



Flash Reports on Labour Law January 2022

Summary and country reports

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Flash Report 01/2022 on Labour Law

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Executive Summary

National level developments

In January 2022, extraordinary measures associated with the COVID-19 crisis continued to play a significant role in the development of labour law in many Member States and European Economic Area (EEA) countries.

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

Developments related to the COVID-19 crisis

After the increase in infection rates related to the advent of the omicron variant of COVID-19, many countries still have measures in place in January 2022 to prevent the spread of the COVID-19 virus in the workplace, and a state of emergency and/or restrictions were extended or re-adopted in many countries, including **Cyprus** and the **Czech Republic**.

However, several countries, such as **Denmark**, **Ireland** and **Norway**, removed all COVID-19 restrictions as of February 2022.

Teleworking remains compulsory in **Belgium** and **Greece**, and is strongly recommended in **Slovakia**. Partial teleworking has also been mandated in **France**. In **Hungary**, rules on teleworking have been slightly amended to regulate the case of pandemic alert.

Many legislative developments are still related to the requirement for workers to provide a COVID-19 certificate (so-called '3G Certification', 'Green Pass', 'SafePass', etc.) attesting vaccination against COVID-19, recovery or providing a negative test result. This requirement has been introduced for workers in the healthcare sector and in the social assistance sector in **Croatia**, and for all workers in **Slovakia**. In

France and **Italy**, the COVID-19 certificate has been amended for certain categories of workers and can now only be obtained in case of vaccination or recovery from COVID-19. In **Poland**, a new bill that would introduce the possibility for employers to request information on the results of their employee's COVID-19 tests was submitted to Parliament.

Conversely, in **Lithuania**, the COVID-19 certificate has been suspended with effect from 05 February 2022. Moreover, the Lithuanian rules on quarantine are being eased, as a list of categories of essential workers may be required to work even if they have asymptomatic COVID-19 infections or have had contact with COVID-19 patients.

Mandatory vaccination of some or all categories of workers are being introduced in some countries. A general vaccination mandate has entered into force in **Austria** and in **Italy** (for individuals aged 50+ years). Conversely, in the **Czech Republic**, the announced vaccination mandate has been revoked; however, measures concerning mandatory testing of employees have been renewed. Similarly, in **Lithuania**, the draft law to mandate vaccinations for medical employees and social workers failed in the final stage of adoption in Parliament. In the **United Kingdom**, it has been announced that the vaccine mandate requiring all health service staff to be vaccinated, with anyone not vaccinated due to be dismissed after 03 February 2022, could be disregarded in England for NHS staff due to chronic staff shortages.

More case law relating to employees who do not adhere to COVID-19 rules emerged, for example in the **United Kingdom**, where a decision of the Employment Tribunal upheld the dismissal of a care home employee who refused to vaccinate against COVID-19.

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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 extended or reintroduced in countries such as **Norway**, **Romania** and **Slovenia**. In **Ireland**, business and worker income support schemes are expected to be discontinued in April 2022.

In **Ireland**, a once-off bonus payment will be recognised to frontline health and ambulance workers.

In **Slovenia**, the recently introduced possibility to raise the pay of medical doctors above that prescribed by the legislation regulating salaries in the public sector has been challenged by some trade union confederations before the Constitutional Court.

In **Spain**, two decisions of the Supreme Court clarified that undertakings claiming temporary lay-offs and working time reduction or special schemes adopted to respond to the COVID-19 crisis must prove that the difficulties of

the undertaking is directly related to the COVID-19 crisis.

Leave entitlements and social security

In **Belgium**, temporary paid leave has been provided until 30 June 2022 to employees to accompany a dependent child to a vaccination centre. Moreover, the temporary leave scheme for parents in case of school or day-care centre closures due to COVID-19 has been extended until 31 March 2022.

Measure to ensure the performance of essential work

In **Belgium**, the maximum number of voluntary overtime working hours (during which the employee is not entitled to compensatory rest or overtime pay) has been increased in all sectors since 01 July 2021.

In **Finland**, the government has issued a decree introducing temporary exemptions to the regulation of working time and rest periods in the road transport sector due to the COVID-19 situation.

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

Topic	Countries
Mandatory COVID-19 certificate or testing at the workplace	CZ HR FR IT LT PL SK
COVID-19 restrictions	CY CZ DK IE NO
Teleworking	BE FR EL HU SK
Wage support scheme	IE NO RO SI
Mandatory vaccination against COVID-19	AT IT UK
Derogations to working time legislation	BE FI
Benefits for healthcare staff	IE SI
Measures for businesses	ES
Care leave	BE

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Other developments

The following developments in January 2022 were of particular significance from an EU law perspective:

Work-life balance

In **Finland**, a broad reform of parental leave schemes will enter into force on 01 August 2022.

A draft legislation to give employees the right to request remote working has been published in **Ireland**.

In **Italy**, the Budget Law for 2022 introduces an additional period of maternity leave for self-employed women, and permanently extends the duration of paternity leave to 10 days.

In **Luxembourg**, two bills aim at modifying the special leave for athletes to take part in sport competitions and at reintroducing a special leave for cultural events.

In **Portugal**, the number of days of justified absence in the event of the death of specific family members has been increased.

In **Sweden**, the Swedish Labour Court upheld the employer's decision to reject an application for part-time parental leave as it would have caused a 'significant disturbance'.

Working time

The **Czech** Constitutional Court has decided a case qualifying the stand-by time of a firefighter as working time, in line with CJEU case law.

In **France**, the Supreme Administrative Court rendered a decision on the stand-by time of members of the military.

In **Portugal**, a new act regulates the conditions of publishing work schedules and the recording of working time applicable to road transport workers.

In **Slovakia**, a decision of the Supreme Court clarifies that overtime work can be performed, and must be remunerated as such, even when the work is performed

without an explicit order of the employer.

Annual leave

In the **Netherlands**, a judgment of the Court of Appeal clarified that the annual leave the employee was unable to take cannot expire.

In **Romania**, the High Court of Cassation and Justice stated that in determining the annual leave allowance due to prison officers, consideration should be given to the pay increases they have benefited from throughout the year for difficult, harmful or dangerous working conditions.

Occupational safety and health

Commission Directive 2019/1834 amending Directive 92/29/EEC on purely technical adaptations on safety and health requirements onboard vessels has been implemented in **Latvia** and **Luxembourg**.

In **Croatia**, the amendment to the Regulations on conditions and measures for protection against ionising radiation has been adopted.

Transfer of undertaking

In **Portugal**, a judgment has clarified the concept of transfer of undertaking.

In **Spain**, the Supreme Court rendered a decision clarifying that legal rules on transfers of undertakings apply even when only a succession of subcontractors occurs in the case of 'succession of staff'.

Protection of whistleblowers

In **France**, the Court of Cassation ruled that the dismissal for serious misconduct of an employee who denounced a situation of conflict of interests is null, as the employee benefited from whistleblower protection which is not limited to the denunciation of criminal offences.

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Draft laws to transpose Directive (EU) 2019/1937 on the protection of whistleblowers are being discussed in **Estonia** and **Luxembourg**.

Status of interns and students

In **Germany**, a decision held that interns who complete a compulsory internship that is a prerequisite for admission to a course of study in accordance with higher education law are not entitled to statutory minimum wage.

A judgment of a **Dutch** court rules that PhD students are not employees if the element of productive work is absent.

Other developments

The **Austrian** Supreme Administrative Court rendered three decisions clarifying the applicable legislation on sanctions for employers of posted workers.

In **Cyprus**, an ongoing debate has been reported over the scheduled introduction of minimum wage in response to the proposal of an EU directive.

The **Estonian** Parliament is discussing amendments to the Employment Contracts Act to transpose Directive (EU) 2019/1152 on transparent and predictable working conditions.

In **France**, a judgment stated that the violation of labour law provisions by a

platform could constitute anti-competitive practices.

The **German** Federal Labour Court has referred a question to the CJEU for a preliminary ruling regarding the rules on collective redundancies.

In **Iceland**, the Equality Complaints Committee issued its first ruling on age discrimination in the labour market.

In the **Netherlands**, new rules shorten the length of employment service required for employees to vote and be elected in works councils.

In **Slovenia**, the regulation of wage compensation in case of temporary absence from work due to illness or injury has been amended.

The **Spanish** government issued a regulation amending rules on vocational education and training.

In **Spain**, a decision confirms that fixed-term workers have the right to the same financial benefits linked to seniority as permanent workers.

A **Swedish** Labour Court upheld the decision of an employing police authority that a policeman no longer fulfilled the criteria for security clearance and therefore summarily dismissed him.

In the **United Kingdom**, a reform of the law that incorporates all of EU law into domestic law, which would make it easier to amend retained EU law, has been announced.

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Table 2: Other major developments

Topic	Countries
Work-life balance	FI IT LU PT SE
Whistleblowers	EE FR LU
Occupational safety and health	HR LV LU
Working time	PT SK
Stand-by time	CZ FR
Annual leave	NL RO
Transfer of undertaking	PT ES
Worker status	FR NL
Vocational education and training	NL ES
Minimum wage	CY DE
Workers' representation	NL
Teleworking	IE
Posting of workers	AT
Age discrimination	IS
Collective redundancy	DE
Fixed-term work	ES
Platform work	FR
Brexit	UK

Implications of CJEU Rulings

Annual leave

This Flash Report analyses the implications of a CJEU ruling on annual leave.

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

The present case concerned a worker whose exercise of his right to take paid annual leave had the effect that the remuneration received in a given month was lower than that which he would have received had he not taken leave during that month, considering that the acquisition of the right to overtime pay was, under the applicable collective agreement, linked to the hours actually worked. The CJEU held that such a method of calculation of working time, according to which the annual leave was not considered hours worked, was likely to deter the employee from exercising his or her right to annual leave, and is thus not compatible with the right to paid annual leave provided for in Article 7(1) of the Working Time Directive, read in the light of Article 31(2) of the Charter of Fundamental Rights.

Most national reports indicate that their national legislation and case law follow the principle established in this ruling, as either the hours of annual leave are indeed accounted for as hours worked for the calculation of the total working hours in a reference period, or overtime is not calculated over a monthly reference period. As such, the case appears to have limited implications in many countries.

Despite the fact that the case was referred to the CJEU by a German court, it has been argued that the ruling might have very limited effects in **Germany**, since the facts of the case were very specific.

Only the **Maltese** national report indicates that its national legislation appears not to be in line with the CJEU's judgment, since any periods of paid annual leave, sick leave or any other leave to which the employee may be entitled and which is availed of by the employee, shall not be taken into consideration as hours worked in the determination of whether the employee exceeded the normal weekly working time.

Some countries (e.g. **Norway**) report that collective agreements could regulate the calculation of overtime in a similar manner as in the present case. Therefore, the present judgment is expected to provide significant guidance on the interpretation of existing provisions on annual leave in collective agreements in countries where rules on the calculation of overtime are generally left to the autonomy of the social partners, such as **Denmark, Iceland, Norway** and **Sweden**, or where collective agreements may in principle derogate to national legislation on the matter (e.g. **Hungary**).

Austria

Summary

(I) Legislation on the COVID-19 vaccine mandate is expected to enter into force in February 2022.

(II) The Supreme Administrative Court has rendered three decisions clarifying the applicable legislation on sanctions for employers of posted workers.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Compulsory COVID-19 vaccination

Legislation on the COVID-19 vaccine mandate (COVID-19-Impfpflichtgesetz – COVID-19-IG, 460/BNR) passed the National Assembly on 20 January 2022 and is expected to pass the Federal Assembly on 03 February 2022.

Austrian residents who have reached the age of 18 are required to get vaccinated against COVID-19 for the protection of public health (compulsory vaccination). The vaccination mandate cannot be enforced through direct coercion. Following an introductory period of six weeks, unvaccinated Austrian residents may be subject to administrative fines of up to a maximum of EUR 3 600 up to four times a year if they do not have and refuse to get vaccinated.

For a brief overview, see a press article [here](#).

The COVID-19 vaccine mandate does not, however, affect the current COVID-19 workplace regulation (4. COVID-19-Maßnahmenverordnung, 4. COVID-19-MV), which stipulates that a valid '3G certificate' (*geimpft, genesen, getestet* – vaccinated, recovered, tested) is necessary for entry to the workplace. Unvaccinated employees can therefore continue to enter their respective workplace despite compulsory vaccination, if they comply with testing requirements, currently with either an antigen test (valid for 24 hours) or a PCR test (valid for 72 hours, in Vienna for 48 hours). For more information, see a press article [here](#).

As the COVID-19 workplace regulation continues to allow employers to impose stricter workplace-requirements, [it is heavily debated](#) whether, and if so, under what circumstances, employers may impose a '2G' rule (*geimpft, genesen* – vaccinated, recovered) and if and how the vaccine mandate affects the imposition of such a rule, and possibly dismissal of non-compliant staff. The current general consensus is that there 'may' be a reason for dismissal if the employee cannot perform her or his job without a valid vaccination/recovered status (e.g. if frequent international travel is required for the job, see [Austrian Trade Union](#)), and that the introduction of a '2G' rule at the workplace 'may' be possible in well-justified cases (see [here](#) for a press article), although the details remain unclear.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Posting of workers

Supreme Administrative Court, Ra 2021/11/0161, 30 November 2021; RA 2020/11/0038, 25 November 2021, and Ra 2020/11/0080, 16 November 2021

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In a number of recent rulings, the Supreme Administrative Court interpreted the amended provisions on the sanctions of the Act to Fight Wage and Social Dumping (*Lohn- und Sozialdumping-Bekämpfungsgesetz – LSD-BG*, [Federal Legal Gazette of 9 September 2021, 2021/174](#), see July 2021 Flash Report).

The criminal provisions of the LSD-BG, as amended by the LSD-BG Amendment Federal Law Gazette I No. 174/2021, were to enter into force on 01 September 2021 and to apply to all proceedings pending at that time, including proceedings before the Supreme Administrative Court and Constitutional Court, in accordance with the unambiguous wording of § 72(10) last sentence LSD-BG. With this transitional provision, the legislator has clearly pursued the goal of ensuring the application of the same legal situation in all criminal proceedings for wage and social dumping pending at the time of entry into force of these provisions (on 01 September 2021), regardless of the authority or court before which such proceedings were currently pending.

The amendment was the result of the CJEU finding that the former provisions were in breach of EU law in its decision of 12 September 2019, C-64/18, *Maksimovic*.

In the first decision, [Ra 2021/11/0161](#), the Supreme Administrative Court held that it follows from this order that in appeal proceedings pending before it, it must examine all contested decisions of the Supreme Administrative Court in administrative penalty cases under the LSD-BG, i.e. irrespective of the date of their issuance, against the standard of sections 26 to 28 and section 29(1) LSD-BG as amended by Federal Law Gazette I No. 174/2021.

In the second decision, [RA 2020/11/0038](#), the Court held that there is no need for a separate legal provision to be able to take the multiple violations of § 26 (2) LSD-BG 2016 into account as aggravating circumstances when assessing the (total) fine to be imposed. Rather, it already follows from § 19 (1) of the Administrative Criminal Code that the importance of the legally protected property and the extent of its impairment due to the offence (which depends, among others, on the number of reports not kept ready) must be considered to assess the penalty.

In the third decision, [Ra 2020/11/0080](#), the Administrative Court stated that when imposing a (single) fine, the number of omitted reports on the posting of workers pursuant to § 19 (1) and (2) LSD-BG 2016 may not be taken into account as an aggravating factor is incorrect. With this legal opinion, the Administrative Court can neither refer to the ruling [Ra 2019/11/0033 to 0034](#) nor to the CJEU judgment of 12 September 2019, C-64/18, *Maksimovic*, on which it is based.

To date, only excerpts of these rulings have been published without providing the reasons for the decision.

The amendment will apply retroactively on all pending procedures (as stated in the first decision) to ensure that the new criminal regime in line with EU prerequisites applies as widely as possible.

The two other decisions state that—within the range of fines—the number of breaches and the fact that the violation has been repeatedly committed must be taken into account to determine the fine.

The decisions of the CJEU in C-64/18, *Maksimovic and Others* and C-33/17, *Cepelnik*, did not prohibit this, but only questioned the fact that there was no upper limit to the fines in combination with a minimum fine for each breach, thus resulting in disproportionate fines. Now there is a maximum fine limitation and the Austrian legislation is now in line with EU prerequisites.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

In Austria, the continuation of pay for paid annual leave is regulated in § 6 Annual Leave Act (*Urlaubsgesetz – UrlG*) which reads as follows (unofficial translation by the authors):

"Holiday pay

§ 6 (1) During leave, the employee shall retain the right to remuneration in accordance with the following provisions.

(2) Remuneration calculated on the basis of weeks, months or longer periods shall not be reduced for the duration of the leave.

