

## Summary Minutes

# Meeting of Directors General for Industrial Relations

21 May 2021

Online meeting

### 1. WELCOME AND ADOPTION OF THE AGENDA.

Mr Stefan OLSSON (Chair, Director, EMPL B.) opened the meeting and welcomed all participants. Despite the circumstances which prevented the group to have a physical meeting this time once again, he very much hoped to be able to meet in person in the near future.

The Draft Agenda was adopted.

### 2. MINUTES OF THE VIRTUAL MEETING OF DIRECTORS GENERAL HELD ON NOVEMBER 2020.

The summary minutes were adopted without amendment.

### 3. PRESENTATION OF THE SLOVENIAN PRESIDENCY'S PRIORITIES IN THE SOCIAL AFFAIRS FIELD.

The presentation was made by Mrs Mateja RIBIČ, as State Secretary in the Ministry of Labour, Family, Social Affairs and Equal Opportunities in Slovenia.

She highlighted the following objectives for the upcoming Presidency:

- to continue discussions on mitigating social and economic consequences of the crisis;
- to contribute to the improvement of working and living conditions of all generations;
- to address demographic challenges through life-cycle approach.

To pursue the above, the following main priorities have been identified:

- Ensuring quality work for life quality of all generations (with an emphasis on health and safety, skills, work life balance, fair wages);
- Ensuring a life-cycle approach to inclusive recovery and demographic challenges (with an emphasis on children, persons with disabilities, women and victims of stereotypes).

Main events to be organised are as follows:

- Formal EPSCO: October 2021 and December 2021
- Informal EPSCO: 8 and 9. July 2021 in Ljubljana
- High-level conference on quality work (October 2021)
- High-level conference on overcoming ageing stereotypes (October 2021)
- High-level conference on increasing the mobility of persons with disabilities (November 2021)
- High-level webinar on equal opportunities for children (November 2021)
- High-level webinar on combating cyber violence against women (December 2021)

More information and updates: [Slovenian Presidency of the Council of the EU 2021 \(europa.eu\)](https://europa.eu)

#### **4. OVERALL UPDATE BY THE COMMISSION ON RECENT AND UPCOMING INITIATIVES AND ACTIVITIES.**

Building on the preceding presentation, Mr Stefan OLSSON highlighted in particular the [Action Plan on the European Pillar of Social Rights](#) (ESPR) (adopted in March 2021), which takes the Social Pillar process forward, following the Communication ‘A strong social Europe for just transitions’ adopted early 2020. It defines further the roles of the different actors. It follows a in depth consultation process, including member States’ contributions ( more than 1000 contributions in total).

In substance, as a result of this consultation, the role of Social Europe is underlined, also in the context of these difficult times.

A number of actions are foreseen in the Action Plan, together with a series of targets to be achieved by 2030, i.e.:

- At least 78% of the population aged 20 to 64 should be in employment by 2030;
- at least 60% of all adults should participate in training every year;
- the number of people at risk of poverty or social exclusion should be reduced by at least 15 million by 2030 .

This will be supported by a revised social scoreboard to monitor progress towards 2030.

The Porto Summit (7 and 8 May) was a successful moment, culminating with the Porto Declaration re-asserting this pledge to work towards Social Europe and setting the ESPR as a compass for our action. Also, in the recovery process, green, digital and social strands should be mutually supportive. Mr. OLSSON concluded on this point by evoking the preparation at national level of the recovery and resilience plans, expressing support to national administrations which are developing them jointly with the Commission.

He mentioned various further initiatives:

- The initiative to improve working conditions in platform work, with the launch of a two-stage social partners’ consultation on the matter in late February During the

first stage, social partners were asked their views on the need and possible directions of EU action. Social partners have so far not expressed any wish to enter into negotiations in this area. Overall positions from both sides are divergent. The second stage (planned for the 16 June) will help in identifying possible actions, with the aim of presenting a proposal by end 2021. At the same time we see the case law developing in Member States with worker status as a key aspect, with a trend towards reclassification of on-location platform workers as workers rather than self-employed. The other particularly important aspect in this file will be to improve the transparency and accountability of algorithms.

- The initiative in the competition policy area is also being developed, through which the Commission aims to ensure that competition law (anti-trust) does not prevent the self-employed to regulate their working conditions to do so through collective bargaining (e.g. in the platform work area but also beyond). This initiative will go hand in hand with the one just mentioned above on platform work and they will be presented at the same time. The exact nature of this is still to be determined (legislation or guidelines).
- The work on chemical substances covered by relevant EU law in the OSH area (e.g. renewing limit values). This concerns e.g. asbestos, lead and diisocyanates. A new strategic framework on health and safety at work 2021-2027 should also be presented by the end of June.

He also mentioned the Child Guarantee, the ongoing negotiations on the draft Directive on minimum wages and the transposition of the Directive on transparent and predictable working conditions (thanking Member States for their involvement in the expert group preparing this process).

## **5. PRESENTATION OF THE COMMISSION'S PROPOSAL FOR A DIRECTIVE TO STRENGTHEN THE APPLICATION OF THE PRINCIPLE OF EQUAL PAY FOR EQUAL WORK OR WORK OF EQUAL VALUE BETWEEN MEN AND WOMEN THROUGH PAY TRANSPARENCY AND ENFORCEMENT MECHANISMS (MARCH 2021)**

The presentation was made by Ms Karen VANDEKERCKHOVE Head of Unit D.2 'Gender Equality' in the European Commission (DG Justice and Consumers).

The proposal on equal pay was promised by President Von der Leyen when she took office in 2019 and was presented in March 2021.

As a starting point, in Article 157, each Member State shall ensure equal pay for male and female workers for equal work or work of equal value. However this right is not successfully ensured in the EU.

There are various actions which are linked to pay inequality and addressing the latter is a fundamental element to close the gender pay gap and ensure equality at the workplace. The problem has various root causes: gender segregation in low pay occupations and sectors, virtual segregation, care constraints, etc.

Pay transparency principally has an impact on pay discrimination, but also contributes to addressing the root causes of the pay gap. It can influence decisions taken outside the labour market (e.g. choice of education, choice of career in the light of perspectives of earnings, challenging the preconception of women as second earners).

Two major objectives are pursued by the initiative:

- help workers enforce their right to equal pay (to do so, they need information);
- address the systemic undervaluing of women's work.

Often pay bias is not intentional but embedded in pay structures. The Directive will help to address that through improving transparency.

The proposed measures aim at:

- creating pay transparency at worker level, with information on the pay linked to a post to be provided prior to employment and with a prohibition on employers asking applicants' and workers' salary history (scope: all workers)
- creating pay transparency at employer level, with two main measures, i.e. the obligation to ensure pay reporting and joint pay assessment (if more than 5% gap detected),
- facilitating the application and improving the enforcement of the law, notably with a clarification of existing key concepts of 'pay' and 'work of equal value', and better access to justice: support to victims' representation, reinforced elements as to remedies, sanctions and involvement of social partners.

Before concluding, Ms VANDEKERCKHOVE explained that the draft Directive does not limit the negotiations on pay between a worker and an employer (it gives a basis for fair negotiations); does not reduce employers' discretion to reward workers' experiences (as long as they are based on gender neutral /bias free criteria and objectively justified); does not regulate actual salary levels; the 'equal value' assessment is made at the level of an individual employer (not e.g. at sectoral level); does require costly adaptations to the employers (with specific consideration given to SMEs).

