Flash Reports on Labour Law July 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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Executive Summary

National level developments

This summary is divided into two parts. The first part offers an overview of the extraordinary development of labour law in many Member States and the European Economic Area (EEA) triggered by the COVID-19 crisis; the second part sums up other labour law developments with particular relevance for the transposition of EU labour law.

Developments related to the COVID-19 crisis

Measures to reduce the risk of infection in the workplace

In July 2021, most countries still have measures in place to prevent the spread of the virus in the workplace. While governments are generally easing the restrictions related to the lockdown, in some countries, such as **Cyprus**, **Italy**, **Norway** and **Slovenia,** new restrictions have been imposed on access to various activities for those who cannot provide proof of vaccination or a rapid test result. All restrictions have been lifted in **England,** but caution is still recommended.

From 01 August 2021, teleworking is no longer mandatory in **Portugal**, although it continues to be recommended.

Finally, in the context of the ongoing COVID-19 vaccination plans, some countries have introduced an obligation for several categories of employees in healthcare facilities to be vaccinated against COVID-19. In **Greece**, a law states that employees in nursing homes and healthcare facilities will be placed on unpaid leave if they do not get vaccinated against COVID-19; likewise, in the **United Kingdom**, an amendment to the Health and Social Care Act has introduced the requirement for workers in registered care homes to be fully vaccinated against COVID-19.

Measures to alleviate the financial consequences for businesses and workers

To alleviate the adverse effects of the COVID-19 crisis, state-supported short-time work, temporary layoffs or equivalent wage guarantee schemes have been renewed in many countries.

In **Bulgaria,** the previously enacted relief measures for employers to maintain employment during the COVID-19 crisis have been amended on the basis of the reduction in revenue declared by the employer. Similarly, in **Portugal**, the extraordinary support for the progressive resumption of the activity continues to apply in July and August 2021 for companies with a drop in turnover equal to or greater than 75 per cent.

In **Italy**, the extraordinary short-time working scheme related to the COVID-19 crisis has been refinanced for another 13 weeks until 31 December 2021. The general short-time working scheme is applicable to employers in specific sectors, where the prohibition of dismissal continues. Likewise, in **Luxembourg**, a draft law is being discussed to amend the regulation of short-time work, introducing temporary and permanent modifications.

In the **Netherlands** and the **United Kingdom**, the existing income support measures for employers have been renewed and extended until September 2021.

In **Slovenia**, the 9th Anti-Corona Package of measures was enacted. Among others, it introduces new amended rules on the short-time work scheme and on various COVID-19-related wage supplements for the most exposed workers during the COVID-19 emergency.

Leave entitlements and social security

In **Luxembourg**, extraordinary family-related leave has been extended until 14 September 2021.

In **Romania**, a new law asserts that employees who get vaccinated may benefit from a paid day off from work.

In **Slovenia**, the 9th Anti-Corona Package introduces subsidies for the 2021 annual leave allowance, and regulates wage compensation during quarantine or family-related leave.

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

Topic	Countries
Employer subsidies and short-time work	BG IT LU NL PT SI UK
Health and safety measures	AT CZ DK LU PT
Restrictions for non-vaccinated persons	CY IT NO SI
Mandatory vaccination against COVID-19	EL UK
Family-related and quarantine leave	LU SI
Vaccination leave	RO
Teleworking	PT

Other developments

The following developments in July 2021 were of particular relevance from an EU law perspective:

Teleworking

In **Austria,** the legislation on teleworking for civil servants and government employees has been revised and partially aligned with the private sector's legislation on working from home.

Likewise, in **Hungary**, a government decree has amended the legislation on teleworking, which came into force in November 2020.

In **Luxembourg**, a draft law aims to regulate teleworking for areas already regulated by the social partners' agreement declared to be of general applicability.

Posting of workers

In **Austria,** an Amendment of the Act Against Wage and Social Dumping has been passed in Parliament to transpose the amendments to the Directive on Posted Workers as well as the CJEU's judgments in cases C-33/17, *Čepelnik*, and C-64/18, *Maksimovic*, but the second chamber has issued a suspensory veto.

A **Dutch** Court of Appeal ruled on the concept of the 'country where the work is habitually carried out' *ex* Art. 8 of Regulation (EC) 593/2008 in an international transport case involving truckdrivers hired by a Hungarian company that was closely affiliated with a Dutch transport company and carried out transport services from the Netherlands.

In **Slovenia**, the National Assembly passed the Act amending the Transnational Provision of Services Act, which aims to transpose the Revised Posted Workers Directive 2018/957/EU into national law. It will enter into force on 04 August 2021.

Fixed-term work

The **Portuguese** Constitutional Court has declared the national rule which envisages an 180-day probation period for employees looking for their first job, to be unconstitutional when applied to employees who previously entered into a fixed-term employment contract for a period equal to or above 90 days.

In **Spain**, the government has modified the rules on fixed-term contracts in the public administration to comply with EU law and CJEU case law. These new rules set a maximum duration of three years for interim contracts in the public administration.

Employment status

In **Croatia**, an amendment to the Volunteering Act clarifies that apprentices are not considered volunteers.

In **Ireland**, the 2001 Code of Practice on Determining Employment Status, updated in 2007, has been revised by an interdepartmental working group comprising the Department of Social Protection, the Revenue Commissioners and the Workplace Relations Commission. It takes personal services companies and workers in the gig economy into consideration.

Other developments

Two decisions of the **Austrian** Supreme Court on collective redundancies and the forfeiture of annual leave are of interest from an EU labour law perspective.

The **Belgian** Constitutional Court dismissed an appeal for annulment of the Law of 23 March 2019 on the organisation of penitentiary services, which is deemed an acceptable interference on the right to strike.

In **Hungary**, a strike planned by air traffic controllers was prohibited during the state of emergency.

In **Finland,** the Pay Security Act has been amended to increase the maximum amount guaranteed for the payment of employees' claims arising

from an employment relationship in the event of employer insolvency.

In **France**, Parliament passed a law to improve occupational health and safety.

In **Germany**, the Federal Administrative Court ruled on the concept of on-call time, holding that the concept elaborated by the CJEU must be followed. The Court had also ruled that the Working Time Directive does not contain any specifications for the amount of a purely national compensation claim for overtime.

The **Italian** Court of Cassation has affirmed that the transfer of a functionally autonomous branch of an undertaking from one undertaking to another is considered a transfer of undertaking.

In **Luxembourg**, A draft law has been presented with the aim of implementing a legal framework on moral harassment (mobbing) at work.

The **Polish** Constitutional Court dismissed a question of constitutional legitimacy of the Law on Limiting Trade on Sundays, Public Holidays and Some Other Days. Subsequently, a group of deputies submitted a draft to amend this law. Conversely, new exceptions to the ban on Sunday trade have been introduced in **Slovenia**.

In **Romania**, a new Emergency Ordinance removes the obligation of microenterprises with less than 9 employees to specify the job description in the employment contract in writing.

Implementation of EU and international law

In **Estonia**, two drafts have been prepared to transpose Directive (EU) 2019/1152 on transparent and predictable working conditions and the 2018 amendments to the ILO Maritime Labour Convention into Estonian law.

Likewise, in **Poland**, the amendments to the Law on Work at Sea were enacted by the lower chamber of Parliament to implement the requirements of the ILO Maritime Labour Convention.

In **Finland**, a draft legislative proposal aims to transpose the EU Directive on the protection of whistleblowers.

In **Spain**, Directive (EU) 2018/958 on a proportionality test prior for the adoption of a new regulation of professions has been transposed into law.

Table 2: Other major developments

Topic	Countries
Teleworking	AT HU LU
Posting of workers	AT NL SI
Fixed-term work	PT ES
Employment status	HR IE
Working time	AT DE
Right to strike	BE HU
Transparent and predictable working conditions	EE RO
Sunday trade	PL SI
Seafarers	EE PL
Transfers of undertakings	IT
Employer insolvency	FI
Occupational health and safety	FR
Violence and harassment at work	LU
Professional qualifications	ES

Implications of CJEU Rulings

Working time in the Armed Forces

This Flash Report analyses the implications of a CJEU ruling on working time of military personnel.

CJEU case C-742/19, 15 July 2021, Ministrstvo za obramo

In this case, which concerned a non-commissioned officer in the Slovenian Army, the CJEU analysed whether 'stand-by periods' during which a military personnel member is required to remain at the barracks to which he or she is posted, but does not perform actual work there, must be regarded as working time within the meaning of the Working Time Directive.

First, the Court clarified the personal scope of application of the Working Time Directive, providing guidance on the instances in which the security activities carried out by a military personnel member, such as guard duty in peacetime, is excluded from the scope of the Working Time Directive.

Secondly, following the recent decision of the CJEU in cases C-344/19, *D.J. v Radiotelevizija Slovenija*, and C-580/19, *RJ v Stadt Offenbach am Main* (analysed in March 2021 Flash Report), this judgment provides further clarity for national courts on the regulation of stand-by time. It clarifies that the Working Time Directive does not preclude a stand-by period during which a military personnel member does not perform actual work from being remunerated differently than a stand-by period during which he or she performs actual work.

In this regard, a large majority of the reports indicate that this case has limited implications for national legislation. In some states, such as **Austria**, **Denmark**, **Estonia**, **Netherlands**, **Norway** and **Romania**, military personnel are generally covered by the general rules on working time, with some narrowly construed exemptions for special military activities, in conformity with the Directive. In other states, such as **Belgium**, **Bulgaria**, **Croatia**, **Czech Republic**, **Finland**, **Hungary**, **Italy**, **Lithuania**, **Luxembourg**, **Poland**, **Portugal**, **Slovakia** and **Spain**, military personnel are regulated by a sectoral set of rules, which appear to be in line with thejudgment. Finally, in **Iceland** and **Liechtenstein**, the judgment has no implications due to the absence of military forces.

However, some countries, including **Germany** and **Norway**, report that the Court's guidance on the scope of Directive 2003/88 on military personnel may have some significance for national law, as this guidance must be taken into consideration when interpreting the relevant exemptions from working time regulations for special military activities. Also, it is likely that the guidance from the CJEU will be of significance for **Greece**, where the on-call time of military workers is not regulated.

It is also reported that the judgment has noteworthy implications for **Ireland**, given that members of the Defence Forces are not covered by the working time regulation, for **Latvia**, where military personnel are not covered by labour law, and their working time is only regulated to a minimum extent by an internal legal act of the Ministry of Defence, and for **Sweden**, where workers in the armed forces are exempt from the rule on normal working hours, daily rest periods, night work and compensatory rest periods.

Finally, since the request for a preliminary ruling was made by the Slovenian Supreme Court, the clarification provided by this CJEU judgment is of utter relevance for **Slovenia**. It is worth noting that the rules on working time in the Slovenian Armed Forces were amended in July, introducing, inter alia, more flexibility and derogations for rest periods (see below, *Slovenia*, Section 1.2.2)

Austria

Summary

(I) The legislation on teleworking for civil servants and government employees has been revised and partially aligned with the private sector's legislation on working from home.

(II) To transpose the amendments to the Directive on Posted Workers as well as the CJEU's judgments in cases C-33/17, *Čepelnik*, and C-64/18, *Maksimovic*, an Amendment of the Act Against Wage and Social Dumping has been passed in Parliament, but the second chamber has issued a suspensory veto.

(III) Two decisions of the Supreme Court are of interest from an EU labour law perspective, and deal with collective redundancies and the forfeiture of annual leave.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Teleworking

In the wake of the COVID-19 crisis, legislation on teleworking for civil servants and government employees has been revised and partially aligned with the legislation on working from home (WFH) in the private sector. The amendment has passed both the National and the Federal Assembly and entered into force on 27 July 2021.

Teleworking requires an agreement of both parties and can be agreed for individual days only. The State needs to provide the employee with the necessary digital equipment. If the civil servant/employee uses his or her own digital equipment to work, he or she is entitled to reimbursement as regulated in the Act on Remuneration of Civil Servants/State Employees. It is clarified that civil servants as well as employees are bound not only by official secrecy but by general secrecy regarding their work when teleworking. The main difference to the private sector's work from home legislation is that teleworking in the public sector includes working from other locations outside one's home (or the home of a close relative/partner), i.e. it includes other undefined locations, such co-working spaces, etc.

1.2 Other legislative developments

1.2.1 Posting of workers

Both the necessity to transpose the amendments to the Directive on Posted Workers as well as the CJEU's judgments in case C-33/17, *Čepelnik*, and case C-64/18, *Maksimovic*, led to an Amendment of the Act Against Wage and Social Dumping. The Amendment passed the National Assembly on 07 July 2021, but was vetoed by the Federal Assembly on 15 July 2021 (a veto by the Federal Assembly is a suspensory veto). Hence, the Amendment will not enter into force on 1 September 2021 as planned, but—possibly with some further amendments—at a later stage.

The proposed amendment contains the following key points:

- Austrian labour law fully applies to workers posted to Austria for 12 months or 18 months, as long as it is more favourable to the workers, with the exception of the provisions referred to in the Directive in connection with the conclusion or termination of the employment contract;
- Application of statutory regulations, regulations laid down by ordinance or collective bargaining on cost reimbursement/substitution to workers posted to Austria;

- Re-definition of posting: until now, the conclusion of a service contract between a foreign company posting workers and the Austrian service recipient was not required for the existence of a posting within the meaning of the Act. This provision is abolished, meaning that in future, postings will require the conclusion of a cross-border service contract, which means a fundamental restriction of the Act's scope of application;
- Clarification that lack of certain information in the official material on postings to be provided pursuant to Art. 5 of Directive 2014/67/EU (official website) is a mitigating factor in administrative penalty proceedings for violations of the Act Against Wage and Social Dumping connected with that lack of information;
- By implementing the government programme and against the background of the CJEU's case law in *Maksimovic and Others*, C-64/18 and *Cepelnik*, C-33/17, the administrative penalties have been revised: instead of the accumulation principle regarding fines (meaning that fines per violation per employee concerned are accumulated without a maximum limit), fines ranging between EUR 0 and EUR 20 000 for reporting violations in connection with the posting and for thwarting acts in connection with wage inspection are proposed. Moreover, fines ranging between EUR 0 and EUR 30 000 for failure to keep and submit wage documents are proposed, and in the case of underpayment of wages, a graduated penalty system is planned, depending on the amount of damage, with a maximum penalty of EUR 400 000. Furthermore, a new regulation of the provision of security has been introduced;
- Exceptions to the application of the Act (e.g. for short-term postings, postings of high earners, postings for intra-company trainings) have partially been redefined.

2 Court Rulings

2.1 Collective redundancies

Austrian Supreme Court, 9 ObA 47/21h, 24 June 2021

In Austria, the Collective Redundancies Directive 98/59/EC is transposed in § 45a of the Act on Promotion of the Labour Market (*Arbeitsmarktförderungsgesetz* – AMFG) (unofficial translation and highlights by the author):

> *"§ 45a. Involvement of Employers*
>
> *(1) Employers shall notify the regional office of the Public Employment Service responsible for the location of the enterprise in writing if they intend to terminate the employment relationship of*
>
> *1. at least five employees in an enterprise with, as a general rule, more than 20 and less than 100 employees, or*
>
> *2. - 4. ...*
>
> *within a period of 30 days.*
>
> *(2) The notice under subsection (1) shall be given at least 30 days before the first declaration of termination of an employment relationship. ...*
>
> *(3) - (4) ...*
>
> *(5) Dismissals within the meaning of subsection 1 shall be legally invalid if they are given*
>
> *1. before the notification referred to in subsection 1 has been received by the regional office of the Public Employment Service*
>
> *or*

> *2. after the notification has been submitted to the regional office of the Public Employment Service within the period specified in subsection 2 without prior consent of the regional office in accordance with subsection 8*
>
> *having been pronounced.*
>
> *(6) - (7) ...*
>
> *(8) The regional office of the Public Employment Service may, after hearing the regional directorate, give consent to the dismissal before the expiry of the time limit under subsection 2, if the employer provides evidence of the existence of important economic reasons, such as the conclusion of a works agreement within the meaning of section 97(1)(4) in conjunction with section 109(1)(1) of the Labour Constitution Act (social plan). Whether it was possible or reasonable for the employer to give notice of the intended termination in due time must also be taken into account. ...”*

In the present case, the dispute focussed on whether the concept of dismissal also includes termination agreements initiated by the employer with the result that they are invalid during the 30-day period pursuant to § 45a (5) AMFG.

The Supreme Court pointed out that § 45a (1) AMFG refers to the wider notion of ‘termination of employment’, while § 45a (5) AMFG uses the term ‘dismissal’. Paragraph 1 does not include any further differentiations of different forms of terminations and therefore, case law holds that consensual forms of termination are also included, not only unilateral ones. Therefore, consensual forms of termination shall also be considered if they have been initiated by the employer when calculating the fulfilment of the threshold in paragraph 1 for informing the Public Employment Services.

By contrast, the nullity sanction of § 45a (5) AMFG, according to its very clear wording, only refers to dismissals and has the effect of a temporary prohibition of such terminations. No case law existed yet and the doctrine was divided: while some argued for the inclusion of terminations by mutual agreement (e.g. Löschnigg/Standeker, Einvernehmliche Auflösung und Kündigungsfrühwarnsystem, RdW 2000/518; Eichmeyer/Andréewitch, *COVID-19-bedingte Beendigung von Arbeitsverhältnissen*, RdW 2021/52), others claimed that only unilateral dismissals ought to be considered *(*Olt, *Das Frühwarnsystem bei ‘Massenkündigungen’ nach § 45a AMFG, ARD 6448/5/2015*; Schrank, *Arbeitsrecht und Sozialversicherungsrecht* [86. Lieferung 2020], Ch 45/E/2b Rz 98; cf. also Weinmeier, *Freizügigkeit und Sozialpolitik im EWR und ihre Umsetzung im österreichischen Recht* [1994], 120 f).

Drawing on the different terms used in paragraphs 1 and 5 of § 45a AMFG as well as on historical arguments, the Supreme Court assumed that this differentiation was intended here and that no unintended (transposition) loophole exists that needs to be closed by way of analogy.

The Court also argued that EU law does not require this as the CJEU’s decision in case C-55/02 *Commission v Portugal* demonstrates. In its ruling, the CJEU pointed out that the concept of ‘redundancy’, as described in Article 1(1)(a) of Directive 98/59/EC, may not be defined by any reference to the laws of the Member States, but instead has meaning in Community law (para. 49). “*The concept has to be interpreted as including any termination of contract of employment not sought by the worker, and therefore without his consent. It is not necessary that the underlying reasons should reflect the will of the employer. (para. 50)*”. It therefore does not include terminations by mutual agreement.

The Supreme Court then pointed out that Article 1 of Directive 98/59/EC explicitly envisages that:

> *“For the purpose of calculating the number of redundancies provided for in the first subparagraph of point (a), terminations of an employment contract which occur on the employer's initiative for one or more reasons not related to the*

> *individual workers concerned shall be assimilated to redundancies, provided that there are at least five redundancies*."

According to the CJEU (case C-55/02, *Commission v Portugal*), dismissals differ from terminations of employment contracts, which are treated as dismissals under the conditions set out in this subparagraph of Art. 1(1) of the Directive by the absence of the employee's consent (para. 56). Since terminations by mutual consent require the employee's consent, they are to be regarded as terminations treated as dismissals within the meaning of this subparagraph (equivalent dismissals).

According to the CJEU (case C-422/14, *Rivera*), the additional condition contained therein, namely that 'the number of dismissals is at least five' is to be interpreted as not referring to terminations of the employment contract that are treated as dismissals, but only to dismissals in the strict sense. Accordingly, if there are not at least five dismissals within the meaning of Art. 1(1) of the Directive, there is no equal treatment of terminations that arise at the employer's initiative and for one or more reasons that do not relate to the person of the employee.

Even if this threshold of five dismissals is exceeded, equivalent dismissals according to this sub-paragraph are only decisive for the calculation of the number of dismissals according to Art.1(1)(a) i-ii (also according to Recital 8 of the Directive). However, there is no general equation for collective dismissals within the meaning of Art.1(1)(a) of the Directive. The application of Part II (information and consultation of employee representatives) and Part III of the Directive (administrative collective dismissal procedure)—which is of particular interest here—to equivalent dismissals is not prescribed by the Directive. With regard to the legal consequences, this is also not a priori absurd, because not all types of equivalent dismissals open up appropriate possibilities for action and consultation for the employer or authority. This also applies to terminations by mutual consent, since a mutually agreed termination of the employment relationship before the expiry of the waiting period is supported by the will of the employee, even if the termination is initiated by the employer and the reason for it does not relate to the person of the employee, requires the employee's consent and may also be desired by the employee in the long term. Case-related advisory and problem-solving activities by the authorities would lead nowhere, however. Finally, the Collective Redundancies Directive still does not require the invalidity of the notice of termination as a consequence of a violation of the collective redundancy procedure, but merely provides that the intended collective redundancies will become effective at the earliest 30 days after receipt of the notice (with the option of reducing this period). Accordingly, it does not follow from the Directive that the sanction envisaged in § 45a para 5 AMFG (i.e. the nullity of the termination), interpreted in conformity with the Directive, does not have to be applied to mutually agreed dissolutions initiated by the employer.

The Supreme Court, therefore, does not interpret the concept of dismissal in a broader sense to also include termination agreements initiated by the employer. Thus, the sanction of nullity does not apply to such terminations within the 30-day period following notification of the Public Employment Services.

2.2 Annual leave

Austrian Supreme Court, 9 ObA 88/20m, 27 May 2021

§ 4 (5) of the Austrian Act on Annual Leave (Urlaubsgesetz – UrlG) provides as follows on the use of annual leave and its forfeiture (unofficial translation by the author):

> "*Holiday entitlement shall lapse after two years from the end of the holiday year in which it arose.*"

In the present case, part of the annual leave (54 days in total) was used for training purposes, which the employee claimed to be illegal. Annual leave must be used for

recreation purposes, and not for training that is in the interest of the employer. Therefore, these 54 days of annual leave had not been used and were still available. They had also not been forfeited as they were not used within the two years mentioned in § 4 (5) UrlG. The employee claimed that the mentioned provision was not applicable based on the CJEU's case law, which requires the employer to inform employees of imminent forfeiture of annual leave, which was not the case.

The Supreme Court did not answer the question whether annual leave can be used for training purposes, but left it open as it considered annual leave entitlement to be time barred. It argued that the CJEU's relevant case law did not apply as the facts of the case were different.

