (Article 239 of the Labour Code). Employees who have suffered the consequence of violations of obligations resulting from labour law relationships, and the employee representatives of an employer whose activity they monitor pursuant to Article 239, and who identify a violation of labour law regulations, may lodge a complaint with the competent Labour Inspectorate (Article 150 paragraph 2 of the Labour Code).

According to Article 171 paragraph 1 of Act No. 55/2017 Coll. on civil service, the provisions of Article 150 and Article 239 letter a/ of the Labour Code shall apply mutatis mutandis to civil service relationships.

CJEU case C-326/19, 03 June 2021, Ministero dell'Istruzione, dell'Università e della Ricerca

The implementation of the Directive is ensured by the Labour Code. According to Article 48 paragraph 6 of the Labour Code, a further extension or renewal of an employment relationship for a fixed-term of up to two years or over two years can be agreed with a teacher in higher education or a creative employee in science, research or development if there are objective reasons relating to the character of the activities of the teacher in higher education or creative employee in science, research or development as stipulated in special regulations.

This special regulation is established in Act. No. 131/2002 Coll. on Higher Education, as amended.

According to Article 77 paragraph 1 of this Act, the positions of academic teachers and posts of 'professors' and 'docents' are filled by the selection procedure pursuant to Article 15 paragraph 1 letter d). The selection procedure for the filling of posts of

'professor' and 'docent' is simultaneously the competition for filling the position of an academic teacher. The higher education institution publishes the announcement of the selection procedure on the website designated by the Ministry of Education and on its official notice board or the official notice board of the faculty, if it is a job or function assigned to the faculty. The requirements for filling the position of academic teacher in the field of pedagogical activity and in the field of creative activity shall be stated by the higher education institution in the notice of announcement of the selection procedure, within which it shall also verify their fulfilment.

(The public higher education institution shall issue the internal regulations stipulated in Article 15 paragraph 1 of the Act. Among them are "the Rules of Selection Procedure for filling positions of academic teachers and research workers, and posts of "professors" and "docents", and management personnel (letter d/).)

An employee who has no scientific-pedagogical degree or artistic-pedagogical degree of 'professor' or 'docent' may be employed as an academic teacher based on one competition for a period of no longer than five years. The function of 'docent' (associate professor) and of professor may be filled without a scientific-pedagogical title or without an artistic-pedagogical title 'docent' or 'professor' for a fixed period, together for a maximum of three years, taking into account employment at all public higher education institutions, state higher education institutions and private higher education institutions; concurrent employment relationships are taken into account, each separately. An employment contract for the function of 'docent' (associate professor) or of professor concluded with a person without a scientific-pedagogical title or without an artistic-pedagogical title 'docent' or 'professor' after the expiration of the period mentioned in the previous sentence is invalid from the first day of the calendar month following its expiration (Article 77 paragraph 2 of the Act).

The employment of academic teachers (paragraph 1 above), who has not the scientific-pedagogical degree of 'professor' or 'docent', employed in the faculties of medicine, pharmacy and veterinary medicine and at workplaces of public higher education institutions, where the execution of employees' work requires the completion of a certain level of specialised training, may be concluded on the basis of one competition for a period longer than that in paragraph 2 above. The period shall be determined by the Dean or Rector for ten years at most (Article 77 paragraph 3 of the Act).

An academic teacher may fill the function of 'docent' or 'professor' on the basis of one competition for a period not longer than five years. If an academic teacher has filled the function of 'docent' or 'professor' at least for the third time, with the total time period of his/her work in such posts for at least nine years, and has, in the case of the function of 'docent' (associate professor), the scientific-pedagogical title or the artistic-pedagogical title 'docent' or 'professor', and in the case of the function of 'professor', the scientific-pedagogical title or the artistic-pedagogical title 'professor', he/she acquires the right for an employment contract with such higher education institution for the position of academic teacher and appointment to this function for a definite period until he or she reaches the age of 70 years (Article 77 paragraph 4 of the Act).

An academic teacher may be released by the Rector or Dean, if this is an academic teacher assigned to the faculty, from fulfilment of educational tasks for a reasonable time period and to enable him/her to pursue only scientific work or artistic work. This is without prejudice to the provisions of special regulations on employees' remuneration (Article 77 paragraph 5 of the Act).

The employment of academic teachers terminates at the end of the academic year in which they complete 70 years of age, unless their employment was terminated earlier by special regulations (Labour Code). The Rector or Dean, in the case of an employee assigned to the faculty, may conclude an employment relationship with a person over the age of 70 years in the position of academic teacher in the case of an employee assigned to the faculty for a maximum of one year; in this way, it is possible to also repeatedly conclude an employment relationship (Article 77 paragraph 6 of the Act).

If an academic teacher holds the function of Rector or Dean at a higher education institution and during his or her term of office in this function, his or her employment is to be terminated on the basis of an employment contract or due to reaching the age of 70 under paragraph 6, his or her employment shall end at the end of his or her term of office (Article 77 paragraph 7 of the Act).

According Article 77 paragraph 8 of the Act without a selection procedure for the position of academic teacher, the Rector or Dean may for a maximum of one year

(a) recruit an employee in part-time employment, or

(b) conclude agreements on work performed outside the employment relationship.