## **6. JURISPRUDENCE OF NATIONAL COURTS ON THE CLASSIFICATION OF PLATFORM WORKERS: COMPARATIVE ANALYSIS AND TENTATIVE CONCLUSIONS**

The presentation was made by Christina HIESSL, Associate Professor at the Goethe University Frankfurt. Her research is based on the analysis of some 150 administrative and judicial decisions on the status of platform workers in 11 countries (9 Member States as well as Switzerland and the UK) – for 5 countries, these are last instance judgements, which ruled in favour of workers (or third categories with important labour rights). Where higher instances changed the outcome of judgements in case of appeal, this was generally also to be in favour of workers (or third categories with important labour rights).

The outcome of the decisions is variable depending on the sectors concerned:

- for ride-hailing platforms, in some countries, there is overall a consistent trend towards classification as employee, while the trend is more erratic in other sectors;
- in the sector of food, parcel and grocery delivery platforms, one may see an even clearer trend towards a classification as employees, although to various degrees, except for the UK which tends to have different outcomes than for the rest of countries that have been studied;

- the situation is different in the case of services to businesses or services in private households, where the classification is less consistent.

Professor HIESSL set out a typology of criteria and rationales used by the courts:

- contractual designation / will of the parties;
- exclusivity / non-compete clauses, but these tend not to have much weight in the final assessment;
- personal work performance, with the specific question of substitution/subcontracting - important in the assessment notably in the UK and it is often examined whether this is a theoretical or real possibility;
- obligation to work (for a defined or minimum amount of time), including the existence of sanctions in case a worker refuses a task (or *a contrario* incentives to work) ;
- direction and control (instructions, but also supervision and sanctions), which was often decisive in favour of worker status, with a specific focus on how platforms and clients give detailed guidelines, how tracking systems and rating systems are used, or the existence of a disciplinary system for types of ‘misconduct’;
- organisational integration vs. entrepreneurial independence, e.g. wearing uniforms and branded bags, or when the assets essential to carrying out its services are the platform’s property (e.g. apps and algorithms);
- criteria focusing on the principal, e.g. features of the platform as a potential ‘employer’ (core business and how individual tasks relate to it, institutionalized hiring structures, etc.);
- economic (in)dependence, for most jurisdictions this is an additional rather than decisive criterion.

In conclusion, Professor HIESSL addressed the evolution of ‘business models’ of platforms in reaction to national judgments, leading for instance to the removal of sanctions and disciplinary measures.

Adam POKORNY asked about the UK situation, whether it shows a different trend from other jurisdictions. Professor HIESSL responded that the question of substitution is indeed particularly prominent in the UK.

Vatroslav SUBOTIĆ (HR) asked Professor HIESSL if there is a correlation between EU level case law and that of national courts. She explained that there are very few cases at EU level to date on the matter. Only the Yodel case is relevant, in which the Court left leeway to the national court to assess the real or fictitious level of independence of the service provider.

Agnieszka WOLOSZYN (PL) pointed that in Poland, analysis is ongoing, against the background of a rather complex landscape in platform economy. Is it really possible to have a single way to assess a worker status in this sector? Can it be put in an EU legislation? While the variety of criteria may persist, depending on countries, Professor HIESSL pointed to the potential added value of a rebuttable presumption of employment as a general principle (i.e. making it easier for the worker to bring claims).

## **7. PRESENTATIONS AND INFORMATION BY DELEGATIONS ON THE RECENT DEVELOPMENTS REGARDING LABOUR LAW AND INDUSTRIAL RELATIONS IN THE MEMBER STATES**

Mrs Marina IOANNOU-HASAPI, (Director, Department of Labour Relations, Ministry of Labour, Welfare and Social Insurance in Cyprus) spoke about the introduction of minimum wage in the hotel industry and the safeguarding of specific benefits in the construction industry, through legislation.

She first of all explained that terms and conditions of employment, to a large extent, are determined freely, through collective bargaining and collective agreements. Transposition of EU was made without prejudice to this system.

Also as to minimum wages, there is no national minimum wage covering all occupations in Cyprus. It is generally subject to collective bargaining. Some occupations (principally those with vulnerable workers) have however a minimum wage set by law every year (salespersons, clerks, child-care workers, school assistants and personal care workers, security guards and cleaners). Due to the economic crisis, wages in those occupations has remained the same since April 2012.

The hotel industry, historically, has had one of the highest coverage rates for collective agreements in Cyprus. However, during the early 2000s this started to decline. During the late 2000s, trade unions began to demand that collective agreement provisions be secured through legislation, notably on wages, so that all workers can be properly protected throughout the sector. The negotiations for the renewal of the collective agreement for the years 2019-2022 started at the request of the trade unions but proved to be a difficult process. The Minister of Labour, Welfare and Social Insurance played a mediation role between the two parties in order to reach an agreement. An agreement was concluded at end 2020. The new collective agreement included, among others, a call to the Government to issue an Order securing through legislation the minimum wages in 19 hotel occupations. Consequently, on January 8<sup>th</sup> 2020, an Order on the Minimum Wages in the Hotel Industry was issued for the first time – which is an improvement for all workers (even those who are not members of a trade union) in the sector, including in terms of enforcement.

With regard to the construction sector, a similar development took place in May 2020 with the Employees in the Construction Industry (Basic Terms of Service) Law. The Law is considered to be a milestone in the history of the sector in Cyprus, as it safeguards specific provisions deriving from the Collective Agreement of the Construction Industry Sector, such as working hours, overtime, public holidays, provident fund and bonus. This Law ensures that the above five terms of employment, as defined in the Collective Agreement, are applied to all employees of the sector, even those who are not members of a trade union, thus preventing unfair competition among employers.

These developments have shown that consensus based decisions (including codification into legislation), have increased chances of success and general acceptance, particularly on issues affecting organized groups, or a large percentage of the population if they are reached after thorough discussions and the practical contribution of the social partners themselves. It reflects a win/win situation.

Mr Noel RODRÍGUEZ GARCÍA, adviser in the Labour General Direction, Ministry for Labour, Migrations and Social Security in Spain presented the most developments in the area of platform work.

The main aim of a recently proposed measure by the government in the area of platform work was to consolidate an array of rights applicable to workers in that sector to be comparable to the rights other workers benefit from. The assumption is that labour law

and innovation are not in conflict, having in mind that labour law should protect the most vulnerable on the labour market. This is broadly consistent with national courts' caselaw on the matter, while a consensus was reached among social partners when it comes to this goal.

In Spanish labour law, whenever there is a work relation, which is paid, voluntary, personal, performed on the employer's behalf and subordinated, it shall be covered by existing rules.

In platform work, subordination and work performed on behalf on the employer are not obvious, as a worker has the possibility to refuse work. However the algorithm plays here a key role. Whenever a worker acquires ratings, accepts or refuses a task, etc., this translates into the algorithm and influences the work in a positive or negative way (e.g. being offered more or less work; being temporarily unable to access the app.). This means 'soft control' and in fact subordination, as Spanish Courts have found out. Moreover, the work has to be performed on behalf of the employer as the latter establishes the prices.