It pointed out that the CJEU's decision C-619/16, *Kreuziger*, related to a case in which the employee seeking compensation for leave had not actually applied for leave. In that particular case, the CJEU referred to its case law that Article 7(2) of Directive 2003/88/EC must be interpreted as precluding national legislation or practice under which, at the end of the employment relationship, no financial compensation is paid to the worker for paid annual leave not taken, if it was not possible for him/her to take all of his/her paid annual leave to which he/she was entitled before the end of the employment relationship because, for example, he/she was on sick leave during the entire or part of the reference and/or carry-over period. Article 7(1) of Directive 2003/88/EC does not, in principle, preclude national legislation that provides for arrangements for the exercise of the right to paid annual leave, which includes the loss of that right at the end of a reference period or a carry-over period, provided, however, that the worker whose right to paid annual leave has expired actually had the opportunity to exercise the right conferred on him/her by the Directive. The aim is to avoid a situation in which the task of ensuring the exercise of the right to paid annual leave would fully shift to the employee, while the employer would thus be given the opportunity to evade his/her own obligations by invoking that the employee did not request to take leave (para. 50). The employer must provide the employee the opportunity to exercise such an entitlement by requesting him/her—formally if necessary—to do so and, if necessary, informing him/her of the forfeiture of leave (para. 51 et seq.; see also CJEU, case C-684/16 *Max-Planck-Gesellschaft*).

In the present case, the Austrian Supreme Court determined that the employer had not evaded these obligations: the use of annual leave required the conclusion of a leave agreement, which, according to the understanding of the parties to the dispute, was actually concluded in connection with the training agreement. There was an explicit reference to the consumption of leave. The content of the agreement also contained the essential elements of an annual leave agreement, namely the release of the worker from her work duties with continued payment of her remuneration entitlement for a definable period of time and duration. Unlike in the *Kreuziger* and *Max Planck* cases, the worker thus did not need any further formal reference to outstanding holiday entitlements, because she was aware of them and was prepared to use them for training purposes. Even assuming that the agreed designation of the leave for training purposes was ineffective, the facts of the case differed from those in the cases decided by the CJEU. Therefore, even in accordance with the CJEU's case law, the Austrian Supreme Court did not find any conduct on the part of the employer by which it evaded the 'duty of care for leave' as set out in the legislation. The application of § 4(5) UrlG therefore remains valid and the leave was time barred.

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obrambo

The recent CJEU judgment does not require amendments to the working time regulation for Austrian military personnel as they are covered by working time legislation, and the exemptions provided for military personnel are narrowly construed.

Austrian military personnel are civil servants and as such fall under the respective regulation for civil servants, including the general regulation on working time included in the Act on Civil Servants.

§ 48f of the Act on Civil Servants provides for the following exemption (all translations are unofficial and by the author as are the highlights):

> *"(2) §§ 48a to 48e shall not apply to civil servants with specific state duties which, in the public interest, cannot be deferred, in particular*
>
> *1. – 5. …*
>
> *6. in the armed forces or*
>
> *7. …*
>
> *in so far as the unique characteristics of those activities inevitably conflict with it.*
>
> *(3) In the cases of subsections 1 and 2, it shall be ensured that the greatest possible protection of the health and safety of the staff is guaranteed, taking into account the protective purpose of the provisions not to be applied."*

Case law interprets this exemption restrictively, which seems to be in line with the CJEU's present ruling. In the decision of the Supreme Administrative Court of 25 March 2015, 2013/12/0176, it pointed out that the exception under § 48f (3) numeral 3 of the Civil Servants Act for police officers does not apply to the activities of the officers of the executive service of the security police, which are carried out under normal circumstances, even if this service copies dealing with incidents which by their nature cannot be foreseen. A later decision of the Federal Administrative Court of 4 December 2018, BVwG W129 2191492-1 points out that not the service as an executive officer, e.g. in the police force *per se* leads to the admissibility of a deviation from working time law; rather, a deviation is only justified if and in the case of those employees who must be used unconditionally and without a time limit for the performance of specific state functions.

Additionally, an administrative Ordinance for Military Personnel and their Obligations has been issued (*Verordnung über die Allgemeinen Dienstvorschriften des Bundesheers*), containing specific regulations on working time and stand-by periods, which only applies to military personnel who are in an employment relationship as far as the regulation of civil servants do not apply. This means that the regulations mentioned above prevail.

The general working time regulation for military staff (*Zeitordnung* - § 29 of the Ordinance) in training allows for eight hours daily and for five hours on Saturday, and no working time on Sundays (§ 29 para 1). All other military staff may not work for more than 45 hours on average within a time period of six weeks (§ 29 para 2). The Ordinance allows deviations from this standard working time, e.g. during the various degrees of stand-by duty for military personnel (ranging from 'easy' stand-by to 'full' stand-by duty) as well as guard duties. In case of stand-by or guard duties, 24-hour shifts are allowed, but not consecutive shifts (§ 29 para 4). In case of combat, or preparation for combat or when participating in exercises simulating combat, this working time regulation does not apply (§ 29 para 5).

4 Other Relevant Information

Nothing to report.

Belgium

Summary

The Belgian Constitutional Court dismissed an appeal for annulment of the Law of 23 March 2019 on the organisation of penitentiary services, which is deemed an acceptable interference on the right to strike.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Strike in essential services

Constitutional Court, No. 107/2021, 15 July 2021

The socialist trade union ACOD has criticised the Law of 23 March 2019 on the organisation of penitentiary services and the status of penitentiary staff. But the Constitutional Court dismissed the appeal for annulment of the Law, ruling that the minimum service during prison strikes is not a disproportionate restriction of the right to strike.

The Law of 23 March 2019 introduced minimum services in prisons in case of strikes: in the event of a strike lasting over 24 hours, staff members must give a 72-hour notice about whether they will strike or not. Each prison can thereby check whether they have sufficient staff. If this is not the case, staff can be called on if necessary.

According to the Belgian Constitutional Court, there is no question about a 'disproportionate interference with the right to strike'. According to the Court, there is a certain interference, but it lies within an acceptable margin, on the one hand, because trade unions were involved in drafting the law, and on the other, because the law serves a legitimate purpose, namely 'to ensure the provision of services that are essential to the dignity of the detainees'.

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obrambo

Public sector employees and civil servants, in principle, fall within the scope of the Law of 14 December 2000, establishing certain aspects of the organisation of working time in the public sector (the Law on Working Time in the Public Sector). Military and civilian personnel whose presence is required for providing services in the 'intensive service', 'assistance' and 'operational deployment' units, are excluded from the scope of application of the law (Chapters III 'Working Time' and IV 'Night Work' of the Law on Working Time in the Public Sector). Such exclusions are only permitted on condition that the minimum health and safety requirements for the organisation of working time and the special provisions for night work adapted to the specific tasks to be performed by these workers are specified in a Royal Decree.

The law does not distinguish between staff members of the Army, the Air Force and the Navy. The Military Police belong to the Armed Forces.

What is meant by providing services in the 'intensive service', 'military assistance', 'relief' and 'operational deployment' is specified for military personnel. Outside an armed conflict, a soldier operates in a period of peace and is categorised in one of the following

positions (see Law of 20 May 1994 on the legal status of defence personnel; Royal Decree of 06 July 1994 setting down provisions on forms of operational deployment):

- 'In formation', i.e. a military candidate or officer during training and schooling;
- 'In normal service';
- 'In relief' to meet the needs of the population;
- 'In operational deployment'.
- 'In intensive duty', which is an exercise and manoeuvre of at least 24 hours;
- 'In military assistance', a command under one of the forms of military assistance.

The Law of 14 December 2000 stipulates that the organisation of working time for military personnel must be laid down in a Royal Decree that guarantees a certain level of protection corresponding to that of other workers within the meaning of the law. Unlike with regard to police officers, the King appears to have failed, at least in part, to guarantee this minimum protection for military personnel in the Armed Forces in a detailed Royal Decree (see the Report *Art und Grad der Umsetzung der Europäischen Arbeitszeitrichtlinie bei Streitkräften der EU-Mitgliedstaaten. Sachstand of the Wissenschaftliche Dienste of the German Bundestag*, June 2014, p. 7).

When military personnel are in the position 'in formation' or in 'normal service', the Law on Working Time the Public Sector applies**.**

The legislation on working time for Armed Forces is quite complicated. The legislation for military personnel is very disparate and difficult or untraceable. A 'Regulation DGHR-REG-TRAVARB-001 Ed 003 / Rev 004 of 03 December 2019 on working time arrangements, leave of absence, dispensations from duty and temporary derogations from duty on request for military personnel' exists for military personnel in the Armed Forces (hereinafter 'Army Working Time Regulation'). The legal status of this regulation is unclear.

Soldiers are either in a period of war or peace. The following guidelines relate to the Army who serve 'actual service' during a period of peace.

Maximum weekly working time

The average length of service for military staff in active employment below the rank of officer is set at 38 hours per week (Royal Decree of 18 March 2003 on the remuneration of military personnel of all grades and on the system of services of military personnel in active employment below the rank of officer).

The weekly working time of 38 hours shall be spread across five working days with an average of 7 hour 36 minutes, and the daily limit of 9 hours shall not be exceeded.

Reference period

The reference period is the semester in which the work was performed.

Compensatory rest

Any working time exceeding 38 hours per week must be compensated before the end of the semester following the semester in which the service was provided (i.e. the reference period). A transfer of maximum 38 hours to the subsequent semester is possible.

The Belgian legislation for the members of the armed forces seems to be in line with the CJEU's decision. The CJEU allows a security activity performed by a military personnel member to be excluded from the scope of that Directive:

- where that activity takes place in the course of initial or operational training or an actual military operation; or

- where it is an activity which is so specific that it is not suitable for a staff rotation system which would ensure compliance with the requirements of that directive; or
- where it appears, in the light of all the relevant circumstances, that that activity is performed in the context of exceptional events, the gravity and scale of which require the adoption of measures that are indispensable for the protection of the life, health and safety of the community at large, measures whose proper implementation would be jeopardised if all the rules laid down in that directive had to be observed; or
- where the application of that directive to such an activity, by requiring the authorities concerned to set up a rotation system or a system for planning working time, would inevitably be detrimental to the proper performance of actual military operations.

Remuneration for stand-by periods

The Belgian legislation is more detailed regarding payment of stand-by and on-call time.

The 'Regulation DGHR-REG-TRAVARB-001 Ed 003 / Rev 004 of 3 December 2019 on working time arrangements, leave of absence, dispensations from duty and temporary derogations from duty on request for military personnel' in the Armed Forces stipulates that a stand-by period during which a military personnel member is required to remain at the barracks to which he or she is posted, but does not perform actual work there, is paid.

The Belgian legislation is thus in line with Directive 2003/88, as the CJEU allows for stand-by periods during which a military personnel member is required to remain at the barracks to which he or she is posted, but does not perform actual work there, to be remunerated differently than a stand-by period during which he or she performs actual work.

4 Other Relevant Information

Nothing to report.

Bulgaria

Summary

The relief measures for employers to maintain employment during the COVID-19 crisis have been amended on the basis of the reduction in revenue declared by the employer.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Relief measures

The Council of Ministers adopted Decision No. 213 of 01 July 2021 amending and supplementing Decrees No. 151 of 2020 and No. 325 and 378 of 2020 (State Gazette No. 56 of 06 July 2021, available here). It provides for the financial means to retain the employment of workers. The financial support shall amount to:

- 50 per cent of the amount of the insurance income for April 2021 and of the social insurance contributions due on the part of the employer of each worker in case of a reduction in revenue of no less than 30 per cent according to the employer;
- 60 per cent of the amount of insurance income for April 2021 and of the social insurance contributions on the part of the employer for each worker in case of a reduction in revenue of no less than 40 per cent according to the employer.

When the employer receives financial support for the same expenses from the European Structural and Investment Funds or from the state budget as compensation for services assigned by the state, the total amount of provided funds cannot exceed 80 per cent of the insurance income for April 2021 and from the insurance contributions due on the part of the employer.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obrambo

The service time of military personnel members in Bulgaria is regulated in Articles 193–196 of the Defence and Armed Forces of the Republic of Bulgaria, an Order of the Minister of Defence and the Statutes of the Armed Forces.

Servicemen are required to be available at any time of day and night to fulfil their obligations related to military service. The obligation to be at available in case of an emergency shall be specified in the Statutes of the Armed Forces (Article 193). Servicemen may be assigned to on-call duty under the terms and procedures specified in the Statutes of the Armed Forces and other normative and administrative acts issued by the Minister of Defence. The maximum duration of the on-call duty may not exceed

24 hours, and 168 hours in an entire month.

The on-call duty time is considered service time. When servicemen carry out on-call duty in accordance with their schedule, they receive supplementary pay (Articles 195–196).

Therefore, Bulgarian legislation seems in line with the CJEU's ruling.

4 Other Relevant Information

Nothing to report.

Croatia

Summary

(I) The Amendment to the Pension Insurance Act has widened the circle of retired persons who are permitted to simultaneously work and receive their full pension.

(II) An amendment to the Volunteering Act clarifies that apprentices are not considered to be volunteers.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1. Work of retired persons

The Amendment to the Pension Insurance Act (Official Gazette No. 84/2021) has widened the circle of retired persons who can simultaneously work and receive their full pensions.

As a general rule, a retired person who starts to perform an activity for which an obligation exists to pay social security contributions (such as work based on a contract of employment), the payment of his/her pension is suspended. However, there are certain exceptions to this rule. Before the amendment, the exception referred to the beneficiaries of old-age pension and old-age pension for long-term insured persons if they continued to work half time, beneficiaries of disability pensions with partial loss of working ability, i.e. those with a professional incapacity for work, and beneficiaries of early old-age pension who are employed up to half of their full working time.

The novelty is that beneficiaries of survivals pensions who work up to half of full working time are no longer suspended from receiving the full amount of their pension.

1.2.2. Apprentices

Based on the Amendment to the Volunteering Act (Official Gazette No. 84/2021) *"apprenticeships and other forms of training of persons who are employed for the first time in the profession for which they were educated, or who thus gain work experience determined by law or other regulations as a condition for performing the job of the profession for which they were educated"* are not considered to be volunteers.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obrambo

The working time of military personnel members in Croatia is regulated by the Act on Service in the Armed Forces of the Republic of Croatia (ASAFRC) of 2013 (last amended in 2019) and the Decision on Working Time Schedule of 2014 (last amended in 2018).

The general rule of 40-hours of weekly full-time work (Art. 154(1) of the ASAFRC) does not apply to guard duty nor to work during military exercises, functional courses, schooling, education and training in military locations and buildings, stand-by duty, internal services, peace support operations, field work, camping and compulsory accommodation in military locations and buildings due to need for service, etc. (Art. 154(4) of the ASAFRC).

Active military personnel members are not entitled to an increase in salary for overtime work, night work, shifts, work on Saturdays, Sundays, holidays, non-working days, stand-by, etc., but receive the allowance calculated as a certain percentage of their basic salaries (Art. 155 read together with Art. 139(5) of the ASAFRC). This provision was challenged before the Constitutional Court of the Republic of Croatia as discriminatory against active military personnel because it puts them in an unequal position compared to other employees in the Republic of Croatia, but the Constitutional Court has not found it to be unconstitutional. It ruled that there is a rationale for differentiating between active military personnel members and other employees in the Republic of Croatia due to special responsibilities and obligations resulting from the different nature of their jobs (Para 8 of the U-I/8058/2014, 06 June 2017 and para 7 of U-I/2776/2017, 19 December 2017).

Art. XX(4) of the Decision on Working Time Schedule reiterates that the military personnel members on guard duty are not entitled to a salary increase for overtime work, but are entitled to the allowance. The same refers to stand-by time (Article XV of the Decision on Working Time Schedule). The amounts (i.e. the percentage of basic salary) of the mentioned allowances are regulated in the Ordinance on Salary Allowances for Active Members of Military Personnel of 2014 (last amended in 2019). It is worth mentioning that every day of performance of guard duty and days off after guard duty in terms of the regular monthly fund of working hours are considered days of regular working time (Art. XX(3) of the Decision on Working Time Schedule).

It seems that the Croatian legislation on stand-by time payments for active military personnel, i.e. the above-mentioned provision (Art. 155 read together with Art. 139(5) of the ASAFRC), which states that military personnel members (among others, during guard duty and stand-by periods) are not entitled to an increase in salary is not precise enough because it does not differentiate between the remuneration for performance of actual work and remuneration for the non-performance of actual work during their stand-by period. The Ordinance on Salary Allowances for Active Members of Military Personnel also does not make such a differentiation.

In certain situations (peace support operations, crisis, humanitarian operations, etc.), the Croatian legislator does not provide for any limits of working time and stand-by time (derived from Article XIV of the Decision on Working Time Schedule). In case of work under a special schedule, the active military personnel member works for 12 hours and is on stand-by for the subsequent 12 hours. When such working time schedule lasts 5 or more days, an active military personnel member is entitled to a day off (Art. XVII(1) of the Decision on Working Time Schedule). In some specific forms of such a special schedule, such as a 24-hour duty, an active military personnel member is entitled to a day off. As a rule, the next working day is a day off (Art. XVIII(1) of the Decision on Working Time Schedule). The Ordinance on the participation of members of the Armed Forces of the Republic of Croatia in peace support operations, crisis response operations, humanitarian operations and other activities abroad does not provide for daily rest but for annual and paid leave (Art. 19(5) of the Ordinance on the participation of members of the Armed Forces of the Republic of Croatia in peace support operations, crisis response operations, humanitarian operations and other activities abroad). Since these specific situations are excluded from the scope of the Working Time Directive, the mentioned provisions are in line with the CJEU judgment in the present case.

4 Other Relevant Information

Nothing to report.

Cyprus

Summary

The government is easing restrictions related to the lockdown measures, but new restrictions have been imposed for those who cannot provide proof of vaccination or a rapid test result.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Pandemic situation

July witnessed a continuation of the easing of restrictions associated with the lockdown, which has affected labour relations as the fourth phase commenced from 14 July onwards. In addition, the government has decided to impose restrictions in terms of access to goods and services, both public and private, unless people can provide proof of vaccination or a rapid test result (valid for 72 hours). This has resulted in protest and demonstrations, including rioting against a private media group.

The government has set a deadline in early August for the availability of free universal rapid tests, with the exception of minors or those who are unable to be vaccinated. Those who refuse to be vaccinated will have to carry the costs of the tests themselves. There is strong opposition to these measures.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obrambo

This case is of some relevance for Cyprus, as the Working Time Directive does not preclude a stand-by period during which a member of military personnel is required to remain at the barracks to which he or she is posted, but does not perform actual work there, from being remunerated differently than for a stand-by period during which he or she performs actual work.

The second aspect of the Court's finding is also relevant, which provides that in the assumption that Directive 2003/88 applies, a stand-by period imposed on a military personnel member that requires him or her to be present continually at his or her workplace must be regarded as working time where that workplace is separate from his or her place of residence. However, since the way in which workers are remunerated for stand-by periods is covered by national law and not by Directive 2003/88, the latter does not preclude a stand-by period during which a military personnel member is required to remain at the barracks to which he or she is posted, but does not perform actual work there, from being remunerated differently than for a stand-by period during which he or she performs actual work.

According to the Cypriot WT law on daily rest, each worker shall have a rest period of at least 11 consecutive hours per 24-hour period (the Cypriot WT law in Greek is called: *Ο Περί της Οργάνωσης του Χρόνου Εργασίας Νόμος του* 2002 (63(I)/2002). Art. 4(1) of the Cypriot WT law states that the 24-hour period begins at 00:01 and ends at 24:00 hours (Art. 4(2) of the Cypriot WT law). The same law provides that the weekly rest period, subject to certain provisions (subsection (1) of Article 4 of the Cypriot WT law), which every worker is entitled to shall be a continuous minimum of 24 hours per week. However, Art. 6(2) provides that if justified for objective or technical reasons or by the conditions of work organisation, a minimum rest period of 24 hours may be set. Also, if the employer so decides, the employee is entitled to either two rest periods of 24 consecutive hours over a 14-day period (Art. 6(3)(a) of the Cypriot WT law) or to a continuous minimum rest period of 48 hours per 14-day period (Art. 6(3)(b) of the Cypriot WT law).

There is a statutory standard maximum that explicitly refers to overtime. The WT law contains a maximum weekly working time that may not exceed 48 hours, on average, including overtime (Art. 7(1), subject to the provisions of any laws or regulations that contain more favourable arrangements for workers). The reference period is four months (Art.7(3) of the Cypriot WT law). However, subject to the general principles of protection of the safety and health of workers, these do not apply to the police and armed forces, as the law explicitly provides for minimum safety and health requirements for the organisation of working time, save that the law does not apply, namely in relation to members of the Armed Forces (Cyprus WT Law, Art. 3(4)(a)) and members of the Police (Cyprus WT Law, Art. 3(4)(b)). To derogate from Article 6 and Article 16(b) of the Working Time Directive, the law explicitly provides for minimum safety and health requirements for the organisation of working time, save that the law does not apply, namely in relation to (a) members of the Armed Forces; (b) members of the Police.

As regards the police, the working time is included in the Police Regulations (issued under Art. 13, the Law on Police, 73(I)/2004 (*Ο Περί Αστυνομίας Νόμος του* 2004)), which also includes special police officers (under the Law on Police, 73(I)/2004 (*Ο Περί Αστυνομίας Νόμος του* 2004), Art. 13(2)(i)); and fire officers (Art. 13(2)(j) of the Law on Police, 73(I)/2004). These are governed by the Police Regulations, under Art. 13 of the Law on Police, 73(I)/2004. The Council of Ministers is authorised, after considering the opinion of the Chief, to adopt regulations on police order, administration and governance, which shall be submitted to the House of Representatives for approval (Art. 13(1) of the Law on Police, 73(I)/2004). The terms of service, including hours of service, are governed by the above rule, as explicitly stipulated under Art. 13(2) of the Law on Police, 73(I)/2004. Different timetables and rest periods are provided for special police units, the riot police, fire officers, sergeants and various ranks of police officers (prison guards are not police officers; they are covered by a different set of rules, as they are appointed by the Public Service Commission and fall under the auspices of the Ministry of Justice).

The regulation of working time for the National Guard is included in the Regulations, issued the Council of Ministers as stipulated in Art.71(1) of the Law on the National Guard 19(I)/2011 (*Ο περί Εθνικής Φρουράς Νόμος του* 2011 (19(I)/2011), available here). The Council of Ministers is authorised to issue regulations for improved application of the provisions of this Law or the regulation of any matter that is subject to regulation or determination under this Law. Under Art. 71(2), the regulations issued by the Council of Ministers may provide for recruitment of military personnel (Art. 71(2)(a)); hierarchy, seniority and promotions (Art. 71(2)(b)); permits and working hours (Art. 71(2)(c)).