(As mentioned above, the Slovak Labour Code regulates not only the labour (employment) contract (and employment relationship), but also "agreements on work performed outside the employment relationship" (Articles 223 – 228a). Each of these three agreements is a fixed-term agreement concluded for a period of up to a maximum of 12 months (Articles 226, 228 and 228a of the Labour Code).

The legislation is in principle in line.

CJEU case C-550/19, 24 June 2021, Obras y Dervicios Públicos and Acciona Aqua

The legal regulation of fixed-term employment was quoted in detail in the commentary to C 726/19. The most important aspects are presented here.

As already mentioned above, a further extension or renewal of the fixed-term employment relationship to two years or beyond two years can only be agreed for the reasons stated in Article 48 paragraph 4 letters a/-d/ of the Labour Code:

a) substitution of an employee during maternity leave, parental leave, leave immediately linked to maternity leave or parental leave, temporary incapacity for work or an employee who has been given long-term leave to perform a public function or trade union function, (these successive contracts are restricted by the length of such obstacles to work in the relevant special laws governing them);

b) the performance of work for which it is necessary to significantly increase employee numbers for a temporary period not exceeding eight months of the calendar year;

c) the performance of work that is linked to the seasonal cycle, which repeats every year and does not exceed eight months in the calendar year (seasonal work);

d) the performance of work agreed in a collective agreement.

For the majority of reasons, the duration of the fixed-term employment relationship is clear. However, problems could arise in practice for a reason given under letter d/ - "the performance of work agreed in a collective agreement".

This is a further extension or renewal of the fixed-term employment relationship to two years or beyond.

As regards the safeguarding of employees' rights in the event of transfers of undertakings according to Article 28 paragraph 1 of the Labour Code, if a business unit, which is an employer or a part of an employer for the purposes of this Act or if a task or activity of an employer or part thereof is transferred to another employer, the rights and obligations arising from labour law relationships towards the transferred employees shall pass to the transferee employer.

A transfer pursuant to the cited paragraph 1 is the transfer of a business unit, which preserves its identity as an organised group of resources (tangible assets, intangible assets and personnel), whose purpose is the performance of the economic activity, regardless of whether this activity is primary or supplementary (Article 28 paragraph 2 of the LC).

According to the cited Article 28 paragraph 1 of the Labour Code, all rights and obligations arising from labour law relationships towards the transferred employees shall pass to the transferee employer. In the event of a dispute, the national court would, of course, have to comply with the CJEU judgment (less favourable position solely as a result of the transfer), even if it accepted the view that it can only be about the rights and obligations arising from the last contract concluded by that worker with the outgoing undertaking.

4 Other Relevant Information

Nothing to report.

Slovenia

Summary

(I) The declaration of pandemic was not extended due to the improved epidemic situation. Most of the measures aimed at mitigating the negative consequences of the pandemic remained in force during June 2021.

(II) Amendments to the Road Transport Act introduced the legal basis for digital platforms in passenger transport, such as Uber.

(III) The legislation on regulated professions was amended with the rules on the proportionality assessment, transposing EU Directive 2018/958.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Relief measures for businesses and workers

As announced by the government last month, the declaration of the epidemic was not extended upon the expiry of the Ordinance of May 2021 (see May 2021 Flash Report); the second-wave epidemic was declared/extended from 19 October 2020 until 15 June 2021.

Although the formal declaration of the COVID-19 epidemic expired on 15 June 2021, various measures aiming to contain the spread of COVID-19 virus infections remained in force, but gradually eased throughout June; the most recent measures are published here: Official Journal of the Republic of Slovenia (OJ RS) No. 101/21, 24 June 2021).

Various measures introduced to mitigate the negative consequences of the COVID-19 crisis (anti-corona packages, the so-called PKPs) remained in force during June 2021. No major changes were made in June 2021 from the perspective of labour law. However, many of the measures expired at the end of June 2021.

For example, the partial reimbursement of wage compensation for temporarily laid-off workers—the most widely used measure for adjusting the labour force and preventing dismissals since the beginning of the COVID-19 crisis—which was extended many times, the last time in May 2021 (see May 2021 Flash Report), expired at the end of June 2021.

The reimbursement of wage compensation during quarantine, during periods of inability to work due to childcare and *vis major*, as well as the monthly basic income for self-employed persons and for various other categories of persons, etc. also expired at the end of June 2021 (see March 2021 Flash Report).

The minimum wage subsidy will 'transform' into a subsidy in the form of lower social insurance contributions during the second half of 2021 (see February 2021 Flash Report).

As regards the short-time work scheme, which will expire at the end of June 2021, it is expected that this measure will be extended. A new package of measures is being prepared by the government, which would extend certain measures and introduce some new ones, this time more focused on specific sectors of activity hit particularly hard by the COVID-19 crisis (*'Predlog zakona o interventnih ukrepih za pomoč gospodarstvu in turizmu*, available here).

1.2 Other legislative developments

1.2.1 Foreign workers

The Order determining the occupations in which the employment of foreigners is not linked to the labour market (see December 2020 Flash Report, under 1.2.1.) was extended until 31 December 2021 (*'Odredba o spremembi Odredbe o določitvi poklicev, v katerih zaposlitev tujca ni vezana na trg dela'*, OJ RS No. 100/21, 24 June 2021, available here, p. 6258).