The preparation of the new regulation started even before the key judgement of the Supreme Court of 24 September 2020 and was accelerated afterwards. Social partners reached an agreement in March 2021. The law was approved in May 2021. It applies to workers providing delivery services through platforms using algorithms. These are presumed to be workers under Spanish law. The law also provides for an obligation to inform the legal representatives of the workers about the design of the algorithms.

Adam POKORNY asked who took part to the negotiations: were they trade unions or other types of workers' representatives? Mr RODRÍGUEZ GARCÍA clarified that the two main Unions nation-wide are the parties to the negotiations. In addition, one of the initial steps towards the legal reform was a public consultation, so other organisations, or even individual workers could have a say. Adam POKORNY asked who would receive the information on the algorithms? The speaker explained that the information is to given to elected representatives (e.g. those taking part to the workers' committee in large companies, or simple delegates otherwise).

Finally Mrs Ana COUTO OLIM (Director General, Employment and Labour Relations, Ministry of Labour, Solidarity and Social Security in Portugal) presented the latest developments in her country with regard to remote work and the recent Green Paper on the future of work.

The reflection on the future of work was developed with contributions of the social partners, to reflect on possible reform of Portuguese labour law. The Green Paper addresses the following questions:

- employment, new forms of work and working relations;
- artificial Intelligence and algorithms;
- right to privacy and data protection;
- working time, reconciling professional and family life and the right to disconnect;
- inclusion, equality and non-discrimination;
- social protection in the new forms of work;
- associations, workers representation and social dialogue;
- skills, vocational training and lifelong learning;

- inspection, safety and health at work and new psychosocial risks;
- public administration;
- climate change, energy transition, green recovery and territory.

The presentation focused on employment and new forms of work, in the context of dynamic changes on the Portuguese labour market. In view of the latter, the priorities are:

- promoting decent work and inclusivity (combating job insecurity; promoting collective bargaining; enhancing active employment policies; training and qualification policies, protecting incomes, inclusive social protection and specific counter-measures for the most disadvantaged groups);
- regulating the new forms of work associated with changes in work and digital economy, namely work on digital platforms, telework and digital nomadism;
- investing in strategic areas with potential for job growth, particularly in sectors and skills strongly linked to digitalization and technology, the climate and energy transition and the internationalization of the economy;
- developing lifelong training and re/qualification programs, taking into account the needs and trends on the labour market;
- Considering, in the context of promoting networking between organizations and companies and the so-called shared economy, how redeployment or relocation of workers could be organized among undertakings, based on voluntariness and preservation of rights.

The presentation then focused on remote work, examining the following aspects: opportunities for workers and employers but also challenges and risks for both. While Portugal was one of the first countries in Europe to regulate teleworking in national law in 2003, it appears now necessary to develop and improve telework regulation in its different aspects (in particular, the possibilities and modalities of implementing hybrid models that combine face-to-face and remote work). The following needs should notably be addressed:

- expanding the list of cases in which the worker has the right to telework, namely in the context of promoting reconciliation of work and family and in case of disability;
- creating mechanisms that prevent the extension of working time, or an excessive connection to work, promoting the right to disconnect and actual disconnection during rest periods;
- finally, reflecting on instruments assuring that telework does adversely impact on women and does not aggravate asymmetries in the division of unpaid work.

## **8. PRESENTATION BY THE COMMISSION ON EU ACTIVITIES IN THE FIELDS OF SOCIAL DIALOGUE (INTER-PROFESSIONAL AND SECTORAL) AND LABOUR LAW**

Ms Marie LAGARRIGUE (Deputy Head of Unit EMPL B2 ‘Working Conditions’) started by updating the participants on social dialogue.

She highlighted first the 2022 initiative to reinforce social dialogue announced in the Social Pillar Action Plan, and which builds on the report of Andrea Nahles, Special Advisor on Social Dialogue to Commissioner Schmit, presented earlier this year. The

initiative will include the launch of a new award for innovative social dialogue practices; an information and visiting programme for young future social partner leaders; the review of sectoral social dialogue at EU level; and a new supporting frame for social partner agreements at EU level. Social partners will be closely involved and consulted throughout 2021.

Information was provided on the latest tripartite social summit which took place on 24 March 2021 focusing on the topic “How to achieve a fair and sustainable recovery?”, the path to economic recovery and the Porto Social Summit.

Cross-industry social partners continue with the implementation of their recent autonomous agreements, i.e. the 2017 one on active ageing (where final implementation report is to be presented in autumn) and the 2020 one on digitalization.

For sectoral dialogue, besides continuing activities aiming at dealing with the consequences of the sanitary crisis, work has been continuing on a number of agreements (upcoming agreement in the railways sector, ongoing negotiations for Central Government Administrations’ agreement on digitalization, implementation of the agreement in the personal services/hairdressing sector). Examination of the EPSU case (C-928/19 P, appeal stage) at the CJEU continued with a hearing held on 26 October 2020 and the Advocate General issued Opinion on 20 January 2021, proposing that the Court dismisses the appeal based on a literal, contextual and teleological interpretation of Article 155(2) of the Treaty (TFEU).

The Commission launched two 1<sup>st</sup> stage social partner consultations on planned initiatives, i.e.:

- In December 2020 on the protection of workers from risks related to exposure to chemical agents at work and to asbestos at work
- In February 2021 on a possible action addressing the challenges related to working conditions in platform work.

Additionally the Commission continued to consult social partners on other relevant initiatives not requiring a formal two stage consultation in the form of dedicated hearings or consultation meetings at high political level – as below:

- Sustainable corporate governance (Feb 2021)
- Seasonal workers (March 2021)
- Collective bargaining for self-employed (April 2021)
- Micro-credentials, Individual Learning Account (April 2021)
- Green paper on ageing (April 2021)
- OSH strategic framework (April 2021)

As regards the European Semester, the 8 December 2020 EMCO review was the fifth on social dialogue with the participation of social partners. It took place via a videoconference. The three countries with CSRs on this topic were reviewed. A case study (involvement of social partners in Italy) was also discussed. In 2021 the semester cycle is to be adapted. The usual ‘winter package’ will be replaced by Reform Plans, highlighting how the funds from the new Recovery and Resilience Facility will be used to curb the national economic recovery in the Member States. Their recovery and

resilience plans should effectively address the policy challenges set out in the country-specific recommendations adopted by the Council in 2019 and 2020.

Regarding the transposition process of recent Directives, Ms LAGARRIGUE referred briefly to the transposition process of the new Directive on Transparent and Predictable Working Conditions (Directive (EU) 2019/1152, reminding the deadline for transposition of 1 August 2022. Regular meetings of the experts' group (composed of Member States with social partners participating as observers) continue to be held with the next meeting planned on 4 June 2021. The draft report of the group should be finalized before summer and published on Europa.<sup>1</sup>

Ms LAGARRIGUE also referred to the meeting of the DGIR subgroup on the Working Time Directive held on 8 December 202 and confirmed work ongoing on a 2022 package to be composed of new implementation report and update of the interpretative communication.

As regards recent case law of the CJEU, please refer directly to the annex.

#### **9. INVITATION BY THE FRENCH DELEGATION TO THE NEXT MEETING IN MAY 2021 IN PARIS**

The French representative (Mr Régis BAC, Head of Department, Ministry of Labour, Employment and Inclusion, France) invited the group to its next meeting in November 2021, which may be held in Paris if the sanitary situation allows.