Different working hours and rest periods are provided for different services and ranks in the National Guard. Officers of different ranks have their own schedule depending on their rank and armed forces unit as well as on the task they undertake; other serving army personnel have their own schedule, including: volunteers on five-year contracts (*Οι περί Εθελοντών Πενταετούς Υποχρεώσεως του Στρατού της Δημοκρατίας Κανονισμοί του 1995, ΚΛΜ*. 44/95, Cyprus Gazette, No. 2958 03 March 1995, available here) (such

as permanent sergeants (*Μόνιμοι Λοχίες*) and corporals), soldiers under contract (who are low-paid solders) (*Συμβασιούχοι Οπλίτες*). The monthly salary is calculated on the A1 salary scale, with an annual gross salary of EUR 14 675.13 (including the 13th salary); the monthly salary is approximately EUR 950 (available here). There are also different rules for cadets and conscript soldiers.

Even under those categories for which the WT allows for derogations, the law does not allow reference periods to exceed 12 months. The WT law stipulates that it is further understood that, in accordance with the general principles of the protection of the safety and health of workers, reference periods, for objective or technical reasons or for reasons of work organisation, may be laid down in collective agreements or in agreements between employers and employee representatives, but the law does not allow reference periods to exceed 12 months (Art. 3(4)(a), Cyprus, Law transposing the Working Time Directive, *Ο Περί της Οργάνωσης του Χρόνου Εργασίας Νόμος του* 2002 (63(I)/2002), available here).

There is very little case law on this subject.

There is a distinction in Cyprus between working time and rest periods, notably in relation to stand-by and on-call time. There is no reference to the on-call time of police, except for firefighters, who fall under the organisation of the police. The distinction has been examined in a Cypriot court case on the fire brigade: *Attorney General v Michalis Kongorizi* (22/05/2006, No. 34/2005, 55/2005) on-call time, i.e. periods during which a worker is required to remain at the workplace, ready to carry out his or her duties if requested to do so. The Supreme Court, citing relevant CJEU case law (namely case C-303/98, *Simap;* and case C-151/02, *Jaeger)*, ruled that the issue of remuneration has not been interpreted by the CJEU, or, for that matter, that no EU or Cypriot labour law has dealt with this issue; therefore, it is to be dealt with entirely on the basis of the contract agreed between the two parties. The Supreme Court ruled that based on the contract concluded between the parties, on-call time had to be counted as working time. The Supreme Court ruled that the two cited CJEU cases 'were not concerned with the issue of remuneration but with matters of labour law', and that the relevant provisions of the law transposing the Working Time Directive did not interfere in any way with the issue of remuneration, nor did they impose a duty to remunerate on-call time as equal to the actual execution of duties by the employee. It seems surprising that the European Commission report on the implementation of the Working Time Directive (COM(2010) 802 final), rightly unequivocally construed that ''On-call time' refers to periods where a worker is required to remain at the workplace, ready to carry out his or her duties if requested to do so', as the Court of Justice's rulings 'all on-call time at the workplace must be fully counted as working time for the purposes of the Directive'. Yet, it considered that 'on-call time at the workplace is entirely treated as working time under national law in nine Member States, including Cyprus'.

In another case, the Administrative Court allowed an appeal by firefighters on the recognition of and compensation for on-call waiting time (*Nicoli and others V Republic*, case number 1471/2015, 15 April 2020). This case may be relevant for the Army, even though the case applied to the police force. The applicants had appealed against the decision of the Police Chief to compensate them for the time they had been on-call. They claimed that the decision ought to be annulled on two grounds:

1. It was insufficiently justified.
2. It was contrary to European Union law, in particular to the Working Time Directive 2003/1988 /EC and relevant CJEU decisions.
3. It is contrary to Article 3 of the Universal Declaration of Human Rights and the International Covenant on Economic, Cultural and Economic Relations (CFT) (3) and refers to Article 24 of the Universal Declaration of Human Rights and the International Covenant on Economic and Political Rights.

4. It violates Articles 38, 50 and 51 of the General Principles of Administrative Law of 1999 (Law 158 (I) / 1999) and the principle of equality enshrined in Article 28 of the Constitution.

The Court also referred to the established practice where on-call duty had been in force for over 20 years, when there was adverse discrimination in the treatment of two different groups of fire brigade officers, i.e. duty officers, and the district/assistant district officers. Until 29 July 2015, the duty officers were not expected to be on duty after completing their service due to a change in their working hours to 11 hours, and a 24-hour rest period; in case of 13 hours of work, they were entitled to a 48-hour rest period, while the district/assistant district officers continued to perform their on-call duty. Furthermore, in addition to the complaint of non-payment of compensation, the Court considered other problems associated with the on-call duty: the maximum average weekly working time of 48 hours concerned both types of firefighters and within this limit—which according to relevant case law is considered overtime—without any derogation for firefighters. The Court referred to the wording of the concept of 'rest period' during which the employee has no obligation towards his/her employer, i.e. he/she is not prevented from pursuing his/her interests freely and uninterruptedly to neutralise the effects on his/her safety and health. The Court considered the applicants' claim that the non-observance of the obligations and deadlines imposed on a Member State by a Community Directive cannot be justified by any provisions or practices of its internal law. The Administrative Court decided that the decision of the Police Chief was insufficiently justified and thus allowed the appeal.

It must be noted that the Department of Labour Relations proposed an amendment to the Working Time Law 2002 to 2007, which would extend the weekly reference day from Monday to the following Tuesday. However, trade unions raised objections and called for the reference period to remain as is, i.e. from Monday to Sunday. The Department of Labour Relations has also submitted a proposal to amend the daily reference period (Article 4 of the Working Time Law), which has conditional support from trade unions. The largest trade unions would only agree on the condition that it is specified that when the work requires a shift system, no worker will be called to offer more than one-hour services within a 24-hour period, which is currently defined as covering the time 00.01-24.00 of the same day. Unions are concerned that the proposed amendment may result in a deterioration of treatment of workers who work under a shift system.

4 Other Relevant Information

Nothing to report.

Czech Republic

Summary

(I) The travel ban has been retained and extended.

(II) The Supreme Court has ruled that if an employer terminates an employment relationship with an employee during a probation period on the basis of an occupational injury and a consequent incapacity for work, the termination itself may be discriminatory.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Travel ban

With effect as of 19 July 2021, the restrictions on the entry of persons to the territory of the Czech Republic have been readopted – with certain amendments (see, among others, the May 2021 Flash Report). The text of the Protective Measure of the Ministry of Health No. MZDR 20599/2020-99/MIN/KAN of 16 July 2021 is available here.

With effect as of 09 July 2021 until 31 July 2021, it is not recommended for Czech citizens as well as foreign nationals with a residence in the territory of the Czech Republic to travel to certain countries, unless absolutely necessary, due to the increased COVID-19 risk in these countries (see Protective Measure of the Ministry of Health No. MZDR 20599/2020-97/MIN/KAN of 08 July 2021, available here).

The government also adopted rules for reporting mass events. With effect as of 19 July 2021, organisers of mass events (over 1 000 participants) must report these events to the competent public hygiene authority – without undue delay (for events until 22 July) or 5 days before the event (for events from 23 July 2021 onwards) (see here).

1.2 Other legislative developments

1.2.1 Residence of foreign nationals

Act No. 274/2021 Coll., amending Act No. 326/1999 Coll., on the residence of foreign nationals in the Czech Republic, and on the amendment of certain other acts, as amended, has been adopted and published (available here). The Act will enter into effect on 02 August 2021.

The Act was adopted in response to the Withdrawal Agreement concluded between the EU and the UK. It regulates certain aspects relating to the stay of UK nationals, especially those who benefit from (are covered by) the Withdrawal Agreement, as well as their family members.

Moreover, the Act also adapts the Regulation (EU) 2019/1157 on strengthening the security of identity cards of Union citizens and of residence documents issued to Union citizens and their family members exercising their right of free movement in the Czech legal system (as regards family members of EU nationals, requirements on the necessary documentation of foreign nationals, etc.)

2 Court Rulings

2.1 Equal treatment

Supreme Court, No. 21 Cdo 504/2021, 08 April 2021

In this decision (text available here), the Supreme Court ruled that if an employer terminates an employment relationship with an employee during a probation period on the basis of an occupational injury and a consequent incapacity for work, the employee is not entitled to severance pay (as is the case with regard to notices of termination or agreements on termination for inability to perform work following an occupational injury), but the termination itself may be discriminatory.

In the present case, the employee (plaintiff) performed work for the employer as a manual worker during a probation period. Within this period, the employee suffered an occupational injury, which was not disputed and was compensated by the employer's insurance company. A medical examination found that the worker was no longer capable of performing the same manual labour. The employer consequently dismissed the employee during the probation period without stating a reason. The employee assumed that the real reason for the termination was his health condition and claimed severance pay amounting to 12 average monthly earnings.

It is worth noting that the Czech Labour Code only allows for the terminations of an employment relationship based on the following: (1) agreement on termination, (2) notice of termination, (3) immediate termination, and (4) termination during the probation period. Further, the Labour Code stipulates a mandatory severance pay of at least 12 average monthly earnings in case the employee's employment relationship is terminated due to his/her incapacity for work following an occupational injury in case of a notice of termination or an agreement on termination for this reason (Sec. 52 letter d) of the Labour Code).

While the Court of First Instance referred to the occupational injury and the principle of protection of the employee and awarded him severance pay, the Court of Appeal highlighted the nature and logic of a probation period and the fact that the Labour Code only stipulates such severance pay for terminations by notice or agreement, not for terminations during the probation period.

The Supreme Court agreed with the Court of Appeal that the Labour Code is clear on this matter – the legislator obviously decided to connect the 12-month severance pay to notices of termination and agreements on termination only; while the courts can repair gaps in laws by analogy and teleological reduction, they cannot change the law or defy the legislator's will.

However, the Court reminded the lower courts that while civil adversarial procedures are ruled by the principle that the subject-matter of an action is delimited by the parties, the plaintiff's legal characterisation of the claim is not binding for the court. If the claim can be judged from a different legal perspective, the court is required to do so. The Supreme Court ruled that, with a view to the above-mentioned facts, the claim can be described as a claim for reasonable satisfaction due to the violation of the prohibition of discrimination in employment relationships (instead of a claim for severance pay).

Because the Court of Appeal judged the claim to only be a claim for severance pay and not on for reasonable satisfaction as well, the Supreme Court set aside the decision and referred the case back to the Court of Appeal.

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obrambo

As regards the remuneration of stand-by periods of military personnel, a special law applies, i.e. Act No. 221/1999 Coll. on Professional Soldiers.

Section 30(1) of the Act on Professional Soldiers states that 'if important interest of service requires it, a soldier's supervisor can order the soldier to perform stand-by service'. During such stand-by service, the soldier does not perform any work, but is

ready to perform work if necessary. Section 30(3) of the Act on Professional Soldiers states:

> *"stand-by service at a place other than the designated place of duty shall not count towards the basic weekly duty period. Stand-by service at the designated place of duty shall not be included in the basic weekly duty period only during the period of central coordination of rescue and liquidation work, during the duration of a state of emergency or if it can be reasonably expected that the Army of the Czech Republic will be used in the near future to perform the tasks of the Police of the Czech Republic or that a state of national emergency will be declared."*

Therefore, if a soldier is required to stay at a designated place of service during a stand-by duty, such stand-by duty shall be counted as service time (working time), except in specified extraordinary situations. Therefore, the national legislation seems in line with the CJEU's decision and does not contradict the Working Time Directive. Cases in which a soldier is required to be on stand-by at a place other than his/her designated place of service and if such time is not considered service time (working time), it can be subsumed under situations that lie outside of the scope of the Working Time Directive according to the CJEU.

However, as regards stand-by service at a place other than the designated place of duty, such is never counted towards the basic weekly duty period – this may sometimes be contrary to the Directive, as, under certain circumstances, the soldier may be limited in his or her organisation of leisure time to such a degree that it may be necessary to consider such time as part of his/her working time. It is clear from previous CJEU decisions in cases C-344/19, *Radiotelevizija Slovenija* (cited in the judgment in question) and C-580/19, *Stadt Offenbach am Main* that even such stand-by duty may be regarded as working time under certain conditions. To that extent, Article 30(2) of the Act on Professional Soldiers may be in conflict with the case law of the CJEU.

4 Other Relevant Information

Nothing to report.

Denmark

Summary

Nothing to report.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Denmark has now almost fully re-opened and the restrictions are being lifted continuously. 54.7 per cent of the population is fully vaccinated and 72.3 per cent have received their first vaccine. The infection rates are relatively stable.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obramo

First, the CJEU clarifies the scope of the Working Time Directive when determining which activities performed by military personnel are covered by the scope of the Directive. It follows from the ruling that not *all* tasks performed by military personnel may be excluded from the scope of the Directive.

In Denmark, the Directive has been transposed into three different legal acts (The Holiday Act, The Working Time Act and the Act on Occupational Health and Safety). The following briefly examines the extent to which military personnel are covered by the relevant provisions on working time.

First, the right to paid annual leave has been implemented in the Holiday Act (Law No. 230 of 12 February 2021). The Holiday Act is supplemented by collective agreements on paid annual leave, but collective agreements may not derogate from the Working Time Directive or the Holiday Act to the detriment of the employee.

Holidays for employees in the military, state emergency personnel, etc. must be organised in conformity with the general rules of the Holiday Act, cf. section 44. For groups of military personnel carrying out 'special activities', and when services are required in extraordinary situations, it is possible to place the primary paid holiday period outside the primary holiday period. As compensation, military personnel will receive 1.8 days of payment for each day of annual leave that is relocated, cf. section 44(2). Moreover, the 5 annual leave days provided for Danish employees in addition to the 4 weeks of paid annual leave established in the Working Time Directive may, under the same strict requirements, be postponed from one holiday period to the next, cf. section 44(1). The postponement of the 5 Danish paid annual leave days does not collide with the rights promoted in the Working Time Directive.

The options for derogating from the right of military personnel to paid annual leave as stipulated in the Working Time Directive in Denmark is very limited, and thus Danish legislation is in line with the principles of exceptions promoted by the CJEU ruling.

Second, the 'rules on maximum weekly working time, daily breaks, night work and health assessments' have been implemented in the Working Time Act (Law No. 896 of 24 August 2004).

The Working Time Act is supplemented by many collective agreements on these elements on working time. Collective agreements cannot derogate from the rules in the Working Time Directive to the detriment of the employee.

Military personnel are covered by a collective agreement on maximum weekly working time, daily breaks, etc. The so-called Implementation Agreement on Aspects on the Organisation of Working Time was agreed in 2003 between the Ministry of Finance and the Confederations of Employee Associations (the full title of the collective agreement is 'Agreement concerning certain aspects of the organisation of working time'). Section 1(4) of the Implementation Agreement reiterates Article 2 of Directive 89/391/EEC, stating that the agreement is not applicable, where characteristics unique to 'specific public service activities', such as the armed forces or the police, or to specific activities in civil protection services inevitably conflict with it.

The Implementation Agreement on Aspects on the Organisation of Working Time does not apply during military activities such as drills, sailings, special duties or services with the Sirius Patrol in Greenland. For such activities, the Defence Ministry and the trade union for military personnel, Centralforeningen for Stampersonel (CS), have concluded several working time agreements for those specific situations.

The Danish system thus seems to be in line with the CJEU ruling. This, as the main rules on working time, both in the Working Time Act and in the Implementation Agreement on Aspects on the Organisation of Working Time, are generally applicable to military personnel as well, and only situations in which active duty prevents the organisation of working time are exempt. In addition, these exempt situations are covered by collective agreements concluded between the Ministry of Defence and the trade union for military personnel, including on working time, which apply to the times of active duty not covered by the Implementation Agreement on Aspects on the Organisation of Working Time.

(For an example of a collective agreement on working time during active duty, see here.)

Finally, the 'rules on daily and weekly rest periods' are implemented in the Act on Occupational Health and Safety (Law No. 674 of 25 May 2020). Military personnel, as a general rule, are covered by the provisions in this Act.

There are two important exemptions. First, 'genuine military service' is excluded from the scope of the Act, cf. Art 2, No. 2: '…[w]ork that is performed by military personnel, and which may be regarded as genuine military service.' The definition of 'genuine military service' was clarified following a request of employee associations, in a departmental circular, No. 9279 of 8 May 2003:

> *"Art. 2. Genuine military service covers work, which*
> 1) *is executed by the military personnel's land-based units, including soldiers under compulsory military service, irrespective of the way they may be attached to the Ministry of Defence, and members of the Home Guard, and*
> 2) *is executed in that part of the Ministry of Defence's operative tasks, including military education and training tasks, that take place with a view to resolving mandatory tasks of civil protection, counter-terrorism, peace-making, peace keeping and war, and*

3) *which is planned in a training or education directive or a similar directive with a description, scope, placement and time frame for the activity."*

It follows from the provision that it depends on 'the individual activity' whether the said personnel are covered or excluded from the scope of the Act on Occupational Health and Safety. Decisions by the Working Environment Complaints Board found that the interpretation of the Ministry of Defence's 'genuine military service' was too broad. The military personnel, who sometimes had 24-hour shifts, did not perform military service, as their tasks entailed 'ordinary maintenance of machinery, control in case of active alarms, and patrolling'. Those tasks have to be carried out irrespective of the state of military preparedness. The Ministry of Defence was consequently required to observe the rules on daily and weekly rest periods.

It should be emphasised that the activities in connection with genuine military service should, to the widest extent possible, be carried out in line with the intent of the Act on Occupational Health and Safety, cf. Art. 3(1) in the circular (*"Art. 3(1)). The Agreement contains a joint declaration which states that the activities that are covered by genuine military service shall, to the widest extent possible, be carried out with the objective of the Act on Occupational Health and Safety, that the work shall be performed in a fully responsible manner in terms of safety and health"*).

Moreover, the work of 'military personnel at sea' is excluded from the scope of the Act, cf. Art 3(2). Thus, rules on daily and weekly rest periods are not applicable. The regulation of working conditions are instead set out in the Dep. Circular on Safety and Health Onboard Ships and Vessels of the Naval Command (*Bestemmelse vedrørende sikkerhed og sundhed om bord i søværnets skibe og fartøjer*).

To conclude, military personnel are, as a general rule, covered by the ordinary rules on working time in all three acts, and derogations are only allowed in specific situations – in line with the Directive's exemptions as interpreted by the CJEU ruling. Only certain 'special military activities' are excluded from the material scope of the working time rules, which—on the surface—seems to be in conformity with the recent ruling of the CJEU, or alternatively could be interpreted as being in conformity with EU law. In administrative board decisions, the exclusion of tasks such as ordinary maintenance of machines, patrolling, etc. was determined to be contrary to the scope of application of the Danish working time regulations. The existing Danish legal framework is, thus, considered to be in line with the recent clarification by the CJEU.

In this judgment, the CJEU reiterates prior case law in establishing that the Directive does not preclude national provisions that entail different 'remuneration' schemes for a person performing guard duty during stand-by time and guard duty during which actual work is performed. This clarification is fully in line with the Danish understanding, as remuneration is not regulated in the statutory acts, but only in collective agreements. In the Danish context, many collective agreements regulate remuneration much more nuanced than the Working Time Directive, and periods of actual work performed are very often remunerated differently than stand-by time. The precision of the CJEU in this regard supports the justification that the Danish approach of distinguishing between the calculation of hours of remuneration, on the one hand, and the calculation of working hours as opposed to rest periods, on the other, is in line with the EU *acquis*.

4 Other Relevant Information

Nothing to report.

Estonia

Summary

(I) Two drafts have been prepared to transpose Directive (EU) 2019/1152 and the 2018 amendments to the ILO Maritime Labour Convention into Estonian law.

(II) The Supreme Court has specified the criteria for calculating compensation for material and non-material damages deriving from an occupational injury.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Transparent and predictable working conditions

The draft amendment to the Employment Contracts Act, the Civil Service Act and the Working Conditions of Employees Posted to Estonia Act has been prepared by the Ministry of Social Affairs. The draft transposes Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union. The purpose of the draft is to bring the notification of the employee's working conditions into conformity with the law of the European Union. The Member States of the European Union have the obligation to transpose the Directive by 01 August 2022 at the latest.

The draft supplements the information in the Employment Contracts Act, which the employer must notify the employee in writing of upon the conclusion of an employment contract. The employer has the obligation to inform the employee about any training provided by the employer, compensable leave, the length of the probation period, the procedure for compensating overtime, the form of termination of employment and the obligation to state reasons for dismissal, and the institutions receiving taxes and payments and concomitant protection.

In the event of change in the data, this information must be provided no later than the date on which the change enters into force.

The draft also provides for the protection of an employee against unfavourable treatment in the event that an employee relies on his or her rights and obligations, draws attention to the violation thereof or supports another employee in the protection of his or her rights.

The Working Conditions of Employees Posted to Estonia Act is supplemented with a new notification obligation, prescribing the scope of the information the employee must be notified in in writing in case of a posting of more than one month. These data include, for example, the duration of the posting period in Estonia, the salary and currency of payment, and the conditions for returning home from Estonia.

In addition, the draft contains an amendment that is unrelated to the transposition of the Directive. The amendment specifies that holiday pay must be paid to the employee on the penultimate calendar working day. The need for the amendment arises from the practice of implementing the law, as the question has been raised whether holiday pay must be paid on the penultimate calendar day or on the penultimate real working day before the employee starts his/her annual holiday. The amendment is made for reasons of legal clarity.

1.2.2 Seafarers Employment Act

A draft amendment to the Seafarers Employment Act has been prepared by the Ministry of Social Affairs. The draft transposes the amendments to the ILO Maritime Labour Convention adopted in 2018 into Estonian law concerning the validity of a maritime labour contract and the payment of remuneration to a crew member in a situation in which the crew member is imprisoned for an armed robbery or piracy.

2 Court Rulings

2.1 Occupational safety and health

Supreme Court, No. 2-17-19464/48, 16 June 2021

On 16 June 2021, the Civil Chamber of the Supreme Court issued Decision No. 2-17-19464/48 on the configuration of compensation for occupational injuries. The legal basis of the decision was the Occupational Health and Safety Act and the Law of Obligations Act.