(3) In all other cases, regular remuneration shall be paid for the duration of the leave. Regular remuneration shall be the remuneration to which the employee would have been entitled if the leave had not been taken.

(4) In the case of piecework or piecework wages, premiums or remuneration similar to piecework or other performance-related premiums or remuneration, holiday pay shall be calculated on the basis of the average of the last thirteen fully worked weeks, excluding work performed exceptionally only.

(5) Collective agreements within the meaning of § 18 (4) of the Labour Constitution Act, Federal Law Gazette No. 22/1974, may determine which benefits paid by the employer are to be considered holiday pay. The method of calculating the amount of holiday pay may be regulated by collective agreement in derogation of subsections 3 and 4.

(6) Holiday pay shall be paid in advance for the entire duration of leave at the start of the holiday."

As detailed in the December 2021 Flash Report, established case law requires employers to take regular overtime for the calculation of holiday pay into account based on the employee's average remuneration pursuant to § 6 (4) UrlG. Generally, the average overtime worked in the previous 13 weeks is included, as it is assumed that the employee is likely to have worked the same amount of overtime hours had she or he not taken annual leave. If for special reasons (e.g. illness, seasonal differences, etc.) it is clear that the period of 13 weeks does not represent an adequate understanding of the overtime hours that the employee would have worked if he or she were not on annual leave, a longer observation period that is more in line with the idea of continuity should be used (Supreme Court decision of 20 April 2020, *9 ObA 5/20f*). Hence, Austrian legislation and case law carefully calculates pay for annual leave to not reduce employees' regular income when they take annual leave.

Another aspect worth noting is that the Austrian Working Time Act (*Arbeitszeitgesetz, AZG*) defines overtime hours more narrowly than the CBA in *Koch Personaldienstleistungen*. Based on the Austrian Working Time Act and Austrian CBAs, overtime hours resulting in surcharges are not calculated on the basis of exceeding the monthly amount of working time. Overtime time hours (flexible working time models based on the Working Time Act may generally allow for some deviation) are accumulated when working time exceeds regular [daily working time hours](#) (eight hours, although deviation in CBAs/working time models is possible) and [weekly working time hours](#) (forty hours, though deviation in CBA/working time models is possible), then [overtime surcharges of 50 per cent apply](#). Hence, considering the average overtime worked over the past 13 weeks when calculating holiday pay provides a very accurate account of the overtime hours/the income the employee would have earned if he/she were not on leave, and thus ensures that employees do not receive a lower income while they are on leave.

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As there is no financial discouragement for employees to take annual leave, Austrian legislation and case law are in line with the ruling of the CJEU in case C-514/20, *Koch Personaldienstleistungen*.

4 Other Relevant Information

Nothing to report.

Belgium

Summary

(I) Temporary paid leave is provided to employees to accompany a dependent child to the vaccination centre until 30 June 2022. Temporary leave for parents in case of school or day-care centre closures due to COVID-19 has been extended until 31 March 2022.

(II) Teleworking remains compulsory.

(III) The maximum number of voluntary overtime working hours, which do not entitle the employee to compensatory rest or overtime pay, has been increased in all sectors since 01 July 2021.

(IV) A new law announces a programme aiming to reintroduce the incapacitated employee to the labour market through adapted work, other work or training.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Temporary childcare leave

The Law of 23 December 2021 on temporary support measures due to the COVID-19 pandemic (*Moniteur belge* of 12 January 2022, p. 1013) has been introduced.

The right to short-term leave with continued entitlement to remuneration has been extended to employees to accompany a cohabiting minor child, or an adult person with a disability, to a vaccination site for the required time. This right only applies to one of the cohabiting parents or guardians.

This part of the law will cease to have effect on 30 June 2022, but the King may postpone it until 31 December 2022.

In addition, the employee may be absent from work without pay, if a cohabiting minor child cannot attend day care or school because they are closed to contain the spread of COVID-19, or because the child has to attend compulsory distance education or is in quarantine or isolation. This also applies to employees if a dependent child with disabilities cannot go to a care centre or can no longer benefit from other treatment organised or recognised by the competent authority. The employee shall immediately inform the employer, including proof of one of the above situations. For the period in which the employee makes use of this right, he or she is entitled to temporary unemployment benefits due to force majeure at the expense of the National Employment Office as a result of COVID-19.

This part of the law will cease to apply on 31 March 2022.

1.1.2 Teleworking

The Royal Decree of 27 January 2022 amending the Royal Decree of 28 October 2021 containing the necessary measures of the administrative police to prevent or limit the consequences for public health of the declared epidemic emergency concerning the coronavirus COVID-19 pandemic (*Moniteur belge* 27 January 2022) was introduced.

Teleworking remains compulsory. However, return trips may be scheduled with a maximum of one day per week at the workplace per person. However, this is only permitted on the condition that no more than 20 per cent of the staff for whom teleworking is mandatory are also present at the same time.

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1.2 Other legislative developments

1.2.1 Overtime

The Law of 12 December 2021 implementing the social agreement within the framework of inter-professional negotiations between the national employers' organisation and trade unions for the period 2021–2022 (*Moniteur belge* of 31 December 2021) was introduced.

This law includes some measures resulting from the intersectoral negotiations during 2021–2022. Among others, the annual number of voluntary overtime working hours (so-called 'reliance hours') has been increased from 100 hours to 220 hours a year in all sectors since 1 July 2021. However, such overtime does not entitle the employee to compensatory rest or overtime pay, nor do any social security contributions or taxes need to be paid.

1.2.2 Reasonable accommodations

The Law of 12 December 2021 on the introduction of the so called 'Back to Work route' under the coordination of the 'Back to Work Coordinator' in the sickness and invalidity benefits insurance for employees (*Moniteur belge* of 17 December 2021) was introduced.

This social security law is important for many employment relationships. This new 'Back to Work' route for incapacitated employees creates the possibility of entering a 'Back to Work' route under the coordination of the 'Back to Work Coordinator' via their compulsory social security sickness and invalidity health insurance fund.

The pathway supports disabled employees in finding appropriate support for a return to the labour market through adapted work, other work or training. The initiative to effectively start this trajectory can come from the advisory doctor of the health insurance fund or from the beneficiary employee. During the process, there is close cooperation between the beneficiary employee, the advisory doctor of the health insurance fund, the doctor treating the employee, and possibly an occupational doctor of the company.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual Leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

The present ruling does not have implications for Belgian labour law. According to Belgian labour law, a (temporary agency) worker, who takes annual leave, is generally entitled to an extra overtime salary, if he or she has worked additional hours in the month concerned. The Belgian legislation and collective bargaining agreements do not fully exclude the days of annual leave of the (temporary agency) employee from the calculation of the number of hours of overtime work and the right to additional overtime pay in the month concerned.

4 Other Relevant Information

4.1 Minimum wage

The Law of 12 December 2021 implementing the social agreement within the framework of inter-professional negotiations between the national employers' organisation and trade unions for the period 2021–2022 (see above, §1.2.2) increases the guaranteed intersectoral minimum monthly income.

Bulgaria

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

The present case does not have any implications for Bulgarian legislation and national practice in relation to the requirements of Article 7(1) of Directive 2003/88/EC. Under Bulgarian labour legislation, the days of paid annual leave shall be counted and paid according as working time. Pursuant to Article 50 of the Labour Code, the collective labour agreement may not regulate issues of the employment and social insurance relations of employees, which are regulated by mandatory provisions of the law. This means that such an agreement may not regulate issues related to the calculation of overtime, including in cases of paid annual leave (to provide the standard working hours based on which payment for overtime is determined), as these issues are regulated by mandatory provisions of the labour legislation.

Article 142 of the Labour Code provides that working time shall be calculated in terms of working days on a daily basis. The employer may establish a summary calculation of the working time under conditions and a procedure, determined by an ordinance of the Council of Ministers (the Ordinance on Working Time, Rest Periods and Leaves). In the case of summary calculations of working time, the employer shall determine a period, for which the summary calculation is established, with a duration from 1 to 4 months. A collective labour agreement at industry or branch level may determine a period for the summary calculation of working time up to 12 months. The maximum duration of a work shift upon calculation of working time on a weekly or longer basis may be up to 12 hours, while the total duration of the work week may not exceed 56 hours and for employees who work reduced hours, it may be up to one hour beyond their reduced working time.

The allocation of working time shall be established by the employer in the internal rules of employment of the undertaking (Article 139 (1) of the Labour Code). The provision of Articles 9a–9b of the above-mentioned Ordinance establishes the rules on the summary calculation of working time – drawing on the referred work schedules, determining the norm for the duration of working hours and the calculation of overtime. The norm for the duration of working time is determined for the entire period for which the summary calculation is established. In cases of night work, the sum of working hours in the employee’s schedule shall be calculated after the conversion of night hours into daily shifts of 4 hours or more of night work, with a coefficient equal to the ratio between the normal duration of the day and night working hours – 1 143, specified for the daily recording of working hours. A recalculation of night working hours into daily hours shall not take place where reduced working hours are established for the workplace and in cases where the employment contract is concluded for night work only.

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Where an employee has taken leave during all or part of the period for which the total calculation of working time has been established, the rate for the duration of his/her working time shall be recalculated by subtracting from his/her number of working days per calendar year the respective days of leave permitted per calendar year.

Where during the entire or part of the period for which the total calculation of working time has been established, an employee has taken leave for temporary incapacity for work, for pregnancy, childbirth and for the adoption of a child up to the age of 5 years, the norm for the duration of his/her working time shall be recalculated and the relevant hours subtracted from the approved work schedule.

Hours worked by the employee, which at the end of the period for which the summary calculation of working time is determined, are higher than the hours determined in the relevant work schedule, will be considered overtime. This work is paid as overtime work. The norm is mandatory, and the collective labour agreement may not derogate from this.

4 Other Relevant Information

Nothing to report.

Croatia

Summary

(I) Workers in the healthcare and in the social assistance sector are required to present a COVID-19 certificate or other relevant evidence of having been tested, vaccinated or recovered from the COVID-19 disease to enter the employer's premises.

(II) The Amendment to the Regulations on Conditions and Measures for Protection Against Ionising Radiation in the Performance of Activities with Ionising Radiation Sources has been adopted.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 COVID-19 certificate

The employees of all institutions engaged in social assistance are required to present a digital EU COVID certificate or other relevant evidence of having been tested, vaccinated or recovered from the COVID-19 disease to enter the employer's premises. Employees who refuse to be tested or to present a digital EU COVID certificate or other relevant evidence of having been tested, vaccinated or recovered from the COVID-19 disease are not allowed to enter the employer's premises. If he/she fails to ensure implementation of the above-mentioned special security measures, the obligation to present evidence of testing, vaccination or recovery from the COVID-19 disease to enter the employer's premises, the person responsible is subject to misdemeanour liability. The same applies to the healthcare sector (private and public).

[See here](#) for the Amendment to the Decision on the Introduction of a Special Security Measure in the Social Assistance Sector.

[See here](#) for the Amendment to the Decision on the Introduction of a Special Security Measure for Mandatory Testing of all Employees of Healthcare Institutions, Companies Performing Healthcare Activities and Private Healthcare Workers for the SARS-CoV-2 Virus.

1.2 Other legislative developments

1.2.1 Occupational safety and health

The Regulations on Conditions and Measures for Protection Against Ionising Radiation in the Performance of Activities with Ionising Radiation Sources which transposed Directive 2013/59/Euratom into Croatian legislation has been amended. Among others, the provisions on the criteria for determining the types of areas of exposure to ionising radiation (Article 8) and the types of tests within quality control and the frequency of these tests (Article 16) have been amended.

[See here](#) for the Amendment to the Regulations on Conditions and Measures for Protection Against Ionising Radiation in the Performance of Activities with Ionising Radiation Sources.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

According to Article 94 of the Labour Act, the employee is entitled to an increased salary for overtime work. The amount of overtime payments is defined in the employment contract, collective agreement, or work regulations (derived from Article 15(1)(8) and 15(2)). Usually, the basic salary is increased by 30 per cent to 50 per cent for overtime work (see, for instance, Article 43(2) of the Collective Agreement for the Construction Sector of 2020 or Article 53(1) of the Basic Collective Agreement for Public Servants and Employees of 2017). Employees are paid for every hour of overtime work, there is no threshold for hours worked that grant entitlement to overtime pay. Furthermore, overtime work may not be performed on a regular basis because employees can only work overtime in case of force majeure, an extraordinary increase in the scope of work and in cases of a pressing need (Article 65(1) of the Labour Act).

It can be concluded that employees in Croatia will not face the situation described in this case and would not be discouraged from taking paid annual leave. During annual leave, they are entitled to salary compensation which may not be less than his/her average monthly salary over the previous three months (Article 81 of the Labour Act).

4 Other Relevant Information

Nothing to report.

Cyprus

Summary

The government has retained most of the emergency measures to contain the COVID-19 pandemic, including restrictions for non-vaccinated persons.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

As the number of infections and hospitalisations remained high, the government retained most of the emergency measures to contain the COVID-19 pandemic, including restrictions for non-vaccinated persons.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

Article 7(1) of 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, read in the light of Article 31(2) of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding a provision in a collective labour agreement under which, in order to determine whether the threshold of hours worked granting entitlement to overtime pay is reached, the hours corresponding to the period of paid annual leave taken by the worker are not to be taken into account as hours worked.

Annual leave in Cyprus is regulated by the Law on Annual Leave with Pay (8/1967) (*Οι περί Ετησίων Αδειών μετ' Απολαβών Νόμοι του 1967 έως 1999*) and the Cypriot WTL law purporting to transpose the WTD (*Ο Περί της Οργάνωσης του Χρόνου Εργασίας Νόμος του 2002 (63(I)/2002)*) provide for four weeks of annual holiday leave, which are fully paid for all employees. The WTL provides that all employees are entitled to four weeks of paid leave in accordance with the terms and conditions provided by legislation or collective agreements and/or the practice of obtaining the right and the granting of leave (Art. 8(1)). More favourable arrangements contained in collective agreements are permitted.

No such case has been brought before the court in Cyprus. However, the practice in Cyprus to determine whether the threshold of hours worked, which grant entitlement to overtime pay has been reached for the purposes of calculating pay under circumstances such as those decided in the present CJEU case, envisages that the hours corresponding to the period of paid annual leave taken by the worker are not to be considered as hours worked. In other words, the worker will be paid overtime pay.

4 Other Relevant Information

4.1 National debate on minimum wage

The government is pressing on with its objective to introduce minimum wage in response to the proposal of an EU directive on the matter. The debate over the introduction of new minimum wage legislation has intensified with the social partners (employers' associations and trade unions) taking a stance on the matter. The Minister of Labour presented a PowerPoint presentation to the social partners of the broad approach the new legislation will cover, but no detailed study or draft legislation has been presented.

The employers' association, which initially opposed the idea of a minimum wage as inflationary and as undermining collective bargaining, has decided to enter into a dialogue that may lead to the adoption of such a system, but has expressed the view that the introduction of minimum wages across the board entails the abandonment of the current COLA system (see Michalis Antoniou: *„ΑΤΑ & Εθνικός Κατώτατος Μισθός: Ευρωπαίοι μόνο σε όσα μας αρέσουν;“, Philelefttheros*, 30 January 2022). The initial opposition of employers' associations deemed that the existing system, which covers the process of establishing minimum wage by decree, was problematic, arguing that it was too high beyond what the economy could afford (approaching the minimum wage of far wealthier countries), and poses a serious disincentive for creating new jobs (*Alpha Ενημέρωση: Συζήτηση για τον κατώτατο μισθό*, 20 November 2019). The last Annual Report of the Employers' Association 2019 repeated the associations' long-held position advocating the abolition of minimum wage. They considered that minimum wages were 'calculated in a distorted way', they were 'very high and beyond the capabilities of the Cypriot economy, as it approaches the minimum wages of other much more economically advanced countries while at the same time it is a serious disincentive for job creation' (*Έκθεση Διοικητικού Συμβουλίου ΟΕΒ για το έτος 2019*, p. 44). The Cyprus Employers & Industrialists Federation (OEB) opposed the logic of the EU Commission Directive; the Annual Report of Cyprus's Employers & Industrialists Federation (OEB) 2020 reiterated the view that the Association opposes the statutory regulation of wages in Cyprus.

After a meeting between PEO trade union federation delegation with President Nicos Anastasiades, the General Secretary of PEO, former Minister of Labour Sotiroulla Charalambous stated that the Union welcomed talks on a national minimum wage, which needed to address important issues so that it does not serve as a tool to push salaries down further (see Anna Savva: 'Introduction of minimum wage at centre of palace meeting', *Cyprus Mail*, 03 February 2022). The other large trade union confederation, SEK, strongly supports the introduction of a minimum wage system (Adamou Adamos: *„Κρίσιμο ραντεβού για τον κατώτατο μισθό“, Philenews*, 21 December 2021).