1.2.2 Platform work

The amendments to the Road Transport Act were passed by the National Assembly (Act Amending the Road Transport Act*, 'Zakon o spremembah in dopolnitvah Zakona o prevozih v cestnem prometu (ZPCP-2H)'*, OJ RS No. 94/21, 11 June 2021, p. 5791-5794, available here) and introduce the legal basis for digital platforms in passenger transport such as, for example, Uber. The government coalition argued that these changes would facilitate the digitalisation of the transport sector and improve the services for passengers, while the centre-left opposition criticised the amendments as being written by lobbyists and tailored to Uber, warning about the risks of precarious work and violations of labour rights.

1.2.3 Recognition of professional qualifications

The Act Regulating the Procedure for the Recognition of Professional Qualifications for Practising Regulated Professions was amended (*'Zakon o spremembah in dopolnitvah Zakona o postopku priznavanja poklicnih kvalifikacij za opravljanje reguliranih poklicev (ZPPPK-B)'*, OJ RS No 92/21, 08 June 2021, available here, p. 5762-5764)

These amendments introduce the rules on the proportionality assessment for regulated professions and transpose EU Directive 2018/958 on a proportionality test before the adoption of new regulations on professions (OJ L 173, 09 July 2018, p. 25–34). The deadline for transposition expired on 30 July 2020.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

The case concerned successive fixed-term employment contracts in the public sector, (non)existence of measures aiming to prevent and sanction abuse arising from the use of successive fixed-term employment contracts in the public sector and the question whether the economic crisis can be taken into account.

The case is of no particular relevance for Slovenian law, since in Slovenia, there are legal measures that address the abuse of successive fixed-term contracts of employment in the public sector, and the conversion of fixed-term contracts into the employment contract of indefinite duration in case of an abuse is possible in the public sector.

According to Article 54 of the Public Employees Act (*'Zakon o javnih uslužbencih (ZJU)'*, OJ RS No. 56/2002 et subseq.), public employees shall enter into an employment

relationship of indefinite duration, except in the cases determined by the ZJU or a sector-specific Act governing the employment relationships of public employees in the specific sector.

According to Article 68, paragraph 1 of the ZJU, a fixed-term employment contract may be concluded (in the public sector):

- for posts subject to the personal trust of a holder of public office (posts in a minister's office);
- for substituting temporarily absent public employees;
- for performing work requiring expertise organised as a project with limited duration, and for the performance of public tasks in the event of a temporary workload increase which by its nature lasts for a limited period of time and cannot be handled with the existing number of public employees;
- for a traineeship or other similar forms of theoretical and practical training;
- for the managerial positions of director-general, secretary-general, head of a body within a ministry, head of a government office, head of an administrative unit, and director of a municipal administration or municipal secretary;
- in cases when a change in the scope of the public tasks of an authority may be expected which may result in a reduction in the number of public employees required, in which case such posts shall be specifically marked in the job classification;
- in case of employment of a top athlete or coach to support and promote elite sport.

According to Article 68, paragraph 3 of the ZJU, the provisions of the Act governing employment relationships, i.e. the ZDR-1 (the Employment Relationships Act, *'Zakon o delovnih razmerjih (ZDR-1)'*, OJ RS No. 21/13 et subseq.), regulating the restrictions on successive fixed-term employment contracts and the consequences of violating the provisions on fixed-term contracts of employment apply in the public sector. The time limit of two years for one or more successive fixed-term employment contracts (Article 55 of the ZDR-1; there are certain exceptions to this "max. two years" rule), therefore, applies in the public sector. Article 56 of the ZDR-1 is also applicable in the public sector, according to which,

> *"if a fixed-term employment contract is not concluded in accordance with the law or a collective agreement (for example, no permitted reason prescribed by the law exists or the maximum duration prescribed by the law has been exceeded, etc.), or if the worker continues to work after the period for which he concluded the fixed-term employment contract has expired, it shall be assumed that the worker has concluded an employment contract of indefinite duration*."

This has been substantiated by case law (Article 56 of the ZDR-1 in connection with Article 68, paragraph 3 of the ZJU applies in the public sector) – see, for example, judgment of the Higher Labour and Social Court No. Pdp 28/2021, 02 March 2021, ECLI:SI:VDSS:2021:PDP.28.2021, judgment of the Supreme Court No. VIII Ips 157/2014, ECLI:SI:VSRS:2015:VIII.IPS.157.2014, 17 February 2015).

An economic crisis and economic considerations related to it 'as such' do not constitute an objective reason for concluding (successive) fixed-term contracts or for extending such contracts (see above, Article 68, para 1 of the ZJU).

CJEU case C-326/19, 03 June 2021, Ministero dell'Istruzione, dell'Università e della Ricerca

The case concerned fixed-term employment contracts of university researchers (in the public sector). This case is of some relevance for Slovenian law. In Slovenia, researchers

are frequently employed on the basis of fixed-term contracts at universities and research institutions, especially at the beginning of their career.