The employee had a serious accident at work during the construction of the power station, as a result of which the employee's health was affected, his income decreased and he incurred additional expenses. The employee was diagnosed with a permanent incapacity for work following an injury at work. The employee claimed compensation for loss of income, monthly compensation for loss of income and default interest for property damage, as well as compensation for non-property damage to the extent determined by the court.

The Supreme Court dissected the configuration of compensation. The Court found that the loss of income could be caused by damage to health even if the victim received a retirement pension. In calculating and awarding compensation for damage to health caused by work-related injuries, the court must assess which circumstances and evidence are the most accurate in predicting the victim's income which he or she would have received without the damage. Depending on the circumstances, the Court may determine the amount of compensation to be paid on the basis of the income before the damage occurred or only on the basis of the expected income in the future. The amount of the loss may be calculated on the basis of, for example, the average monthly income paid by an employer with whom the employment relationship did not end as a result of the employee's state of health, or on the basis of the salary of the same activity.

Periodic compensation for damage to health can be indexed to an index that reflects the possible change in the victim's lost income over time. Such an index may, for example, be an index reflecting the change in the overall average gross wage or the average gross wage of persons working in the same activity as the injured party, but not a consumer price index.

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obrambo

There is no specific regulation on the working time of armed forces in Estonia. General rules for employees or civil servants apply. Employment in the armed forces can be divided into two categories: employment under the employment contract and employment as a civil servant. In case a person is employed as a civil servant, no employment contract and a civil servant will be appointed under an administrative act.

The Civil Service Act (Civil Service Act), section 38, regulates on-call time, i.e. the time in which an official is required to be available to perform functions outside his/her working time if the specified obligation is included in his or her job description.

If the on-call time is not included in the official's job description, the on-call time may be applied with the consent of the official granted in a format enabling reproduction in a written form.

For the on call-time, additional remuneration which is not less than 1/10 of the basic salary of an official must be paid to the official for on-call time or, at the request of the official, be compensated with additional free time, which shall be not less than one-fourth of the length of the on-call time. The part of the on-call time during which the official performs functions is considered working time. Upon the application of on-call time, an official must be guaranteed the possibility of using daily and weekly rest time.

Three possibilities exist in Estonia: working time, rest periods and on-call time. On-call time is neither working time nor a rest period. In this sense, this time in employment does not fit into the categorisation of the CJEU. Although an employee and an official are free to decide where to be or what to do during on-call time, he/ she must be reachable for the employer and must be ready to start working after being called to work by the employer.

The on-call time covered by Estonian employment law and public service law can generally be considered working time.

4 Other Relevant Information

4.1 COVID-19, vaccination of employees and respect of COVID-19 measures

Estonian labour legislation already now allows employers to dismiss unvaccinated employees if the employer's risk assessment considers vaccination to be indispensable for the protection of their own and others' health. This is of course an extreme measure. Vaccines are now available to everyone, but there is still a risk of a third wave, and the dismissal of workers who have not been vaccinated may be back on the agenda. Serious consideration must also be given as to whether unvaccinated people should in the future be allowed, for example, to remain on paid leave if they need to quarantine, which would be reimbursed on account of taxpayers and employers. Social protection must be guaranteed, especially for those who behave responsibly towards their own health and the health of others.

There has been no pressure from the state to dismiss unvaccinated workers. This is neither necessary nor appropriate, as employers themselves have a strong interest in protecting their employees and clients. The national focus should remain on the smooth organization of vaccination and more effective communication. The strategic management of national vaccination has been widely criticised by the public, as well as by the National Audit Office of Estonia.

See here and here.

Finland

Summary

(I) The Pay Security Act has been amended to increase the maximum amount guaranteed for the payment of employees' claims arising from an employment relationship in the event of employer insolvency.

(II) A draft legislative proposal discusses a series of amendments to the Seafarers' Employment Contracts Act to regulate the employer's right to require employees to take an alcohol test in the workplace.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Employer insolvency

The amendment to the Pay Security Act (866/1998), which has raised the maximum amount guaranteed for the payment of employees' claims arising from an employment relationship in the event of employer insolvency to EUR 19 000, came into effect on 01 July 2021. This increase better corresponds with the current level of wages.

1.2.2 Seafarers

The government has proposed a series of amendments to the Seafarers' Employment Contracts Act, No. 756/2011, to regulate alcohol testing of employees at the workplace.

According to the Labour Court judgment No. TT 2019:80, the employer had no right to require an employee who worked on the vessel to take an alcohol test on the basis of the collective agreement, which contained provisions on this issue. The Labour Court referred to the statements of the Constitutional Law Committee and Employment and Equality Committee of the Parliament according to which the right of the employer to require an employee on a vessel to take a breathalyser test must be regulated in law in a sufficiently precise manner.

The legislative draft circulated for comments proposes the employer to have the right to require an employee who works on a vessel to take an alcohol test (breathalyser test) to determine whether the employee is under the influence of alcohol during his/her working hours.

According to the proposal, alcohol tests for employees on vessels would be justified from the perspective of maritime safety and the special conditions of maritime travel. Current legislation does not contain provisions that would allow the employer to require an employee on a vessel to take this test.

It is proposed that the employer could require employees to take an alcohol test, if the conditions laid down in the Act are met. Random breathalyser tests or regularly conducted tests, for example, at the beginning of each shift, would be possible for employees whose tasks could endanger the safety on vessels when working while intoxicated. An employer could also require an employee to take a breathalyser test if the employer has reason to suspect that the employee is intoxicated at work.

In addition, provisions are proposed that require the use of appropriate procedures for organising breathalyser tests as well as on the processing of personal data in connection with breathalyser tests to be included in the Act.

The proposal would also apply to pontoon ferries that are not covered by the Seafarers' Employment Contracts Act.

2 Court Rulings

2.1 Termination of employment

Labour Court, TT 2021:65, 14 July 2021

The case concerned the termination of an employment contract of a financial assistant, due to the fact that he had been working under the influence of alcohol. On the vessel where he was working, zero tolerance applied during working hours. The employee had already been given a written warning in relation to alcohol use. The warning was considered justified.

The worker appealed against his termination. According to the collective agreement, in addition to the warning and request to seek treatment, there was always an obligation to take measures that concern referrals to treatment. According to the agreement on referral to treatment, this should be requested before taking disciplinary action. The employer had not taken such measures (to refer the employee for treatment) based on the agreement on referral to treatment. The employer had not sufficiently sought to undertake a referral to treatment before taking disciplinary action against the employee.

The Court therefore accepted the worker's claim, ruling that the employer did not have a proper and weighty reason to terminate the employment contract.

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obramo

The Act on the Working Hours of Defence Force Civil Servants, No. 218/1970, contains rules on working hours and is supplemented by a separate decree, No. 301/1970.

Since the 1970s, collective agreements have been concluded on working hours and these agreements govern the remuneration related to stand-by period. These agreements have been developed to ensure that the working time regulation applies to the special characteristics of the Defence Forces.

The report on the need to amend the Act on the Working Hours of Defence Force Civil Servants (Publications of the Ministry of Finance 2020:12) was issued in 2020 by the working group, whose task was to determine which amendments to the Act are necessary to implement the working time protection of public officials. However, the working group did not reach a common understanding on the need to amend the legislation.

4 Other Relevant Information

4.1 Draft proposal on workers' privacy

The draft proposal includes provisions on collecting personal data concerning employees in the Act on the Protection of Privacy in Working Life (759/2004). The right of the employer to collect personal data on employees without the employee's consent of the employee would be extended. Collecting personal data for the purpose of supervision of work and for fulfilling the statutory obligations of the employer would be permitted

without consent. According to the present provisions, collecting personal data without consent is only possible in situations regulated separately or if an authority provides data to the employer for fulfilling a statutory obligation. The proposed amendment aims to streamline the legislation with the Data Protection Regulation as well as with the needs and practices of work life.

4.2 Draft proposal on the protection of whistleblowers

Working groups of the Ministry of Justice and the Ministry of Economic Affairs and Employment have prepared a draft for a government proposal on whistleblowing legislation that would implement the Whistleblower Protection Directive. The preparation of the proposed act, which would be a general act protecting whistleblowers, will continue after the round of statements.

France

Summary

(I) French Parliament has passed a law to improve occupational health and safety.

(II) The Court of Cassation has ruled on the dismissal of employees refusing to take an oath due to their religious beliefs.

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 law improving occupational health and safety (Law improving occupational health and safety, No. 2021-1018, 02 August 2021, Official Journal of 03 August 2021), implements and clarifies the terms of the national interprofessional bargaining agreement (ANI) on occupational health of 09 December 2020.

The law is organised into four main sections:

- strengthening prevention of occupational diseases within companies and separating public health from occupational health;
- defining a core of services to be provided by the prevention and occupational health services;
- providing better support for certain vulnerable groups and fighting employment disengagement;
- reorganising the governing structure of the occupational health system.

Specifically, the law provides for the obligation to consult the Social and Economic Committee (CSE) on the unique risk assessment document (DUER) and its updates and to keep these documents for at least 40 years on a digital database, to strengthen the training of staff representatives in occupational health, to improve medical monitoring of employees (post-exposure visit, mid-career visit, follow-up) and to create a set of compulsory services for inter-company occupational health and prevention services (SSTIs, which will become SPSTIs).

These measures will come into force on 31 March 2022, at the earliest.

2 Court Rulings

2.1 Equality of treatment

Labour Division of the Court of Cassation, No. 20-16.206, 07 July 2021

The case concerned a transport inspector of RATP, the public transport operator responsible for most of the public transport in the Greater Paris area. This job is subject to a prior oath because transport inspectors have the power to issue fines. However, taking an oath may contravene the religious freedom of the individuals concerned.

An agent was hired by RATP as a trainee under the terms of the staff regulations, her definitive admission to the permanent staff of RATP being subject to her taking an oath. RATP sent her a notification to appear before the High Court in order to swear her in, in

application of Article 23 of the Law of 15 July 1845 on the railway police. However, the agent indicated at the hearing that her religion prevents her from taking oaths, i.e. she did not take the oath.

The agent was subsequently dismissed because she had refused to take the oath, as this wrongful act prevented her from being admitted as permanent staff of the RATP.

The employee brought an action before the Employment Tribunal seeking to have the dismissal qualified as lacking real and serious cause, invoking the fact that she had refused to take the oath on grounds of her religious convictions, but had proposed to take another oath in accordance with her religion, which the president of the court had refused. The appeal judges rejected her claim, and she appealed to the Court of Cassation, claiming that her dismissal was null and void because of discrimination based on her religious beliefs.

The Court of Appeal argued that the contested formula of oath taking existed for many professions, and that the applicant was not placing her right hand on a religious text or even on the Constitution. The Court also considered that the formula of oath taking was not marked by any religious connotation or reference to a higher authority, and was only intended to express the person's commitment to loyally and to solemnly respect the obligations entrusted to him or her (i.e. to record offences and draw up reports in compliance with the rules binding on the person concerned). It therefore concluded that the employer had complied with the law, which requires employees to be sworn in to carry out their duties.

The Court of Cassation, based on Article 9 of the European Convention on Human Rights and Article L. 1232-1 of the Labour Code, overturned the appeal decision. It pointed out that everyone has the right to freedom of thought, conscience and religion, and that this right implies the freedom to manifest one's religion or belief individually or collectively, in public or in private, through worship, teaching, practices and the performance of rites. It also recalled the—now very classic—formula of Article 9(2) of the European Convention, according to which this freedom "*shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others*".

If dismissal for misconduct is not possible, should the employer have dismissed the employee for real and serious reasons because of her refusal to take an oath? In his opinion attached to the judgment (p. 15), the First Advocate General considered that:

> "*the most appropriate option, and the only one likely to allow the employee to carry out the job for which she had been hired and trained, was for the employer to reschedule an oath by proposing to the court an alternative form of oath, which did not take away anything from the substance of the commitment, but which corresponded to the forms in use in the employee's religion. Only if the judge had maintained his refusal of such an oath formula would the employer have been entitled to dismiss the employee, not for misconduct, but for real and serious cause*".

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obramo

In this judgment, the Grand Chamber of the CJEU ruled that military personnel of EU Member States cannot be completely denied the rights conferred to workers by Directive 2003/88/EC concerning certain aspects of the organisation of working time.

This judgment arose in a dispute over the payment of overtime between the Slovenian Ministry of Defence and a former non-commissioned officer. The French and Spanish

governments intervened in the proceedings to argue that this issue falls within the scope of the organisation of the Armed Forces of the States, excluded from the scope of EU law by Article 4(2) of the Treaty on European Union.

The Court of Justice refused to limit itself to the status of military personnel but considered that the applicable rules depend on the activity being carried out. It stated that some activities 'such as those connected, in particular, to administrative, maintenance, repair and health services, as well as services relating to public order and prosecution, cannot be excluded in their entirety from the scope of Directive 2003/88' (para 69). However, 'where members of the armed forces are faced with circumstances whose gravity and scale are exceptional […], their activities are excluded from the scope of Directive 2003/88' (para 73). The Court of Justice also allows for the exclusion of activities of workers 'who, either because they are highly qualified or due to the extremely sensitive nature of the tasks assigned to them, are extremely difficult to replace with other members of the armed forces by means of a rotation system which would make it possible to ensure both compliance with the maximum working periods and the rest periods provided for by Directive 2003/88, and the proper performance of the essential tasks assigned to them' (para 76).

Article L. 4123-1 of the French Defence Code deals with the remuneration of military personnel without distinguishing between the effective work period and on-call periods:

> "*Military personnel are entitled to remuneration, including pay, the amount of which is fixed according to either the grade, step and qualification or titles held, or the post to which they have been appointed. Benefits in kind may be added.*
>
> *The index classification of military bodies, grades and posts shall take into account the particular duties and obligations to which they are subject.*
>
> *In addition to their pay, soldiers receive a residence allowance and, where applicable, family allowances. An allowance for military expenses, taking into account the particular duties of the military, is also allocated to them under the conditions laid down by decree.*
>
> *Special allowances may also be granted for duties performed, risks incurred, place of service or quality of services rendered.*
>
> *The specific statutes set out the rules for the classification and advancement in the ranks of a grade. They may provide for exceptional or special ranks.*
>
> *Any general measure affecting the remuneration of civil servants of the State shall, provided the necessary adjustments are made, be applied with simultaneous effect to military personnel.*
>
> *Where the assignment involves housing difficulties, military personnel shall receive appropriate assistance.*
>
> *Volunteers in the armed forces and students with military status undergoing training in schools designated by order of the Minister of Defence shall receive remuneration fixed by decree which may be lower than the remuneration provided for in Article L. 3231-2 of the Labour Code.*"

In its written statement, the French government invoked its 'major international responsibilities for the maintenance of peace and security' and its 'structurally higher level of military engagement than other States' (para 98 of the conclusions of the Advocate General). Recalling that France is now the only Member State with nuclear weapons, Advocate General Henrik Saugmandsgaard Øe did not deny that a State 'could demonstrate the need to depart from this Directive to a higher degree than is intended by' its submissions (para 100).

The Court of Justice referred to these exceptions, pointing out that "*the specific features which each Member State imposes on the functioning of its armed forces must be duly taken into consideration by EU law, whether those specific features result, inter alia,*

from the particular international responsibilities assumed by that Member State, from the conflicts or threats with which it is confronted, or from the geopolitical context in which that State evolves" (para 44 of the judgement).

4 Other Relevant Information

Nothing to report.

Germany

Summary

(I) The Federal Administrative Court has delivered an important judgment on the concept of on-call time. The Court ruled that to examine whether on-call time exists, the concept elaborated by the CJEU must be followed. The Court had also ruled that the Directive 2003/88/EC does not contain any specifications for the amount of a purely national compensation claim for overtime.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 On-call time

Federal Administrative Court, No. 2 C 18.20, 29 April 2021

The Federal Administrative Court recently published the reasons for its decision on its ruling on compensatory time off for police officers due to their deployment at the G7 Summit in Elmau in 2015. In this decision, the Court ruled, among other things, that when examining whether on-call time exists, irrespective of whether a working time regulation falls within the scope of Directive 2003/88/EC, the case law of the CJEU for the delimitation of working time and rest period within the meaning of Art. 2(1) and (2) of the Directive must be observed, because the German legislature has provided for a uniform concept of on-call time. The Court had also ruled that Directive 2003/88/EC does not require that a purely national compensation claim for exceeding the regular working time regulated in the Member State consists of a certain amount.

In this regard, the Court states the following:

> *"According to the established case law of the Federal Administrative Court, an on-call duty exists if the civil servant has to be available at a place determined by the employer outside the private sphere for immediate deployment at any time, and when experience shows that a call on duty is to be expected (...). The Senate has recently summarised this to the effect that on-call duty in this sense presupposes that the civil servant must remain available at a place that cannot be freely chosen and changed the reference to "privately" and that the times in question are characterised by "remaining available" for an assignment that could arise at any time (...). In this respect, it is decisive whether the times are considered to be on-call duty, free time or a form of stand-by duty (...). The extent to which it can be expected from experience that they will be used can be an important factor for the assumption of working time in the form of on-call time (...). However, such a typifying overall consideration of the frequency of actual assignments is not relevant if the nature of "being on stand-by" for an assignment that could arise at any time already results from the nature of the assignment (...). With these standards, the Senate sees itself in agreement with the case law of the Court of Justice of the European Union"* (paras. 25 et seq.).

The Court further states:

> *"According to the case law of the CJEU, which the Senate follows and on which its own case law is based, it is decisive for the classification of on-call time as "working time" within the meaning of Directive 2003/88/EC that the employee must be at a place determined by the employer and must be available to the employer in order to be able to provide the appropriate services immediately, if*

> *necessary [the Court refers to the judgments of the CJEU in cases Jaeger, Dellas and Matzak]. An employee who is required to remain at his or her workplace during such on-call time at the immediate disposal of his or her employer must be outside his or her family and social environment and is less free to dispose of the time during which he or she is not called upon. Consequently, this entire period, irrespective of the work actually performed by the employee during that time, is to be classified as "working time" within the meaning of Directive 2003/88/EC [the Court refers to the judgments of the CJEU in cases Radiotelevizija Slovenija, Stadt Offenbach am Main and Pfeiffer a.o]. If, due to the absence of an obligation to remain at the workplace, on-call time cannot automatically be classified as "working time" within the meaning of Directive 2003/88/EC, the national courts must still examine whether such a classification does not result from the consequences that the full restrictions imposed on the employee have for his or her possibility to freely organise the time during which his or her professional services are not used and to devote him- or herself to his or her own interests [the Court refers to the judgments of the CJEU in cases Radiotelevizija Slovenija and Stadt Offenbach am Main]"* (para 30).

Finally, the Court states the following:

> *"Directive 2003/88/EC does not contain any specifications for the amount of compensation claim for overtime provided for by section 88 sentence 2 of the Federal Civil Servants Act (*Bundesbeamtengesetz*). The provisions of the Directive, such as Art. 6(b) of Directive 2003/88/EC, require Member States to take the necessary measures to ensure that the Directive's occupational health and safety provisions are complied with and that, for example, the average working time within the seven-day reference period of 48 hours, including overtime, is not exceeded. To implement the Directive, it is therefore necessary for regulations to be adopted which, for example, prevent the limit of Art. 6 letter b) of Directive 2003/88/EC from being exceeded and which make use of the margins of the Directive such as those of Art. 16(b) and Art. 19 of Directive 2003/88/EC merely in a manner that complies with EU law (...). However, the Directive does not require that a purely Member State-regulated compensation claim for exceeding the Member State-regulated regular working time stipulates a specific amount (…). Insofar as previous decisions of the Senate may suggest that Union law contains such "specifications" (…), the Senate does not adhere to this."* (para 40).

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obrambo

In its decision, the CJEU held that a security activity performed by a military personnel member is excluded from the scope of that Directive if certain conditions are met.

The present case may lead to a review of the relevant provisions on working time of soldiers.

In Germany, section 30c of the Soldiers' Act (*Soldatengesetz*) must be observed. It stipulates that the regular weekly working time of soldiers who are deployed under the responsibility of the Federal Ministry of Defence is, in principle, 41 hours (section 30(1) sentence 1). A soldier required to perform military service beyond his or her regular weekly working hours

> *"insofar as the special features of this service require it and the additional work is limited to exceptions. If he/she is required to work more than 5 hours per month beyond the regular working hours as a result of overtime ordered or approved by the service, he/she shall be granted appropriate special leave for*

this overtime within one year. This shall not apply if release from work is not possible for compelling official reasons" (section 30(2)).

In the case of on-call duty, the regular working hours may be reasonably extended in accordance with the needs of the service. In curative medical facilities of the Federal Armed Forces, the working time may be extended by up to 54 hours in a seven-day period under certain conditions (section 30(3)). Pursuant to section 30(4), subsections 1 to 3 do not apply to activities within the scope of

"1. Operations and obligations similar to operations, in particular

a) in the context of mandated foreign missions,
b) for national defence, in case of tension or in the context of an internal emergency,
c) in the context of national crisis prevention,
d) in defence of the alliance within the framework of the North Atlantic Treaty Organization, and
e) for participation in military tasks within the framework of the United Nations or the Common Security and Defence Policy of the European Union,

2. administrative assistance in the event of natural disasters or particularly serious accidents and within the framework of urgent emergency aid, humanitarian aid services and assistance (…),

3. sea voyages lasting several days,

4. alerting and massing as well as mission-related operational planning and military training in preparation for missions and deployments in the case of numbers 1 and 2, as well as

5. exercise and training projects in which operational conditions are simulated in accordance with numbers 1 and 2".

4 Other Relevant Information

Nothing to report.

Greece

Summary

(I) A law states that several categories of employees in nursing homes and healthcare facilities will be placed on unpaid leave if they do not get vaccinated against COVID-19.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Measures against unvaccinated workers in healthcare facilities

Law 8020/2021 stipulates that several categories of employees, such as healthcare professionals, will be placed on unpaid leave if they do not get vaccinated against COVID-19. The unpaid leave will last, according to the government, 'as long as the pandemic lasts'.

The legislation will take effect as of 16 August for workers at nursing homes and from 01 September for staff at hospitals and other healthcare facilities

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obrambo

Article 1 of Presidential Decree 88/1999, which transposes Directive 2003/88, applies to members of the armed forces. However, it does not apply to members of the armed forces concerning 'activities presenting specificities linked to their nature'. It is also provided that in the event of such an exclusion of members of the armed forces, the health and security of employees must be preserved.

There is no specific arrangement for military personnel who are on stand-by time.

Therefore, the judgment is of relevance as it clarifies the issue of stand-by time of military personnel.