#### **10. ANY OTHER BUSINESS**

N/A.

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<sup>1</sup> The report was published on 6 August 2021 and can be found at <https://ec.europa.eu/social/BlobServlet?docId=24459&langId=en>

**Labour law: Relevant developments in case law of the Court of Justice of the European Union (as at 21.05.2021)**

*Working Time (Dir. 2003/88/EC, hereafter ‘the WTD’)*

Judgments:

- *Case C-344/19 Radiotelevizija Slovenija* (ruling of 09.03.2021)
  - *Facts:* This case concerns a dispute between a technical transmission specialist (Mr D. J.) and his employer, Radiotelevizija Slovenija. Mr D.J. was employed in radio and television transmission centres located in the high mountains in remote places, with few possibilities of entertainment in the surroundings. He claims that the periods of his stand-by duties, during which he had the obligation to remain reachable and, if necessary, to arrive at the place of work within one hour, should qualify as ‘working time’ in the meaning of Article 2(1) of the WTD.
  - *About:* This case concerns the qualification as ‘working time’/‘rest time’, within the meaning of Article 2(1) and (2) of the WTD, of periods of ‘stand-by duties’ of a worker, where the maximum time to arrive at the place of work cannot exceed one hour and where the place of work is situated in remote areas with difficult access and limited possibilities of leisure activities in its surroundings. This case provides the Court of Justice with an opportunity to clarify the impact of its ruling in Case C-518/15, *Matzak*. In the *Matzak* case, the Court qualified as ‘working time’ periods of stand-by time of a fireman who was obliged to respond to calls from his employer and be able, when necessary, to arrive at his place of work within 8 minutes (under normal traffic conditions). These conditions of his stand-by time very significantly restricted his opportunities to have other activities. In Case C-344/19, the time to arrive at the place of work is much longer (one hour). However, the possibilities for the worker to pursue his own interests are, similarly to the *Matzak* case, relatively limited, due to the particular geographical situation of his working place.
  - *Hearing:* Joint hearing with case C-580/19 on 22.06.2020.
  - *What the Advocate General said* (06.10.2020): AG Pitruzzella proposed fine-tuned criteria for qualifying ‘stand-by’ duty as working or rest time. According to him, the determining factor for such qualification should be the intensity of the constraints imposed on the worker by their employer, with particular focus on the reaction time to the call. In the event that the reaction time is short, but is not such as to absolutely hinder the freedom of the worker to choose their whereabouts, additional elements are to be taken into consideration to determine their overall effect on the worker's rest. These additional elements must be imposed by the employer (which excludes in particular the possibility to take into account a specific geographical situation of the working place). In the case at hand, the AG concluded that the conditions of the stand-by duty of the worker

concerned do not trigger the qualification of this duty as ‘working time’ (subject to verification by the national judge).

- *What the Court said* (09.03.2021): The Court clarified the criteria under which stand-by periods spent outside of the workplace can qualify as ‘working time’.
  - Such stand-by periods qualify as ‘working time’ where the constraints imposed on the worker objectively and very significantly affect their ability to manage freely their time during which their professional services are not required and to pursue their own interests.
  - One of main elements to take into account in this context is the reasonableness of the time limit within which the worker is required to resume their work. However, the Court emphasises that the consequences of such a time limit must be specifically assessed, taking into account not only the other constraints imposed on the worker, such as the obligation to have specific equipment with them when returning to the workplace, but also the facilities that are made available to them.
  - The national courts must also have regard to the average frequency of the activities that the worker is actually called upon to undertake over the course of that period, where it is possible to estimate it objectively.
  - By contrast, organisational difficulties that a period of stand-by may entail which are the result of natural factors or the free choice of the worker are not relevant. That is the case where there are limited opportunities for leisure pursuits within the area that the worker is unable to leave in practice during a period of stand-by time according to the stand-by system.
- *Case C-580/19 Stadt Offenbach am Main* (ruling of 09.03.2021)
    - *Facts*: Mr R.J is a firefighter (division commander) with the Offenbach am Main fire service. In addition to his regular duty, according to the legislation applicable to the Offenbach fire service, he regularly has to perform ‘incident command’ duty (‘IC duty’). While on IC duty, Mr R.J. must be constantly reachable, keep his uniform ready and have an operational vehicle with him. While on duty in certain situations, he must go to the incident scene or place of employment. During IC duty he has to choose his whereabouts in such a way that, if he is alerted, he can reach the Offenbach city boundary with the operational vehicle and in uniform within 20 minutes. The national judge asks the Court of Justice to clarify whether the periods of ‘IC duty’ qualify as ‘working time’ or, alternatively, as ‘rest time’ under the WTD.
    - *About*: This case concerns the qualification as ‘working time’/‘rest time’ within the meaning of Article 2(1) and (2) of the WTD of periods of stand-by duty of a worker who must, during such duty, be constantly reachable, keep his uniform ready and have an operational vehicle with him and remain in a place from which he can reach the Offenbach city boundary with the operational vehicle and in uniform within 20 minutes. This case provides the Court of Justice with an opportunity to clarify the impact of its ruling in Case C-518/15, *Matzak*. The factual situation in

Case C-580/19 is very similar to the *Maztak* case, but the conditions of the ‘stand-by’ duty of Mr R.J. seem less onerous.

- *Hearing*: A joint hearing with case C-344/19 took place on 22.06.2020.
  - *What the Advocate General said* (06.10.2020): See above under *Case C-344/19, Radiotelevizija Slovenija*. In the case at hand, the AG considered that the reaction time of 20 minutes is not disproportionately short, but on the other hand, it is not obvious, given the particular circumstances of the IC duty, that the worker concerned can effectively enjoy his rest during this duty. The AG leaves the assessment on whether this is in fact the case to the national judge. Elements such as the need to wear technical work clothes, the provision of a service vehicle to get to the place of intervention and the potential frequency of actual interventions should be taken into account in the context of this assessment.
  - *What the Court said* (09.03.2021): See above under *Case C-344/19, Radiotelevizija Slovenija*.
- *Case C-585/19 Academia de Studii Economice din București* (ruling of 17.03.2021)
    - *Facts*: In the framework of an ESF operational programme co-financed by the EU budget, a grant was awarded by the Romanian authorities to the ‘Academia de Studii Economice din București’, an establishment of higher education. The authorities considered some of the beneficiary’s staff costs as ineligible because the experts carrying out the project had reported a total number of hours higher than the 12-hour limit set by national law. Those workers were actually employed under multiple contracts with a single employer, with part-time employment contracts on top of full-time, 40-hour-a-week contracts. The Romanian administration rejected the subsequent complaint by Academia as unfounded, notably on the grounds that the WTD limits working time to 13 hours per day.
    - *About*: Concerns the question whether the limitations to working time laid down in the WTD, in particular as regards daily rest and maximum weekly working time, must apply with regard to individual contracts (i.e. per contract) or with regard to all the contracts concluded with the same employer, or with different employers (i.e. per worker).
    - *Hearing*: No hearing was held.
    - *What the Advocate General said* (11.11.2020): AG Pitruzzella considered that the question on the application of the working time limits of the WTD to employment contracts concluded with several employers is inadmissible. He advised the Court to rule that the limits on the duration of the working day and working week imposed by Article 3 and Article 6(b) of the WTD apply to all the employment contracts concluded by a dependent, non-autonomous worker with the same employer, and not to each individual employment contract.
    - *What the Court said* (17.03.2021): The judgment is consistent with the AG opinion. The Court ruled that, where an employee has concluded several contracts of employment with the same employer, the minimum daily rest period provided for in Article 3 of the WTD applies to those

contracts taken as a whole and not to each of them taken separately. The Court also emphasized that, when ascertaining whether the Directive's limits on the duration of working time have been exceeded, a national court must verify that the workers concerned carry out subordinated work, that the hours stipulated in their contracts correspond to actual working time within the meaning of the WTD and that the Directive's derogations for autonomous workers do not apply.