If their fixed-term contract is concluded in accordance with the law, they cannot claim conversion into a contract of indefinite duration. In addition to objective reasons justifying the conclusion of fixed-term contracts which are stipulated in the ZJU and general rules governing fixed-term contracts (see above under CJEU case 726/19), the sector-specific legislation must be taken into account. In accordance with Article 31 of the Research and Development Activity Act (*'Zakon o raziskovalni in razvojni dejavnosti (ZRRD)'*, OJ RS No. 96/02 et subseq., available here) regulating the employment of researchers on fixed-term contracts, a contract of employment for a fixed period of time exceeding two years may be concluded in the case of training and education to obtain a master's degree or doctorate, for a period of time prescribed by the programme for obtaining the title, taking into account the justified absence of the young researcher during the period of co-financing. Many researchers are employed on a fixed-term contract that is concluded within the framework of a temporary research project; in this case, there are special rules on time limits and the 'general' time limit of two years may be exceeded if a contract of employment is concluded for the entire period of the research project. However, if an objective reason does not exist or if the rules on time limits are not observed, then the conversion into an employment contract of indefinite duration is possible. As already described above (under CJEU case C-726/19), there are legal measures that address the abuse of successive fixed-term contracts of employment that fully apply in the public sector and, therefore, also to researchers employed at universities. Case law confirms this (see, for example, judgment of the Higher Labour and Social Court No. Pdp 643/2017, 09 November 2017, ECLI:SI:VDSS:2017:PDP.643.2017, available here).

CJEU case C-550/19, 24 June 2021, Obras y Dervicios Públicos and Acciona Aqua

The case concerned specific types of contracts, known in Spanish law as '*fijos de obra'*; these are fixed-term contracts for a specific construction project, which are temporary contracts specific to the construction sector. For the '*fijos de obra'*, there is no prescribed time limit (they are excluded from the rules on time limits for fixed-term contracts) and, consequently, the rules on conversion into contracts of indefinite duration in case the maximum duration has been exceeded do not apply. In addition, in case of a transfer, only the duration of service under the last fixed-term employment contract is recognised and taken into account by the transferee.

The case is of no particular relevance for Slovenian law; there is no such specific fixed-term employment contract in the construction sector. The general rules on fixed-term contracts apply and, in case of abuse, if there is no objective reason or the prescribed time limit for fixed-term contracts has been exceeded, the conversion into a permanent contract is possible according to the general rules of the ZDR-1 (see more above, in particular Articles 54, 55 and 56 of the ZDR-1). In case of a transfer, the entire length of service on the basis of all successive fixed-term employment contracts must be taken into account by the transferee (Article 75, para 3 of the ZDR-1).

However, it is worth noting that there are problems with fixed-term employment contracts (and other non-standard forms of work) in the construction sector 'in practice'*:* the existing rules are often not respected in practice.

4 Other Relevant Information

4.1 Collective bargaining

The government signed an agreement with public sector trade unions (not all of them signed the agreement) which abolishes some of the remaining austerity measures introduced during the 2008 financial crisis, introduces certain changes and adjustments

as regards the reimbursement of work-related costs and certain other payments, and delays payday in the public sector (from the fifth to the tenth day of a month for the previous month); the agreement is available here. The conclusion of annexes to collective agreements covering public sector employees followed (Annex to the Collective Agreement for non-commercial sector in the Republic of Slovenia and annexes to sectoral/occupational collective agreements: for the cultural sector; for persons employed in health care; for the health care and social protection sector; for doctors and dentists; for the research sector; for the education sector; for professional journalists), all published in OJ RS No 88/21, 03 June 2021, p. 5155-5179, and in OJ RS No 94/2021, 11 June 2021, p. 5865-5868.

4.2 Professional firefighters on strike

Professional firefighters started a two-day warning strike on 30 June 2021 stating that the government failed to engage in a proper social dialogue; they are demanding to negotiate a collective agreement and for the government to respect its previous commitments (available here).

Spain

Summary

(I) The health and safety regulation on risks of carcinogens was modified to implement Directive (EU) 2019/130 on the protection of workers from the risks related to exposure to carcinogens or mutagens at work.

(II) The system of youth guarantee was updated to comply with the relevant Council Recommendation of 30 October 2020.

(III) The Supreme Court has ruled on the subject of transfer of undertakings.

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 health and safety regulation on risks on carcinogens has been modified to implement Directive (EU) 2019/130 of the European Parliament and of the Council of 16 January 2019 amending Directive 2004/37/EC on the protection of workers from the risks related to exposure to carcinogens or mutagens at work. From now on, workers must be protected from dermal exposure to mineral oils previously used in internal combustion engines to lubricate and cool the engine's moving parts, as well as in jobs involving exposure to diesel engine emissions.

1.2.2 Youth guarantee

The system of youth guarantee promoted by the European Union was regulated in Spain by Law 18/2014, of 15 October, and amended by Royal Decree Law 6/2016.

The government has published an update of this system, entitled 'Youth Guarantee Plus 2021-2027 Plan for decent work for young people'. According to data provided by the government, the outcome of the previous plan was successful, but the impact of the COVID crisis on youth employment has been more severe than for other groups, because it has not only affected job opportunities, but also training. This update complies with Council Recommendation of 30 October 2020 on A Bridge to Jobs – Reinforcing the Youth Guarantee and replaces Council Recommendation of 22 April 2013 on establishing a Youth Guarantee 2020/C 372/01.