4 Other Relevant Information

4.1 National minimum wage

The prime minister has announced that the national minimum wage will be increased by 2 per cent contrary to the recommendations of business representatives.

Business and commercial groups requested a freezing of the minimum wage due to the special circumstances caused by the pandemic and the fact that GDP fell by 8 per cent last year.

Currently, the minimum salary in the private sector is set at EUR 650 per month. The 2 per cent increase, which will raise the minimum monthly salary to EUR 663, will be effective from 01 January 2022.

Hungary

Summary

A government decree has amended the legislation on teleworking, which came into force in November 2020.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Teleworking

Government Decree No. 487/2020 on the 'application of the rules on teleworking during the state of emergency' came into force on 12 November 2020 and remains in force, based on the authorisation of the government by Act 109 of 2020.

Government Decree No. 487/2020 was amended by Government Decree No. 393/2021 of 03 July 2021.

The original decree

Decree No. 487/2020 contained the following rules:

First, Article 86/A of Act 93 of 1993 on Occupational Safety and Health, which contains specific labour safety provisions on teleworking, shall not apply. This did not make a real difference, since all other provisions of the Occupational Safety and Health Act applied.

Article 86/A states:

> *"(1) The provisions of this Act shall apply to teleworking subject to the exceptions set out in this Chapter.*
>
> *(2) By way of derogation from what is contained in the third sentence of Subsection (2) of Section 2 and in Paragraph c) of Subsection (7) of Section 54, work equipment for teleworking may also be provided by the employee subject to an agreement with the employer. Use of such equipment shall be contingent upon having a preliminary inspection for occupational safety conducted in accordance with Subsections (3)-(4) of Section 21 by the employer in advance.*
>
> *(3) The workplace designated for teleworking must be approved by the employer in advance for occupational safety standards. The employee shall be authorised to make any changes for occupational safety purposes upon the employer's prior consent.*
>
> *(4) Within the meaning of the Labour Code, an inspection conducted by the employer or his or her representative shall be considered justified if performed for the implementation of Paragraph b) of Subsection (7) of Section 54.*
>
> *(5) Apart from the inspection referred to in Subsection (4), the employer or his or her representative, in particular the persons referred to in Sections 8, 57 and 58, shall be entitled to gain admission to the property where the work is being performed to carry out duties, and the procedure related to occupational safety, such as the commissioning of equipment, assessment of risks, safety inspection and the investigation of accidents.*
>
> *(6) The employer shall inform the employee concerning the facilities available for consultation and the representation of interests with respect to safety at work as regulated under Chapter VI, and the names of persons placed in charge of these duties and information as to where they can be reached. The labour safety representative may enter the designated workplace upon the employee's consent.*

(7) The occupational safety and health board shall conduct the inspection under Subsection (4) of Section 81 on work days only, between 8 a.m. and 8 p.m. The occupational safety and health administration shall notify the employer and the employee at least three working days in advance about the inspection. The employer shall obtain the employee's consent for admission to the designated workplace for this purpose prior to the commencement of the inspection."

Secondly, tax deductions have been introduced that automatically (without documents) reduce the basis of taxation by 10 per cent of the minimum wage. This will decrease the cost of employment of teleworkers.

Third, the employer and the employee may derogate from Article 196 of the Labour Code. This means that they may freely derogate from this (and only this) Article, even to the detriment of the employee. It does not introduce an important change due to the regulations stipulated in Article 196. The main difference is that the parties may agree on teleworking, change the place of work or apply partial teleworking (on certain days a week) without amending the employment contract.
Article 196 states:

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

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

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

a) of inspections conducted by the employer;

b) of any restrictions on the use of computing equipment or electronic devices; and

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

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

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

The above described changes have not meant a 'real change' in the legal environment of teleworking and has not affected the implementation of EU law.

The main amendments

- Instead of Article 86/A of Act 93 of 1993 on Occupational Safety and Health, the following rules must be applied in terms of the health and safety of teleworkers: teleworking may be performed with work equipment and tools belonging to the teleworker. In this case, the employer must check the equipment and tools being used for work, and whether they comply with the applicable health and safety standards. The employer must inform the teleworker about his/her health and safety information rights and about the health and safety representative in accordance with the Act on Health and Safety;
- The employer must inform the teleworker in writing about the health and safety rules and measures in case teleworking is performed digitally. The employer may monitor the teleworker's compliance with these standards using IT;
- In case of teleworking not performed digitally but by other means, the parties may agree on the workplace in writing. This workplace must comply with the applicable health and safety rules;

- The health and safety representative may enter the workplace with the teleworker's consent;
- The parties may derogate from the rules of Government Decree No. 487/2020;
- Instead of Article 196 of the Labour Code, the following rules must be applied:
    - In the event of teleworking, the employee performs his/her work in part or in full at a place that differs from the employer's premises;
    - The parties must agree on teleworking in the employment contract;
    - If not agreed otherwise by the parties:

      a) The employer's right to issue orders only covers the tasks performed by the employee.

      b) The employer may control and monitor the teleworker's work performance from a distance by electronic, IT, digital means.

      c) The employee performs work at the employer's premises for a maximum of one-third of his/her working days in a year.

      d) The employer must ensure the employee's right to enter his/her premises and to be in contact with other employees.

      e) If the employer controls the teleworker's work at the teleworker's workplace, the monitoring shall not cause an unproportionate burden in relation to the use of the employer's premises.

      f) The employer must provide the same information to teleworkers as to other employees;
- Article 197 of the Labour Code shall not be applied during a state of emergency.

1.1.2 Strike in essential services

A strike was planned by civil air traffic controllers in August 2021 for an unlimited period. In response, Government Decree No. 446/2021 (Official Journal No. 142) was issued, prohibiting the strike of the air traffic controllers during the state of emergency.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obramo

The scope of Act 205 of 2012 on the legal status of soldiers (hereinafter referred to as the Act) covers those working for the military as professional and contract soldiers, volunteer reserve soldiers performing actual service, candidates for military officers and candidates for military lieutenants (Article 1). The Act is known by the Hungarian abbreviation *Hjt*.

The Act covers military personnel at all levels (national, regional or local). There is no other act on this issue.

According to Article 249 (f), the Act specifically refers to Directive 2003/88/EC and fully transposes the Directive.

According to Article 95(1) of the Act, the weekly general service time (working time) is 40 hours.

Article 95 (2) of the Act regulates stand-by service. This can be requested by the employer, if

- due to the nature of the work, no work is performed during at least one-third of the employee's regular working time based on a longer period, during which the employee is at the employer's disposal; or
- in light of the characteristics of the work and of the working conditions, the work performed is significantly less strenuous and less demanding than commonly required for a regular job and the military personnel member is on stand-by, performing service at the place of service (place of work).

According to Article 95(3) of the Act, the employer may order continuous on-call service, if the military organisation requires such non-stop service, and if the service provider's scope of work is related to this military service, or if the work requires increased attention or physical efforts over two-thirds of the service time.

Stand-by service and continuous on-call service may not exceed 54 hours in case of a reference period or an average (Article 95(4)).

Guard service, aside from providing a rest period, refers to service with a weapon at a place designated by the superior to guard and protect buildings and other objects or persons (Article 105(1)).

On-call service, aside from providing a rest period, refers to service at a place designated by the superior to provide certain service (Article 105(2)).

According to Article 105(3), the military personnel member implements stand-by service, if he/she must be ready for work for unplanned tasks, and must work in case of receiving such an order. Stand-by may mean:

- stand-by outside of the army base, if the time of stand-by is defined by the employer, and the place is chosen by the soldier with regard to the time it takes to reach the army base;
- stand-by at the army base, if the time and place of stand-by is defined by the employer;
- stand-by for tasks in connection with armed or international obligations, if it involves preparation for or performance of armed or international tasks for a period defined in the order, with a rest period.

In case of guard, on-call and stand-by service, the worker is entitled to a rest period of at least equal the amount of the period of service (Article 107(2)).

The detailed Hungarian provisions comply with the judgment.

4 Other Relevant Information

Nothing to report.

Iceland

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obramo

As Iceland does not have a military, the ruling has no implications on Icelandic labour law.

4 Other Relevant Information

Nothing to report.

Ireland

Summary

The 2001 Code of Practice on Determining Employment Status, updated in 2007, has been revised by an interdepartmental working group comprising the Department of Social Protection, the Revenue Commissioners and the Workplace Relations Commission. It takes personal services companies and workers in the gig economy into consideration.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obrambo

This decision, which confirms that Directive 2003/88/EC applies to the organisation of working time of military personnel has considerable implications for Ireland, given that section 3(1) of the Organisation of Working Time Act 1997—which implements the Directive—provides that the Act shall not apply to a member of the Defence Forces.

4 Other Relevant Information

4.1 Employment status

A revised Code of Practice on Determining Employment Status has been published. The Code of Practice was first published in 2001 and updated in 2007. In light of the emergence since then of new forms of work, the Code has been further revised by an interdepartmental working group comprising the Department of Social Protection, the Revenue Commissioners and the Workplace Relations Commission. Its purpose is 'to provide a clear understanding of employment status, taking into account current labour market practices and developments in legislation and case law'. The Code addresses the use of 'intermediary arrangements', such as a personal services company, and workers in the digital/gig economy.

4.2 Recipients of the pandemic unemployment payment

As of 28 July 2021, 192 296 persons (45.4 per cent of who are female) were in receipt of the Pandemic Unemployment Payment (PUP). The sectors with the highest number of recipients are the accommodation and food services (44 678), wholesale and retail trade (29 440) and administration and support services (21,457). The number in construction has dropped from 42 333, at the end of April, to 16 919. In terms of the age profile of PUP recipients, 20.4 per cent were under 25. Additionally, 1 642 persons were in receipt of the COVID-19 Enhanced Illness Benefit. In total to date, 160 713 persons have been medically certified for receipt of this benefit, 53.5 per cent of who were female.

Italy

Summary

(I) New restrictions have been imposed on access to various activities for persons who cannot present a 'green pass' confirming vaccination against COVID-19 or who are not in possession of a recent negative test.

(II) The extraordinary short-time working scheme related to the COVID-19 crisis has been refinanced for another 13 weeks until 31 December 2021. The general short-time working scheme is applicable to employers in specific sectors, where the prohibition of dismissal is maintained.

(III) The Court of Cassation has affirmed that the transfer of a functionally autonomous branch of an undertaking from one undertaking to another is considered a transfer of undertaking.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 State of emergency

The Decree Law of 23 July 2021 No. 105 extends the state of emergency until 31 December 2021 and requires a 'green pass' to access various activities (restaurants indoor, shows, museums, gyms and indoor pools, arcades, amusement parks, spas, festivals and fairs, conferences, etc.).

The green pass is obtained after receiving the vaccine, after recovering from COVID-19 or following a negative test result, but in the latter case, this is only valid for 48 hours.

1.1.2 Relief measures

The Decree Law of 30 June 2021 No. 99 introduces new regulations on short-time working allowance (*Cassa Integrazione Guadagni)* and dismissals.

First, the short-time working scheme has been extended by another 6 months until 31 December 2021 for companies in crisis in the aviation sector (Art. 4(1)).

Secondly, employers in the textile, clothing, leather and fur sectors, who have suspended or reduced their workforce, can apply for the ordinary short-time working scheme for 17 weeks between 01 July and 31 October 2021. In this case, they do not pay the additional contribution (Art. 4(2)(4)(5)). These employers can neither initiate collective dismissal procedures nor dismiss employees for economic reasons until 31 October 2021.

Finally, another period of extraordinary short-time working scheme related to the COVID-19 crisis is established for 13 weeks until 31 December 2021. Companies that use this measure can neither initiate collective dismissal procedures nor dismiss employees for economic reasons during the entire period the short-time working scheme applies.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Transfer of undertaking

Corte di Cassazione, No. 18948, 5 July 2021

In the present case, the Supreme Court affirmed that the transfer of a functionally autonomous branch of an undertaking from one undertaking to another shall be considered a transfer of undertaking.

The functional autonomy of the business unit to be sold must already exist when it is spun off from the transferor. This autonomy consists in the ability of the business unit to provide productive services using its own means, without the need for the transferor or others to make changes.

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obrambo

The Legislative Decree of 8 April 2003, No. 66, implementing Directives 93/104/CE and 2000/34/CE, does not apply to the military 'in the presence of particular needs inherent to the service performed or reasons connected to public order and security, defence and civil protection services' (Art. 2).

The Act of 8 August 1990, No. 231, Art. 10, regulates the military's working time. It provides that the military must be 'fully available to provide services' and that working time under 'normal conditions' shall be 36 hours/week, plus another 2 hours. Any hours that exceed this time is paid as overtime or, in some specific cases, other forms of compensation (Legislative Decree 15 March 2010, No. 66, 'Code of the Military Order').

The Italian military system does not provide for lower wages for periods of stand-by or for military personnel who are 'on duty' in the barracks.

The CJEU's decisions thus has no implications for Italian legislation.

4 Other Relevant Information

Nothing to report.

Latvia

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obrambo

Latvian law does not, in principle, envisage the application of the working time regulations provided in Directive 2003/88/EC to persons in the military service.

First, Article 12(2) of the Military Service Law excludes legal regulations on working time and rest periods provided by the Labour Law, which is the main legal document transposing Directive 2003/88/EC. The Labour Law is only applicable as long as it regulates leaves not taken into account for the purposes of entitlement to paid annual leave. Second, Article 12(3) of the Military Service Law provides that service time and rest periods are regulated by the Military Service Regulation.

> *"Article 12. The soldier's right to work*
> *(1) A soldier is a defender of the state and implements his/her rights to work by performing military service.*
> *(2) The norms regulating the employment relationship is not applicable to a soldier, with the exception of norms regulating the prohibition of discrimination, the periods of leave not taken into account for the purposes of entitlement to paid annual leave, the rights of pregnant workers, breast-feeding workers, women during a period of up to 1 year after giving birth, norms regulating pregnancy and maternity leave, paternity leave, adoption leave and leave for a person who factually takes care of a child and parental leave as far as such legal regulation does not contradict with the present law and State and Municipal Institutions' Remuneration Law;*
> *(3) The length of a day of military service of a soldier depends on service needs. A detailed division between the time for the performance of duties and rest periods and applicable conditions are provided in the Military Service Regulation and orders are issued on the basis of this regulation. Annual leave is decided by the commander of a unit."*

This regulation is an internal legal act of the Ministry of Defence.

The Military Service Regulation (*Militārā dienesta iekārtas reglaments*, available here) presently in force addresses rest periods to a minimum extent:

- A soldier who has to drive a vehicle is entitled to 6 hours of continuous rest following a 24-hour service (Point 26);
- In case a soldier is ordered to carry out a 24-hour mission, he/she is entitled to at least 12 hours of a continuous break before such a mission (Point 220).

It follows that all other service times and rest periods are regulated by separate orders of the commanders of a unit (Article 9 the Military Service Law).

Consequently, Latvian law does not comply with the interpretation provided by the CJEU's decision.

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 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obrambo

The present CJEU case, which concerned issues related to the protection of the safety and health of workers, the organisation of working time, the concept of 'working time' and the stand-by period, focusses primarily on military activities and on members of the armed forces.

The Liechtenstein Armed Forces were abolished in 1868. Since then, the Principality no longer has an army. Therefore, this judgment has no implications for Liechtenstein.

4 Other Relevant Information

Nothing to report.

Lithuania

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obramo

At first glance, Lithuanian law seems to be in line with the judgment of the CJEU. The professional military service (*profesinė karo tarnyba*) is regulated in the Law on the Organisation of the National Defence System and Military Service (*Lietuvos Respublikos krašto apsaugos sistemos organizavimo ir karo tarnybos įstatymas*, see State Gazette, 1998, No. 49-1325). The special act, which deals with working time aspects of the employee is the Statute of the Military Service, approved by the Minister of Defence (*Karo tarnybos statutas*, see State Gazette, 2008, No. 30-1057). According to Article 50 of the Statute of Military Service, a soldier's daily and total weekly service is not limited and depends on the needs of the service, but commanders (superiors) must provide the soldier with daily and weekly rest to ensure recovery in terms of his/her health and working capacity: the daily uninterrupted rest period may not (normally) be less than 11 consecutive hours. Uninterrupted weekly rest periods must (normally) last at least 24 hours. Article 52 of the Statute stipulates that the daily service time is normally 40 hours per week, and the daily service time is usually 8 hours per day.

By contrast, those who perform administrative, maintenance, repair and health services are performed by public servants or employees. Both categories fall under the legislation that transposes Directive 2003/88.

4 Other Relevant Information

Nothing to report.

Luxembourg

Summary

(I) Extraordinary family-related leave has been extended until 14 September 2021.

(II) A draft law has been presented to amend the regulation of short-time work, introducing temporary and permanent modifications.

(III) A draft law aims to regulate teleworking for areas already regulated by the social partners' agreement declared to be of general applicability.

(IV) A draft law has been presented with the aim of implementing a legal framework on moral harassment (mobbing) at work.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Family-related leave

The Law of 15 July 2021 concerning various pandemic-related decisions has been published. The derogatory rules on family leave (*congé pour raisons familiale*s), which should have ended on 14 July 2021 and which are detailed in previous Flash Reports, have been extended until 14 September 2021.

1.1.2 Short-time work scheme

On 09 July 2021, a new draft law was presented to amend the regulation of short-time work, introducing temporary and permanent modifications.

In the context of the health crisis, certain derogatory measures had been introduced for short-time work schemes (*chômage partiel*), in particular exceptions to the maximum number of eligible working hours. The new bill is based on the fact that some companies are still in need of support due to the pandemic, while others have no option but to conduct an in-depth restructuring as a direct or indirect consequence of the pandemic.

As a temporary measure for the year 2021, the number of eligible working hours per year is 1 714 hours instead of the standard 1 022 hours, but on condition that a job retention plan (*plan de maintien dans l'emploi)* accompanying the fundamental restructuring (*restructuration fondamentale)*, has been put in place. The bill does not clearly define what is meant by 'fundamental restructuring'; it is intended to exclude mere internal reorganisation projects.

As a non-temporary change to the Labour Code, the limit will remain at 1 714 hours under the same condition, namely that a job retention plan accompanying the fundamental restructuring has been put in place, but with the additional condition that this plan must result from an agreement between the social partners, ratified in the framework of a tripartite sectoral meeting with the government, and duly approved. These tripartite agreements have so far been more of a practical tool than a clearly defined legal instrument.

The draft will also specify that employees who have received a notice of redundancy cannot benefit from this measure; this exception is explained by the fact that partial unemployment is aimed at employment retention.

It also supplements the mandatory content of job retention plans by requiring a section that provides a detailed projection of the company's future development with a view to guaranteeing its sustainability in the short-, medium- and long term, particularly in relation to investments to be made for the company's future development. The plan can only be approved if it contains a detailed timetable and if the social partners set up a

monitoring committee. It must also include a detailed and quantified training programme and, in case of voluntary departures, individual external support for employees.

Given that an approved plan opens the door to numerous public assistance schemes, the question is the seriousness of the project, and requiring the employer to take initiative.

1.2 Other legislative measures

1.2.1 Teleworking

On 23 July 2021, a new draft law was presented to regulate teleworking.

The social partners signed a new agreement on teleworking in October 2020 (available here; see October 2020 Flash Report), which was declared to be of general applicability in Luxembourg in January 2021 (see January 2021 Flash Report).

In clause 14, the social partners requested the legislator to make certain changes, namely:

1) To include the delegates' consultative competences (L. 414-3 (1) Labour Code) and co-decision competences (L. 414-9) in the Labour Code.
2) To adopt the provisions of the Labour Code on safety and health (in particular, work in front of a screen) and occupational health services for this form of work, as well as employee delegates and a safety delegate.

In line with the request under 1), the present bill introduces the following clarifications:

- Article L. 414-3 will specify that (in companies with a staff delegation, i.e. with 15 employees and up), the employer is required to inform and consult the employee delegation on the introduction or modification of a specific teleworking arrangement at company level;
- Article L. 414-9 will specify that (in companies with 150 employees or more), the introduction or modification of a specific teleworking arrangement is a matter of co-decision, i.e. the employee delegation and the employer will have to reach an agreement.

From a legal perspective, this bill will hardly introduce any changes. These competences are already mentioned in the Convention, which is binding. The only effect of this future law is that it will no longer be in the hands of the social partners, who will not be able to reverse their decision.

The much more complex demand sub 2), namely safety and health rules for teleworkers, is not addressed by the bill, and the grounds for the law do not even mention this request by of the social partners.

1.2.2 Moral harassment

On 23 July 2021, a new draft law was presented to regulate moral harassment.

Moral harassment was not regulated in Luxemburg for quite some time. Case law refused to consider it a problem of health and safety at work and developed its case law around the principle of the performance of contracts in good faith (Article 1134 of the Civil Code).

A detailed legal foundation only existed for sexual harassment and, by virtue of European directives, for discriminatory harassment, although the latter did not play a practical role.

In 2009, based on the European Framework Agreement (available here), the Luxembourg social partners signed an agreement that was declared to be of general applicability (available here). This agreement has not, however, been widely reflected in case law and many voices continue to demand a more detailed legal framework.

In this context, the Minister of Labour drafted a bill on moral harassment in the workplace. The parliamentary document points out that Luxembourg is second only to France in terms of the percentage of employees who claim to be victims of harassment.

Many measures are modelled on the rules relating to sexual harassment, but some differences exist between the two regimes.

The bill includes new provisions on mobbing and supplements the title on equal treatment between men and women. This classification may be open to discussion; however, it cements the fact that Luxembourg does not consider mobbing to be primarily an occupational health issue.

The scheme will not only apply to employees, but also to apprentices, trainees and special temporary contracts that may be concluded with pupils and students.

The bill envisages a definition of mobbing as follows:

> *"Any behaviour or act, as well as any conduct, which by its repetition or systematisation, undermines the dignity or the emotional and physical integrity of a person by creating an intimidating, hostile, degrading, humiliating environment, shall constitute moral harassment in the context of employment relationships within the meaning of this chapter, as well as repeated conduct with the purpose or effect of deteriorating working conditions, likely to infringe the rights and dignity of the employee, to alter his or her physical or mental health or to compromise his or her professional future.*
>
> *Within the meaning of the preceding paragraph, business trips, professional training, communications related to or resulting from work by any means whatsoever and even outside normal working hours are an integral part of the performance of work".*

If the first paragraph is more classical, the second one seems to be a Luxembourg innovation.