One major issue is the level of minimum wage, how it is to be determined and which occupational groups will be included and excluded. The Minister of Labour has already hinted that the proposal may well follow the practice of some other countries that have a system of minimum wage, which will however exclude some categories of vulnerable workers such as domestic workers and agricultural workers (see Adamou Adamos: *Εθνικός κατώτατος μισθός αρχές του 2022 με εξαιρέσεις, Philelenews*, 24 December 2021).

Czech Republic

Summary

(I) The mandatory vaccination for certain groups of persons has been cancelled. The government has reintroduced and amended mandatory testing of employees.

(II) The government has retained and amended travel restrictions and restrictions on certain businesses.

(II) The Constitutional Court has decided a case qualifying the stand-by time of a firefighter as working time, in line with CJEU case law.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Mandatory vaccination

Decree No. 21/2022 Coll., amending Decree No. 537/2006 Coll., on vaccination against infectious diseases, was published on 31 January 2022 and entered into effect on 01 February 2022. The text of the decree is available [here](#).

The Decree effectively cancels mandatory vaccination for certain groups of persons, as introduced in December 2021 by the Decree of the Ministry of Health No. 466/2021 Coll., amending Decree No. 537/2006 Coll (see December 2021 Flash Report), and vaccination is no longer mandatory for the relevant groups of persons.

1.1.2 Screening of employees for COVID-19

The government has reintroduced and amended mandatory testing of employees for COVID-19. Employees have to be tested at least twice per week, unless one of the exceptions applies.

See the extraordinary measure of the Ministry of Health No. MZDR 461/2022-1/MIN/KAN of 05 January 2022, subsequently amended by the extraordinary measures of the Ministry of Health No. MZDR 461/2022-2/MIN/KAN of 14 January 2022 and No. MZDR 461/2022-3/MIN/KAN of 26 January 2022. The text of the extraordinary measures is available [here](#), [here](#) and [here](#).

1.1.3 COVID-19 restrictions

The government has retained and amended the travel restrictions by amending the list of risk countries. See the protective measure of the Ministry of Health No. MZDR 705/2022-4/MIN/KAN of 28 January 2022 which was adopted with effect as of 31 January 2022, in connection with the Protective Measure of the Ministry of Health No. MZDR 20599/2020-138/MIN/KAN of 23 December, available [here](#).

Moreover, the government readopted and amended restrictions on certain businesses. See the Protective Measure of the Ministry of Health No. MZDR 1518/2022-1/MIN/KAN of 14 January 2022 has been adopted with effect as of 17 January 2022, available [here](#).

1.1.4 Amendment of the Pandemic Act

Draft Act amending Act No. 94/2021 Coll., the Pandemic Act, is currently in the legislative procedure and is being deliberated in the Chamber of Deputies. The Draft Act is available [here](#).

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The Draft Act aims to introduce a number of changes in the Pandemic Act (see February 2021 Flash Report), and would extend the effect of the Pandemic Act indefinitely.

Apart from a few technicalities and entrusting two more ministries with the power to issue extraordinary measures in certain areas, the Draft Act contains two major amendments:

- (1) It broadens the range of areas that can be regulated by extraordinary measures (e.g. it would be possible to introduce mandatory testing not only for employees, but for other groups of persons as well; further, it would be possible to introduce blanket quarantines for people with positive antigen tests or those who return from areas with an increased risk of infection, etc.), and
- (2) It changes the period of effect of the Pandemic Act (currently, the Pandemic Act remains in effect until 28 February 2022, whilst the Draft Act would extend this period indefinitely).

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Stand-by time

Constitutional Court, decision No. II.ÚS 1854/20, 18 October 2021

The present judgment (available [here](#)) concerned a firefighter, employed by an airport, whose employer required him to remain within the area of the airport and be available within 3 minutes when present in the workplace, including during his breaks for rest and food. The firefighter demanded remuneration for the duration of these breaks as he considered them to be working time. In his opinion, the employer's requirements prevented him from resting.

The Constitutional Court ruled that if a worker is required to be ready to resume work and be available within 3 minutes when present at the employer's workplace during breaks for meal and rest, it constitutes working time, and the worker is entitled to remuneration. Work that consists in constant readiness to intervene is, by its nature, work which cannot be interrupted and therefore cannot be considered as a rest period. Unpaid rest periods, on the other hand, can only be time which the employee can manage freely.

First, it is important to note that the Supreme Court's ruling was issued before the CJEU ruling in case C-107/19 *Dopravní podnik hl. m. Prahy*, while the ruling of the Constitutional Court was issued thereafter. Consequently, the Supreme Court followed its decision No. 21 Cdo 6013/2017 (the original case C-107/19) which was later set aside by the CJEU.

As already described in the September 2021 Flash Report, the Czech Labour Code differentiates between work breaks for meal and rest which are provided by the employer after continuous work of maximum six hours, and a reasonable time for meals and rest periods that take place when the work cannot be interrupted. The former shall last at least 30 minutes and is considered as a rest period, thus unpaid; the latter, on the other hand, is considered working hours since the employee is not given any real rest because the nature of the work requires it (e.g. an employee supervising boilers who cannot leave the boilers' proximity for more than 5 minutes due to the technical requirements of the boilers), and is therefore awarded a salary.

When the Supreme Court decided the original case C-107/19, i.e. case No. 21 Cdo 6013/2017, it applied the above mechanism, and decided this case in a similar way. It

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held that the work of a firefighter shall not be considered work that cannot be interrupted, thus the firefighter was not entitled to wages for breaks.

The Constitutional Court pronounced its ruling after the CJEU decision in case C-107/19 *Dopravní podnik hl. m. Prahy*. While it agreed with the mechanism the Supreme Court described (i.e. for a reasonable time for meals and rest periods to be possible only for work that cannot by its nature be interrupted), it held that it had not been applied correctly.

Similarly to the CJEU, the Constitutional Court held that in employment relationships, it is always necessary to determine whether the time under consideration is working time or a rest period, as there is no third option. If the firefighter had been required to be ready to intervene within 3 minutes at the latest, even during a scheduled meal and rest break, then he was performing work which, by its nature (being on alert, being ready), could not be interrupted. Whether or not there was a need to intervene during breaks, i.e. whether or not the firefighter was called off his breaks, is completely irrelevant to the assessment of the firefighter's claim. Unpaid rest periods, on the other hand, can only be times the employee can manage at his or her own discretion, i.e. to take time off and not be at the employer's disposal during that time.

Next, the Constitutional Court held that since the national legislation originates in EU law, it must be interpreted in view of the CJEU case law, i.e. working time necessarily includes any periods of stand-by during which restrictions are imposed on the employee that significantly affect his or her ability to manage his or her time and pursue his or her own interests.

Lastly, it affirmed that the Supreme Court should have been aware that the 'model case' was being assessed by the CJEU and that the Advocate General was of a different opinion that was based on previous CJEU case law. The Constitutional Court held that it was not the mere failure to raise a preliminary question that constitutes a breach of the right to judicial protection, but the arbitrary procedure of the Supreme Court to be contrary to CJEU case law, without the Supreme Court having initiated proceedings on the preliminary question.

The present decision of the Constitutional Court is thus in line with the case law of the CJEU.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

In the Czech Republic, the calculation of working hours for the purpose of determining the number of hours of overtime worked, the hours taken as paid leave are included as working hours. Section 348 of the Labour Code states the following:

*"(1) The following shall be considered as performance of work:
b) paid leave"*

Furthermore, collective agreements may not impose new obligations on employees or curtail their rights in accordance with the Labour Code. Such a provision of a collective agreement would automatically be void.

Therefore, the practice in the Czech Republic is in line with this CJEU ruling.

4 Other Relevant Information

Nothing to report.

Denmark

Summary

COVID-19 restrictions will be lifted from 01 February 2022.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Lifting of COVID-19 restrictions

COVID-19 infection rates have continued to increase rapidly in Denmark throughout January due to the spread of the new Omicron variant. However, the Danish government has decided to open up society (almost) in its entirety. From 01 February, COVID-19 will be downgraded from a critical disease, and nearly all restrictions will be repealed. Travel restrictions may still apply, however.

The vaccination rates have increased to 82.5 per cent (first vaccine) and 80.6 per cent are fully vaccinated. 60 per cent of the population have now been re-vaccinated. Particularly vulnerable citizens (with weak immune system) have already or will soon be offered a fourth vaccine.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

In Denmark, the Working Time Directive 2003/88/EC has been transposed in three different statutory acts as well as in collective agreements. The right to overtime pay—or the definition of overtime work—is not regulated in statutory acts.

Overtime work—and the right to overtime pay—is normally regulated in collective agreements. The rules on overtime work vary from one agreement to another, and the terms used—'overtime work' or 'overtime pay'—may not necessarily have the same meaning across different agreements. Typically, overtime work refers to extraordinary work performed for the employer outside the monthly, weekly or daily normal working time specified in the collective agreement. For example, the [Collective Agreement for Industry, 2020-2023](#), Section 13 (2) specifies: "Overtime work is work that is performed outside the planned daily working time within the individual employee's specific work week..."

The method for calculating overtime work is rarely stated directly in the collective agreement and is often based on either a common practice approved by both sides, or case law in cases of dispute.

Looking at previous industrial arbitration practice (cf. industrial arbitration ruling of 18 November 1999), it is evident that under that specific collective agreement, an

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employee's annual leave or sick leave was not taken into account as regular working days (i.e. they were considered neutral) in the calculation of overtime work.

The question in the present case was whether the parties had agreed to calculate the employee's weekly or daily working time (with consequences for the possibility to take time off in lieu). It followed from the facts of the case that annual leave and sick leave days were not included in the calculation of overtime work.

If the parties to a collective agreement further disagree on the interpretation of the calculation of overtime work, the dispute can be settled by industrial arbitration, cf. the Danish [Labour Court Act](#) (L 1003 of 24 August 2017), Section 21.

A calculation of working time in which periods of sick leave and annual leave are considered neutral periods corresponds with the Danish [Working Time Act](#) (L 896 of 24 August 2004), Section 4, which implements the Working Time Directive 2003/88/EC, Article 6:

"The average working time for a seven-day period calculated over a four-month period cannot exceed 48 hours, incl. overtime work. Periods of annual paid leave and periods of sick leave are not to be included in or must be considered neutral in the calculation of average working time."

Collective agreements cannot derogate from the minimum level of protection in the Working Time Directive. As provisions are implemented by both the Working Time Act and in collective agreements, the Working Time Act is the default regulation. If a collective agreement is ambiguous on the topic, the Working Time Act will apply instead, cf. section 1 (1) and (2). The requirement of including a minimum level of protection in collective agreements is interpreted strictly, as was the case in the [ruling FV 2020-348](#) of 16 July 2020. In that case, the arbitrator determined that the collective agreement did not implement the minimum level of protection stipulated in the Working Time Directive, and instead, the Working Time Act applied between the parties.

In conclusion, the recent CJEU ruling introduces a framework for the interpretation of all provisions in collective agreements that cover the calculation of the payment for overtime work.

The interpretation of the CJEU is in line with current practices and case law between the collective parties on the calculation of overtime work in Denmark, as periods of sick leave and annual paid leave are to specifically be included as neutral periods, i.e. they do not affect the calculation negatively.

Some practices or calculations differ from the case law or from the system described in the Working Time Act. In that case, the ruling provides a framework for interpretation should such a dispute arise between the parties.

4 Other Relevant Information

Nothing to report.

Estonia

Summary

(I) The Estonian Parliament is discussing amendments to the Employment Contracts Act. The amendments are connected to the transposition of Directive (EU) 2019/1152.

(II) The Estonian Parliament has discussed the draft law on the protection of whistleblowers, with a view to transposing Directive (EU) 2019/1937.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Amendments to the Employment Contracts Act and Related Acts

On 17 January 2022, the draft law on Amendments to the Employment Contracts Act and Related Acts was initiated in the Riigikogu (*Töölepingu seaduse ja sellega seonduvalt teiste seaduste muutmise seadus*, Act Amending the Employment Contracts Act and Related Acts, No. 521 SE, 31 January 2022).

The draft aims to transpose Directive (EU) 2019/1152 of the European Parliament and of the Council on transparent and predictable working conditions in the European Union into Estonian law. To achieve this, the Employment Contracts Act (TLS), the Civil Service Act (ATS), the Working Conditions of Workers Posted to Estonia Act (ELTTS) and the Occupational Health and Safety Act (OHS Act) will be amended.

Some of the key provisions of the amendments to the Employment Contracts Act are discussed below.

First, the draft supplements the amount of information in the TLS that the employer must provide to the employee in writing upon taking up employment. In practice, the wording of the ECA has caused confusion in distinguishing between a written document related to an employment contract and an employment contract (i.e. whether information on working conditions must be included in the employment contract), thus changing the wording of the provision. Theoretically, a problem arises about what must be reflected in the written employment contract, and how important it is for documents to comply with the obligation to provide information. The Estonian Trade Union Confederation has also referred to this in its opinion to the draft.

Second, a provision will be added to ensure that employees are protected against unfavourable treatment (including adverse consequences) both when exercising their rights under the transposing directive (e.g. the right to seek suitable working conditions) and when exercising other employee rights (e.g. the right to annual leave, the right to choose a trustee). According to the Directive, workers must be protected against unfavourable treatment in the exercise of their rights under the Directive, but the TLS takes over the Directive's requirements beyond the minimum required by the Directive.

Moreover, the law is supplemented with a provision that gives the employee the right to apply for suitable working conditions and to receive a reasoned written response to his or her application from the employer. In addition, it is said *expressis verbis* that upon returning from paternity leave, adoption leave, parental leave of a parent of a disabled child, unpaid parental leave or parental leave of a severely disabled child or at the end of a care leave under the Health Insurance Act, the employee shall acquire the right to improved working conditions during his or her absence. This provision derives from Directive (EU) 2019/1158 on work-life balance for parents and carers.

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Thirdly, the draft expands the list of grounds to better clarify situations that do not justify cancellation.

Fourthly, it clarifies the payment and calculation of holiday pay.

Fifthly, it aims to amend the Working Conditions of Workers Posted to Estonia Act, stipulating the obligation of the employer to inform an employee posted to Estonia in writing of certain information provided for in law. The notification obligation applies to postings of at least one month.

Finally, the Occupational Health and Safety Act will also be amended to add an obligation for the employee to ensure that his or her employment or the provision of services to another person does not endanger his or her life or the health of others.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

The judgment of the Court will not have any major implications for Estonian law. However, the case is relevant and important in the practice of labour law in Estonia as it specifies the regulation for identifying overtime.

The terms and conditions of a collective agreement which are less favourable to employees than those prescribed by an Act or other legislation are void, unless an option for such an agreement has been prescribed by law ([Collective Agreements Act](#) Art. 4 (2), 14.04.1993, RT I 1993, 20, 353). This applies to the conditions for calculating (and compensating) overtime.

The [Employment Contracts Act](#) (17 December 2008, RT I 2009, 5, 35) defines, among others, the concepts of aggregated working time and overtime work. The law also stipulates general principles for determining, calculating and compensating summarised working time and overtime work. The Employment Contracts Act does not establish a fixed maximum number of hours in the law when calculating overtime work. The maximum amount of overtime allowed depends on the applicable working time restrictions and rest requirements.

It is presumed that an employee works 40 hours over a period of seven days (full-time work), unless the employer and employee have agreed upon a shorter working time (part-time work) (ECA Art. 43 (1)). To calculate the summarised working time, the agreed working time of the employee over a period of seven days during the calculation period is taken into account (ECA Art. 43 (3)). An employer and employee may agree that the employee shall undertake to perform work over the agreed working time (overtime work). In the case of calculation of the summarised working time, overtime work refers to any work exceeding the agreed working time at the end of the calculation period (ECA Art. 44 (1)).

At the same time, neither the Employment Contracts Act nor other legislation provides for a more specific procedure for the calculation of summarised working time or the identification and compensation of overtime work. As a rule, the employee performs his or her duties during the agreed working hours, but § 44 (1) of the ECA allows the parties to agree that the employee undertakes to work overtime, i.e. to work beyond the agreed working hours. In the case of calculation of summarised working time, overtime work exceeds the agreed working time at the end of the accounting period.

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This means that to determine overtime work, it must be clarified what the agreed working time is. The part of working time that exceeds the agreed working time is overtime work in this case. The prevailing practice in Estonia according to the general wording of the law is as follows.

The working time fund for each employee is based on the number of calendar working days in a given calendar month, minus public holidays and other times when the employee has the right to refuse to perform work.