This new Plan highlights the need to improve training systems and methods, focusing on training in language and digital skills. It also aims to identify job opportunities in sectors with growth potential, such as ICT, agriculture, livestock, art and tourism. Another objective is the reduction of the high school dropout rate to ensure the employability of young people.

The Plan also focuses on preventing the abusive use of internships and aims to introduce effective measures to ensure equality and non-discrimination on grounds of sex. Measures should also give preference to the most vulnerable youth population at risk of exclusion, such as young people living in isolated or less populated areas.

This Plan is a programmatic document that must be translated into concrete actions and was submitted to the European Commission in June for proper assessment.

2 Court Rulings

2.1 Transfer of undertakings

Supreme Court, No. 602/2021, 08 June 2021

The concept of transfers of undertakings has been problematic in Spain, and the Supreme Court case law has not always complied with the criteria provided by the CJEU. However, the Spanish Supreme Court has tried to adapt and respect CJEU case law, as proven by the present ruling. With express reference to the CJEU ruling in case C-463/09, 20 January 2011, *CLECE*, the Supreme Court stated that no transfer of undertaking had occurred when a hotel, which contracted out the cleaning of its premises to a private company, decided to terminate its contract with that company and to undertake the cleaning of those premises itself with its own staff.

2.2 Equal treatment

Supreme Court, No. 604/2021, 08 June 2021 and No. 612/2021, 09 June 2021

Collective agreements in Spain apply to all workers in the undertaking, but are valid for a limited period of time. When a collective agreement ends, it can be replaced by another one, which may improve or worsen the conditions of the previous agreement. For years, new collective agreements generally maintained certain wage supplements for older workers, but eliminated them for new workers. As a general rule, the Supreme Court has held that this difference in treatment on the basis of the date of entry into the undertaking violates the principles of equality and non-discrimination. These judgments reiterate this consolidated doctrine.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

This problem has been reported numerous times over the last five or six years. Fixed-term employment in public administration has been very problematic in Spain, and the issue has not been well-resolved. It should be noted that the abusive use of fixed-term contracts is not permitted in Spain. An irregular (abusive) fixed-term contract results in its conversion into a permanent one. Therefore, a temporary contract without an objective reason does not automatically end on the date established in the contract, because it becomes a permanent contract from its very beginning. If the employer terminates the contract on the grounds that it is a fixed-term employment contract, the worker can challenge the decision before the courts, which will recognize that it is a permanent contract and will grant a severance pay for unfair dismissal.

However, this is not an easy rule to apply when a public administration is involved, because access to a permanent job in public employment requires passing a selection process, which must respect the principles of equality, merit and ability. Thus, the abusive use of fixed-term contracts in public administration does not lead to the conversion of the temporary worker into a permanent one. Instead, the Supreme Court has created the 'indefinite but not permanent worker' ('*trabajador indefinido no fijo de plantilla*'). The irregular fixed-term contract thus does not end on the originally scheduled date, but when the job is filled by a career civil servant. Consequently, the initial worker could remain in this temporary job for years, but this is not a type of contract and there is no legal regulation, nor registration, because it is a type of relationship that only exists when a court declares that the fixed-term contract concluded by the public administration is abusive. This situation cannot arise when the

employer is a private undertaking, because an invalid fixed-term contract is converted into a permanent one. Those 'indefinite but not permanent workers' are a category on their own, between fixed-term contracts and permanent ones, but under the Framework Agreement, they must be considered fixed-term contracts. They are similar to interim contracts, but do not have a fixed termination date, so the worker could spend years in this situation. There have been problems relating to severance pay at the end of such contracts, but the Supreme Court ultimately decided that the worker is entitled to it.

However, this issue was not addressed in the present CJEU ruling, which refers to a valid replacement contract, according to Spanish Law. Spanish public administration has many temporary needs, because of its huge role. There are numerous programmes to promote employment, training for employment, or to provide services, all of them of a temporary nature. There are fixed-term programmes with a specific budget which usually require temporary workers. Education and health sectors are public services that cannot be interrupted and both are very demanding in terms of manpower, because constant replacements are needed (substitution of civil servants on sick or maternity leave, or filling vacancies until the job is filled by a career civil servant after passing an open competition exam).

Therefore, interim contracts (replacement contracts) are frequent, and can be used in two situations according to the relevant legal provisions. Firstly, in cases in which the employer needs to substitute workers who have the right to keep their job. This contract ends when the replaced worker returns. Secondly, the employer can hire an interim worker while the selection process is being carried out for a vacant job. Labour law specifies a maximum duration for the interim contracts in this latter case (three months), but only applies to private employers. Thus, this type of interim contract in public administration has no limit of duration and can last years. There was no strict obligation for the public administration to start the selection process at a specific moment (the law seems to establish three years), because the Supreme Court has provided for a lot of flexibility (which the CJEU expressly mentions). These replacement contracts do not entitle to a right to severance payment when they are terminated.

It should also be borne in mind that a number of practical problems arise from the various interests involved. Firstly, interim workers, who have long been on the job, do not always want the selection process to be carried out, because they are not sure that they will get the job, so they could lose the temporary job and become unemployed. They might prefer to remain in the same situation, even for years. Secondly, to solve this problem, trade unions sometimes pressure the public administration to give the interim worker a permanent job, but this goal is difficult to achieve because according to the Spanish Constitution, the selection process must be governed by the principles of equality, merit and ability. In the absence of an agreement with the trade unions, some public administrations prefer not to open competition to maintain a good working environment.