- *Conclusion:* In the absence of any evidence that the disputed remuneration is linked to employment contracts concluded by the experts with several employers, the Court ruled only on the case of workers who have several employment contracts with the same employer. In view of the facts presented by the referring court, the Court of Justice also restricted the scope of its judgment to the issue of compliance with the minimum daily rest period.

### Upcoming:

- *Case C-107/19 Dopravní podnik hl. m. Prahy*
  - *Facts:* The applicant, who was employed by the defendant as a firefighter, worked under a shift system organised into day and night shifts. The day shift began at 06.45 and ended at 19.00 and the night shift lasted from 18.45 to 07.00. In the course of a shift, there were two breaks – which were always 30 minutes long. During their breaks, the firefighters could go to the staff canteen in a neighbouring building, but could not leave the compound. When visiting the canteen, they were equipped with transmitters in case they needed to attend an urgent call-out. In such a situation, they had to reach the exit within two minutes. The time period during the breaks was not counted as working time, nor remunerated. However, if a call-out occurred during the food and rest break, that period was counted as working time and remunerated as such.
  - *About:* The central question put forward by the national court is whether, in the context of a break period in which an employee must be available to his employer within two minutes, in case there is an emergency call out, this period must be considered 'working time' within the meaning of the WTD. The referring court also asks whether the assessment to be made in relation to the question above is influenced by the fact that such interruption of the break occurs only at random and unpredictably or, as the case may be, by how often such interruption occurs. Lastly, the referring court raises a question of a possible conflict between the decision of the Supreme Court of the Czech Republic and EU law with regard to whether the legal opinion pronounced in that decision in appeal proceedings in cassation is binding on lower courts in the same proceedings.
  - *What the Advocate General said (13.02.2020):* AG Pitruzzella proposed that the Court should rule that Article 2 of the WTD should be interpreted as meaning that a rest break granted during a worker's daily working time, during which he must be available to his employer, in case there is need to respond to an emergency call out within two minutes, must be considered as working time within the meaning of that provision. That assessment is

not affected by the fact that such interruptions of the break occur only at random and unpredictably or, as the case may be, by how often such interruptions occur.

- *Case C-742/19 Ministrstvo za obrambo*
  - *Facts:* This case concerns a request from the Supreme Court of the Republic of Slovenia for advice on interpreting Article 2 of the WTD and Article 2 of Directive 89/391/EEC (hereafter ‘the Framework Directive’). The applicant was employed as a non-commissioned officer in the Slovenian army, and for one week each month, he kept guard at the barracks, 24 hours a day, seven days of the week. While on guard duty he had to be ready for work and to remain at the defendant’s premises at all times. In the event that the military police or an inspection or intervention team came (unannounced), he was required to present himself and to carry out the orders of his hierarchical superiors. In respect of these periods of guard duty, the defendant paid the applicant his ordinary pay for eight hours of work, treating eight hours as ordinary working time. The defendant did not treat the remaining hours as working time, and instead paid the applicant a stand-by duty allowance of 20% of his basic pay.
  - *About:* The two key questions are whether, 1) Article 2 of the WTD applies to workers employed in the defence sector and to military personnel who perform guard duty in peacetime, and, if so, 2) whether the provisions of Article 2(1) and (2) of the WTD preclude national legislation pursuant to which time spent by workers in the defence sector at their place of work or at some other designated place on stand-by, including guard duty performed by military personnel who are obliged to be physically present in barracks, but not actually working, is not counted as ‘working time’.
  - *Hearing:* 21.09.2020.
  - *What the Advocate General said (28.01.2021):* AG Saugmandsgaard Øe considered that the WTD is, in principle, applicable to the military. However, a distinction should be drawn between the ‘ordinary duties’, where the WTD would apply, and ‘specific activities’, where it would not. Such specific operations would include, *inter alia*, military operations, including domestic operations, as well as initial training and exercises. The activity of supervising military installations, on the other hand, is not, in principle, part of such specific activities. Further, the AG proposed that the period during which a military staff member is required, during on-call duty, to remain present in the barracks to which he is assigned, at the disposal of his superiors, without actually carrying out work, must be regarded, in its entirety, as ‘working time’.
- *Case C-909/19 Unitatea Administrativ Teritorială D.*
  - *Facts:* This case was referred by the Court of Appeal of Iași (Romania). BX, a worker employed by a municipality on a full-time basis, attended mandatory vocational training courses linked to his duties away from his place of work, for a total of 160 hours and partly outside his normal

working hours, including on Saturday and Sunday afternoon. He claimed before the competent court the payment of 124 hours of overtime spent attending those training courses. The court considered that those extra hours spent on training do not constitute working time. BX then brought an appeal before the Court of Appeal of Iași.

- *About:* The case concerns the question whether, under the WTD, the period of time during which a worker attends mandatory vocational training courses after completing their normal hours of work, at the premises of the training services provider, and away from their place of work, constitutes ‘working time’.
- *Hearing:* not yet held.

- *Case C-104/20 Habitations sociales du Roman Païs*

- *Facts:* This case concerns a dispute between a worker (S. D.) and his former employers (Habitations Sociales du Roman Païs and ASBL Régie des Quartiers de Tubize, Belgium). S.D. claims i.a. the payment of overtime work. The employers of S.D. did not establish any system enabling the duration of time worked each day by each worker to be measured (contrary to what was decided in Case C-55/18, CCOO, where the Court stated that every employer is obliged to have such a system in place). According to the national judge, the relevant national rules, which provide that the claimant has the burden of proof, make it impossible for S.D. to prove his claim.
- *About:* This case concerns the compatibility with Articles 3, 5 and 6 of the WTD and with Article 31(2) of the Charter of Fundamental Rights of the EU of a national procedural rule, which provides that workers have the burden of proof of overtime work, including where their employer did not put in place any system enabling the duration of time worked each day by each worker to be measured (contrary to what was decided by the Court of justice in Case C-55/18, CCOO), which makes it impossible in practice for the workers to prove their rights.
- *Hearing:* not yet held.

- *C-214/20 Dublin City Council*

- *Facts:* The complainant was a part-time firefighter who was retained by the fire station to which he is attached to respond to an emergency call when alerted. He was on stand-by 24 hours per day with the duty to respond to emergencies when alerted by means of a bleeper by the employer. He was required to respond to a call within ideally 5 and maximum 10 minutes. The complainant was required to live and work within a reasonable distance of the fire station, permitting him to reach the fire station within the defined turn-out time. He was also employed as a taxi driver. He had to provide a confirmation from his second employer that he would be released to attend incidents as required by the fire service. He was also precluded from taking any other work during hours spent actually attending fires or at the station engaged in training or drills.