At the same time, the Supreme Court issued a controversial decision in 2017 (Supreme Court [Ruling No. 3-2-1-69-17](#), 14 June 2017), according to which an employee's agreed summarised working hours are not reduced by the hours worked on a national or public holiday. The practice in Estonia has thus far not been contradictory to the CJEU's decision. The ruling of the Supreme Court has not been accepted in the legal literature (Erikson, M.: The effect of a public holiday on the duration of working time in the case of summarised working time. *Juridica* 2020/3, [see here](#)).

The employee has a right to refuse to perform work, inter alia, if the employee is on holiday and is temporarily incapacitated for work for the purposes of the Health Insurance Act (ECA Art. 19 p 1, 2).

The Supreme Court issued a decision in 2015 (Supreme Court Decision [No. 3-2-1-143-15](#), 16 December 2015), according to which if an employee was temporarily incapacitated for work during the calculation period of aggregated working time, the agreed working hours of his or her accounting period may only be reduced by the days he or she was unable to work due to incapacity for work. There is no reason to reduce the agreed working hours by the number of days the employee was not required to work according to his or her work schedule.

If the employer has not been able to draw up a work schedule during the employee's temporary incapacity for work, the working time shall be determined on the assumption that the employee works 40 hours over a seven-day period and 8 hours a day. In this case, only the working days during which the employee was temporarily incapacitated for work are excluded from the agreed work period.

Accordingly, the Court considered two different situations in more detail in which the working time during which the employee was entitled to refuse to perform work must be deducted from the agreed working time. It was distinguished between whether or not a work schedule had been drawn up at the time of the refusal to perform work.

A similar principle applies to holidays. There is no reason why a temporary incapacity for work should be treated differently from annual leave in the case of calculating possible overtime work.

In summary, based on the prevailing practice in Estonia and indirectly on the 2015 Supreme Court ruling, it can be said that when determining overtime work, the employee's working time fund must be defined, from which the time during which the employee has the right to refuse to perform work must be deducted, including when the employee takes annual leave. In this case, the aim is to ensure that the employee does not lose compensation for overtime work due to leave.

However, it should be pointed out that the current law only sets out the principles, but there is no clear procedure in Estonia at the level of legislation for identifying and compensating overtime work.

4 Other Relevant Information

4.1. Protection of whistleblowers

On 10 January 2022, the *Riigikogu* initiated proceedings on the draft Act on Protection of Whistleblowers. The draft regulates the conditions and scope of protection for

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whistleblowers who became aware of a violation that became known in the course of their employment. The draft is also linked to Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of whistleblowers.

Member States were required to transpose the Directive in part by 17 December 2021. The first reading of the bill took place in Parliament on 26 January 2022. The deadline for amendments was set for 08 February 2022.

4.2. Changing Public Holidays and Days of National Importance Act

On 13 January 2022, the *Riigikogu* initiated proceedings on the Draft Amendments to the Holidays and Anniversaries Act. The draft amends the Holidays and Anniversaries Act by granting an additional day off on the working day following a national holiday or public holiday that falls on a weekend. The explanatory memorandum to the draft states, among other things, that the amendment will bolster employees' work motivation.

Finland

Summary

(I) The government has issued a decree that introduces temporary exemptions to the regulation of working time and rest periods in the road transport sector due to the COVID-19 situation.

(II) A broad reform of parental leave schemes will enter into force on 01 August 2022.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Working time in the road transport sector

The government has issued a decree (*Valtioneuvoston asetus LVM/2022/1*) on temporary exemptions to the regulation of working time and rest periods for drivers. The exemptions that were in force in spring 2020 were reintroduced for 30 days due to the worsening COVID-19 situation. The decree will be in force from 17 January to 15 February 2022.

According to the temporary exemptions, daily driving time may not exceed 11 hours; weekly driving time may not exceed 60 hours; driving time accumulated over two consecutive weeks may not exceed 120 hours; the daily rest period must be at least 9 hours each day; the weekly rest period may be shortened to at least 24 hours every other week without a compensatory rest period; a maximum 5.5-hour drive must be followed by a break of 45 minutes, which may be divided into a 15-minute break, which is to be taken first, followed by a 30-minute break later; regular weekly rest periods may be taken in a vehicle according to the driver's preference, as long as it has suitable sleeping facilities for each driver and the vehicle is stationary.

1.2 Other legislative developments

1.2.1 Work-life balance

The President has approved a bill on the reform of family-related leave schemes, which will enter into force on 01 August 2022.

The reform provides for an increase in the number of parental leave days and more flexibility will be recognised for parents in the uptake of leave. The reform aims to increase equality in the working life and between parents, and to take better account of different types of families.

The reform will, for the first time, give both parents an equal quota of parental leave; both parents will be entitled to a quota of 160 parental allowance days. Parents will be allowed to transfer up to 63 parental allowance days of this quota to the other parent, custodian, spouse or the spouse of the other parent. In the final stage of pregnancy, a pregnancy allowance period of 40 daily allowance days will apply. There will be six daily allowance days per week. In total, the allowance days for parents during family leave will amount to more than 14 months. Single parents will have the right to use the quotas of both parents. Twins, triplets and other multiple-birth children represent an exception to this model — the quota of parental allowance days for their parents will increase by 84 daily allowance days per second child and every child thereafter.

Parents can use parental allowance days until the child reaches the age of two. Daily allowance days can be used in several parts. Parents in employment relationships will be entitled to split the leave up into four parts. Only pregnancy allowance days will have to be used over a single continuous period starting 14–30 days before the estimated date of birth. Parents may also take part-time parental leave. In such cases, one partial

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parental allowance day will take up half a day of the quota. The amount of partial parental allowance is also half the amount of full parental allowance.

All parents who have custody of their child will have an equal right to daily allowance, regardless whether they are biological or adoptive, custodial or non-custodial and regardless of the parent's gender. The provisions on the duration and time of leaves laid down in the Employment Contracts Act (*Työsopimuslaki*, 55/2001) will be amended in a similar manner.

In addition, the reform will introduce the right to take unpaid carers' leave for up to five days per year, in line with the Work-life Balance Directive EU 2019/1158.

2 Court Rulings

2.1 Human trafficking

Supreme Court, Korkein oikeus 2022:2, 26 January 2022

In the present judgment, the Court convicted an employer of human trafficking crimes.

The Court recognised that the employer had misled the workers, nationals of Thailand employed as berry pickers, in terms of their accommodation and earning opportunities in Finland when recruiting them and arranging their transport and accommodation in Finland.

The position of the workers, which was dependent on the personnel of the accommodation camp, and their precarious situation were taken advantage of to make them pick berries and mushrooms in forced labour and their accommodation violated their human value.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

The present judgment has no implications for Finland.

According to Section 7 of the Annual Holidays Act (*Vuosilomalaki*, 162/2005), which contains provisions on earnings during annual leave, for any period of absence from work for which the employer is by law required to pay the employee, he or she is considered to be at work for an equivalent period to time.

4 Other Relevant Information

4.1 Draft law on foreign workers

The government wants to speed up the residence permit process by reforming Chapter 5 of the Aliens Act (*Ulkomaalaislaki*, 301/2004). According to the draft government proposal, the processing time for work-based residence permits would be shortened to an average of 30 days. The reform would also increase the use of automation and enable the certification of employers to make the application process easier. The draft proposal aims to increase work-based and education-based immigration.

According to the draft proposal, the Act would lay down provisions on the general requirements for issuing all work-based residence permits. At the same time, the Act would also lay down provisions on the obligations of employers and employees in the residence permit process. Reviews show that over 80 per cent of residence permit applications based on work and education are positive. The new provisions would enable a wider use of automation for part of the process. The permit authorities would also use

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information obtained from other official registers, which would eliminate the need to ask the applicant or employer for the information.

The provisions on residence permits for entrepreneurs and high-growth start-up entrepreneurs would be clarified, and those who have completed a degree or research work in Finland would receive a new type of permit. A residence permit for a specialist would also be added to the Act as a separate permit and the Act would include more detailed provisions on the determination of pay.

Under the current legislation, travel documents must be valid for the entire period for which the residence permit is issued. It is now proposed in the draft government proposal that it would suffice for the travel document to be valid when the first residence permit is issued. At the same time, as work-based immigration would be promoted, exploitation of foreign labour would be prevented. A regulation on the supervision of the use of foreign labour would be specified.

The possibility to suspend the granting of residence permits to a certain employer for a fixed period of time would be extended to cover not only residence permits for employed persons but all work-based residence permits. In addition to the TE Office, the Finnish Immigration Service could make such suspension decisions in the future. The proposed legislative amendments have been circulated for comments from 24 January to 07 March 2022. The government's proposal is expected to proceed to Parliament in early May 2022 and the amended Act is due to come into effect at the beginning of October 2022.

4.2 Report on preventing the exploitation of foreign workers

The report 'Preventing the exploitation of foreign labour on the support needs and knowledge gaps of the authorities' was published by the Ministry of Economic Affairs and Employment of Finland (Publications of the Ministry of Economic Affairs and Employment, 2022:2).

The report, authored by Mika Raunio, Toni Ahvenainen and Sari Vanhanen, states that as work-based immigration increases, exploitation of foreign labour is expected to grow in Finland. Addressing this problem requires more information on the phenomenon and investments in the development of resources and cooperation between authorities. In addition, the discussion on human trafficking and related prevention measures in the field of work-related exploitation should be expanded and specified, and intervention in less severe forms of the phenomenon should also be enabled. The report examines the need to close the knowledge gaps of authorities that process work-based residence permit applications and supervise the employment of foreigners to help them identify and fight the exploitation of foreign labour. The report focuses on the permit process and explores opportunities for preventing work-related exploitation offered by the recent amendment of the Aliens Act which expanded the legal protection of victims.

France

Summary

(I) The COVID-19 certificate for workers has been amended and can now only be obtained in case of vaccination or recovery from COVID-19.

(II) A new health protocol mandates part-time teleworking until 02 February 2022.

(III) The Supreme Administrative Court rendered a decision on the stand-by time of members of the military.

(IV) The Court of Cassation has clarified the scope of the unions' action to challenge individual fixed annual working time in days in employment agreements and the sanction in case of breach by the employer.

(V) The Court of Cassation ruled that the dismissal for serious misconduct of an employee who denounced a conflict of interest situation is null, as the employee benefits from whistleblower protection which is not limited to the denunciation of criminal offences.

(VI) A judgment stated that the violation of labour law provisions by a platform could constitute anti-competitive practices.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 COVID-19 certificate

The law reinforcing the tools for managing the COVID-19 health crisis and its implementing decree of 22 January 2022 came into force on 24 January 2022.

The Vaccination Pass has replaced the Health Pass for people aged 16 or older (Decree 2022-51 of 22 January 2022, Art. 1, 5°; Decree 2021-699 of 01 June 2021, Art. 47-1 modified). The presentation of the Vaccination Pass is mandatory for both the public and individuals (employees, volunteers, etc.) who work in places, activities and events concerned (Decree 2022-51 of 22 January 2022, Art. 1, 5°, d; Decree 2021-699 of 01 June 2021, Art. 47-1 modified).

Thus, in practice, employees who were previously required to present a Health Pass must now present a Vaccination Pass.

Proof of vaccination status is required for access:

- leisure activities (cinemas, theatres, etc.);
- commercial catering or drinking establishments (restaurants, bars, etc.), with the exception of collective catering, take-away sales and professional road and rail catering;
- fairs, seminars and trade shows;
- department stores and shopping centres based on a motivated decision of the Prefect
- for long-distance travel by interregional public transport (rail, air and road).

If they are unable to present proof of vaccination status, they will be refused access, except for individuals with a certificate of recovery or proof of a medical contraindication to vaccination.

By way of derogation, individuals who have had a first dose of the vaccine for at least four weeks may also be admitted upon presentation of proof of administration of their

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first dose and the result of a PCR or antigen screening test or examination carried out less than 24 hours old.

Finally, for travel by inter-regional public transport, a negative virological screening test less than 24 hours old may be sufficient in the case of travel for a compelling family or health reason. In the event of an emergency that prevents this test from being carried out, it will even be possible to use these means of transport without a test (Decree 2022-51 of 22 January 2022, Art. 1, 5° b; Decree 2021-699 of 01 June 2021, Art. 47-1, II modified).

The Health Pass is maintained for minors under the age of 16 years (Decree 2022-51 of 22 January 2022, Art. 1, 5°, a; Decree 2021-699 of 01 June 2021, Art. 47-1, I bis new) and for public access to health establishments, except in emergencies (Decree 2022-51 of 22 January 2022, Art. 1, 5°, c; Decree 2021-699 of 01 June 2021, Art. 47-1, IV amended).

1.1.2 Teleworking

A new National Health Protocol applicable to companies, which strengthens the health rules applicable within companies, applies with effect from 03 January 2022.

The major change is compulsory homeworking for a minimum of three days per week if the role of the employee allows for his/her tasks to be performed remotely. In this context, homeworking can be imposed on employees. This number can be increased to four days a week if suitable. The labour inspector will be able to impose sanctions of up to EUR 1 000 per employee concerned for companies that 'do not comply' with the new homeworking rules and there will be some controls.

The health protocol remains very strict as regards compliance with barrier gestures, in particular the wearing of a mask in all enclosed collective workspaces (except for employees who sit alone in an office) and compliance with a 1 m distance between individuals. Employees are also encouraged to be vaccinated as part of the vaccination strategy (but no obligation has been introduced, though a current debate in Parliament is likely to impose a mandatory Vaccination Pass for nearly all social activities, albeit not in the workplace).

Although this was initially applicable for three weeks, mandatory remote working for at least three days per week has now been extended for two additional weeks, until 02 February 2022.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Working time

Conseil d'État, No. 437125, 17 December 2021

The Council of State has rejected the request of a member of the military of the departmental *gendarmerie* who requested the annulment of the refusal of the Minister of the Interior to apply Article 6 of the Working Time Directive to his unit, which sets the maximum weekly working time, and clarified that the stand-by duty imposed on military personnel of the departmental *gendarmerie* are not working time, apart from the time spent in actual interventions.

This case follows a decision of the Council of State (*Conseil d'Etat*) of 2019, which rejected the annulment of the provisional instruction No. 36132/GEND/DOE/SDSPSR/BSP of 8 June 2016 regulating working time in the military

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raised by a member of the military on the basis that it did not apply the maximum weekly working hours set by the Directive. The case was dismissed due to the passing of the time limit for lodging an appeal (see [CE, 4 October 2019, No. 428971](#)).

After the substantial case law of the CJEU in March 2021 (Case C-580/19, Stadt Offenbach am Main, and Case C-344/19, Radiotelevizija Slovenija) on the concept of on-call duty and stand-by time, a new case was raised by a member of the military before the highest administrative court.

In the present case, the Conseil d'Etat considered at first that:

22. ...It follows from these provisions that departmental gendarmerie formations are likely to carry out both civilian and military missions. It does not appear from the documents in the file that the members of the departmental gendarmerie, which is a component of the armed forces, as a whole carry out activities falling within the scope of the Directive of 4 November 2003 mentioned in point 15, the ministers maintaining, moreover, that only a "very small" share of the personnel carry out such activities.

The Conseil d'Etat considered that the working time of a departmental *gendarme* can be broken down into three parts: actual working time, rest period and on-call duty in between.

The high administrative court examined first the on-call duty periods

31. Firstly, gendarmerie officers and non-commissioned officers are required to occupy barracks accommodation, as provided for in Article L. 4145-2 of the Defence Code and its implementing regulations. This obligation to live in barracks is directly linked to the availability obligation mentioned in point 24. In return, the gendarmes' accommodation is conceded to them by absolute necessity of service and free of charge, in accordance with Article R. 2124-67 of the General Code of Public Property. It also follows from point 3.1.1.1 of the instruction of 13 December 2018 that this accommodation is located at the place of work or, failing that, in the immediate vicinity.

32. It is clear from the ministers' submissions, which are not contested on this point, that gendarmerie officers and non-commissioned officers, within the framework set by Annex II of the instruction of 8 June 2016, carry out their on-call period at their residence. The fact that the accommodation granted free of charge to gendarmes is located at their place of work or in its immediate vicinity allows the military personnel concerned to freely dispose of their time when they are not mobilised, in their social and family environment, while quickly reaching their place of employment if necessary. The facility thus granted to the gendarmes makes it possible to reduce the objective impact of the periods of immediate on-call duty on the military personnel concerned, even though the mobilisation period imposed on them would be very short.

33. Secondly, it follows from the second paragraph of I of the instruction of 8 June 2016 that, in the event of operational necessity, line managers give priority to hiring military personnel from the "employed resource", i.e. military personnel already on duty, and that they only resort to gendarmes placed on immediate stand-by in the second instance, when resources are insufficient. This order of priority is likely to limit the frequency of calls and, consequently, the effective activity time of the soldiers concerned.