This is the current status quo. Following this CJEU ruling, the government announced a legal reform. However, the regions (autonomous communities) play a decisive role, because they decide the hiring in sectors such as education and health. The government is trying to negotiate a reform with the regions and it seems that they want to start the selection processes in time, that is, before the replacements contracts exceed the three-year deadline provided for in Article 70 of the Basic Statute of Public Employees. However, that would imply that many long-time interims would lose their jobs, as mentioned earlier, so there have been some protests and threats of strikes.

Other proposals for this future reform consist in an automatic termination of replacement contracts after three years. However, this seems to be unsatisfactory, because there would be no severance payment and it would not resolve the actual issue, namely the excessive temporary employment rate in public administration (there would be a rotation of interims in the same vacancy). Therefore, the government is aware that there is a big problem (it has been aware of this for years), but there are so many interests involved that finding a proper remedy is not an easy task. EU law must be

respected, but the remedy must be in line with the Spanish Constitution and with the powers of the regional administrations. The economic impact of the reform and the interests of the workers involved are not trivial issues, because the consequences of massive protests—even strikes—in several sectors (such as health and education) would be tremendous, particularly in the context of COVID.

On 28 June, the Supreme Court has announced a change of its previous doctrine with the aim to adapt to CJEU case law. From now on, these replacement contracts may not exceed three years. If the selection process does not start then, the replacement worker will become an 'indefinite but not permanent' worker ('*trabajador indefinido no fijo de plantilla*'). Therefore, the worker could lose his/her job if the vacancy is filled in the future, but he/she has the right to a severance payment (20 days of salary per year worked).

CJEU case C-326/19, 03 June 2021, Ministero dell'Istruzione, dell'Università e della Ricerca

This ruling will have no implications in Spain, because the hiring system differs. The Spanish legislation on universities designs a professional career in which temporary contracts have a pre-established duration. The transition from one contract to another, even to a permanent position, requires a positive evaluation from a state agency and successful passing of a competitive examination. The system seems to be more similar to the Italian Type B contracts, and not Type A contracts. However, Article 22 of the Science Law regulates a similar contract as the Italian Type A contract, with a maximum duration of five years, i.e. hypothetically, similar problems could arise. This ruling will not have any implications for Spain, probably because it is deemed that Italian law complies with Article 5 of the Directive.

CJEU case C-550/19, 24 June 2021, Obras y Servicios Públicos and Acciona Agua

The Spanish Labour Code establishes the rules for fixed-term employment contracts, a category of employment contracts with special provisions in terms of their duration and termination. Any other aspect of the employment relationship is governed by the general rules. The Labour Code regulates three types of fixed-term employment contracts:

- for the performance of a specific assignment or service within the company's activity, the execution of which—albeit limited in time—is of uncertain duration;
- due to temporary business or organisational needs (market circumstances, accumulation of tasks or excess of orders);
- substitution of workers with a right to return to their work posts or for the temporary coverage of a vacant job.

However, Additional Provision 3 of the Labour Code and Additional Provision 3 of the Law on Subcontracting in the Construction Sector provide that the first type of fixed-term employment contract (the contract for a specific assignment or service) can be adapted to the construction sector by the relevant collective agreements with the purpose of providing 'greater employment stability'. This particular type of employment contract is regulated in Article 24 of the Collective Agreement of the construction sector, but it was originated in regulations approved by the government in the 1970s, so it is customary in Spain.

This CJEU ruling will have implications for Spanish legislation, because Article 24 needs to be modified to introduce measures to prevent abuse. The collective agreement of the construction sector expires on 31 December 2021, so the parties will probably start negotiations in the near future. It is too soon to say whether they will start negotiations immediately to reform this type of fixed-term contract or whether they will wait to reform it during the negotiations on the renewal of the collective agreement in full. This

second option is the most probable, so it is unclear whether this ruling will lead to any changes during 2021.

The statement concerning the rights and obligations of the subrogated employees is relevant as well, because the incoming undertaking is only required to observe the rights and obligations that arise under the last contract concluded by the employee subrogated. Spanish provisions on transfers of undertakings (Article 44 of the Labour Code) are more protective of workers, because employees involved in several transfers of undertakings retain their seniority starting with the first contract, which is relevant for the calculation of severance payment, for example. Until now, it was clear that a collective agreement could not modify this rule to the detriment of the worker. However, the situation could change after this ruling, but it is too early for a proper assessment and we will have to wait for a Supreme Court judgement.

4 Other Relevant Information

4.1 European Social Charter

Spain has ratified the European Social Charter (revised) and the Additional Protocol providing for a system of collective complaints.

4.2 Unemployment

Unemployment decreased in May by 129 378 people. There are currently 3 781 250 unemployed people.

Sweden

Summary

The government presented the details of a reform of the Employment Protection Act in early June. As the Prime Minister resigned shortly thereafter, the future of the reform is now uncertain.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Collective bargaining

Labour Court, AD 2021 no 27, 16 June 2021

A trade union, that was not party to a collective agreement with the main contractor (construction business), invoked the right to bargain or negotiate with the main contractor in dispute situations, even though the members of the trade union had never been employed by the main contractor, but only by a subcontractor. The Labour Court concluded that the main contractor, by refusing to call for negotiations, had violated the recent Supply Chain Wage Responsibility Act *Entreprenörsansvarslagen* (2018:1472) and the duty to negotiate under the Co-determination Act (para 10).