- *About*: This case concerns the question whether the stand-by time of a firefighter who must respond to a call within ideally 5 and maximum 10 minutes and is able to be employed simultaneously by a second employer constitutes working time with the first employer in the sense of Article 2(1) of the WTD. If this question is answered in the affirmative, the national court additionally inquires whether a worker who works for a second employer while working on stand-by to their first employer accrues working time in the sense of Article 2.
  - *Hearing*: not yet held.
- *Case C-217/20 Staatssecretaris van Financiën*
    - *Facts*: The applicant, a Dutch civil servant suffering from a long-term illness, was paid 100% of his remuneration for the first year of illness. He engaged in a reintegration process and resumed work on a part-time basis due to health reasons. In that context he was paid 100% of his remuneration for the hours for which he was deemed fit for work, and 70% for the hours for which he was incapacitated for work. He took annual leave and continued to be paid at the same rate during his leave.
    - *About*: This case concerns the level of remuneration to which a worker who is partially incapacitated for work due to illness is entitled under Article 7(1) of the WTD during periods of annual leave. The referring court asked the Court of Justice whether a worker in that situation should retain their remuneration at the level it was immediately prior to their taking annual leave, even if, due to the long duration of the incapacity for work, that remuneration is lower than that paid in the event of full fitness for work.
    - *Hearing*: not yet held.
- *Case C-233/20 job medium*
    - *Facts*: This case concerns a dispute between, on the one hand, a worker, WD, and, on the other hand, his former employer, a firm entitled job-medium. WD claims an allowance *in lieu* of annual leave not taken before the termination of his employment relationship in the specific context where the termination is due to a decision on the part of the worker to terminate the contract early without having given the appropriate degree of notice. The employer refuses such payment, relying on Paragraphs 10(1) and 2 of the Austrian *Urlaubsgesetz*, under which no allowance *in lieu* of annual leave is payable in respect of the current (last) working year, where the worker unilaterally terminates the employment relationship early without cause.
    - *About*: This case concerns the compatibility with Article 7 of the WTD as well as with Article 31(2) of the Charter of Fundamental Rights of the EU of a national legislation, under which no allowance *in lieu* of annual leave is payable in respect of the current (last) working year, where the worker unilaterally terminates the employment relationship early without cause.
    - What the Advocate General said (15.04.2021): Advocate General Hogan noted that in the present case, the worker actually worked during the

reference period and thus acquired his entitlement to paid annual leave. The only reason why the allowance *in lieu* would be not due would be that he terminated his contract prematurely without cause. He proposed to the Court to rule that Article 7 of the WTD and Article 31(2) of the Charter of Fundamental Rights of the EU must be interpreted as precluding the national rule at stake.

- *Case C-262/20 Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' kam Ministerstvo na vatreshnite raboti*
  - *Facts*: The applicant is a public official in Bulgaria who is employed as a 'shift foreman' at the Regional Office of the Town of Lukovit. He is in dispute with his employer, the defendant, regarding the calculation of working hours during night duty and the application of a multiplying factor so that 7 hours of night work are equivalent to 8 hours of day working time.
  - *About*: This case concerns the protection of night workers and the duration of periods of night work of police officers and firefighters. The questions put forward by the national court are: 1) whether the WTD requires the normal duration of periods of night duty to be set in relation to the normal duration of periods of day duty; 2) whether national provisions regulating the normal duration of periods of night work for workers in the private sector must also apply to public-sector workers; and 3) whether the objectives of the WTD require the normal duration of periods of night work to be laid down in national law.
  - *Hearing*: not yet held.
  
- *Case C-514/20 Koch Personaldienstleistungen*
  - *Facts*: The applicant is a temporary worker who is employed by an employment agency, the defendant. The employment relationship between the parties is governed by a collective agreement that stipulates a monthly threshold to be reached in order to be entitled to overtime pay. To reach this threshold, only hours actually worked can be counted. In the month of August 2017, the applicant took 10 days of annual leave. In accordance with the collective agreement, the defendant deducted 10 annual leave days, with the result that the total hours worked by the applicant in that month did not reach the overtime threshold.
  - *About*: This case concerns the interpretation of Article 7(1) of the WTD on a worker's right to paid annual leave, more precisely on entitlements to overtime pay when taking minimum annual leave. The central question is whether it is compatible with EU law not to count working hours corresponding to the worker's annual leave towards a threshold to be reached in order to be entitled to overtime pay.
  - *Hearing*: not yet held.
  
- *Cases C-518/20 Fraport and C-727/20 St. Vincenz-Krankenhaus*
  - *Facts*: Both cases concern a dispute between, on one hand, workers and on the other hand, their former employers. The workers did not take paid

annual leave before they became unable to take this leave for a long period of time for health reasons. In both cases the workers claimed that the entitlements to paid annual leave had not lapsed 15 months after the end of the leave year in which they were acquired because their respective employers had not fulfilled their obligation to cooperate in the granting and taking of leave.

- *About:* In both cases the national court raises the question whether the WTD should be interpreted as meaning that a worker, who is suffering from full reduction of their earning capacity, is entitled to carry over, to a period that exceeds 15 months after the end of the leave year, the paid annual leave that could have been taken in the course of the leave year before the onset of the reduction of earning capacity, had the employer enabled the worker to exercise their leave entitlement by informing them of the concerned leave and inviting them to take it. If this question is answered in the affirmative, the national court additionally inquires whether it is also impossible for the right to paid annual leave to lapse at a later point in time in cases where a full reduction of earning capacity persists.
- *Hearing:* not yet held.

- *Case C-120/21 LB*

- *Facts:* The case concerns a dispute about the payment *in lieu* of untaken annual leave by an applicant who had been employed by the defendant from 1996 until 2017. In a court action she claimed payment of 101 days' untaken leave, many of them from prior to 2012. In the course of the proceedings, the defendant pleaded the statute of limitations, arguing that the regular limitation period of 3 years had expired before the termination of the employment relationship in respect of the leave entitlements for which the applicant claimed payment.
- *About:* Further to case C-284/16 Max Planck, this case concerns conformity with the WTD and the Charter of Fundamental Rights of the statute of limitations, specifically whether it can bar a worker from claiming untaken leave entitlements if the employer failed to give the worker the opportunity to take the leave.
- *Hearing:* not yet held.

- *Case E-11/20 (EFTA Court) Eyjólfur Orri Sveinsson*

- *Facts:* The case concerns a dispute between an aircraft mechanic and the Icelandic Transport Authority as his employer. The applicant's claims the time he spent travelling abroad, for his employer, outside his normal working hours, should be recognised as working time under national law.
- *About:* The key question is whether Article 2 of the WTD should be interpreted as meaning that time spent travelling by an employee in the service of, and at the behest of, his employer, to a workplace which is not the employee's regular workplace, is working time when it falls outside ordinary daytime working hours.
- *Hearing:* 04.02.2021.