34. It follows from the foregoing that, contrary to what Mr Q. maintains in view of all the constraints and facilities granted to gendarmerie members placed on immediate stand-by duty, given that the rules of employment laid down by the instruction of 8 June 2016 provide for them to be mobilised only at a later stage in the event of operational necessity and in the context of the balance between the hardships and compensation specific to the military status, these periods of immediate stand-by duty cannot be considered, as long as they are carried out

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at home, as constituting in their entirety working time, since only the periods of actual mobilisation of the gendarmes concerned should be granted this qualification. Consequently, in view of what was said in paragraph 29, there is no reason to take the stand-by duty of members of the departmental gendarmerie into account when assessing compliance with the objective of Article 6 of the Directive of 4 November 2003.

This approach must be read in the light of point 93 of case C 742/19, *Ministrstvo za obrambo*.

The Conseil d'Etat proceeded to analyse the regulation on the right to rest periods provided for by the provisions applicable to the gendarmerie. It considers that:

35. Firstly, the circular of 4 November 2013 provides that each member of the military is entitled to two days off per week, covering a period of forty-eight consecutive hours or two periods of twenty-four hours each. It follows from point 1.3 of this circular that the weekly rest period is granted during the week in which it is accumulated, except in cases of absolute necessity for service.

36. Secondly, point 2.1 of the instruction of 8 June 2016 provides that members of the departmental gendarmerie benefit from a daily rest period of eleven consecutive hours per twenty-four hour period of activity, i.e. fifty-five hours per week. Point 2.2 provides for the granting of compensatory physiological rest in cases where the daily physiological rest period has been reduced, which is granted either in the form of an eleven-hour rest period, granted at the end of the last tour of duty, or by carrying over the unallocated hours within a maximum period of fourteen days. Although point 2.3 of the Directive provides that rest periods may not be granted in exceptional cases, for objective operational reasons defined in the light of several cumulative conditions, for particular services or to achieve operational training objectives, it follows from what was said in point 15 on the exclusions from the scope of the Directive of 4 November 2003 that these activities do not, in any case, fall within its scope.

37. It also follows from the provisions of points 1.2, 1.3 and 2.1 of the same instruction that members of the departmental gendarmerie may, during their eleven hours of rest, be placed on immediate or delayed stand-by duty. However, on the one hand, the instruction of 8 June 2016 ensures that when the member is effectively engaged during a period of on-call duty, he or she benefits from his or her right to rest, either in the form of a daily rest period granted after his or her last duty, or by carrying over, within a short period of time, the hours of rest not consumed. On the other hand, as stated in paragraph 34, the stand-by duty of members of the departmental gendarmerie should not be taken into account when assessing compliance with the objective set out in Article 6 of the Directive of 4 November 2003, when they are not actually mobilised.

38. Thirdly, the circular of 16 March 2021 provides that members of the departmental gendarmerie have two 'quarters off' per week, which, according to point 1.1 of the circular, are periods during which gendarmes are not subject to any service obligation and enjoy freedom of movement. A period of free time may be granted for six, five or fourteen hours, depending on whether it is in the morning, afternoon or night, in accordance with point 1.2 of the circular. As stated in the second paragraph of point 2.1.2 of this circular, each member of the armed forces is in principle entitled to two night quarters. It also follows from the last paragraph of that point that where the minimum of two night quarters cannot be granted owing to special circumstances, the unit commander may grant 24 consecutive hours of free time.

39. In the case of the two weekly night-time free quarters, which are three hours longer than the rest period entitlements available under the sole title of the daily rest period, the provisions of the circular of 16 March 2021 guarantee a minimum

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additional rest period of at least six hours per week for members of the departmental gendarmerie.

It follows from the regulatory texts analysed in paragraphs 35 to 39 that a member of the departmental gendarmerie is guaranteed a weekly rest period of 119 hours. It can be deduced from this that the period during which this soldier does not benefit from such a guaranteed rest period does not exceed fifty-nine hours per week.

In brief, the Conseil d'Etat takes it for granted that the solution that "*the military may not be able to take part in the solution according to which the maximum period of time, in principle two hours, to join their unit does not constitute working time within the meaning of the Directive of 4 November 2003*" (p. 29).

As for the situation of military personnel placed under situations of immediate stand-by, who may be called up at any time by the commander of their unit, the argument is much more detailed. The Council of State's decision takes all of the elements the Court of Justice requires to be examined into account. The Council of State duly took these criteria into account before concluding that the stand-by duty imposed on the military personnel of the departmental gendarmerie is not working time, apart from any possible interventions.

It could, of course, also be considered that the majority of *gendarmes* are on-call in their accommodation granted by absolute necessity of service, potentially with their families. However, any immediate stand-by duty prohibits them from leaving their barracks. In this respect, it could also have been considered that these are strong constraints that limit the ability of the soldier to devote him-/herself to his or her own interests.

2.2 Collective agreements

Chamber for social and labour matters of the Court of Cassation, No. 19-18.226, 15 December 2021

In the present case, a negotiated agreement on the reduction and organisation of working hours for management staff was concluded on 11 January 2001 in the companies Conforama France, Cogedem and Conforama Management Services. The *Syndicat national de l'encadrement du commerce SNEC CFE-CGC* brought an action before the court seeking, among other things, a declaration that the agreement was null and void and that the individual fixed-term work agreements concluded pursuant to it were null and void, arguing that the agreement did not respect the employees' right to health and safety.

The Court of Appeal had found that the employer had not complied with the clauses of the collective agreement intended to ensure the protection of the health and safety of the employees subject to the fixed number of days system. On this ground, it confirmed the Court of First Instance's judgment, which held that the company agreement of 11 January 2001 was unenforceable against executive employees who had entered into a fixed-term work contract.

Against this decision, the union requested the collective agreement to be declared null and void on the grounds that it did not meet the conditions for validity of a daytime work agreement, because the managers concerned were not autonomous and because it did not ensure the protection of the health and safety of those concerned. It also considered that the employer had failed to comply with the clauses guaranteeing such protection, and that the agreement should therefore be declared unenforceable against the employees for the period covered by the failure to comply, in particular because the employer's vigilance regarding the (over)workload of the persons concerned was not up to the legal and case law requirements. Finally, the union demanded the cancellation or

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unenforceability of the individual fixed-price agreements entered into pursuant to this agreement.

The Court of Cassation censured the decision on the basis that only the individual agreements were to be rendered ineffective and not the collective agreement declared unenforceable against the employees. However, in the absence of consequences of the cassation, no referral for a decision on the merits was necessary.

First, the Court of Cassation ruled on the admissibility of the union's action by delimiting its scope. According to Article L.2132-3 of the Labor Code, *"professional unions have the right to take legal action. They may, before all courts, exercise all the rights reserved to the civil party concerning facts directly or indirectly prejudicial to the collective interest of the profession they represent"*.

The collective interest of the profession in the name of which the union acts reaches certain limits relating in particular to situations in which a merely individual interest is at stake, particularly when rights exclusively attached to the person of the employee are at stake.

In the present case, the Court of Cassation noted that while a trade union may take legal action to force an employer to end an irregular system of recourse to a fixed number of days and to comply with the obligations set out in the agreement to ensure compliance with reasonable maximum working hours and daily and weekly rest periods, the Court of Cassation did not consider that the union's claims for the nullity or unenforceability of the individual fixed number of days agreed with the employees concerned and for the calculation of their working hours should be rejected, its requests to obtain, on the one hand, the nullity or unenforceability of the individual fixed-term work agreements of the employees concerned and, on the other hand, that their working hours be calculated according to the rules of ordinary law, which do not aim to defend the collective interest of the profession, are not admissible.

The union remains admissible in its action to have the collective agreement declared null and void, just as it could act in execution or in violation of an agreement.

The Court of Cassation then ruled on the nullity of the agreement. It recalled that it is up to the judge to verify in the event of a dispute that the duties actually performed by the executive do not allow him or her to be subject to the collective work schedule. The Court of Cassation notes that in this case, the Court of Appeal pointed out that the constraints imposed on certain executives to close the store or to be on call did not prevent them from having autonomy in the organisation of their work schedule and did not require them to be subject to the collective work schedule, so that these employees were likely to fall within the scope of the fixed-term work week.

In order to be valid, the collective agreement authorising the conclusion of individual fixed-term work agreements must determine the terms and conditions according to which the employer ensures the evaluation and regular monitoring of the employee's workload; the terms and conditions according to which the employer and the employee communicate periodically on the employee's workload, on the articulation between his or her professional and personal life, on his or her remuneration as well as on the organisation of work within the company. After analysing the stipulations of the criticised agreement, the Court of Cassation found that the collective agreement was valid and met the legal requirements.

Finally, the Court of Cassation ruled on the question of consequences of the employer's failure to comply with the collective agreement. In the present case, the trade union complained that the Court of Appeal had confirmed the judgment of the first instance insofar as it had limited the non-enforceability of the agreement of 11 January 2001 to the period prior to 2015.

The Court of Cassation refused to recognise the non-enforceability of the collective agreement against the employees as a sanction for the employer's failure to implement the agreement. It recalled that the employer's failure to implement the otherwise valid

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collective agreement establishing a fixed-term workweek has the sole effect of rendering the individual agreements concluded on its basis ineffective (Cass. soc., 25 janv. 2017, n° 15-21.950. – Cass. soc., 15 déc. 2016, n° 14-29.701).

2.3 Protection of whistleblowers

Chamber for social and labour matters of the Court of Cassation, No. 20-10.057, 19 January 2022

In the present case, an employee hired as an assistant by a public accounting and auditing firm had alerted his employer to a conflict of interest between his duties as a public accountant and those as an auditor, and had warned that if he could not discuss this issue with him, he would refer the matter to the regional company of auditors, which he did by letter the day before the interview prior to dismissal. He was then dismissed for serious misconduct.

He brought the matter before the industrial tribunal to have his dismissal declared null and void or without real and serious cause, and to obtain the payment of compensation and bonuses. The industrial tribunal and subsequently the Court of Appeal declared the dismissal null and void on the grounds that the employee had been subjected to an unlawful measure of retaliation. The employer appealed to the Supreme Court.

The Court of Cassation rejected the appeal and approved the position of the Court of Appeal. It ruled that “because of the infringement of the freedom of expression, in particular the right of employees to report unlawful conduct or acts they have observed in the workplace, the dismissal of an employee for having reported or testified, in good faith, to facts of which he had knowledge in the course of his duties and which, if they were established, would be likely to characterise criminal offences or breaches of ethical obligations provided for by the law or regulations, shall be null and void”.

2.4 Platform work

Commercial Division of the Court of Cassation, No. 20-11.139, 12 January 2022

This case involved two chauffeur-driven vehicle (VTC) companies: one company summoned another claiming that it was committing acts constituting unfair competition by failing to comply with various laws and regulations relating to transport and labour law. In particular, the claimant invoked the existence of an employment relationship between this platform and the drivers using its services.

The Court of Appeal issued a ruling without specifically analysing the actual conditions under which the drivers perform their activity. On the contrary, the Court of Cassation clarified that if, in the performance of their activity giving rise to registration in professional registers or directories, natural persons are presumed to not be linked with the principal by an employment contract, this may nevertheless be established when these persons provide services under conditions that place them in a permanent legal subordination relationship with regard to the principal.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

In France, only those hours worked in excess of the statutory weekly working hours at the request of the employee’s superior will be regarded as overtime. However, the employer has the duty to ensure that employees do not exceed the daily and weekly limits. Those who work overtime are entitled to compensatory payment involving a surcharge (which is generally 25 per cent for the first 8 hours worked during the week,

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and then 50 per cent), and which cannot be less than 10 per cent of the employee's standard pay. Each overtime hour may either be paid or compensated with compensatory rest, i.e. every hour of overtime worked gives rise to either 1 hour of pay or 1 hour of rest, plus the relevant surcharge.

The actual working time is the time during which the employee is available to the employer and complies with his or her directives, without being able to freely pursue personal interests (Article L. 3121-1 of the Labour Code). It should, however, be noted that there are a large number of cases where the employee finds him/herself in a situation which does not perfectly correspond to this definition.

For instance, travel time between home and work is not actual working time. However, the solution is the opposite if the employee cannot freely go about his/her personal interests during this period, e.g. when the employee is required to use the company vehicle, make the shortest trip over a limited time slot, and without being able to transport a foreign person to the company.

In the event that the regular travel time between the home and the usual place of work is exceeded (due to employer requirements), it must be compensated either in the form of rest or financial compensation which is determined by an agreement of the company or establishment or, failing that, by convention or a branch agreement.

Secondly, the travel time required to get to the workplace after entering the company (even if the employee is required to wear work clothes) does not constitute actual working time if, during this period, the employees are not available to the employer. However, when employees are likely to be approached by customers, travel time then becomes actual working time.

As regards break time, breaks are not considered paid work provided that employees take their break in a room separate from the workshops and that they are not subject to any intervention by the employer. As such, it does not matter that employees cannot leave the company's premises. The obligation to be reachable at all times on his/her professional mobile phone, including when leaving a post, is not sufficient to reclassify break times as actual working time.

Concerning dressing and undressing time for employees who must wear work clothes, this does not constitute effective working time, unless a company agreement or a convention or a branch agreement provides for it. The dressing and undressing time must give rise to compensation in the form of rest or in financial form if (a) wearing work clothes is compulsory, (b) dressing and undressing must take place in the company or at the workplace.

With regard to on-call time, the Labour Code (Art. L. 3121-9) defines it as follows: "*A period during which the employee, without being at his place of work and without being at the permanent and immediate disposal of the employer, must be able to intervene to accomplish work in the service of the company*". The duration of this work is considered to be effective working time. The on-call time presupposes that the employee is not present at the workplace. The on-call period necessarily entails the granting of compensation either in financial form or in the form of rest. The amount or volume of this compensation is set by the collective agreement or, in the event of a unilateral set up, by the employer.

Concerning professional training, the Labour Code (Art. L. 6321-2) provides as follows: "*Any training measure that conditions the exercise of an activity or a function in application of an international convention or legal provisions and regulatory (compulsory training) constitutes effective working time*". In practice, other training measures (not compulsory) also constitute effective working time with the exception of training measures determined by collective company agreement or, failing that, a branch agreement that states training can take place outside working hours; and, in the absence of a collective agreement, but with the agreement of the employee, training

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measures that can take place outside working hours, up to a limit of 30 hours per year and per employee.

In addition, under certain conditions, employees can use their personal training account (CPF) to participate in training during their working time. The hours devoted to training during working time then constitute actual working time and give entitlement to continued remuneration.

4 Other Relevant Information

Nothing to report.

Germany

Summary

(I) The Federal Labour Court has referred a question to the CJEU for a preliminary ruling regarding the rules on collective redundancies.

(II) The Federal Labour Court has held that interns who complete a compulsory internship that is a prerequisite for admission to a course of study in accordance with higher education law are not entitled to statutory minimum wage.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Collective redundancy

Federal Labour Court, 6 AZR 155/21 (A), 27 January 2022

The Sixth Senate of the Federal Labour Court has referred a question to the CJEU for a preliminary ruling concerning section 17 (3) sentence 1 of the Unfair Dismissals Act (*Kündigungsschutzgesetz, KSchG*). The Court has submitted the following question: "What purpose is served by the second subparagraph of Article 2(3) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, under which the employer is required to send to the competent authority a copy of at least the elements of the written notification to the employees' representatives referred to in subparagraph 1(b)(i) to (v)"?

According to section 17(1) sentence 1 of the KSchG, the employer is required to report to the Employment Agency before he or she dismisses a certain number of employees within 30 calendar days.

According to section 17(2) sentence 2 of the KSchG, if the employer intends to make notifiable dismissals, he or she shall provide the works council with the relevant information in due time and inform it in writing in particular about:

1. The reasons for the planned dismissals,
2. The number and occupational groups of the employees to be dismissed,
3. The number and occupational groups of workers normally employed,
4. The period during which the dismissals are to take place,
5. The criteria envisaged for the selection of workers to be dismissed,
6. The criteria envisaged for the calculation of any severance pay.

Section 17(3) sentence 1 of the KSchG reads as follows:

"The employer shall at the same time forward a copy of the notification of the works council to the Employment Agency; it shall contain at least the information prescribed in subsection 2, sentence 1, nos. 1 to 5".

Section 134 of the Civil Code reads as follows:

"A legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion".

The Federal Labour Court has requested the CJEU to provide an answer to the question as to the purpose of the duty of notification under the second subparagraph of Article 2(3) of the Directive. In the opinion of the Senate, it depends on this whether section

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17(3) sentence 1 of the KSchG, which is to be interpreted in conformity with EU law, is to be regarded as a prohibition law pursuant to section 134 of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*), just like other provisions in collective dismissal proceedings which—at least also—have the purpose of protecting employees. In this case, the dismissal would be invalid.