The draft introduces the obligation to refrain from any harassment, as well as the employer's duty to ensure that any moral harassment of which he/she becomes aware ceases immediately. Under no circumstances may measures be taken to the detriment of the mobbing victim.

The employer is also under the obligation to prevent harassment after informing and consulting the staff delegation (*delegation du personnel*), or, in smaller companies, all employees.

If an incident of harassment occurs, the employer must carry out an internal assessment and, if necessary, adapt the company's prevention measures.

The procedure that is put in place when the employer fails to take adequate measures to end the harassment is more innovative. The employee (or, with his or her agreement, the staff delegation) can refer the matter to the Labour and Mines Inspectorate (*Inspection du Travail et des Mines)*. The Inspectorate will investigate the case, conduct the necessary hearings and draw up a report containing, if necessary, recommendations and proposals for measures to put an end to the acts of moral harassment. At the latest within 45 days of receiving the file, the Inspectorate will transmit it to the employer and order him or her to take the necessary measures to end the acts of harassment within a certain period. If the employer does not comply with the Inspectorate's recommendation, he or she may be subject to an administrative fine.

As is the case with sexual harassment, the draft provides for protection against retaliation for victims and witnesses, as well as a procedure for the annulment of a

dismissal that is pronounced to come as retaliation. The employee-victim has the right to resign with immediate effect.

Finally, the draft defines the role and involvement of the staff delegation.

There are no plans at present to withdraw the 2009 social partner agreement. It would therefore remain in place alongside the future legislative text. This situation is likely to give rise to a number of inconsistencies and uncertainties regarding the legal regime, if only because of the parallel existence of three definitions of harassment (discriminatory harassment (Art. L. 241-1(2) of the Labour Code), the definition in the Convention and the future legal definition).

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obrambo

Labour law covering the Police and Army was not precisely regulated for quite some time and was based on unwritten practice. In 2019, agreements were signed, including one for the Army (link).

The preamble to the agreement clearly demonstrates the authorities' concern to comply with European directives, interpretative communication and case law.

The maximum daily working time in the Army is 10 hours, in principle, including overtime. However, the maximum daily working hours may be exceeded in certain listed cases, including 'military guard duty' (*garde militaire)*, without exceeding a maximum of 12 hours. The Convention justifies this exception on the grounds that the Army must provide continuous guard service 7 days a week, 24 hours a day. This maximum daily working time may only be exceeded a maximum of four times in a four-month reference period.

A 12-hour military guard duty performed on a working day will be taken into account at the rate of 12 hours, while a 12-hour military guard duty performed on a non-working day or public holiday will be taken into account at a rate of 14 hours.

The Court's first answer concerns the application of Directive 2003/88/EC as a whole. In this sense, the Luxembourg text covers all military guards. Most of them will not fall under the restrictive conditions under which, according to the Court, the Directive is not applicable. In most cases, a staff rotation system is possible, events may not be that important and there is no risk of an inevitable detriment to the proper performance of actual military operations.

The question, therefore, arises whether Luxembourg's regime is in line with the Directive in authorising, once a month on average, a military guard of up to 12 hours.

According to the preamble to the agreement, the social partners justified this exception by referring to Article 17(3) of the Directive, which allows for exceptions in case of security and surveillance activities requiring continuous presence to protect property and persons, and in case of activities that involve the need for continuity of service or production.

The Court did not explicitly take a position on whether these derogations apply to military guards (i.e. 'a security activity performed by a member of military personnel'). However, in paras. 86 and 87 of its judgment, it refers to these derogations. Therefore,

there are no obvious problems of non-conformity of Luxembourg's working time rules for military guards.

The second answer provided by the Court seems to be of no relevance for Luxembourg as it only deals with remuneration.

4 Other Relevant Information

Nothing to report.

Malta

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obramo

This issue is regulated by a collective agreement which was published in late 2020. The collective agreement is not yet publicly available and hence it is difficult to understand how the decision in question might impinge on the same.

Furthermore, the Organisation of Working Time Regulations, 2004 state that:

> "*These regulations shall be applicable without prejudice to the introduction and implementation of provisions in collective agreements or any other agreement entered into between employers and employees, which are more favourable to the protection of the safety and health of workers.*" (Regulation 3 (4))

In such a case, it is reasonable to assume that the collective agreement would include more favourable provisions and hence, those would prevail.

4 Other Relevant Information

Nothing to report.

Netherlands

Summary

(I) The fourth Temporary Emergency Measure extends the possibility for employers to request a subsidy for wage costs from July to September 2021. It is expected that these measures will cease as of the fourth quarter of 2021.

(II) A Dutch Court of Appeal ruled on the concept of the 'country where the work is habitually carried out' *ex* Art. 8 of the Regulation (EC) 593/2008 in an international transport case involving truckdrivers hired by a Hungarian company that was closely affiliated with a Dutch transport company and carried out transport services from the Netherlands. The Court determined that the Netherlands should be considered the country where the work is habitually being carried out.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Relief measures

On 23 July 2021, the fourth Temporary Emergency Bridging Measure to preserve employment (NOW-4) was published (Stcrt. 2021, 36246). Employers could apply as of 26 July 2021 and request a subsidy for the wage costs of July-September 2021.

In its letter of 29 June 2021 (published on 08 July 2021), the government announced its intention to end the emergency package following this fourth Temporary Emergency Bridging Measure since it can be expected that there will be no further restrictions and measures in the fourth quarter.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Posting of workers

Court of appeal Arnhem-Leeuwarden, ECLI:NL:GHARL:2021:7206, 27 July 2021

The Court of Appeal issued a decision in a long-lasting dispute between a Dutch transport company (Van den Bosch Transport) and several Hungarian truckdrivers. The Dutch trade union FNV was also engaged in the proceedings against this transport company as well as in parallel proceedings on a prejudicial question that was answered by the CJEU (CJEU case C—815/18, *Federatie Nederlandse Vakbeweging*) regarding the applicability of the Posted Workers Directive.

Following a decision of the Supreme Court of 23 November 2018, ECLI:NL:HR:2018:2165, the Court of Appeal ruled on the question whether Dutch or Hungarian labour law (and therefore, Dutch or Hungarian wages) applied to the truckdrivers. The truckdrivers were hired by a Hungarian company that was closely affiliated with the Dutch transport company and carried out transport services from the Netherlands. The main question was whether the Netherlands should be considered the country in which the work is habitually being performed as stipulated in Art. 8 of Regulation (EC) 593/2008. The Court answered that question affirmatively, taking into account the following circumstances:

- the transport services that were performed in Western Europe almost always originated and ended in the Netherlands;

- the work was organised from the Netherlands and all orders were given from the Netherlands;
- the trucks were put at the drivers' disposal in the Netherlands;
- Most of the transport services were carried out in north-western Europe, the number of kilometres driven in Hungary were negligible;
- The goods were unloaded in various places in Europe, mostly outside of the Netherlands, but never in Hungary.

Furthermore, the Court of Appeal had to rule on whether the truckdrivers' employment contracts were more closely connected with Hungary. The answer to that question was negative. Although the truckdrivers paid taxes and premiums in Hungary, the Court of Appeal did not find this to be decisive because that circumstance was only a consequence of the drivers living in Hungary.

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obramo

This ruling does not seem to have any implications for Dutch regulations. Directive 2003/88 has been transposed into the Dutch Working Time Act (WTA) and subordinate legislation. This legislation is applicable to the Armed Forces. The WTA contains three provisions that stipulate derogations for defence personnel (amongst others).

Article 2:2 WTA states that the Act is not applicable to work that is performed in connection with a disaster or crisis. This seems to correspond to the exception accepted by the CJEU in paras. 73/74:

> "*where it appears, in the light of all the relevant circumstances, that that activity is carried out in the context of exceptional events, the gravity and scale of which require the adoption of measures indispensable for the protection of the life, health and safety of the community at large, measures whose proper implementation would be jeopardised if all the rules laid down in that directive had to be observed*."

Furthermore, Art. 2:4 WTA stipulates that the Act is applicable to defence personnel unless there are extraordinary circumstances or war (including other military operations, according to the parliamentary history of this article), the Act would hamper the efficient performance of statutory duties, or in other circumstances to be assigned by the Minister of Defence. The Act (with the exception of the provisions protecting pregnant women and birth) is also not applicable in case of travelling or training. This corresponds to the exception that the CJEU describes in paras. 77 and 80: "*where that activity takes place in the course of initial or operational training or an actual military operation*". Art. 2:4 WTA also covers situations where the application of the Directive "*to such an activity, by requiring the authorities concerned to set up a rotation system or a system for planning working time, would inevitably be detrimental to the proper performance of actual military operations.*"

Article 2:4 WTA also stipulates that the provisions of the Working Time Act are not applicable if their application hamper the statutory tasks. This is a broader exception than the CJEU describes in paras. 75-76 "*where it is an activity which is so particular that it is not suitable for a staff rotation system which would ensure compliance with the requirements of that directive*". However, there is no indication that this exception is used in a non-restrictive way.

Regarding the second part of the ruling on remuneration of stand-by shifts, there are no relevant implications for the Netherlands.

4 Other Relevant Information

Nothing to report.

Norway

Summary

(I) The employment and labour law measures that have been introduced to respond to the COVID-19 crisis continue to apply.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Gradual reopening of society

Following a long period of decreasing infection rates, there have been signs of an increasing trend in late July. The fourth and final step of the government's plan for a gradual reopening of society was initially planned in late July but has been postponed and will be reconsidered in mid-August. Consequently, there has not been any further easing of the strict national infection control regulations in July. Some municipalities and regions, i.e. Oslo, still have stricter regulations in place.

The request to refrain from traveling abroad was removed on 05 July for countries in the EEA, Schengen and the UK and other countries considered safe. There are restrictions on entry to Norway for foreign nationals, but the restrictions were further eased from 26 July (see details here). The regulations on quarantine apply upon entry into Norway for both foreign and Norwegian nationals. These regulations have been altered and differentiated for persons with a vaccination certificate (see details here).

The unemployment rate has been relatively stable since October 2020, but rose slightly from December to March. Since then, the employment rate has started to decline. The decline was significant both in May and June. At the beginning of July, there were 163 300 unemployed people, amounting to 5.8 per cent of the workforce (see the statistics here).

The employment and labour law measures introduced in 2020 to mitigate the effects of the COVID-19 crisis have been described in detail in previous Flash Reports.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obrambo

Directive 2003/88 has been transposed in Chapter 10 of the Norwegian Working Environment Act (WEA). Hired military personnel in the Armed Forces are considered employees according to Norwegian law, and the activities of the Armed Forces are generally covered by the WEA. Military personnel are thus not generally excluded from the scope of regulations on working time. The WEA's Chapter 10 provides for several derogation clauses, most importantly section 10-12 (4), which allows certain trade unions to conclude collective agreements that derogate from most provisions in Chapter

10. This derogation clause is considered to be in line with the derogation clauses of the Directive.

There is also a specific derogation clause for the Armed Forces and activities in connection with the Armed Forces' exercise activities, in regulations pursuant to the WEA, cf. FOR-2005-12-16-1567 section 3. Section 3 allows the Ministry of Defence and the relevant trade unions to derogate from most working time regulations in Chapter 10 by collective agreement. The social partners may only agree on derogations that are "necessary to ensure an appropriate and sound implementation of defence-specific activities". The derogation clause does not include the fundamental principle in WEA section 10-2 (1) that working time arrangements may not expose workers to adverse physical or mental strain, and must allow workers to observe safety considerations.

Due to the necessity requirement, the derogation clause does not seem to be in clear conflict with the guidance provided by the Court on when security activities carried out by a military personnel member are excluded from the scope of Directive 2003/88. On the other hand, the Court's guidance is more detailed and may require a stricter interpretation than the wording implied by the clause.

Therefore, the main implication of the decision seems to be that the Court's guidance on the scope of the Directive must be carefully considered when interpreting the clause and determining the freedom of collective bargaining: regulations in collective agreements for military personnel that derogate from the provisions on working time in the WEA must be restricted to the activities of military personnel who, according to the guidance in the decision, fall outside the scope of the Directive or have a basis in provisions pursuant to the Directive's derogation clauses.

Regarding the Court's reasoning on the second question, it seems that there are no clear implications for Norwegian law. Time spent on stand-by duty, where the worker is required to stay at the workplace, is considered to be working time according to the provisions in WEA Chapter 10, which implements Directive 2003/88, see WEA section 10-4 (2). It is already well established that the Directive does not preclude a different (lower) remuneration for different categories of working time, see, e.g. Supreme Court judgment HR-2018-1036-A (para 76).

4 Other Relevant Information

Nothing to report.

Poland

Summary

(I) The amendments to the Law on Work at Sea were enacted by the lower chamber of Parliament to implement the requirements of the ILO Maritime Labour Convention.

(II) The Constitutional Court dismissed a question of constitutional legitimacy of the Law on Limiting Trade on Sundays, Public Holidays and Some Other Days. Subsequently, a draft law amending this law was submitted by a group of deputies.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Seafarers

On 23 July, the amendments to the Law of 05 August 2015 on Work at Sea were enacted by the Sejm (lower chamber of Parliament). The primary aim of the new regulations is to implement the provisions of the ILO Maritime Labour Convention, as amended by the Special Tripartite Commission on 27 April 2018. The new Law intends to safeguard the rights of seafarers if they are held captive on or off the ship as a result of piracy or armed robbery against the ship, and to modify some regulations of Polish law (inter alia, the provisions on working time of seafarers).

More information on the legislative process is available here.

The specific amendments to the Law on Work at Sea are as follows:

- The new Art. 31 item 1a: if a seafarer is held captive on or off the ship as a result of piracy or armed robbery against the ship, the maritime employment contract shall be extended until the arrival of the ship to the nearest harbour that makes safe repatriation possible, irrespective of the fact whether the contract has been terminated or has expired;
- The amended Art. 31 item 2: if the seafarer does not return to his or her home country aboard the ship, the maritime employment contract is extended until the seafarer's arrival to the repatriation point indicated in the maritime employment contract;
- The new Art. 35a: the remuneration of a seafarer who is held captive on or off the ship as a result of piracy or armed robbery against the ship should be paid until his or her release and arrival to the point of repatriation indicated in the maritime employment contract. In case of the seafarer's death, remuneration is paid until the date of his or her death;
- The amended Art. 44 item 1: the working time on the ship shall not exceed 8 hours within a 24-hour period and an average five-day work week in the applicable reference period to not exceed one month (previously, the applicable reference period amounted to six months);
- The new Art. 58 item 3: if the seafarer is held captive on or off the ship as a result of piracy or armed robbery against the ship, he or she is entitled to free-of-charge repatriation, irrespective of the fact when the abovementioned events occurred.

The amendments to the Law on Work at Sea provide continuity of maritime employment contracts, irrespective of the duration for which the contract was concluded, the continuity of the payment of wages, and extend the right to free-of-charge repatriation. They correctly implement the requirements of the Maritime Labour Convention.

As a next step, the amendment will be subject to a legislative process in the Senate and shall be signed by the President. It can be expected that these steps will be undertaken soon, and that the new regulations will take effect in the near future.

2 Court Rulings

2.1 Limitations to trade on Sundays, public holidays and some other days

Constitutional Court, K 10/18, 27 July 2021

On 27 July, the Constitutional Court delivered a ruling (case K 10/18) on the constitutionality of the Law of 10 January 2018 on limiting trade on Sundays, public holidays and some other days (consolidated text: Journal of Laws 2021, item 936).

The abovementioned Law prohibits trade activities on Sundays. It took effect on 01 March 2018, and the general prohibition to carry out trade activities on Sundays took effect on 01 January 2020. However, there are numerous exceptions to the ban (see January 2018 Flash Report).

A claim was lodged by the employers' organisation 'Lewiatan' in May 2018. The plaintiff claims that the new regulations have created a group of subjects that are not covered by the ban. Consequently, there is an unjustified differentiation between various employee groups. Some constitutional principles have been violated, inter alia, the protection of work, the freedom of work, equality and proportionality. The provisions of the Law are unclear and have caused serious uncertainty. It is very difficult to apply and to enforce the Law. Moreover, *vacatio legis* was very short and gave employers no possibility to adjust to the new circumstances (see May 2018 Flash Report).

The Constitutional Court rejected the employers' organisation's claims. Therefore, the statutory prohibition of trade activities on Sundays thus remains in force. The Court was of the opinion that the definitions on the limitations are specific enough. It also ruled that a period of *vacatio legis* of 23 days was sufficient to give entrepreneurs time to adapt to new legal regulations. The Court stated that the employers' organisation did not have *locus standi* to challenge other regulations of the Law, and did not decide on the merits (especially on the scope of exceptions to ban on trade activities on Sundays). It should be emphasised that two out of five judges disagreed with the ruling and presented dissenting opinions.

Information on the judgment is available here and here.

Further discussions on the Sunday ban on trade activities can be expected in the near future (see, e.g. the draft law presented two days after the ruling, analysed below, Section 4).

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obramo

In Poland, the legal status of members of the Armed Forces is regulated in the Law of 11 September 2003 on the military service of professional soldiers (*Ustawa o służbie wojskowej żołnierzy zawodowych*, consolidated text: Journal of Laws 2021, item 1131 available here).

Article 60 of the Law provides that the length of service is determined by the tasks to be executed by the professional soldiers. The tasks are determined by the commanding officers, though it should be possible to execute these in 40 hours per week. Article 71 of the Law regulates the remuneration (and its components) of professional soldiers.

The details that are of relevance for the present analysis are regulated by ordinances of the Minister of National Defence. The first one is the Ordinance of the Minister of National Defence of 26 June 2008 on the service time of professional soldiers (*Rozporządzenie Ministra Obrony Narodowej w sprawie czasu służby żołnierzy zawodowych*, consolidated text Journal of Laws 2019, item 1044, available here).

Paragraph 2 of the Ordinance introduces stand-by service (*służba dyżurna*) that may cover, inter alia, guard duty at the barracks, which may last anywhere between 12 and 24 hours. Paragraph 4 provides for stand-by service that does not exceed eight hours and should be included in the period of service.

The second ordinance is the Ordinance of the Minister of National Defence of 6 April 2021 on the payment of additional remuneration for professional soldiers (*Rozporządzenie Ministra Obrony Narodowej w sprawie wypłacania żołnierzom zawodowym dodatkowego wynagrodzenia*), Journal of Laws 2021, item 695, available here.

The Ordinance covers specific situations that give soldiers the right to additional remuneration. Paragraph 8 provides, inter alia, that for each hour of stand-by service, the soldier is entitled to an additional allowance of PLN 50 (around EUR 12) per hour.

It thus seems that any period the soldier would be required to remain at the barracks and be able to provide services immediately would be covered by the concept of working time in accordance with Directive 2003/88. Additional provisions on remuneration for stand-by periods also exist. Since Directive 2003/88 does not apply to remuneration and allows for differentiated treatment of periods of work or stand-by duty (especially paragraphs 96-98 of case C-742/19), there is no need to amend the national regulations.

4 Other Relevant Information

4.1 Limitations on trade on Sundays, public holidays and some other days

On 29 July, a group of deputies from the ruling party 'Law and Justice' submitted a draft law to Parliament amending the Law of 10 January 2018 on Limiting Trade on Sundays, Public Holidays and Some Other Days, in force since 01 January 2020.

The draft law proposes two amendments. The first amendment concerns the exception provided for in Article 6 item 1.7 of the Law, which stipulates, inter alia, that Sunday trade activities can be performed in post offices. In practice, several commercial networks and shops have decided to provide postal services, especially the possibility to pick up a parcel delivered by private delivery companies. This decision means that those establishments can carry out trade activities, even if the postal services offered are of a marginal and ancillary character. The draft provides that trade activities could only be carried out if the provision of postal services is the main service offered (i.e. in practice, the exceptions would be applicable only to regular post offices).

The second amendment concerns another exception provided for in Article 6 item 1.27 of the Law, which covers commercial outposts where trade activities are performed personally by an entrepreneur who is a natural person, who acts in his/her own name and on his/her own account. In practice, this regulation covers small shops where the owner personally performs trade activities on Sundays. The draft provides that such an entrepreneur would be entitled to a free-of-charge assistant such as his/her spouse,

children or parents. Those persons cannot be employed by the entrepreneur/owner of the shop.

At the moment, it is not possible to determine whether the amendment will actually be enacted. It can be expected that public debate on the ban will continue in the near future.

Portugal

Summary

(I) The government has extended the situation of calamity in the Portuguese mainland territory until 31 August 2021.

(II) From 01 August 2021, teleworking is no longer mandatory, although it continues to be recommended, and some restrictions to digital activities are ended.

(III) The extraordinary support for the progressive resumption of activity continues to apply in July and August 2021 to companies with a drop in turnover equal to or greater than 75 per cent.

(IV) The Portuguese Constitutional Court has declared the national rule, which stipulates a 180-day probation period for employees looking for their first job, unconstitutional when applied to employees who have previously entered into a fixed-term employment contract for a period equal to or above 90 days.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Situation of calamity

By Resolution of the Council of Ministers No. 91-A/2021, of 09 July, the government has extended the situation of calamity in the Portuguese mainland territory due to the COVID-19 pandemic until 25 July 2021. The situation of calamity was renewed until 08 August 2021 through Resolution of the Council of Ministers No. 96-A/2021, of 22 July.

On 30 July 2021, the Resolution of the Council of Ministers No. 101-A/2021, which extends the situation of calamity in the Portuguese mainland territory until 31 August 2021, was published. This Resolution also establishes the rules for the progressive lifting of restrictions implemented to prevent and mitigate the risk of transmission of the COVID-19 virus.

1.1.2 Teleworking

Among others, it should be highlighted that from 01 August 2021, teleworking is no longer mandatory, although it is still recommended if the functions can be carried out under this regime, and some restrictions to economic activities related to the opening hours of establishments have come to an end.

1.1.3 Relief measures

Decree Law No. 56-A/2021, of 06 July extends the extraordinary measures of support to employees and companies within the context of the COVID-19 pandemic. Specifically, the extraordinary support for the progressive resumption of activity ('*apoio extraordinário à retoma progressiva*'), introduced by Decree Law No. 46/2020, of 30 July, as subsequently amended, continues to apply to companies with a drop in turnover equal to or greater than 75 per cent, allowing them to reduce their employees' regular working hours by up to 100 per cent in July and August.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Fixed-term employment

Constitutional Court, ruling No. 318/2021, 18 May 2021

This ruling of the Constitutional Court, issued on 18 May 2021 and published in the Official Gazette on 01 July 2021, declares the provision of Article 112 (1) (b) (iii) of the Portuguese Labour Code, introduced by Law No. 93/2019, of 04 September, which sets forth a 180-day probation period for permanent employment contracts entered into with employees looking for their first job (understood as employees who have not been hired under a permanent employment contract before), to be unconstitutional when applied to employees who have previously entered into a fixed-term employment contract for a period equal to or above 90 days.