## *Fixed-term work (Dir. 1999/70/EC)*

### Judgments

- *Case C-760/18 MV (11.02.2021)*
  - *Facts:* The defendant, the Municipality of Agios Nikolaos, is a local authority. The applicants were employed from various start dates in 2015 in the defendant's cleansing department under fixed-term employment contracts governed by private law. The contracts, which were initially for a term of eight months, were renewed without interruption until 31 December 2017. As the defendant had no permanent staff, the applicants argued that they had covered the fixed and permanent needs of the department and, that their employment contracts concealed employment contracts of indefinite duration which took the abusive form of repeatedly renewed fixed-term employment contracts. Consequently, they requested their initial contracts to be considered as employment contracts of indefinite duration and their termination invalid.
  - *About:* While a conversion of fixed-term employment contracts into permanent ones, as the one requested by the applicants, is permitted in the private sector, the Greek Constitution, as revised in 2001, prohibits the conversion in the public sector.
  - *What the Court said (11.02.2021):* In first place, the Court clarified that the expression 'successive fixed-term employment contracts' in Clause 5 of the Directive covers the automatic extension of the fixed-term employment contracts, even when, as it is the case in the main proceedings, there is formally a single contract.
  - In second place, the Court stated that, in cases of abuse arising from the successive use of fixed-term contracts, the national courts shall interpret and apply the relevant provisions of national law in such a way that it is possible duly to penalise that abuse and to nullify its consequences. That could, if necessary, involve disapplying certain provisions of the national constitution.

### Upcoming

- *Case C-282/19 YT and Others ('Gilda')*:
  - *Facts:* YT and others, the applicants, are Catholic religious education teachers recruited by the Italian Ministry of Education on the basis of fixed-term employment contracts. In particular, the employment relationships are based on annual appointments, which are automatically reconfirmed, in accordance with the provisions of the applicable collective agreement. The applicants have certificates attesting to their suitability as Catholic religious education teachers issued by the diocesan ordinary, which have not been revoked. The applicants were recruited on the basis of regional ranking lists established for each diocese, and appointed by the education authority on the basis of a proposal from the diocesan ordinary. All of the teachers have been employed for more than 36 months, in some cases even more than 20 years. This raises the question whether these

teachers are sufficiently protected against the abusive use of successive fixed-term contracts. On 31 July 2015, the teachers brought an action before the District Court in Naples, claiming that their fixed-term employment contracts should be converted into contracts of indefinite duration and, in the alternative, compensation for damage. *About:* Whether the absence of measures to protect these teachers against abusive successive fixed-term contracts is contrary to clause 5 of the Framework Agreement and also if national law contains sufficient measures to penalise the past abuse. The lack of possibility to grant conversion seems discriminatory, because other teachers (teaching subjects other than Catholic religious education) have the possibility to convert their fixed-term contracts into contracts of indefinite duration.

- *What the Advocate General said* (18.03.2021): the Advocate General took the view that there are no ‘objective reasons’, pursuant to Clause 5(1)(a) of the Framework Agreement, justifying successive recourse to fixed-term contracts for Catholic religious education teachers. However, given that Clause 5(1) of the Framework Agreement lacks the preconditions for direct effect, and that there appears to be an unequivocal exclusion under Italian law of conversion of the teachers’ fixed-term contracts to contracts of indeterminate duration, the obligation imposed by the Court’s case-law on Member State courts to interpret pertinent national rules so as to secure the efficacy of Clause 5 does not extend to requiring *contra legem* interpretation of Member State law so as to imperil legal certainty or the principle of non-retroactivity.

Therefore, the referring court will only be obliged to convert the teachers’ fixed-term contracts to contracts of indeterminate duration in the event of violation of their right not to be discriminated against on the basis of religion or belief, as protected by Article 21 of the Charter, and the right to an effective remedy to correct this wrong, under the first paragraph of Article 47 of the Charter, in conformity with the principles set out by the Court in its ruling in *Egenberger*.

If such discrimination is established, lifting the prohibition on conversion of the fixed-term contracts in issue will be required by EU law, in the absence of one or more legal remedies within the structure of the national legal system concerned.

- *Case C-550/19 Obras y Servicios Públicos and Acciona Agua:*
  - *Facts:* From 8 January 1996 EV concluded a series of temporary full-time contracts with Obras y Servicios Públicos. From 24 January 1997 these contracts continued without interruption. His most recent contract was signed on 1 January 2014. On 3 October 2017, EV was transferred to Acciona Agua, S.A. when it was awarded the contract entitled ‘Urgent renovation and repair work to the supply and reuse system of Canal de Isabel II Gestión SA’, previously performed by Obras y Servicios Públicos. Previously, on 5 September 2017, EV had filed a claim against his employer, Obras y Servicios Públicos, and against Acciona Agua, seeking for his period of service to be recognised as having begun on 8 January 1996 and for that employment relationship to be recognised as permanent.

- *About:* The case concern the compatibility of the national Collective Agreement for the construction sector with the mentioned EU Law and, more specifically, requires the analysis of the existence of measures to prevent the abuse of the use of successive ‘fixed-term contracts for a specific construction project’ and, in case of transfer or succession of undertakings, the potential discrimination of fixed-term workers and the potential deterioration of the employment conditions of the transferred employees based on a claimed reduction of the seniority accumulated with the previous employer.
- *Case C-726/19 Instituto Madrileño de Investigación y Desarrollo Agrario y Alimentario:*
  - *Facts:* Ms JN worked during more than 13 years for the Instituto Madrileño de Investigación y Desarrollo Agrario (a public body) as catering assistant, under a temporary replacement contract to cover a vacant post linked to an official vacancy list. When an open competition took place and a successful candidate was appointed to cover that vacancy, the contract of Ms JN was terminated without any compensation.
  - *About:* The purpose of the request is to determine essentially whether ‘temporary replacement contracts to cover a vacant post’ comply with Clause 5 of the Directive, which requires from Member States to have measures in place to prevent abuse arising from the use of successive fixed-term employment contracts. The referring court expresses some doubts about the possibility to prevent and properly penalise cases of abuse when the temporary replacement contract to cover a vacant post is used in the public sector, where there is no clear limit in the number or duration of renewals applicable to that type of contract. Finally, the referring court also questions the possibility to justify the absence of measures to prevent the abuse in the existence of particular budgetary constraints due to the recent financial crisis.
  - Judgment/order to be published on 03.06.2021

*Other upcoming cases:*

- *C-942/19 Servicio Aragonés de la Salud* (Judgment/order to be published on 03.06.2021)

***Part-Time Work (Dir. 97/81/EC )***

Judgment:

- *Case C-841/19 Fogasa (order published on 03.03.2021)*
  - *Facts:* The applicant in the main proceedings was employed under a part-time fixed-term employment contract. The employer closed the premises where the applicant in the main proceedings worked and disappeared from its offices and its known address. As the company was declared insolvent by a court order, the national Wages Guarantee Fund (FOGASA) became liable for payment of the outstanding wages and the compensation awarded to the

worker. In calculating the amount paid to the applicant, FOGASA applied the legal ceiling of twice the minimum wage but reduced pro-rata to the worker's rate of part-time work.

- *About:* The compatibility with EU law (Directive 97/81/EC, Directive 2008/94/EC and Directive 2006/54/EC) of the Spanish Supreme Court's interpretation of national law according to which, in case of employer insolvency, the amount which FOGASA is liable to pay a part-time worker is limited in proportion to the part-time nature of his/her employment.
- *What the court said* (03.03.2021): Neither Directive 2006/54/EC nor Directive 97/81/EC preclude national legislation which, as regards the payment by the liable national institution of the wages and compensation that have not been paid to workers due to the insolvency of their employer, provides for a ceiling to that payment for full-time workers which, in the case of part-time workers, is reduced pro rata temporis according to the hours worked by those workers in relation to those worked by full-time workers. Nevertheless, it is for the national court to verify that those ceilings do not fall below a level which is compatible with the social objective of Directive 2008/94/EC.