2.2 Minimum wage

Federal Labour Court, 5 AZR 217/21, 19 January 2022

The Federal Labour Court has held that interns who complete a compulsory internship that is a prerequisite for admission to a course of study in accordance with higher education law are not entitled to statutory minimum wage.

According to the Court, the exclusion of claims to the statutory minimum wage under section 22 (1) sentence 2 No. 1 Minimum Pay Act (*Mindestlohngesetz, MiLoG*) not only covers compulsory internships during studies, but also those that are compulsory according to study regulations as a prerequisite for taking up a particular course of study.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

The CJEU has held that Article 7(1) of Directive 2003/88/EC must be interpreted as precluding a provision in a collective labour agreement under which, in order to determine whether the threshold of hours worked granting entitlement to overtime pay is reached, the hours corresponding to the period of paid annual leave taken by the worker are not to be taken into account as hours worked.

In a first comment in the literature on the CJEU's decision it has been argued that the ruling might only have limited effects (see Dieter Krimphove, *Mehr Geld ohne Mehrarbeit?*, *ArbRAktuell* 2022, p. 36). In this context, the author of the article suggests that according to the reasoning of the judgment, no remuneration or overtime compensation claim was granted for a (hypothetical) work performance not rendered. Rather, according to the author, the CJEU turned against a calculation mechanism that completely excludes (partial) overtime work that has already been formally acquired in terms of its remuneration by the fact that the employee cannot reach a certain threshold value (148 working hours) in a given calculation period due to holidays. According to the author of the article, the significance of the ruling is limited since the facts of the case were very specific.

4 Other Relevant Information

Nothing to report.

Greece

Summary

Part-time teleworking and staggered shifts continue to apply to limit the spread of COVID-19.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Teleworking

To limit the spread of COVID-19, teleworking (by 50 per cent) is encouraged for staff in both the public and private sectors. Staggered shifts (employees starting work at different times) continue to apply in both sectors (Ministerial Decision 81558, Off. Gaz B No. 6290/2021).

The measures are expected to be reviewed in early February.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

Greek law provides that the amount of paid annual leave shall be equal to the employee's regular remuneration that the worker would receive if he or she were working.

This judgment seems to not have any implications for Greece, as Greek law does not provide that the reference unit for setting the threshold number of hours taken into account for determining the amount of overtime pay is to be defined on a monthly basis, but only on a daily or weekly basis.

4 Other Relevant Information

Nothing to report.

Hungary

Summary

The rules on teleworking have been slightly amended to regulate cases of infections during a pandemic.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Teleworking

Act 154 of 1997 on Health Care has been amended. The new Article 232/G provides that in case of a pandemic alert (when there is no state of emergency, but when there is a pandemic), the government may order the application of legal provisions on teleworking with the following adjustments:

- Articles 86/A-86/C of Act 93 of 1993 on Labour Safety (see here for the English version) shall not be applied. In case of teleworking, the employer must inform the employee about the rules of health and safety at work, and the employee must choose the place of work in accordance with these rules;
- 10 per cent of the minimum wage paid to teleworkers shall be exempted from taxation;
- The employer and the employee may freely derogate in an agreement from Article 196 of the Labour Code on teleworking.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

There is no threshold of the regular monthly working hours quota in Hungarian labour law.

'Overtime work' shall mean work performed over and above the hours covered within the framework of working time banking (Article 107 of the Labour Code). Therefore, the number of working hours during paid leave are included in the calculation of overtime work in case of working time banking.

According to Article 93 of the Labour Code:

"(1) The employer may define the working time of an employee in terms of the 'banking' of working time or working hours as well.

(2) Where working time is established within the framework of working time banking, the period covered by the banking of working time shall be arranged based on daily working time and the standard work pattern. In this context,

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public holidays that fall on working days according to the standard work schedule shall be discounted.

(3) In determining the working time according to Subsection (2), the duration of absence shall be discounted, or shall be taken into consideration as the working time defined by the schedule for the given working day. In the absence of a work schedule, the duration of leave shall be calculated based on the daily working time, whether discounted or taken into consideration.”

The employer can decide whether the duration of paid leave shall be discounted or taken into consideration, as the working time defined by the work schedule for the given working day as regards the calculation of overtime work.

The Labour Code is partially in line with the CJEU’s judgment. According to Article 135 of the Labour Code, collective agreements may freely derogate from Article 93.

4 Other Relevant Information

Nothing to report.

Iceland

Summary

The Equality Complaints Committee has issued its first ruling on age discrimination in the labour market.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Age-based discrimination

Equality Complaints Committee, No. 6/2021, 31 January 2022

On 31 January 2021, the Equality Complaints Committee (*kærunefnd jafnréttismála*) issued its first ruling on age discrimination on the labour market in [ruling No. 6/2021](#). The facts of the case were that an employer modified its internal rules on terminations of employment contracts on grounds of age. Instead of 70 years as it had been the case since 2015, the age limit was reduced to 67 years. An employee whose employment contract was terminated on those grounds complained to the Committee that the termination constituted age discrimination.

The Committee concluded that this was a direct discrimination on the basis of age and thus a violation of Act No. 86/2018 on Equal Treatment on the Labour Market, which transposed Directive 2000/78/EC into Icelandic law. The employer had not presented substantive arguments for the termination and violated the principle of proportionality. There were no other grounds for the termination of the employee's employment contract other than his age.

The ruling is the first of its kind as the act is relatively new. The general rule in Icelandic labour law is that employers are free to terminate employment contracts for whatever reason they see fit, as long as those reasons are justifiable with the threshold generally being low. This ruling limits this right of employers and is therefore significant.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

On the basis of an analysis of the major collective agreements in Iceland, the general rule seems to be that overtime is paid for hours worked outside the regular working time or over the specified amount of working hours. In other words, overtime pay is generally measured on a daily basis. In those circumstances, the ruling will likely not have any direct implications.

However, in cases where collective agreements permit calculating overtime on a weekly or even monthly basis, the practice must be modified with respect to annual leave to reflect the rule deriving from this ruling.

4 Other Relevant Information

Nothing to report.

Ireland

Summary

(I) Most COVID-19 restrictions have been lifted.

(II) Business and worker income support schemes are expected to be discontinued in April 2022. A once-off bonus payment will be recognised to frontline health and ambulance workers.

(III) A draft legislation to give employees the right to request remote working has been published.

(IV) A working group on bogus self-employment has been established.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Removal of public health measures

On 21 January 2022, the government agreed to immediately follow the advice of the National Public Health Emergency Team that there was no longer a 'public health rationale' for the continuance of most of the COVID-19 restrictions.

From 6 pm on 22 January 2022, pubs and restaurants were able to return to normal opening hours; the rules limiting attendance at all indoor and outdoor events were discontinued; and a phased return to the workplace began on 23 January. The Minister for Enterprise, Trade and Employment said that the government wanted employers and workers to work out an appropriate phased return by the end of February. Subsequently, the Department published on 31 January what it described as a '[transitional protocol](#)' on good practice guidance for continuing to prevent the spread of COVID-19, which urges employers to maintain constant contact with trade unions and employee representatives about a return to the workplace.

Some rules remain in place such as mask wearing. [See here](#) for the government's press release.

1.1.2 Relief measures

Changes to the business and worker support schemes have also been announced.

A planned reduction in the Employment Wage Subsidy Scheme is to be postponed until March, but the support will be wound down by the end of April. The Pandemic Unemployment Payment (PUP) will be phased out fully by 5 April 2022.

1.1.3 Bonus payment for frontline health and ambulance workers

A one-off Day of Remembrance and Recognition will be designated as a public holiday on 18 March 2022 in remembrance of the 9 239 persons on the island of Ireland (3 103 of whom were from Northern Ireland) who died with COVID and in recognition of the efforts of the general public, volunteers and workers during the pandemic. In addition, there will be a new permanent public holiday established in 2023 in celebration of St Brigid's Day (01 February).

The government has also agreed to provide a tax-free 'recognition payment' of EUR 1 000 to eligible frontline health and ambulance workers.

[See here](#) for the government's press release.

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1.2 Other legislative developments

1.2.1 Right to request flexible working arrangements

The Minister for Enterprise, Trade and Employment has published the [draft scheme of a Bill on the Right to Request Remote Working](#).

A recent Central Statistics Office (CSO) [survey](#) indicates that 80 per cent of workers have worked remotely at some point since the start of the pandemic. Of those in employment who can work remotely, the CSO results indicate that 28 per cent want to continue to work remotely full time and 60 per cent want to work remotely part time.

The proposed legislation would not give workers a right to work remotely but merely a right to request remote working, which can be refused on various grounds such as the nature of the work, additional costs and concerns for the suitability of the proposed workspace on health and safety or data protection grounds.

2 Court Rulings

Nothing to Report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

In this Article 267 reference from Germany, the CJEU ruled that Article 7 of the Working Time Directive precludes provisions in a collective agreement which do not count annual leave taken as 'working time' when determining whether a worker has reached a threshold to be eligible for overtime payments. The CJEU viewed the provision in question as one that might potentially deter a worker from taking his or her annual leave and was thus incompatible with the purpose of the right to paid annual leave.

There are, however, no comparable legislative or collectively agreed provisions in Ireland.

4 Other Relevant Information

4.1 Bogus self-employment

On 27 January 2022, a [motion](#) was moved before Dáil Éireann to debate the [Report of the Joint Committee on Social Protection, Community and Rural Development and the Islands](#) entitled 'Examination of Bogus Self-Employment'.

The Minister of State concluded the debate by emphasising that the government was committed to minimising the potential for bogus self-employment and detecting and dealing with it whenever it did occur. In this regard, he referenced the establishment of a working group on the issue of bogus/false self-employment. The group will comprise representatives of the Revenue Commissioners, the Departments of Social Protection and Enterprise, Trade and Employment, the Irish Congress of Trade Unions and the employers' organisations, Ibec, the CIF and ISME.

The European Commission's proposed directive on platform work is expected to inform the deliberations of the working group as it seeks to identify ways of dealing with the issue and implementing the recommendations contained in the Joint Committee's report.

4.2 Pandemic Unemployment Payment (PUP)

As of 25 January 2022, 80 525 (up from 57 603 as of 23 December 2021) persons (41.7 per cent of whom are female) were in receipt of the Pandemic Unemployment Payment (PUP).

The sectors with the highest number of PUP recipients are accommodation and food services (18 399), wholesale and retail trade (12 745) and administration and support services (8 424). The number in construction dropped from 42 333, at the end of April 2021, to 5 914 in December which has now increased to 7 577.

In terms of the age profile of PUP recipients, 16.2 per cent were under 25. Additionally, 18 777 (up from 8 237 as of 23 December 2021) persons were in receipt of the COVID-19 Enhanced Illness Benefit. In total to date, 360 143 persons have been medically certified for receipt of this benefit, 52.9 per cent of whom were female.

[See here](#) for further information.

Italy

Summary

(I) The Italian legislator extends the COVID-19 vaccine mandate and the applicability of the COVID-19 certificate.

(II) Budget Law No. 238/2021 extends the duration of paternity leave to 10 days.

(III) Budget Law No. 238/2021 amends the rules and conditions of entitlement to the Wages Guarantee Funds for 2022.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Mandatory vaccination and COVID-19 certificate

The [Law Decree 07 January 2022 No. 1](#) introduces new rules on the vaccine mandate and the applicability of the COVID-19 certificate ('Green Pass').

The Law Decree 01/2022 has extended the obligation for vaccination to all citizens who are 50+ years old. It provides for administrative sanctions for those who do not comply with this vaccine mandate.

Furthermore, from 15 February 2022, workers who are 50+ years of age will need to present a 'reinforced' Green Pass to access their workplace. The Decree specifies that the vaccine mandate is met if:

- the primary vaccination cycle is started by 01 February 2022;
- the primary vaccination cycle is completed by 01 February 2022 for those who have already had their first dose;
- the booster dose, subsequent to the primary vaccination cycle, is obtained within the terms of validity of the Green Pass (this validity is reduced to 6 months from 01 February).

Those who cannot be vaccinated due to health problems are exempt from the vaccine mandate. In such cases, the vaccination is not mandatory or can be deferred and the employer will have to assign the workers concerned to different tasks, without reducing their salary, to prevent the risk of them spreading SARS-COV-2.

The reinforced Green Pass is also mandatory for all workers in the private sector, for public employees, for university staff (these obligations are in addition to those already envisaged for health, school, defence and police personnel). If employees do not have a reinforced Green Pass, they will be considered as being unjustifiably absent and will be suspended from work without the right to pay or other remuneration or emolument. The suspension will not produce disciplinary consequences and the suspended workers will in any case have the right to retain his or her employment relationship. After the fifth day of unjustified absence, the employer may suspend the employee for the duration corresponding to that of the fixed-term employment contract stipulated for his or her replacement, in any case for a period not exceeding 10 working days, renewable up to 31 March 2022.

The Decree also establishes that it is mandatory to possess and present the COVID-19 certificate (attesting vaccination, recovery or a negative test) to access a series of services, such as hairdressers, barbers and beauty centres (from 20 January); banks and post offices and shops, except those selling basic necessities (from 01 February).

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1.2 Other legislative developments

By Act 30 December 2021 No. 234, Parliament approves the State budget for the financial year 2022 and the multi-year budget for the period 2022-2024.

The December 2021 Flash Report briefly described the measures relating to employment relationships contained in the law. A more detailed description is provided below.

1.2.1 Work-life balance

Paternity leave, which had already been introduced on an experimental basis, is now a permanent feature in the legislation. According to Paragraph 134, fathers have the right to a mandatory leave of 10 days, even if not consecutive, and to an optional 1-day leave in agreement with the mother and in lieu of a corresponding day of mandatory leave due to the latter. Both leaves can be used in the first 5 months from the birth of the child or from entry into the family in case of foster care or adoption. For the days of leave taken, the father is entitled to an allowance equal to 100 per cent of his salary.

An additional 3-month maternity leave has been agreed for self-employed women in addition to the 5 months they already were entitled to (Paragraph 239).

Moreover, on an experimental basis, social security contributions for working mothers in the private sector are being reduced by 50 per cent for 2022. The reduction shall last 1 year starting from the return of the mother to work after maternity leave.

1.2.2 Wages Guarantee Funds

According to paragraphs 191-220, the Wage Guarantee Fund (*Cassa Integrazione Guadagni*) is applicable to all types of apprenticeships (and no longer only to vocational apprenticeships) and to home working. The length of working time required to access the Fund has been reduced from 90 to 30 days. The amount of indemnity remains 80 per cent of the salary, but there is a single ceiling (and no longer two based on the amount of the employee's salary).

The additional contribution to be paid by companies that apply for *Cassa Integrazione Guadagni* has been reduced for those that did not apply for it in the previous 24 months.

According to paragraph 204-205-207, another type of wage guarantee scheme, the bilateral solidarity funds, have been established for employers to whom the ordinary *Cassa integrazione* does not apply. The alternative solidarity funds for the artisan sector and work agencies apply to employers who employ at least 1 employee. The residual Salary Integration Fund (FIS) applies to employers who employ at least 1 employee, belong to sectors that do not fall within the scope of the CIGO and do not belong to any solidarity fund. The economic benefit provided by this fund is called '*Assegno di integrazione salariale*'. It shall last a maximum of 13 weeks over a two-year period if the employer employs up to 5 employees, and 26 weeks over a two-year period if the employer employs more than 5 employees.

Finally, the expansion contract has been extended to companies with more than 50 employees (paragraph 215).

1.2.3 Termination of productive activities

The law has introduced some procedural constraints for lay-offs related to company closures (paragraphs 224-238). They apply to companies that employ 250 employees and that are closing a plant, department, or office located in Italy, ending the activity and dismissing at least 50 employees. These companies must send a communication to the trade unions, the Regions concerned, the Ministry of Labour, the Ministry of Economic Development and the ANPAL (National Agency for Active Labour Policies) at

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least 90 days in advance. The communication must indicate the date and reasons for the closure and the number and professional profiles of the employees involved. Collective redundancies and individual dismissals for economic reasons imposed before 90 days or in the absence of such a communication are void.

Employers must also develop a plan that limits the employment and economic repercussions of the company closure, specifying the interventions intended to be implemented to encourage the re-employment of employees or the conversion of the production site.

1.2.4 Hiring of employees of companies in crisis

Various financial incentives have been introduced for employers who hire employees working for companies that are in crisis or that are benefiting from the Wage Guarantee Funds.

In particular, employers who hire employees from companies in crisis under a permanent employment contract in 2022 are entitled to full exemption from the payment of social security contributions for 36 months or 48 months if the recruitment takes place in the southern Italian regions (Paragraph 119). This incentive applies to the hiring of all workers, while the 2021 budget law only applied it to the hiring of young people under the age of 35.