The Act on Contractor Liability for Wage Claims, *Entreprenörsansvarslagen* (2018:1472) stipulates the responsibility for the main contractor to shoulder the responsibilities otherwise imposed on employers, even if the employees at issue have never been directly employed by this particular entity. The rationale for the Act is to expand the role of the main contractors in sectors affected by chains of subcontractors with otherwise limited possibilities for the employees or their trade unions to have access to the same labour rights, primarily wage claims, as workers in more traditional employment relationships. The Labour Court monitors this legislative aim to establish a route for such disputes and negotiations and highlighted the relevance of applying the ordinary provision in the Co-determination Act to situations such as the one in the present case.

2.2 Work injury

Kammarrätten I Stockholm, case 278-21, 23 June 2021

The Administrative Court of Appeal (Kammarrätten I Stockholm) found that a man who due to the COVID restrictions was temporarily working from home, was entitled to work injury benefit for the damages he suffered to his teeth when his 2-year old son hit him with a toy. The Court concluded that the connection between work and the injury was established to an extent that qualified for the benefit under the work injury insurance scheme. The case can still be appealed to the Supreme Administrative Court.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-326/19, 03 June 2021, Ministero dell'Istruzione, dell'Università e della Ricerca

This Italian case elaborates a number of issues in one way or other that arise at universities across the EU. The Swedish situation offers a number of similarities, not least the excessive use of fixed-term employment at universities, but also some differences, most prominently, the application of special fixed term arrangements in collective agreements. The CJEU's decision, which delivers a comprehensive understanding of the special features of tenure, postdoc and other forms of, by nature, less permanent employment positions, is well in line with the application at Swedish universities. The regulated forms of permanent positions at Swedish universities are 'teachers', be they lecturers, senior lecturers or professors (under the Ordinance for higher education, *Högskoleförordningen*). While these positions are, prima facie, permanent, they can be temporary in line with the ordinary employment law provisions on fixed-term employment. Tenure track positions, such as postdocs and associate senior lectureships, are by default fixed term, and while postdocs are regulated under the fixed-term provisions in the law or in collective agreements (also local) associate senior lectureships are fixed term (four years) with an option to a promotion to a permanent position if the requirements are met at the end of the 4-year period by special statutory provisions (in the Ordinance for Higher Education, Chapter 4). These provisions, which are expressed in statutory law or in collective agreements, seem to be very much in line with the ruling of the CJEU.

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

The specific features of this case concerned very long and consecutive substitute employment contracts, while the employer was waiting, and apparently failing numerous times, to permanently fill the vacancy. The current Swedish legislation in the Employment Protection Act provides for the option to employ substitute employees, also multiple times and consecutively, but only for a maximum combined duration of two years. The conclusion by the CJEU that the FTD would preclude such very long and multiple consecutive substitute employment contracts as was the case in the present Spanish case would therefore be well in line with the Swedish legislation. However, the current Swedish law offers the possibility to combine different forms of fixed-term contracts in a series of consecutive employment relationships. This means that the employer can offer an employee a substitute fixed-term employment contract (or many) with a maximum duration of less than two years and then continue offering him or her ordinary fixed-term employment contracts of another duration of (less than) two years without establishing a permanent employment relationship. This opportunity provides for a substantial use (or misuse?) of quite long periods of fixed-term contracts. Interestingly, collective agreements can expand or decrease the possibilities of using different forms of fixed-term contracts.

CJEU case C-550/19, 24 June 2021, Obras y Dervicios Públicos and Acciona Aqua

The case concerned the FTD in relation to fixed term employees and if, or to what extent, provisions in collective agreements could exclude fixed-term workers from statutory provisions which would have transformed their temporary employment contract into a permanent one and violated the regulations on consecutive fixed-term contracts. As has been briefly described above, the Swedish Employment Protection Act regulates the conclusion of consecutive fixed-term contracts with a combined maximum time limit of two plus two years. However, this paragraph can be replaced or altered by a collective agreement (or as discussed above in the public sector, also through a special statutory law). Collective agreements that replace the statutory law are common, and might deviate from the legislation, also sometimes with negative consequences for the employee. It is very unusual for no fixed time limit to be stated, but at least one collective agreement, the Salaried Employees Agreement, Development and Services, offers an opportunity for the employee to 'reach a written agreement with the employer

to decline the relevant conversion' after the initial 36 months of his or her fixed-term employment (§ 2 Item 3, page 7, not available online). It is not difficult to imagine that the employer might put pressure on the employee prior to the end of the 36-month period to obtain a written agreement waiving his or her right to convert the contract into one of indefinite duration.

4 Other Relevant Information

4.1 Labour law reform

As has been previously mentioned over the past few years, the Swedish government has been exploring a major reform of the Employment Protection Act, under the influence of the centre-liberal parties passively supporting the government. The government presented the details of the reform in a press release in early June. The reform included liberalising the statutory provisions on the selection for redundancy, as well as some limitations to the use of fixed-term contracts and efforts related to life-long learning and the development of competences in working life. Since the Prime Minister resigned on 28 June due to lack of support in Parliament, the future of the reform is highly uncertain, even if it has the support of the major industrial partners and most likely the majority of the Swedish Parliament.