#### Upcoming:

- *Case C-660/20 Lufthansa CityLine*
  - *Facts:* The employment relationship between the parties to the main proceedings, a pilot and an airline, is governed by a collective agreement. This collective agreement stipulates that one component of the working time that is remunerated by means of the basic pay is the flight duty time. A worker receives remuneration for additional flying duty hours on top of the basic remuneration if he or she has worked a certain number of flying duty hours in a month and has thereby exceeded ('triggered') the thresholds for the higher level of remuneration. That threshold to trigger overtime is identical for full time and part-time workers. The applicant in the main proceedings, the pilot, argues that the lack of a *pro rata temporis* reduction of the threshold which triggers overtime is not compatible with the principle of non-discrimination regarding working conditions between part-time and comparable full time workers.
  - *About:* the interpretation of the non-discrimination principle as enshrined in clause 4 of the framework agreement annexed to Directive 97/81/EC on part-time work. The central question is whether the lack of a *pro rata temporis* reduction of the threshold which triggers overtime is compatible with the principle of non-discrimination between part-time workers and comparable full time workers regarding employment conditions.
  - *Hearing:* not yet held.

## ***Temporary Agency Work (Dir. 2008/104/EC)***

### Upcoming:

- *Case C-232/20 Daimler*
  - *Facts:* The dispute in the main proceedings concerns the request of the applicant, a permanent worker of a temporary work agency who had only worked for a single user undertaking during the totality of his/her employment relationship, to be considered as an employee of the user undertaking.
  - *About:* whether Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, which refers to the work performed by the temporary agency worker in the user undertaking as ‘temporary’, imposes any limits in the duration of the assignment or in the type of position to be covered.
  - *Hearing:* not yet held.
  
- *C-426/20 Luso Temp*
  - *Facts:* In the main proceedings, the applicants are requesting that the defendant be ordered to pay the sums they say they did not receive in respect of paid holiday and holiday bonus pay owed for the period of time during which they worked for the defendant under temporary employment contracts
  - *About:* The Portuguese referring Court is asking the CJEU whether Article 3(1)(f) and Article 5(1) of Directive 2008/104/EC preclude national legislation under which [in certain circumstances on termination of the employment contract], temporary agency workers are entitled to paid holiday and the corresponding holiday bonus pay only pro rata to the period of service in the user undertaking whereas a worker recruited directly by the user undertaking who occupies the same job for the same period of time will be entitled to a longer period of paid holiday and more holiday bonus pay.

## ***Employer insolvency (Dir. 2008/94/EC)***

### Judgments

- *Case C-799/19, Sociálna poisťovňa (25.11.2020)*
  - *Facts:* the family members of an employee who died as a consequence of an accident at work claim the payment of a non-material damage compensation from an employer who has become de facto insolvent.
  - *About:* whether the payment at issue should be included among the ‘employees’ outstanding claims resulting from contracts of employment or employment relationships’ of Article 3 of the Directive.
  - *What the court said:* The Court considered that it is for national law to define the term ‘pay’ and therefore to specify which forms of compensation fall within the scope of the Directive. Moreover,

enforcement proceedings that are intended to enforce a court decision recognising a creditor's claim, such as those at issue, are not equivalent to collective proceedings based on the insolvency of the employer and, therefore, they do not entail the application of the Directive. Nevertheless, national law can extend the protection of the Directive also to that type of proceedings.

- *Case C-841/19, Fogasa (order published on 03/03/2021)*
  - See under Part-Time work above.

### ***Transfer of undertakings (Dir. 2001/23/EC)***

#### Upcoming :

- *Case C-550/19 Obras y servicios publicos*
  - *Facts:* The worker claims his period of service should be recognised as beginning to run from his first contract with a previous contractor and that employment relationship should be recognised as permanent.
  - *About:* Compatibility of a national collective agreement providing that workers on a fixed-term contract for a specific construction project may not acquire the status of permanent workers and that only those rights and obligations contained in those workers' most recent contract need to be respected by the new employer in case of transfer due to a change in contractor. Assessment under Clause 4 of the Framework Agreement on fixed-term work and Article 3(1) of Directive 2001/23/EC on transfer.
  - *Hearing:* not yet held.
- *C-237/20 Federatie Nederlandse Vakbeweging*
  - *Facts:* Subsequent to bankruptcy, a group of wholesale companies was taken over by a number of newly established businesses. The transfer was prepared in a so-called 'pre-pack' - a procedure not laid down in legislation or regulations that takes place prior to the declaration of bankruptcy, whereby the sale of the company to be declared bankrupt is prepared by negotiating with potential buyers. This in order to ensure that the transfer of the business after the bankruptcy could take place very quickly. A significant proportion of the staff was re-employed post-transfer, but on less favourable employment conditions than before.
  - *About:* In the event of the transfer of an undertaking after bankruptcy, an employer's rights and obligations from an employment contract do not automatically transfer to the buyer under the provision of national law implementing Article 5(1) of Directive 2001/23/EC on transfer. Question as to whether that exception also applies if the transfer of an undertaking declared bankrupt had already been prepared before the declaration of bankruptcy in a so-called 'pre-pack'. The Court has ruled that - in the circumstances giving rise to the judgement in Case C-126/16 Federatie

Nederlandse Vakvereniging and Others - the exception provided for in Article 5(1) of the Directive did not apply in the case of a pre-pack. The question is whether the situation is different in the circumstances of the present case and therefore whether that provision is applicable.

- *Hearing*: not yet held.

### ***Statute for a European Company (Dir. 2001/86/EC)***

#### Upcoming:

- *Case C-677/20 IG Metall and ver.di*
  - *Facts*: The employer, SAP AG, a German company originally under the legal form of an *Aktiengesellschaft* (public limited liability company under German law) was transformed into a European Company (SE) in 2014. Before the transformation, SAP AG had a supervisory board with eight members representing shareholders and eight representing the employees. The latter included six employees of the undertaking and two representing the trade unions, who were nominated by the trade unions and elected in a separate election process, in line with the German Law on employee participation. The Agreement on employee involvement in the transformed SE provides for either a supervisory board of 18 members or a reduced supervisory board of 12 members. The representatives of the trade union represented in the group have a right to propose some of the candidates allotted to Germany. However, the Agreement does not provide for a separate election process of the nominated trade union representatives in the case of the 12-member board, which, in the view of the applicants in national court proceedings, breaches Paragraph 21(6) of the German Law on involvement of employees in a European company (*Gesetz über die Beteiligung der Arbeitnehmer in einer Europäischen Gesellschaft 'SEBG'*), transposing Article 4(4) of Directive 2001/86/EC.
  - *About*: The German Federal Labour Court (*Bundesarbeitsgericht*) requested a preliminary ruling on the interpretation of Article 4(4) of Directive 2001/86/EC, in particular its scope. Article 4(4) of the Directive provides that, in case of an SE established by transformation, the agreement on employee involvement in the new SE shall provide for at least the same level of all elements of the employee involvement as those existing within the company to be transformed.
  - *Hearing*: not yet held.