Employers who hire workers under a wage guarantee scheme benefit from a monthly incentive for 12 months equal to 50 per cent of the allowance that would have been due to the worker (paragraph 243-247). If the worker is terminated, the benefit is revoked, and the amount already received must be returned.

Employers can hire workers under a wage guarantee scheme with a professionalising apprenticeship contract, notwithstanding their age.

1.2.5 Cooperatives

Cooperatives established from 01 January 2022 onwards will enjoy an exemption from social security contributions of 100 per cent for 24 months with a limit of EUR 6 000/year (paragraph 253-254).

1.2.6 Apprenticeships

A vocational apprenticeship contract in sports clubs can be concluded up to the age of 30 (and no longer only up to the age of 23 years) (paragraph 154).

1.2.7 Equality legislation

[Act 23 December 2021 No. 238](#) extends the duties of the National Office against Racial Discrimination (UNAR) to also cover discrimination on the ground of nationality. It aims to promote equality and remove any form of discrimination against workers who exercise the right of free movement within the European Union.

For this purpose, it must provide legal assistance to EU workers and their families, exchange information with the anti-discrimination offices of other EU states, carry out or commission and publish investigations of unjustified restrictions and obstacles to the right to freedom of circulation or discrimination based on nationality, and publish information on the application of the European Union rules on the free movement of workers.

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2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

The right to annual leave is guaranteed in the Italian Constitution (Article 36). Employees are entitled to 4 weeks of paid leave (Article 10 of Legislative Decree 66/03), but the law does not provide any provisions on the determination and calculation criteria of the amount of remuneration due for such periods.

The amount is therefore established by collective bargaining (or by the individual contract, if more favourable). Collective agreements usually provide for the payment of the employee's regular remuneration, including all the standard elements and all recurring remuneration, the only exclusion being occasional remuneration.

In any case, the right of collective bargaining to set this remuneration is limited (Art. 36, para. 1 and 3 of the Italian Constitution). Case law has clarified that the level of remuneration must be adequate to ensure that no differentiation is made between workers in terms of effective use of the leaves themselves (see, for example, Court of Cassation, judgment No. 14955 of 20 November 2000, available in *Orientamenti di Giurisprudenza del Lavoro*, 2001, 84). Hence, according to Italian law, a calculation criterion that would make it inconvenient for a worker to take his or her annual leave is unlawful.

4 Other Relevant Information

Nothing to report.

Latvia

Summary

The Commission Directive 2019/1834 amending Directive 92/29/EEC on the minimum safety and health requirements for improved medical treatment on board vessels has been implemented.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.1.1 Occupational safety and health

On 18 January 2022, the Cabinet of Ministers adopted Regulation No.44 'Regulation on labour safety and health protection and medical assistance on vessels' (*'Noteikumi par darba drošības un veselības aizsardzības prasībām un medicīnisko aprūpi uz kuģiem'*, Official Gazette No. 14, 20 January 2022).

The said Regulation was adopted to implement Commission Directive (EU) 2019/1834 of 24 October 2019 amending Annexes II and IV to Council Directive 92/29/EEC of 31 March 1992 on the minimum safety and health requirements for improved medical treatment on board vessels.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

According to [Latvian labour law](#), pay during annual leave must, in principle, correspond to the employee's average pay during the preceding six months. Article 75 of the Labour Law provides the legal regulation on the calculation of average pay for many purposes, including for the calculation of pay during annual leave.

'Pay' within the meaning of Article 75 includes basic pay and all additional payments, including pay for overtime work and bonuses (see also Commentaries to the Labour Law - *Darba likuma komentāri* - Latvian Free Trade Union Confederation, 2020, pages 197-199, available in Latvian [here](#)).

This means that the CJEU decision in the present case does not have an impact on Latvian labour law as the latter fully corresponds to the interpretation given by the CJEU.

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 Annual leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

The specific problem that arose in the present case, which took place against the background of German law, lies in the 'one-month reference unit' that was provided for in connection with the compensation of overtime under the applicable collective employment agreement. Since the reference unit for setting the threshold number of hours included in the calculation for overtime pay is defined on a monthly basis, the fact that the applicant in the main proceedings took days of annual leave in the month in which he worked overtime had the effect that the monthly threshold of normal working hours was not reached.

Liechtenstein's statutory law does not provide for such a reference unit. Section 1173a Art. 6 of the *Civil Code (Allgemeines bürgerliches Gesetzbuch, LR 210)* contains the following provisions: if more hours of work are required than envisaged under the employment contract or provided for by customary standard employment contracts or collective employment contracts, the employee is required to perform such overtime to the extent that he/she is able and may conscientiously be expected to. In consultation with the employee, the employer may compensate him/her within an appropriate period for the overtime worked by granting him/her time off in lieu of at least equal duration. Where overtime is not compensated by time off in lieu and unless otherwise agreed in writing or under a standard employment contract or collective employment contract, the employer must compensate the employee for the overtime worked by paying him his regular salary and a supplement of at least one-quarter thereof.

There does not appear to be a comparable monthly reference unit in the collective employment agreements, either. It appears that most binding agreements have a uniform regulation concerning overtime (see, e.g. collective agreements for the [plastering, painting and scaffolding trade](#); [car industry](#); [master builder and paving industry](#); [gardener and florist trade](#); [carpenter and roofer trade](#)).

It reads as follows: The extent of overtime work shall be reported by the employee to the employer in writing by the end of the week, at the latest, and shall be confirmed by the employer to the employee by signature. Confirmed overtime shall be compensated after prior consultation, primarily by granting time off of equal duration. If the gross target working time is exceeded at the end of a calendar year, the overtime must be compensated by the end of June of the following year. Gross wages shall be paid for any uncompensated overtime worked. No overtime premium is owed. If, at the end of the employment relationship, the gross target working hours applicable up to this point

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are exceeded, the overtime not compensated up to this point must be paid out with a wage supplement of 25 per cent.

The fact that the regulation is the same in all cases examined can be explained by the fact that there is only one trade union in Liechtenstein, namely the [Liechtenstein Employees' Association](#) (*Liechtensteinischer ArbeitnehmerInnenverband, LANV*).

It is not expected that a problem comparable to that dealt with in the CJEU case could arise in Liechtenstein. Liechtenstein law is in line with the case law of the CJEU.

4 Other Relevant Information

Nothing to report.

Lithuania

Summary

(I) The draft law to mandate vaccinations for medical employees and social workers failed in the final stage of adoption in Parliament.

(II) The COVID-19 certificate has been suspended with effect from 05 February 2022

(III) An order has defined the list of categories of workers with asymptomatic COVID-19 infections or who had contact with COVID-19 patients who, on an exceptional basis, may be required to work in the provision of essential services (health services, energy, transport, etc.)

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Mandatory vaccination

The draft law aiming to mandate vaccinations for medical employees and social workers compulsory failed in the final stage of adoption.

On 20 January 2022, Parliament (*Seimas*) was not able to adopt the amendments to the Law on the Prevention and Control of Communicable Diseases of the People, which would provide for compulsory vaccination of doctors and social workers against COVID-19. Compulsory vaccination was to be introduced for persons providing services in health care and social care institutions, as well as for persons providing cleaning, food supply or other services in health care institutions, and for social workers visiting people in their homes (see LRT.lt. Government proposal failed: COVID-19 will not be subject to compulsory vaccination for doctors and social workers, available [here](#)).

1.1.2 COVID-19 certificate

By decision of the Government (Resolutions No. 73-74 of 2 February 2022. Registry of Legal Acts, 2022, Nos 1864-1865), the Passport of Opportunities (the Lithuanian version of the COVID-19 certificate) has been suspended as of 05 February 2022, allowing all citizens to participate in public events and to attend universities, shopping centres, restaurants, cinemas, fitness clubs and similar places of social activities.

The Passport of Opportunities was also required by employers from their employees who work in those institutions or who need to attend them. The Ministry of Health, which proposed the suspension to the government, asserts that this measure to manage the pandemic has been exhausted. The Passport of Opportunities as a whole has been subject of fierce public debate and its constitutionality question is still pending before the Constitutional Court.

1.1.3 Performance of essential services

The Minister of Health (Chief Operational Officer) has approved (Order No. V-119 of 20 January 2022, Registry of Legal Acts, 2022, No. 00925) the list of categories of workers who, on an exceptional basis, may be required to work in areas of essential services with an asymptomatic COVID-19 infection or after previous contact with COVID-19 patients.

The order, signed by the Minister, stipulates that the new regime will apply to public service employees who are required to work continuously "if a large number of public employees with COVID-19 are unable to perform essential functions with COVID-19 are unable to perform ID-19 are unable to perform ly to public service employees who are

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required to work continuously as-privalomas-skiepijimas-ce systems. In the field of health care, exemptions will apply to the majority of medical staff - ambulances, emergency departments, COVID-19 units, supportive care and nursing staff, etc. These include staff from the National Centre for Public Health, laboratories and some other staff. The decision to work will have to be made by the employer, if and when there is such a shortage of staff that essential functions can no longer be provided.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

The judgment of the CJEU has no direct implications for Lithuanian legislation.

First of all, there are no such collective agreements which would entail similar substantial rules on the calculation of remuneration in case of paid annual leave or overtime payment.

Secondly, Lithuanian legislation provides for different principles of calculation of remuneration in case of paid annual leave - all types of remuneration are taken into account within the reference period of three months prior to the month in which annual leave is taken. It is used to calculate the 'average monthly salary' or the 'average daily salary', which are paid for the months/days of annual leave (Procedure for Calculating the Average Salary of an Employee, Civil Servant and Intelligence Officer, approved by the Resolution of the Government No. 496 of 17 June 2017, Registry of Legal Acts, 2017, No. 10853).

Thirdly, in Lithuania there are no rules on threshold of hours worked to be reached to grant entitlement to overtime pay - the payment for overtime is granted from the first hour of overtime (Article 144 (4) of the Labour Code). The additional allowance for overtime is set at 50 per cent.

4 Other Relevant Information

Nothing to report.

Luxembourg

Summary

(I) A bill has been deposited to transpose the Whistleblower Directive.

(II) The Commission Directive 2019/1834 on purely technical adaptations of safety and health requirements onboard vessels has been implemented.

(III) Two bills aim to modify the special leave of athletes to take part in sport competitions and reintroduce a special leave for cultural matters (cultural leave).

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Whistleblower protection

A bill (*Projet de loi n° 7945 portant transposition de la Directive (UE) 2019/1937 du Parlement européen et du Conseil du 23 octobre 2019 sur la protection des personnes qui signalent des violations du droit de l'Union*) has been deposited to transpose the Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (Whistleblower Directive).

The Directive and bill are not limited to employment relationships, but will also, to some extent, cover self-employed persons and third parties. Nevertheless, it will primarily impact labour law and could trigger labour disputes.

In large parts, the bill transposes the Directive verbatim. However, some important decisions have been taken by the authors of the bill:

Material scope

The most important difference between the implementing legislation and the Directive is the extension of its material scope of application. While the Directive is limited to a specific list of violations of EU law, the draft law covers all 'acts or omissions that are unlawful' (*actes ou omissions qui sont illicites*). This difference is extremely broad. The legislator's aim seems to be to cover all 'violations of the law' (*violation de la loi*). This would include all national legislation and regulations, all European Union law and all international treaties ratified by Luxembourg.

It seems that the law is not limited to criminal offences only, but to any failure to comply with a given law.

Contrary to the case law of the European Court of Human Rights, there is no requirement for a minimum threshold of severity, nor is there a requirement of absence of self-interest. An employee who reports a violation of labour law that affects him or her personally is therefore protected. Any employee who makes a claim is therefore likely to invoke the whistleblower's protective status.

The future law does not seem to cover the whistleblowing of facts that are legal but that might offend the general public. For such denunciations, the ECtHR case law will remain the reference.

A certain limitation of the scope of application follows from the fact that, in accordance with the Directive, only whistleblowing that takes place in a professional context is covered.

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Personal scope

From the perspective of persons who may benefit from protection against reprisal, the bill is closely modelled on the Directive. A questionable innovation, however, is that the notion of 'persons having the status of worker, within the meaning of Article 45(1) TFEU' is transposed verbatim. Until now, European texts applying to 'workers' have been transposed into national law for 'employees', 'civil servants' and other categories, without direct reference to European law.

Reporting channels

The transposition law adopts the Directive's criteria. Luxembourg takes advantage of the fact that the Directive allows for the postponement of the obligation to set up an internal reporting procedure in undertakings with 50 to 249 employees.

Involvement of employee representatives

The draft law is silent on this subject. However, in view of the Labour Code and case law, it can be assumed that the establishment of an internal whistleblowing procedure is a matter for 'internal regulations' (*règlement interne*) and thus for the staff delegation. This competence is consultative in undertakings with 15 to 149 employees; beyond that, it is a co-decision competence.

Competent authorities

The law lists 22 authorities that are competent to receive such alerts. The choice of authorities is not explained in the parliamentary proceedings, and is open to criticism. Some important authorities are missing from the list. Furthermore, reporting to the prosecuting authorities (police, public prosecutor's office) does not seem to give the employee whistleblower status.

Penalties

In terms of penalties within the meaning of Article 23 of the Directive, the law gives the competent authorities the power to impose administrative sanctions, ranging from EUR 1 500 to EUR 250 000. This penalty is imposed, for example, on those who do not implement an internal procedure, those who attempt to prevent reporting or are retaliating against protected persons

It is surprising that some purely advisory authorities (e.g. *Obudmsan*) are given the power to impose sanctions.

Protection against retaliation

Protection against retaliation is closely modelled on the Directive. The burden of proof is also reversed: if the employee is subject to a negative decision, it will be presumed that this is a reprisal because of whistleblowing. It seems problematic that neither the Directive nor the national draft provides for a time limit; an employee who has filed a report should not be protected throughout his or her career.

Certain negative measures taken against an employee, including dismissal, can be annulled. The employee must take legal action within 15 days.

1.2.2 Occupational safety and health

[A Grand-Ducal Decree](#) (*Règlement grand-ducal du 15 janvier 2022 modifiant le règlement grand-ducal du 22 juin 2000 portant exécution de la loi du 29 avril 2000 transposant la directive 92/29/CEE du Conseil du 31 mars 1992 concernant les prescriptions minimales de sécurité et de santé pour promouvoir une meilleure assistance médicale à bord des navires*) implements the purely technical adaptations of Directive 2019/1834 of 24 October 2019, amending Annexes II and IV to Council Directive 92/29/EEC as regards purely technical adaptations on safety and health requirements onboard vessels.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

The rules on overtime are contained in Articles L. 123-5 and follow the Labour Code. These rules are of public order and in principle do not allow for derogation by means of collective agreements that define their own overtime regime.

Moreover, according to Article L. 233-1 of the Labour Code, paid holidays count towards weekly working time. This rule is also a matter of public policy.

It is therefore not possible to define by collective agreement that holiday hours are to be taken into account differently from actual working hours to determine whether the employee is entitled to overtime pay or not.

A situation such as the one at issue in the present case can therefore not arise in Luxembourg. Moreover, there does not seem to be any collective agreement that contains a clause similar to the one at issue in this case.

4 Other Relevant Information

4.1 Bill on leave to take part in sport competitions

A bill has been tabled to reform sports leave, i.e. leave that can be granted to elite athletes and women and to coaches, primarily to enable participation in competitions (*Projet de loi modifiant 1° la loi modifiée du 3 août 2005 concernant le sport et 2° la loi modifiée du 31 juillet 2006 portant introduction d'un Code du travail*). This leave has existed since 1976 and has already been the subject of several reforms. Employees, civil servants and self-employed persons can benefit from it. The aim of the bill, as announced in the government coalition agreement, is to clarify certain points, and above all, to increase the number of days of leave to be granted. It is also a response to a criticism by the Council of State which, for constitutional reasons, considered that the principles of sports leave must be regulated by a formal law and cannot be delegated to a Grand Ducal regulation.

The draft contains several technical details that cannot be detailed here.

First of all, a number of extensions will be introduced. The notion of 'elite athlete' (*'sportif d'élite'*) has been extended, including to Paralympic athletes. In addition to elite athletes and coaches, certain administrative and technical staff will now also be eligible to take this leave. The leave may also be used for certain preparatory courses and training. The leave is also extended to official international club competitions (e.g. the Champions League in football).

As a limitation, the text now provides that on the part of the employee, only those who fall within the scope of the Luxembourg Labour Code can benefit from it; the employee must therefore work in Luxembourg. Self-employed persons must also be affiliated in Luxembourg. The number of athletes who can benefit from this leave will also be limited to the maximum number of engagements, depending on the type of competition (match sheets; *feuilles de match*). Similarly, Saturdays and Sundays will no longer be covered by the sports leave.