United Kingdom

Summary

COVID-19 restrictions remain in place, but there were some changes on 21 June.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 COVID-19 restrictions

The latest government guidance can be found here. The government has delayed the end of Step 3 for 4 weeks until 19 July 2021.

It is expected that England will move to Step 4 on 19 July, though the data will be reviewed after 2 weeks whether the risks have decreased. The government will continue to monitor the data and the move to Step 4 will be confirmed one week in advance.

There were some changes on 21 June:

- The rules on weddings and civil partnership ceremonies and wedding receptions or civil partnership celebrations changed on 21 June. See the weddings and civil partnership ceremonies and wedding receptions or civil partnership celebrations section of this guidance;
- The rules on commemorative events following a death such as a wake, stone setting or ash scattering changed on 21 June. See the funerals and linked commemorative events of this guidance;
- The rules on care home visits changed on 21 June. See the care home visits section of this guidance;
- The rules on domestic residential visits for children changed on 21 June. See the childcare section of this guidance.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Fixed-term work

CJEU case C-726/19, 03 June 2021, Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario

Under UK law, there is a requirement for all workers in the public and private sectors that any renewal of a fixed-term contract beyond four years becomes a permanent contract. This is reflected in Regulation 8 of the Fixed-term Work Regulations. This provides:

> *"8.—(1) This regulation applies where—*
>
> *(a)an employee is employed under a contract purporting to be a fixed-term contract, and*

(b)the contract mentioned in sub-paragraph (a) has previously been renewed, or the employee has previously been employed on a fixed-term contract before the start of the contract mentioned in sub-paragraph (a).

(2) Where this regulation applies then, with effect from the date specified in paragraph (3), the provision of the contract mentioned in paragraph (1)(a) that restricts the duration of the contract shall be of no effect, and the employee shall be a permanent employee, if—

(a)the employee has been continuously employed under the contract mentioned in paragraph 1(a), or under that contract taken with a previous fixed-term contract, for a period of four years or more, and

(b)the employment of the employee under a fixed-term contract was not justified on objective grounds—

(i)where the contract mentioned in paragraph (1)(a) has been renewed, at the time when it was last renewed;

(ii)where that contract has not been renewed, at the time when it was entered into.

(3) The date referred to in paragraph (2) is whichever is the later of—

(a)the date on which the contract mentioned in paragraph (1)(a) was entered into or last renewed, and

(b)the date on which the employee acquired four years' continuous employment. (…)"

CJEU case C-326/19, 03 June 2021, Ministero dell'Istruzione, dell'Università e della Ricerca

In the present case, the Court ruled that clause 5 of the Framework Agreement on Fixed-term Work permitted national legislation under which provision is made, in respect of the recruitment of university researchers, for the conclusion of a fixed-term contract for a period of three years, with a single possibility of extension, for a maximum period of two years, making the conclusion of such contracts subject, first, to the condition that resources are available 'for planning for the purposes of carrying out research, teaching, non-curricular activities and student service activities', and, second, that such contracts are extended on condition that there is a 'positive appraisal of the teaching and research activities carried out', without it being necessary for those rules to define objective and transparent criteria making it possible to verify that the conclusion and renewal of such contracts do indeed meet a genuine need, and that they are likely to achieve the objective pursued and are necessary for that purpose.

As mentioned above, in the UK, it is a renewal beyond four years which converts the contract into one of indefinite duration. Even in this case, 'permanent' only has a limited meaning because an employee can still be dismissed for good cause and after due process. This protection commences after two years. If the reason for the dismissal is lack of resources, the individual may get a redundancy payment.

CJEU case C-550/19, 24 June 2021, Obras y Dervicios Públicos and Acciona Aqua

The UK has not taken advantage of the option in Article 5(1)(a) of the collective agreement which is implemented by Directive 99/70. Article 5(1)(b) is the route the UK took.

4 Other Relevant Information

4.1 Enforcement body for employment rights

A single enforcement body is a significant shift for UK employment law, The government has responded to the proposal. The government states:

> *"The consultation responses show there is a real opportunity to deliver more effective enforcement of employment rights for vulnerable workers. The government will proceed with plans to bring together the existing labour market enforcement bodies, in line with the manifesto commitment. This new single body will support employers to comply with the law, building on the compliance activity of the existing bodies, and by providing detailed technical guidance as well as introducing a compliance notice system for lower harm breaches. It must also be more effective at identifying non-compliance. We will look to achieve this through better data use and analysis, as well as tackling the barriers that can prevent workers, third parties and employers from coming forward with information. The body will also have new powers to tackle non-compliance, with the introduction of civil penalties for underpayment for the breaches under the gangmasters licensing and employment agency standards regimes that result in wage arrears. It will also have powers to enforce statutory sick pay, holiday pay and transparency in supply chains / modern slavery statement reporting."*

4.2 Fire and rehire

The ACAS report was published. The government stated that it does not intend to ban fire and rehire practices and that it will not legislate to prevent such practices.

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