As a result of this ruling, setting a 180-day probation period in the abovementioned cases is no longer possible under Portuguese labour law (the general rule of a 90-day probation period now applies to such cases). In addition, the termination of the employment contract between the 91st and the 180th day of the probation period may be considered an unlawful dismissal in such cases.

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obrambo

The ruling issued in case C-742/19 concerns the interpretation of Article 2 of Directive 2003/88/EC of the European Parliament and of the Council of 04 November 2003, regarding certain aspects of the organisation of working time (hereinafter referred to as 'Directive 2003/88'), which defines 'working time' and 'rest period'.

Portuguese labour law, just like Directive 2003/88, only provides definitions of the concepts 'working time' and 'rest period'.

According to Article 197 (1) of the Portuguese Labour Code, approved by Law No. 7/2009, of 12 February, as subsequently amended (hereinafter referred to as 'PLC'), 'working time' is any period during which the worker carries out his/her activity or continues to perform the activity. Apart from this, the concept of 'working time' also includes situations of inactivity, which the law describes as interruptions and work breaks, listed in paragraph 2 of Article 197 of PLC.

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

Based on this legal framework, Portuguese case law has treated stand-by time either as working time or a rest period, depending on whether the worker has to remain at his/her workplace during that period and depending on the restrictions imposed on the worker during that period.

This approach was developed by the Portuguese labour courts following the guidelines of the CJEU's case law on this issue, namely CJEU cases C-303/98, *Simap* and C-151/02, *Jaeger*.

In cases on stand-by time, Portuguese case law has ruled that if the worker remains at his/her workplace (or other place determined by the employer) and is available to work, this period must be considered working time; if the worker has to only be available to work when he/she is called upon but can remain at his/her home or other place chosen

by him/her, it is understood that the worker can pursue his/her own interests, even with certain limitations, thus, such periods do not, as a rule, fall within the concept of working time (for example, see *i)* ruling of Coimbra Appeal Court of 08 November 2007, *ii)* ruling of the Supreme Court of 19 November 2008, *iii)* ruling of Lisbon Appeal Court of 17 December 2014 and *iv)* ruling of Lisbon Appeal Court of 13 January 2016).

According to Portuguese case law, except when otherwise agreed by the parties or a different rule is established in a collective agreement, the worker is only entitled to paid stand-by time when this period falls under the concept of working time. Otherwise, the employer is only required to pay the remuneration corresponding to the work effectively performed during the stand-by time (if any).

It should be noted that the military personnel are not covered by the PLC, which generally applies to the employment relationships entered into with private entities, nor by Law no. 35/2014, of 20 June, as subsequently amended, which contains the legal framework applicable to civil servants '*Lei Geral do Trabalho em Funções Públicas'*, hereinafter 'LGTFP'). Among others, this law excludes the militaries of the Armed Forces from its scope of application.

The specific legislation currently in force applicable to the militaries of the Armed Forces is the respective Statute, approved by the Decree-law no. 90/2015, of 29 May 2015, amended by the Law no. 10/2018, of 02 March 2018, which provides for a duty of permanent availability of the militaries (Article 12 (1)(c)). The militaries are entitled to an additional remuneration due to this special regime of work. However, the law does not qualify whether the stand-by time of the militaries should be considered as working time or rest period. For this reason, we consider that the Portuguese case law described above may also apply to the specific case of militaries.

Consequently, we may conclude that Portuguese case law on the classification of the stand-by time seems to be in line with the settled case law of the CJEU, in particular with the interpretation of Article 2 of Directive 2003/88 included in the ruling analysed above.

4 Other Relevant Information

Nothing to report.

Romania

Summary

(I) A new law asserts that employees who get vaccinated may benefit from a paid day off from work.

(II) A new Emergency Ordinance removes the obligation of microenterprises with less than 9 employees to specify the job description in the employment contract in writing.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Paid leave day for employees who get vaccinated against COVID-19

Law No. 221/2021 supplementing Law No. 55/2020 on measures to prevent and fight the effects of the COVID-19 pandemic (published in the Official Gazette of Romania No. 732 din 26 July 2021) provides for the right of employees who get vaccinated against COVID-19 to a day of paid leave, which is not included in the rest period, for each vaccine dose. One of the parents or the legal representative of a child up to the age of 18 years as well as persons with disabilities up to the age of 26 years also benefit from this right.

Employees who are vaccinated at work—organised by the employer—do not benefit from a day off.

For the employer's activity to not be significantly affected, employees must inform the employer about the scheduling options for the leave days they will be requesting to ensure optimal functioning of their activity.

1.2 Other legislative developments

1.2.1 New model of the employment contract

Government Emergency Ordinance No. 37/2021 amending and supplementing Law No. 53/2003 – the Labour Code (published in the Official Gazette of Romania No. 474 of 6 May 2021. see April 2021 Flash Report), removes the obligation of microenterprises with less than 9 employees to specify the details of job descriptions in writing when hiring employees.

In Romania, an employment contract cannot by drawn up with simply any wording, but must follow a model approved by an Order of the Ministry of Labour. To reflect the change in the Labour Code, the original Order was amended by Order No. 585/2021 on amending and supplementing the framework model of the individual employment contract, provided in the annex to the Order of the Minister of Labour No. 64/2003 (published in the Official Gazette of Romania No. 712 of 19 July 2021). The change consists of an elimination of the obligation for microenterprises with less than 9 employees to provide the job description in writing.

In addition, the obligation to inform the employee about the obligation to join a privately managed pension fund was included among the employer's duties. The wording of the new provision is weak, because it does not distinguish between employees who must join a private pension fund and those who are exempt from this obligation, therefore, the employer will have to provide this information even to employees for whom it is not relevant.

1.2.2 Electronic signature

Emergency Ordinance No. 36/2021 on the use of electronic signatures in the field of employment relationships and for the amendment and completion of certain normative acts (see April 2021 Flash Report) was approved with amendments by Law No. 208/2021 (published in the Official Gazette of Romania No. 720 of 22 July 2021).

The parties may use the advanced or qualified electronic signature when concluding, amending, suspending or terminating employment contracts. Other types of documents can be signed with a simple electronic signature. The control bodies have the obligation to accept, for verification and control, employment contracts and other documents in the field of employment relationships concluded in electronic format, without requesting them in printed format.

As a novelty, the law also provides that if the employer bears the expenses for the purchase of the electronic signature for its employees, these expenses are tax deductible.

In addition, the new law sanctions non-compliance with the employer's obligation to provide conditions for the employee to receive sufficient and adequate training in occupational safety and health, in particular in the form of information and work instructions on the use of display screen equipment: when hiring, when introducing new work equipment, when introducing any new working procedure.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obramo

In Romania, as a rule, the general norms on working time laid down in the Labour Code transposing Directive 2003/88 are also applicable to military personnel. Thus, Law No. 80/1995 on the status of military personnel is also applicable to military personnel in the Romanian Gendarmerie (published in the Official Gazette of Romania No. 155 of 20 July 1995) as subsequently amended, as well as Law No. 384/2006 on the status of soldiers and other professional ranks (published in the Official Gazette of Romania No. 868 of 24 October 2006) do not include provisions derogating from the Labour Code on working time.

Likewise, according to Art. 3 of Order No. 35/2019 on the conditions for establishing the salary increase for overtime performed by personnel with a special status, as well as special activities of an operative or unforeseen nature (published in the Official Gazette of Romania No. 264 of 5 April 2019.), the provision of overtime is carried out in compliance with the legal provisions in force regarding the work schedule and its organisation. Special status personnel include active duty military personnel, police and active duty soldiers and ranks within the Ministry of Internal Affairs.

As an exception, Art. 19 of Law No. 80/1995, as amended by Emergency Ordinance No. 36/2020 (published in the Official Gazette of Romania 268 of 31 March 2020) provides that during a state of emergency, siege, mobilisation and during war, the commanders/ chiefs establish the military personnel's work schedule, depending on the development of the situation and the missions to be completed. The legislation does not include derogations from the general provisions on working time when such an exceptional state has not been declared.

Consequently, it seems that the interpretation provided by CJEU in case C-742/19 *Ministrstvo za obramo* will not have an impact on the applicable Romanian legislation.

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 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obrambo

The legislation in the Slovak Republic does not conflict with the present judgment.

The legal relationships of professional soldiers in the performance of civil service are regulated in Act No. 281/2015 Coll. on civil service of professional soldiers, as amended.

According to Article 1 paragraph 2 of this Act, the Labour Code applies to legal relationships of professional soldiers in the performance of civil service, if provided by this Act. According to Article 217 (1) of this Act, only in the case of the provisions of Article 144a(1)(c), and 144a(2)(b) of the Labour Code, as explained below.

It should be noted that according to Article 12(5) of the Act, a professional soldier may, with his or her prior written consent, in preparation for the performance of the tasks of the Armed Forces or for the performance of tasks based on special regulations, limit his/her personal liberty when in training to deepen or validate his or her mental and physical resilience; the professional soldier's consent can also be withdrawn during this training.

The Act regulates the schedule of service hours (Article 103), the fulfilment of service duties beyond the specified service hours (Article 104) and stand-by time (Article 105).

Service time is the period of time during which a professional soldier is available to the service office, performs civil service and service duties arising from:

- the function to which he/she is appointed or designated; or
- a military order or order of the commander (Article 102(1)(a)-(b)).

According to Article 102(2) of the Act, the length of service time per week is 40 hours, unless this Act provides otherwise in Article 106.

According to Article 103(4) of the Act, the duration of service time over a 24-hour period may not exceed 13 hours. The provision in paragraph 4 shall not apply to professional soldiers in the performance of specific activities. Specific activities and the length of service time in the performance of specific activities shall be established by a staff regulation (Article 103(6)).

A professional soldier is required to perform service duties beyond the specified service time (hereinafter referred to as 'overtime civil service'), if service duties cannot be ensured within the specified service time due to their scope or urgency. Overtime is performed by a professional soldier on the basis of a military order, regulation or with

the consent of the commander (Article 104(1)). A professional soldier is entitled to compensatory leave for overtime civil service exceeding five hours a week. The commander is required to grant the professional soldier compensatory leave and ensure that he or she uses it no later than six months following the month in which the civil service overtime was performed (Article 104(4)).

If the professional soldier has not been granted compensatory leave pursuant to Article 104(4), the procedure specified in Article 177 shall apply (Article 104(4)). According to Article 177 of the Act, a professional soldier who was not provided compensatory leave in accordance with Article 104(4) is entitled to receive the hourly rate of his or her salary for each hour of civil service overtime.

The commander may order a professional soldier in writing to perform stand-by duty, during which he or she must be ready to perform the relevant duties. Stand-by service is ordered beyond the professional soldier's scheduled service time and during that specified time he or she shall remain.

- at the place of public service; or
- at another agreed location (Article 105(1)(a)-(b)).

Stand-by service according to paragraph 1(a) may be ordered for a maximum of 15 hours per week or for 50 hours per month and a maximum of 250 hours per calendar year (Article 105(2)). Stand-by service according to paragraph 1(b) may be ordered for a maximum of 7 consecutive days, with a maximum of 14 days in a month (Article 105(3)).

According to Article 105(4), stand-by service exceeding the scope specified in paragraphs 2 and 3 is only permissible on the basis of a written agreement with the professional soldier. When ordering stand-by service according to paragraph 1(a), a rest area must be defined (Article 105(5)).

According to Article 106(1) of the Act, the provisions of Articles 103 to 105 do not apply to a professional soldier during:

- the performance of tasks related to stand-by and combat stand-by duty, including preparation and training of stand-by and combat stand-by duty;
- military exercise;
- the carrying out of rescue work in the event of an emergency, or when there is an imminent threat that a crisis situation will arise or has already arisen, or during the provision of professional, medical, technical and other necessary assistance in situations of distress;
- the performance of tasks in the protection of the state border and guarded objects, in the protection of public order or in the fight against terrorism and organised crime according to a decision by the government;
- the elimination of the consequences of an extraordinary event arising within the competence of the Ministry of Defence of the SR, ordered by the Minister, or in the Armed Forces, ordered by the Chief of the General Staff;
- the performance of tasks of preparatory civil service;
- training before deployment and during deployment within the scope of specialised training, for certification preparation or a course outside the territory of the Slovak Republic according to Article 37(1) and (3), to perform tasks outside the territory of the Slovak Republic according to Article 77(1)(a) and (c), and 77(2) and during the performance of tasks in a place according to Article 78, which is endangered or affected by armed conflict;
- preparation for deployment to perform tasks outside the territory of the Slovak Republic according to Article 77(1)(b);

- obtaining qualification prerequisites and requirements for the performance of civil service;
- a service trip according to Article 113(4).

As regards remuneration, according to Article 156(3) of the Act, the service salary of a professional soldier is determined by taking into account his/her stand-by service.

A professional soldier who was not provided with compensatory leave according to Article 104(4) is entitled to the hourly rate of his/her salary for each hour of civil service overtime (Article 177).

The so-called 'proviant requisites' should also be mentioned. According to Article 204(1)(b)(1), proviant requisites are free meals, i.e. the temporary provision of nutrition to a professional soldier in temporary civil service, permanent civil service and short-term civil service within the scope of the daily meal allowance or part thereof, provided during the fulfilment of his/her service or stand-by duty according to Article 105 (1)(a), which lasts continuously for at least 12 hours.

If it is not possible to provide proviant requisites, a professional soldier is entitled to monetary compensation in the range of the established rate of the relevant meal allowance (Article 204(5)).

Finally, the Labour Code (Act No. 311/2001 Coll., as amended) should be mentioned. According to Article 217(1) of the Act, the provisions of Article 144a(1)(c) and 144a(2)(b) of the Labour Code shall also apply mutatis mutandis to the legal relationships of professional soldiers in the performance of civil service. According to Article 144a(1)(c) of the Labour Code, the professional soldier who performs work shall also be entitled to compensatory leave for overtime work and for the inactive part of his/her stand-by duty in the workplace. According to Article 144a (2)(b) of the LC, if compensatory leave is provided for the inactive part of stand-by time at the workplace, the performance of work shall not be considered overtime work.

4 Other Relevant Information

Nothing to report.

Slovenia

Summary

(I) The new package of measures aimed at mitigating the negative consequences of the COVID-19 crisis was enacted (the 9th Anti-Corona Package - PKP9). Among others, it introduces new amended rules on the short-time work scheme, wage compensation during quarantine, and on various COVID-19-related wage supplements, and introduces subsidies for the 2021 annual leave allowance.

(II) New exceptions to the ban on Sunday trade have been introduced.

(III) The National Assembly passed the Act amending the Transnational Provision of Services Act, which will enter into force on 04 August 2021. It aims to transpose the Revised Posted Workers Directive 2018/957/EU into national law.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

The measures introduced to contain the spread of COVID-19 virus infections have been gradually eased during the first half of July 2021, but due to the spread of the Delta variant, a further easing of measures was halted in the second half of July 2021. The most recent measures are published here, here and here.

The protocol for those who have recovered-been vaccinated-tested (RVT requirement) applies to many public places and events, such as indoor catering establishments, indoor tourist accommodation establishments (hotels, apartments, camps), at cultural events, at sports events, etc., as well as for the crossing of borders, with certain exceptions. If none of the documents required under the RVT protocol is presented, a 10-day quarantine is required when entering Slovenia, which can end after a five-day quarantine by producing a negative PCR test; it is not possible to quarantine in tourist accommodations.

Cross-border workers have been added to the list of exceptions for quarantine-free entry to Slovenia without the RVT requirement and a COVID-19 certificate; the exception covers workers who live up to ten kilometres from the national border and who return to Slovenia within 5 days. Bosnia-Herzegovina has been included on the list of countries whose PCR and rapid antigen tests for coronavirus are recognised by Slovenia.

The RVT requirement applies in many sectors of activity (for example, in the hospitality sector). The government announced that as of 23 August 2021, the RAT tests (rapid antigen tests) will no longer be free of charge, with certain exceptions (Decree on the implementation of screening programmes for the early detection of SARS-CoV-2 virus infection – *'Uredba o izvajanju presejalnih programov za zgodnje odkrivanje okužb z virusom SARS-CoV-2'*, OJ RS No. 118/2021, 19 July 2021, pp. 7380-7381).

Trade unions have emphasised that if testing is obligatory for workers, the cost must be borne by the employer as part of the health and safety at work measures and the time for testing must be considered working time (see, for example, the statement of the trade union of workers in the trade sector (*Sindikat delavcev trgovine Slovenija*), available here, and the statement of the Education, Science and Culture Trade Union of Slovenia (*SVIZ*) available here; employers also oppose and are urging the government to find a better solution (see, for example, the statement of the Craft and Small Business of Slovenia (*Obrtno-podjetniška zbornica*), available here).

The share of the population vaccinated against COVID-19 is still quite low: according to data of 27 July 2021, only 43 per cent of the population have received one dose of the COVID-19 vaccine and 38 per cent have been fully vaccinated.

1.1.1 Relief measures

The so-called Ninth Anti-Corona Package of measures (PKP9) was enacted: *the Act on Intervention Measures to Assist the Economy and Tourism Sector* (*'Zakon o interventnih ukrepih za pomoč gospodarstvu in turizmu pri omilitvi posledic epidemije COVID-19 (ZIUPGT)*, available here) and *the Healthcare Intervention Measures Act* (*'Zakon o nujnih ukrepih na področju zdravstva (ZNUPZ)'*, available here) were passed by the National Assembly on 07 July 2021, published on 13 July 2021 and entered into force on 14 July 2021.

The new package of measures focusses on specific sectors of activity (such as the tourism and convention industry, restaurants, sports and culture) and predominantly focusses on businesses (partial refund of costs for event organisers, waiver of fees for water rights for swimming pools, one-off support for certain businesses, such as ski lift operators, subsidies and similar). Among the measures relevant from the perspective of labour law are the following:

- the short-time work scheme has been extended and is now regulated *de novo* in Articles 14-26 of the ZIUPGT (for all sectors of activity, it is extended until the end of September 2021, with the possibility of the government to extend it until the end of 2021; explanations of the Ministry of Labour available here);
- subsidies for the 2021 annual leave allowance (*regres za letni dopust*) to which workers are entitled once per year (in the following sectors: tourism, hospitality and events industry, sports and culture) are regulated in the ZIUPGT, Articles 27-32;
- wage compensation for workers if they cannot work due to quarantine, childcare and similar have been extended (until the end of 2021) and regulated *de novo* in Articles 25-36 of the ZNUPZ;
- a new regulation on various wage supplements for the most exposed workers during the COVID-19 emergency has been issued (Articles 18, 41-42 of the ZNUPZ).

According to the Minister of Economy Zdravko Počivalšek, 'the situation in the economy in general is very good and businesses are expected to recover quickly'; on the other hand, the opposition criticised the new package of measures asserting that 'the government was carefree and even negligent in drawing up the measures' and that 'aid was coming much too late' (see, for example here); the Chamber of Commerce and Industry (*Gospodarska zbornica Slovenije*) commented that 'the latest stimulus package … does not meet expectations and does not sufficiently help sectors most severely affected by the COVID-19 crisis' and the Chamber of Trade Crafts and Small Business (*Obrtna zbornica Slovenije*), representing small and medium-sized enterprises (SMEs), criticised that 'the package does not address their concerns and will not help the entire economy' and warned that 'small businesses, the backbone of the Slovenian economy, need to be supported to recover as soon as possible' (see, for example here).

1.1.2 Limitations to Sunday trade

The measure in this package, which is not directly related to COVID recovery, is worth mentioning as it may have certain labour law implications. Until 31 December 2022, as an exception to the ban on Sunday trade (see October 2020 and May 2021 Flash Reports), shops at airports, in tourist information centres and museums may be open on Sundays and holidays.

1.2 Other legislative developments

1.2.1 Posting of workers

The National Assembly has passed the Act amending the Transnational Provision of Services Act ('*Zakon o spremembah in dopolnitvah Zakona o čezmejnem izvajanju storitev (ZČmIS-A*)', available here) which aims to transpose Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services into national law.

The deadline for transposition of this Directive into national law was 30 July 2020 and the European Commission has already started an infringement procedure against Slovenia (INFR (2020)0479; in June 2021, the Commission addressed a reasoned opinion to Slovenia for failing to communicate information on the transposition of the revised EU rules on the posting of workers into its national law, available here.

The ZČmIS-A will enter into force on 04 August 2021. It amends the provisions of the Transnational Provision of Services Act ('*Zakon o čezmejnem izvajanju storitev (ZČmIS*)', available here), Articles 2, 4, 12, 14, and 15 (posting of workers (temporary agency workers), the conditions for posting and registration, the duration of posting, setting of the time limit of 12 months, with an exception of 18 months under the prescribed conditions, documents, supervision, posting of self-employed persons), as well as Article 210 of the Employment Relationships Act (*'Zakon o delovnih razmerjih (ZDR-1*)', available here), which regulates the rights of posted workers.

According to the amended Article 210 of the ZDR-1, workers posted to Slovenia are entitled to the minimum level of rights (on remuneration, working time, breaks and rest periods, night work, minimum annual leave, rights of temporary agency workers, safety and health at work, special protection of workers and equal treatment) as regulated in Slovenian labour legislation and sectoral collective agreements, if this is more favourable to the worker. Exceptions to these rules concern temporary initial work not exceeding eight working days (as regards minimum annual leave and remuneration; Article 210, para. 3) and temporary work not exceeding one month in a calendar year (as regards remuneration; Article 210, para. 4), whereby these exceptions are not valid for the construction sector (Article 210, para. 5). If the actual duration of the posting exceeds 12 or 18 months in case of extension in accordance with the regulations governing cross-border provision of services, the posted worker is entitled to all rights under the Slovenian labour legislation and the applicable sectoral collective agreement, if this is more favourable to the worker (Article 210, para. 6 of the ZDR-1); however, the provisions on the conclusion and termination of an employment contract, on non-competition clauses and on the supplementary occupational pension insurance schemes do not apply (Article 210, para. 7 of the ZDR-1).

1.2.2 Working time in the Armed Forces

The Act Amending the Service in the Slovenian Armed Forces Act ('*Zakon o spremembah in dopolnitvah Zakon o službi v Slovenski vojski (ZSSloV-A)',* available here) was passed by the National Assembly on 13 July 2021. Among others, the rules on working time in the Slovenian Armed Forces were amended, introducing, *inter alia*, more flexibility and derogations as regards the organisation of working time and rest periods. Other issues are addressed by these amendments, such as training, certain aspects of remuneration, the termination of employment, etc.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obrambo

The judgment in the present case is of relevance for Slovenian law.

The request for a preliminary ruling was made by the Slovenian Supreme Court. The case concerned 'guard duty' of military personnel in peace time (uninterrupted guard duty for seven days per month). Eight hours per day were considered working time and paid at the ordinary rate and the remaining hours were considered stand-by duty for which a stand-by duty allowance in the amount of 20 per cent of the basic salary was paid.

The Slovenian First Instance Court and the Court of Appeal dismissed an action brought by an officer of the Slovenian Army, claiming that the remaining hours (during which he had been required to be present at the barracks and available to perform services, but had not performed any actual activities for the employer) should be treated as overtime and paid accordingly. Until now, there was no clear and settled case law on this issue and therefore, the clarification provided by this CJEU judgment is of relevance for the Slovenian law.

The CJEU judgment clarified in which situations security activities carried out by a military personnel member is excluded from the scope of Directive 2003/88. An important emphasis of the CJEU that will have to be taken into account by the Slovenian courts is that not all members of the Armed Forces of the Member States can be permanently excluded from the scope of Directive 2003/88, and that it is for the referring court to determine whether the security activity performed by an officer of the Slovenian Army is of such a nature as to be excluded from the scope of Directive 2003/88 or not. In this assessment, the Slovenian courts will have to take this CJEU judgment into account, according to which Directive 2003/88 does not apply to a security activity performed by a military personnel member, where that activity takes place in the course of initial or operational training or an actual military operation, whether permanently or on a temporary basis, within the borders of the relevant Member State or outside of those borders, and it also does not apply to military activity which is so particular that it is not suitable for a staff rotation system, which would ensure compliance with the requirements of Directive 2003/88, and where it appears that the military activity is being carried out in the context of exceptional events, the gravity and scale of which require the adoption of measures indispensable for the protection of the life, health and safety of the community at large, measures whose proper implementation would be jeopardised if all the rules laid down in Directive 2003/88 had to be observed, or where the application of that Directive to such an activity, by requiring the authorities concerned to set up a rotation system or a system for planning working time, would inevitably be detrimental to the proper performance of actual military operations.

It is worth mentioning that according to the CJEU, "*it is entirely possible, in the light of the documents available to the Court, that that court [that is, the referring court] may conclude that the security activity at issue in the main proceedings constitutes an actual military operation, the result of which being that it falls outside of the scope of that directive*" (para 85).

An important emphasis of the CJEU that is of relevance for Slovenian law and which the Slovenian courts will also have to take into account is that if Directive 2003/88 applies in a particular case concerning a military personnel member, a stand-by period imposed on him/her during which he/she is required to be continually present at workplace must be regarded as working time where that place of work is separate from the residence of that person (para 95).

However, an important emphasis of the CJEU is also that a stand-by period during which a military personnel member is required to remain at the barracks to which he or she is posted, but does not perform actual work there, can be remunerated differently than a stand-by period during which a person performs actual work. Directive 2003/88 does not apply to and does not regulate the remuneration of workers (para 96).

This case, together with case C-344/19 *Radiotelevizija Slovenija* (analysed in the March 2021 Flash Report) is of major relevance for Slovenian law, as Slovenian labour legislation does not define in detail the concept of 'working time' and the concept of 'stand-by duty' and therefore, the case law fulfils and details the meaning of rather general legal provisions. Therefore, the guidance provided by the CJEU case law in this respect is of particular importance for the development of Slovenian case law on this matter.

It is worth noting that the rules on working time for the Slovenian Army were amended (see above, Section 1.2).

4 Other Relevant Information

4.1 Collective bargaining

The Education, Science and Culture Trade Union of Slovenia (*'SVIZ – Sindikat vzgoje, izobraževanja, znanosti in kulture Slovenije'*, available here*)* acceded to an already concluded collective agreement for the health care and social protection sector ('Pristop h Kolektivni pogodbi za dejavnost zdravstva in socialnega varstva Slovenije, available here).

The signatories concluded Annex No. 12 to the Collective Agreement for the Radiotelevizija Slovenija Public Institution (*'Aneks št 12 h Kolektivni pogodbi javnega zavoda RTV Slovenija'*, available here,) concerning redundancies and redundancy payments.

The Interpretation of the collective agreement of the Slovenian coal mining industry ('Razlaga Kolektivne pogodbe premogovništva Slovenije') was published in the OJ RS No. 116/2021, 16 July 2021, available here, concerning severance pay upon retirement.

The new Collective Agreement for Public Utility Services (*'Kolektivna pogodba komunalnih dejavnosti')*, concluded by the social partners on 16 June 2021, was published in the Official Journal on 02 July 2021 (available here). It has been concluded for five years, after more than a year of negotiations (available here).

Annex No. 15 to the Collective Agreement for the Newspaper, Publishing and Bookselling Sector *('Aneks št. 15 k Tarifni prilogi h Kolektivni pogodbi časopisno-informativne, založniške in knjigotrške dejavnosti'*), available here) was published. The minimum rates of pay have been increased.

The Annex No.4 to the collective agreement for the metal products and foundry industry (*'Dodatek št. 4 h Kolektivni pogodbi za dejavnost kovinskih materialov in livarn Slovenije*'), concluded on 24 June 2021, was published in the OJ of 02 July 2021 (available here) setting the minimum amount of annual leave allowance at EUR 1 100.

The adjusted minimum rates of pay and certain work-related costs under the Collective Agreement for Slovenia's Trade Sector *('Kolektivna pogodba dejavnosti trgovine Slovenije')* were published in the OJ of 02 July 2021 (available here).

4.2 Active labour market measures

The rules on standards and norms for the provision of services for the labour market and on the methodology for pricing these services, issued by the Ministry of Labour on the basis of the Labour Market Regulation Act (*'Zakon o urejanju trga dela (ZUTD)'*,

available here) were amended: '*Pravilnik o spremembah in dopolnitvah Pravilnika o standardih in normativih za izvajanje storitev za trg dela in metodologiji za oblikovanje cen teh storitev*', available here. These rules concern standards and norms in the provision of services to unemployed persons, in particular long-term unemployed, career counselling, etc.

Spain

Summary

(i) The government has modified the rules on fixed-term contracts in the public administration to comply with EU law and CJEU case law. These new rules set a maximum duration of three years for interim contracts in the public administration.

(ii) Directive (EU) 2018/958 on a proportionality test prior to the adoption of a new regulation of professions has been transposed into Spanish 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 Teleworking

As reported in the September 2020 Flash Report, the government passed a Decree Law providing for new rules on teleworking.

These rules have now been incorporated into the Law 10/2021, of 09 July 2021, but without any changes or modifications. Therefore, the rights and duties of teleworkers remain the same, but are included in a different legal standard.

1.2.2 Public employment

As reported in multiple Flash Reports, fixed-term employment in the public administration has a very difficult history in Spain, and it is not a well-resolved issue. The Spanish public administration has many temporary needs, because its role is huge. There are a lot of programmes to promote employment, or to train for employment or provide services, and all of them are 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 completing 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, when the employer needs to substitute workers who have the right to keep their jobs. These contracts end when the replaced worker returns. Secondly, the employer can hire an interim worker while the selection process is being carried out for a vacancy. Labour Law specifies a maximum duration for interim contracts in this last case (three months), but it only applies to private employers. Thus, this type of interim (replacement) contract in public administration has (had) no limit of duration and can (could) last years. There was no strict obligation for the public administration to start the selection process at a particular moment, because the Supreme Court has provided for a lot of flexibility (which the CJEU expressly mentions). These replacement contracts did not include a right to severance pay when they were terminated.

Following the CJEU case C-726/19, *Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario*, decided on 3 June 2021, the Supreme Court modified its previous doctrine with the aim of adapting to CJEU case law, and the government announced a legal reform.

This legal reform has been approved by Royal Decree Law 14/2021, of 06 July 2021, and three main rules should be highlighted:

- As a general rule, replacement contracts cannot last longer than three years;
- If the replacement contract lasts longer than three years, the worker is entitled to severance pay at the end of the contract (same amount as for a dismissal on objective grounds);
- In case of a vacancy-based interim contract, public administration will have the obligation to start the selection process once the interim employee has occupied the post for three years.

These measures are intended to comply with the requirements of EU law, but appear to be more of a starting point than a definitive solution. The structure of the Spanish state is complex due to its high decentralisation. The Autonomous Communities and municipalities also have powers that must be respected. In addition, there is currently a draft bill before Parliament which contains changes to the provisions of the Royal Decree Law. Therefore, there will be new developments in the coming months.

1.2.3 Regulated professions

Royal Decree 472/2021 transposes Directive (EU) 2018/958 into Spanish Law on a proportionality test before the adoption of the new regulation on professions. This provision requires the 'competent authority' to undertake an assessment of proportionality before introducing new or before amending existing, legislative, regulatory or administrative provisions restricting access to, or the pursuit of, regulated professions. The ultimate goal is to prevent discrimination on the grounds of nationality or residence and to guarantee the freedom to choose an occupation, as well as the freedom to conduct a business.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obrambo

As a starting point, members of the Armed Forces in Spain are civil servants, hence they fall outside the scope of application of Labour Law. They fall under the rules of Administrative Law. This is relevant, because traditionally, there was no explicit transposition of the Working Time Directive for civil servants. The transposition used to be achieved by means of the Labour Law, thus being explicitly and directly applicable only to employees in the strict sense. However, the regulations on the matter for the civil service have often been inspired by Labour Law regulations, i.e. many standards that derive from the Working Time Directive may have been indirectly applied to civil servants as well.

The rules on working time for employees within the scope of Labour Law are included in the Labour Code, supplemented by other provisions contained in Royal Decree 1561/1995, of 21 September, whilst civil servants have their own regulations. Therefore, the rules on working time for members of the Armed Forces are included in specific provisions adopted on the matter.

Specifically, Article 22 of Organic Law 9/2011, 27 July, on the rights and duties of the members of the Armed Forces, states that the working time of Armed Forces members

shall generally be applicable to all staff of the public administration according to the Basic Statute of the Public Employee, except for the special rules established for the specific functions and needs of the service. These special rules on working time of the members of the Armed Forces are established in Orden DEF/1363/2016, 28 July and Orden DEF/253/2015, 09 February. Directive 2003/88 is not mentioned in any of them. The Armed Forces consist of three different components: the Army, Navy and Air Force. The rules on working time apply to all of them.

According to Article 22 of Organic Law 9/2011, 27 July, and to Article 4 of the Orden DEF/1363/2016, 28 July, 'military personnel are permanently available for service' and 'service needs prevail over the dates and duration of breaks'. Thus, all the following rules on working time can be modified for service needs. Nevertheless, this shall be done in a justified, motivated and individualised manner, paying due consideration to the reconciliation of professional, personal and family life.

The normal working time is 37.5 hours per week of effective work, on average, in an annual calculation (Article 5.1 Orden DEF/1363/2016 'The duration of the general working day will be 37 and a half hours per week of effective work, on average, in an annual computation, equivalent to one thousand six hundred and forty-two hours per year, or the working day specified in the instructions on the working time for the General State Administration and its public bodies'). The duration of the working day of those who perform jobs of a special nature will be 40 hours per week (Article 6 states that 'The duration of the working day for personnel who carry out jobs considered to be of a special nature will be 40 hours per week, without prejudice to the increase in hours that is exceptionally necessary due to the needs of the service').

Some military staff members work in early shifts and others in early and afternoon shifts (Article 5.2):

- Early shift: they have a fixed schedule from 9:00 a.m. to 2:30 p.m. (Monday to Friday). The remaining time to complete the weekly working hours can be carried out flexibly, between 7:30 a.m. and 9:00 a.m. from Monday to Friday and between 2:30 p.m. and 6:00 p.m. from Monday to Thursday, as well as between 2:30 p.m. and 3:30 p.m. on Fridays;
- Early and afternoon shifts: they have a regular schedule from 9:00 a.m. to 5:00 p.m. (Monday to Thursday), with a 30-minute lunch break (not included in the working day), and from 9:00 a.m. to 2:30 p.m. on Fridays. The remaining weekly working hours can be performed flexibly, between 7:30 a.m. and 9:00 a.m. and 5:00 p.m. and 6:00 p.m. from Monday to Thursday and between 7:30 a.m. and 9:00 a.m. and 2:30 p.m. and 3:30 p.m. on Fridays.

Therefore, problems could arise when the 'service needs' lead to additional working time (according to Article 5.3 of the same Orden, 'when the unit's operational or training needs require it, the heads of unit may temporarily vary the working hours, providing the relevant reasons'). Those 'service needs' must be justified and fair reasons must be provided, but there is no specific regulation on working time, except for additional breaks.

There are specific rules for stand-by and on-call time in Article 11.4.bis ("*In cases where military personnel perform on-call duty and are called for service outside their normal working hours, they will be entitled to a rest period, the length of which depends on the duration of the activity from the arrival to the destination until the end of the service*"). There is no definition for stand-by and on-call time, but a rule for a compensatory rest period. When military personnel on stand-by time are required to effectively perform work when they are on-call, they have the right to a compensatory rest period. If these on-call tasks involve working beyond the normal working hours and up to 24 or more hours, this should be compensated with one day of rest. In case of a shorter duration of the requested on-call service, a lower amount of compensatory rest should be provided proportionally. For these purposes, on-call working time starts with the commencement of the assignment and ends with the completion of the task. The

outward or return journey is not included in the duration of the rest period. There is no rule that equals stand-by and on-call with working time or that requires economic compensation.

In short, stand-by periods of members of the Armed Forces are not considered to be working time for remuneration purposes. According to this CJEU ruling, not every stand-by period can be excluded from the scope of the Working Time Directive, but Spanish law does not differentiate, because the rules on working time of the member of the Armed Forces has not been created with the purpose of implementing the Working Time Directive. They follow their own path, so they are not fully in line with the Working Time Directive and CJEU case law.

4 Other Relevant Information

4.1 Unemployment

In June, the unemployment rate fell by 166 911 people, with a total of 3 614 339 unemployed people in Spain.

Sweden

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obramo

In its ruling, the CJEU concluded that a military guard may be exempt from the Working Time Directive when he or she performs military service with respect to the sovereignty of Member States in military matters.

The Working Time Directive is transposed in Sweden mainly in the *Arbetstidslag* (1982:673) (Working Hours Act, unofficial translation available here) and the *Semesterlag* (1977:480) (Annual Leave Act, unofficial translation available here). The rules on working time have been transposed in the *Arbetstidslag*, while the rules on annual leave are transposed in the *Semesterlag*.

According to section 1, the *Arbetstidslag* applies to all activities in which an employee performs work on behalf of an employer, subject to the restrictions specified in section 2. One restriction in section 2 deals with the application to the work performed by the Police, Military and other internal and external public security services. This restriction specifies:

> *"The provisions contained in Section 10b, Section 13, first paragraph, Section 13a and Section 14, third paragraph, second sentence do not apply when the Working Time, etc. of Mobile Workers in Civil Aviation Act (2005:426) is applicable. Nor do they apply to the activities of public authorities – for example, the Swedish defence, police and civil protection authorities – for work that is specific to such activities and whose nature is such that a conflict cannot be avoided with Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time."*

There are no further details on what type of authorities that may have such employees are excluded according to section 2 of the *Arbetstidslag* mentioned above. There is no precise definition of what types of workers are excluded from the *Arbestidslag*. The Swedish legislator supports the general exemption with reference to the fact that the interpretation of EU law is dynamic and that more precise definitions must be made by the EU Court of Justice (Prop. 2003/04:180 p. 24). However, the *Arbetsmiljöverket* (the Swedish Work Environment Authority) explains in a commentary that the type of work is decisive and that such work may be conducted by other authorities aside from the Police and the Security Service. Examples of such other authorities that can perform police work are, inter alia, the Swedish Customs Authority, the Swedish Coast Guard Authority and the Swedish Prison and Probation Service.

The rules that are exempt for the Police and Armed Forces according to section 2 of the *Arbetstidslag* are the rule on the calculation of maximum working hours within a 7-day period (section 10b), the rule on a daily rest period (section 13, first paragraph), the working time of night workers (section 13a), and the rule on compensatory rest periods when derogating from the weekly rest period (section 14, first paragraph, second sentence)

The annual leave rules in the Working Time Directive are transposed in the *Semesterlag*. The *Semesterlag* is applicable to all employees in Sweden, but there are exemptions for military personnel. According to Section 1:

> *"An employee is entitled to annual holiday leave benefits in accordance with this Act. Annual leave benefits comprise annual leave, holiday pay and compensation in lieu of annual leave.*
>
> *Special provisions for certain employees are contained in*
>
> *1. the Extended Annual Leave (Radiological Workers) Act (1963:115);*
>
> *2. the Act on Swedish Armed Forces Personnel in International Military Operations (201:449); and*
>
> *3. the Act on Certain Positions in the Swedish Armed Forces (SFS 2012:332)."*

The CJEU case will be of major significance for the application of the flexible Swedish exemption for military personnel as it clarifies that military service may be exempt.

4 Other Relevant Information

Nothing to report.

United Kingdom

Summary

(I) On 19 July 2021, England removed all restrictions against COVID-19.

(II) The existing income support measures for employers have been have renewed and extended until September 2021

(III) The Health and Social Care Act has been amended to introduce the requirement for workers in registered care homes to be fully vaccinated against COVID-19.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Easing of restriction

As of 19 July 2021, England moved to Step 4 of the roadmap. This means a removal of all restrictions. However, as the government has said: 'Everyone should be cautious while managing the risks as cases of COVID-19 remain high' and recommended some measures to reduce the risk of contagion.

The government also removed the requirement to stay in quarantine for most fully vaccinated travellers.

1.1.2 Relief measures

The fifth Self-Employment Income Support Scheme (SEISS) grant opened for claims on 28 July 2021. This covers any business profit affected by COVID-19 between May and September 2021.

1.1.3 Mandatory vaccinations against COVID-19

The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 (SI 2021/891) (Regulations) were made on 22 July 2021 and come into force on 11 November 2021. They amend SI 2014/2936 by requiring staff employed in registered care homes to be fully vaccinated unless they are exempt. The explanatory memorandum reads:

> *"Regulation 5 amends regulation 12 of the 2014 Regulations. The amendment provides that for the purposes of preventing, detecting and controlling the spread of infection, registered persons ("A") in respect of the regulated activity of providing residential accommodation together with nursing or personal care in a care home, must secure that a person ("B") does not enter the premises used by A unless B meets specific requirements.*
>
> *Those requirements are that:*
>
> *(a) B is a service user of the regulated activity residing in the premises used by A;*
> *(b) B has provided A with evidence that satisfies A that they have been vaccinated with the complete course of an authorised vaccine or that B has provided A with evidence that satisfies A that for clinical reasons B should not be vaccinated with an authorised vaccine;*
> *(c) that it is reasonably necessary for B to provide emergency assistance in the premises;*
> *(d) that it is reasonably necessary for B to provide urgent maintenance assistance with respect to the premises;*

(e) B is attending the premises used by A in the execution of B's duties as a member of the emergency services;
(f) B is a friend or relative of the service user that is or has been residing in the premises;
(g) B is visiting a service user who believes is dying;
(h) it is reasonably necessary for B to provide comfort or support to a service user in relation to a service user's bereavement following the death of a friend or relative; or
(i) B is under the age of 18.
The amendment also provides that relevant persons may process information obtained under the requirements in accordance with the Data Protection Act 2018."

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time in the Armed Forces

CJEU case C-742/19, 15 July 2021, Ministrstvo za obramo

In the UK, the armed forces are covered by Reg 18(2) of the Working Time Regulations, which disapplies the key provision of the Regulation to the Armed Forces:

> *"18.— Excluded sectors*
>
> *(1) These Regulations do not apply–[*
> *(a) to workers to whom [the Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018] apply;*
> *(b) to workers to whom the Fishing Vessels (Working Time: Sea-fishermen) Regulations 2004 apply;*
> *(c) to workers to whom the Merchant Shipping (Working Time: Inland Waterways) Regulations 2003 apply.*
>
> *(2) [Regulations 4(1) and (2), 6(1), (2) and (7), 7(1) and (6), 8, 10(1), 11(1) and (2), 12(1), 13,13A and 16] do not apply–*
> *(a) where characteristics peculiar to certain specific services such as the armed forces or the police, or to certain specific activities in the civil protection services, inevitably conflict with the provisions of these Regulations; ..."*

Regulation 2(1) defines armed forces as 'the naval, military and air forces of the Crown'.

Regulation 25 disapplies the record keeping requirement. It provides:

> *"25.— Workers in the armed forces*
>
> *(1) Regulation 9 does not apply in relation to a worker serving as a member of the armed forces.*
>
> *(2) [Regulations 5A,6A,10(2) and 11(3)] do not apply in relation to a young worker serving as a member of the armed forces.*
>
> *(3) In a case where a young worker is accordingly required to work during [the restricted period, or is not permitted the minimum rest period provided for in regulation 10(2) or 11(3)], he shall be allowed an appropriate period of compensatory rest."*

There was a parliamentary answer to the question as to how the working time rules applied to the armed forces in 1999 (see here).

4 Other Relevant Information

4.1 Labour party proposal on employment status

The opposition Labour Party has announced that it will abolish the employee/worker divide and create a single status of worker with rights from day one if he/she won the next election. Were this to be implemented, it would be a significant change to employment protection and would be of particular benefit to gig economy workers. Labour said:

> *"Labour has today announced plans to give all workers security at work by creating a single status of 'worker' for all but the genuinely self-employed, with rights from day one of employment.*
>
> *A single status of 'worker' would replace the three existing employment categories and remove qualifying periods for basic rights and protections to give workers day one rights in the job.*
>
> *As part of Labour's plan to end insecure employment, all workers would receive rights and protections including Statutory Sick Pay, National Minimum Wage entitlement, holiday pay, paid parental leave, and protection against unfair dismissal.*
>
> *Alongside Labour's commitment to extend Statutory Sick Pay to the self-employed, this would make 6.1 million additional working people eligible to claim Statutory Sick Pay.*
>
> *The proposal follows a number of key legal cases on the gig economy where the central dispute was whether the claimant was a worker, and thus entitled to the minimum wage and holiday pay, or self-employed."*

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