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There is a hierarchy as to the maximum duration of leave per year. For example, it is 90 days for elite athletes with an Olympic contract, 30 days for members of the 'elite cadre' (*cadre d'élite*) of the National Olympic Committee (COSL), 25 days for referees (*arbitres*), 20 days for technical staff (*cadres techniques*), etc.

For administrative staff, the maximum duration depends on the number of competition licences of the federation.

As in the past, sports leave will be considered actual working time. This leave is due in addition to statutory annual leave. The employer is reimbursed from public funds, with the allowance capped at four times the social minimum wage. Self-employed persons receive a lump sum of twice the qualified minimum wage.

In this context, it should be noted that the new Minister for Sport has even envisaged—apart from the Army, where this status exists—the creation of a real status for certain elite athletes, who would thus be remunerated by public funds.

4.2 Bill on cultural leave

Cultural leave (*congé culturel*) was introduced in 1994, with the aim of professionalising the cultural scene. The aim is to allow participation in cultural events in Luxembourg and abroad or to participate in training courses. It was abrogated in 2014 on the grounds that the goal had not been achieved. Within the framework of the 2018–2028 cultural development plan (*plan de développement culturel*), which was drawn up in collaboration with the cultural community, it was recommended that it be reintroduced. The aim is to strengthen Luxembourg's artistic and cultural influence and to enhance the value of art and cultural professions.

The aim of the bill (*Projet de loi n° 7948 portant institution d'un congé culturel et modification : 1° du Code du travail ; 2° de la loi modifiée du 16 avril 1979 fixant le statut général des fonctionnaires de l'État ; 3° de la loi modifiée du 24 décembre 1985 fixant le statut général des fonctionnaires communaux*) is to reintroduce this leave, while setting strict conditions to avoid abuse. The beneficiaries will have to demonstrate 'proven commitment to Luxembourg's cultural and artistic scene' (*un engagement avéré dans la scène culturelle et artistique luxembourgeoise*). They must have been invited to participate in 'high-level' cultural events (*manifestations culturelles de haut niveau*), a criterion introduced to be more selective than was the case under the previous legislation.

On the other hand, the leave will be extended to certain administrative executives (*cadres administratifs*) and staff of federations and associations in the sector to encourage voluntary work in this field. Similarly, the circle of artists has been extended. In addition to the category of creative and performing artists (*artistes créateurs et artistes interprètes/exécutants*), the project aims to include other actors such as bookers (*agents*), artists' managers, curators (*commissaires d'exposition*), etc.

The applicant must be active in one of the following fields: visual arts, architecture, design and crafts; multimedia and digital arts; literature and publishing; music; performing arts.

Leave for cultural actors will be subject to the following cumulative limits: 12 days per year, 20 days per two-year period and 60 days for the entire professional career. One must be affiliated in Luxembourg for at least six months. The criterion of the former 1994 law requiring residence in the country has not been taken up again, because of the risk of conflict with European Union law. For administrative executives, other conditions apply.

It will be specified that Saturdays, Sundays and public holidays are not taken into account.

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The employer must give notice of the request, which may be refused if the employee's absence is likely to have a major detrimental effect on the company.

Private sector employees continue to receive the equivalent of their salary as wages up to a maximum of four times the social minimum wage. The employer will make the advance and is reimbursed by the state.

As regards the procedure for granting leave and the terms of compensation, the bill reintroduces the former legislation that had been repealed.

Malta

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual Leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

The reasoning behind this case is extremely relevant and pertinent to the matter of partaking of vacation leave by employees.

Maltese Law appears to be incompatible with this judgment. Regulation 7 of the Organisation of Working Time Regulations, 2004 ([Subsidiary Legislation 452.87](#)) states the following:

"7. (1) Saving as otherwise provided in these regulations, the average working time for each seven-day period of a worker, including overtime, shall not exceed forty-eight hours provided that:

- (a) the average weekly working time shall be calculated from the total number of hours worked in a reference period as specified in subregulation (3);*
- (b) the periods of paid annual leave, granted in accordance with regulation 8, the periods of sick leave as specified in any relevant legislation issued in terms of the Act or as may be specified in a relevant collective agreement and any other leave to which a worker shall be entitled pursuant to any relevant legislative provision issued in terms of the Act shall not be included in the calculation of the average."*

This provision makes it clear that any periods of paid annual leave, sick leave or any other leave to which the employee may be entitled and which is availed of by the employee shall not be included in the average of working hours calculated to determine whether the employee exceeded the forty-hour weekly average.

Indeed, in terms of the Overtime Regulations 2012 ([Subsidiary Legislation 452.110](#)), any hours in excess of forty hours averaged over a period of four weeks are to be considered as overtime and shall be paid as follows:

"4. An employee whose overtime rate is not covered by a Wages Council Wage Regulation Order shall be paid one and a half times the normal rate for work carried out in excess of a forty hour week, averaged over a four week period or over the shift cycle at the discretion of the employer"

Essentially, therefore, it is clear that the relative Maltese provisions are in contravention of this pronouncement of the CJEU. Whether the legislator will amend the current provisions so that they become aligned to this judgment remains to be seen.

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4 Other Relevant Information

Nothing to report.

Netherlands

Summary

- (I) Job-seekers and employees can now apply for a training budget.
- (II) New rules on works councils shorten the duration of required employment service for employees to vote and be elected to works councils.
- (III) A judgment of a Dutch court holds that PhD students are not employees if the element of productive work is absent.
- (IV) A judgment of the Court of Appeal clarifies that, in line with EU law as interpreted in the CJEU case law, annual leave not taken will not expire after five years if the employee was unable to take his or her leave.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Vocational training

As of 01 March 2022, job seekers and employees can apply for the [STAP budget](#) once a year, with a maximum annual budget per person of EUR 1 000. This subsidy can be used for training and development to help workers remain employable in the labour market. Applying for the STAP budget is only possible if the training activities are listed in a national training register.

The STAP budget will replace the tax deduction for training and development costs that were offered before 2022. According to the Dutch government, this is a change that will help people who benefit the most from an investment in their own careers, such as people who for financial reasons cannot participate in (additional) training.

1.2.2 Works council elections

As of 01 January 2022, the terms for active and passive works council elections [have changed](#), and have been shortened to three months.

An employee can vote (Three months after an employee starts working for a company they can vote (active vote) and be elected (passive vote) for the works council. The minimum duration of employment in the undertaking for active voting used to be six months and 12 months for passive voting. As a [result](#), employees can now engage in employee participation earlier and more frequently than previously.

1.2.3 Wage Guarantee Funds

As of 01 January 2022, the premium for AOF will be [differentiated](#). The AOF is a fund for employees who are incapacitated for work (employers pay contributions to this fund). Prior to this differentiation, employers used to pay the same contribution per employee to this fund as large companies. As a result of this differentiation, the amount of contributions small employers will have to pay to the AOF compared to large employers will be lower. The goal of reducing the contributions is to distribute the burden more fairly. Additionally, small employers can use the money they save to invest in better insurance.

2 Court Rulings

2.1 Status of employee

Court of Groningen, ECLI:NL:RBNNE:2022:5, 04 January 2022

In the present case, the Court of North Holland held that a certain category of PhD students did not conclude an employment contract with the hospital (UMC Groningen). The hospital has four categories of PhD students. The PhD students that filed the claim are PhD students who received a scholarship and combined their training as doctors with their PhD research. This sets them apart from other categories of PhD students who have an employment contract with the hospital.

The PhD students concerned argued that an employment contract existed with the hospital due to the fact that they work for the hospital, receive a salary in the form of a scholarship and that a relationship of authority is present. These are the three requirements for the existence of an employment contract according to [Article 7:610 Dutch Civil Code](#).

According to the Court, there are some relevant differences between the claimant PhD students and other types of PhD students with an employment contract. These differences include, among others, the choice of subjects and the intellectual rights to the end result. Furthermore, the Court concluded that the purpose of the agreement between the PhD students and UMCG is for them to obtain personal benefits. The claimant PhD students did not intend to produce productive work when they signed the agreement, and the element of productive work is necessary for a contract to qualify as an employment contract. The fact that UMCG has a certain interest in promotions does not alter this fact.

This ruling concerned the same topic as that deal with in [another case from 2006](#), but has a different outcome. In the earlier case, the court ruled that the work provided by PhD students could be considered productive work. Naturally, the circumstances in these cases were not precisely the same. In cases concerning the three requirements for the existence of an employment contract, the precise circumstances are important to determine the outcome.

2.2 Annual leave

Court of Appeal (The Hague), ECLI:NL:GHDHA:2021:2386, 12 January 2022

This case concerned (amongst other issues) the expiration of annual leave not taken.

An employee who was fired claimed financial compensation for annual leave that had not been taken during the employment relationship. One of the questions that had to be answered was whether these holiday hours had expired or not. It is important to note that these were not merely a few hours, but a total 251.25 days of untaken holiday leave.

In Dutch law, the right to paid annual leave is found in [Article 7:634 Dutch Civil Code](#) and in [Article 7:639 Dutch Civil Code](#). According to [Article 7:640a Dutch Civil Code](#), hours of annual leave will expire 6 months after the end of the calendar year, unless the employee has not reasonably been able to take his or her leave. [Article 7:642 Dutch Civil Code](#) adds that notwithstanding [Article 7:640a Dutch Civil Code](#), the annual leave days not taken expires after 5 years. This article does not contain the same exception clause as [Article 7:640a Dutch Civil Code](#) regarding the employee's ability to take the leave.

When ruling on the expiry of annual leave in the present case, the Court referred to CJEU case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaftenand*, and considered that the employer must allow for the employee to take his or her annual

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leave. The employer has a far-reaching duty of care and information, which were not fulfilled in this case.

According to Article 7:642 Dutch Civil Code, the annual leave would still expire. However, the Court found that Article 7:642 Dutch Civil Code is not in line with Article 7 of the Working Time Directive, and thus did not apply this article in the present case, the result being that the hours of annual leave the employee was unable to take had not expired.

3 Implications of CJEU Rulings

3.1 Annual Leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

In Dutch law, the right of paid annual leave is found in [Article 7:634 Dutch Civil Code](#) and in [Article 7:639 Dutch Civil Code](#).

Overtime hours are not regulated in Dutch law; regulations on overtime are found in collective labour agreements.

Based on a Dutch court [ruling in 2020](#), it can be concluded that the interpretation of this issue in the Netherlands is in line with the principles set forth in the present case. In the present case, the Court decided that holiday allowance should be comparable to the salary an employee has earned in the past periods. The Court held that this must include regular overtime pay and that employees must be prevented from not taking paid leave because of a financial disadvantage. This is in line with the CJEU's ruling that a financial disadvantage must not dissuade the employee from taking his or her annual leave.

4 Other Relevant Information

4.1 Commuting and climate change

The Dutch government wants employers with 100+ employees to keep track of how much CO₂ employees emit when commuting. This mandatory measurement should yield a climate gain of one million tonnes less CO₂ emissions by 2030.

This obligation was announced on [page 72](#) of the [Climate Agreement](#). However, due to the long government formation in the Netherlands, this process has been delayed. There are still some concerns, for example regarding employees' privacy and the administrative burden on employers. If accepted, the Ministry of Infrastructure and Water Management expects this obligation for employers to be implemented as of 01 January 2023.

Norway

Summary

(I) The government has removed most of the national infection control measures with effect from 01 February 2022.

(II) A new Act on Wage Support will provide partial reimbursement of wage costs for certain employees from December 2021 to February 2022.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Lifting of COVID-19 restrictions

The final step of the government's reopening plan was enacted on 25 September 2021 (see the September 2021 Flash Report). However, the infection rates started to increase again from mid-October, and the increase continued in November and December. Due to the rising infection rates, new local and national restrictions were introduced in November (see the November 2021 Flash Report). Due to even higher infection rates and a rapid increase in hospital admissions at the beginning of December, the government decided to impose a number of stricter national infection control measures that entered into effect on 15 December (December 2021 Flash Report). Some of these measures were adjusted or lifted on 13 January, as hospital admissions remained relatively stable. On 31 January, the government removed most national infection control measures with effect from 01 February (see the details [here](#)). Some measures are still in place, most importantly:

- recommendation to keep a 1-metre distance to people other than those within a shared household or other close contacts (certain exceptions apply, such as in schools and higher education);
- requirement to wear a face mask when it is not possible to keep a 1-metre distance on public transport, at shopping centres, hairdressers, etc., libraries and museums;
- employers are recommended to consider the extent to which employees may work from home based on the workplace in question.

Advice against non-essential travel abroad has been removed for countries in the EEA, Schengen and the UK and other countries considered safe earlier this year. From 01 October 2021, the remaining global advice against non-essential travel was removed. However, there is still some advice against travel to specific countries. The updated travel advice can be found [here](#).

After the reopening of society, the plan was to remove restrictions on entry to Norway in three phases. Phase 1 began on 25 September (see the September 2021 Flash Report), but changes were made for some countries and areas in October and November. From November, the restrictions on who can enter Norway were lifted, and the rules that apply are now the same as prior to the pandemic. There are, however, rules on vaccination certificates and testing for entry into Norway. More information about the current entry rules can be found [here](#).

1.1.2 Relief measures

The new government that took office in October has suggested that several measures introduced in 2020 to mitigate the effect of the COVID-19 crisis will be extended (see October-December 2021 Flash Reports). In January, there were two main developments:

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- A new Act on wage support has been passed ([LOV-2022-01-28-2](#)). This wage support scheme means that businesses will be reimbursed for part of their wage costs for certain employees for a short period (December 2021, January and February 2022). The scheme applies to employees who would otherwise have been dismissed or temporarily laid off due to a drop in turnover related to the national infection control measures introduced in December 2021;
- New regulations related to the Act on temporary compensation schemes for businesses with a substantial decrease in turnover after August 2020 ([LOV-2020-12-18-156](#)) have been introduced. The new regulations supplement the act as regards compensation periods after October 2021. The regulation entered into force on 28 January and can be found here [FOR-2022-01-28-139](#).

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

Directive 2003/88/EC has been transposed into Norwegian law in the [Working Environment Act of 2005 \(WEA\) Chapter 10](#), while the right to paid annual leave is regulated in the [Holiday Act of 1988](#).

Overtime is regulated in WEA Section 10-6. For the purpose of this provision, overtime is defined as work exceeding the limits for normal working hours prescribed by the WEA, cf. paragraph 2.

The use of overtime is generally restricted. Work exceeding the 'agreed' working hours (extra work or overtime) is only permitted in case of an exceptional and time-limited need, cf. paragraph 1. This requirement may not be derogated from by collective agreement, cf. WEA Section 10-12 paragraph 4. Therefore, overtime work generally appears to be exceptional and unforeseeable, as in the present case.

WEA Section 10-6 paragraph 11 requires overtime work to be compensated by a supplement of at least 40 per cent to the employee's earnings for corresponding work during regular working hours. Apart from this requirement of an overtime supplement, the WEA does not regulate pay. The calculation of the overtime supplement is not regulated further, neither in the WEA nor in the Holiday Act. Moreover, the provision on overtime pay in WEA Section 10-6 paragraph 11 may be derogated from by collective agreement concluded by trade unions that fulfil certain requirements on size and representativity, cf. WEA Section 10-12 paragraph 4.

As a consequence, there may well be collective (or individual) agreements in Norway that regulate the calculation of overtime pay in a similar manner as the MTV in the present case. It appears that in some collective agreements the right to overtime pay only applies to hours of actual work (see for an illustration [HR-2018-136-A](#)).

Hence, there may well be regulations in Norwegian law that are problematic in light of the Court's interpretation of Article 7 of Directive 2003/88/EC in the present case.

4 Other Relevant Information

4.1 Unemployment rate

The unemployment rate reached high levels early in the pandemic (see previous Flash Reports). A significant decline started in the spring of 2021 and continued throughout the summer and fall of 2021, but the rates rose slightly from December. By the end of January 2022, there were 126 100 unemployed people, this amounts to between 4 per cent and 5 per cent of the workforce (see the data [here](#)).

Poland

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

It should be assumed that the rules arising from the CJEU ruling in case C-514/20 of 13 January 2022, *Koch Personaldienstleistungen* apply in the Polish legal system.

Although Article 151 §1 of the [Labour Code](#) states that overtime is counted if an employee works in excess of the standard working time (Article 12), it is commonly accepted that to determine whether an employee has worked overtime, it is necessary to take into account the regular number of working hours an employee would have been expected to work in a given reference period (the period in which overtime is verified). The basis for this calculation is Article 130 §3 of the Labour Code, which specifies that hours of annual leave, as well as public holidays, are not to be accounted for in the calculation of normal working hours of a given reference period.

It should be pointed out that collective labour agreements in Poland very rarely regulate the limit of permissible working hours differently than in generally applicable regulations. However, if they were to regulate this matter differently than by the above-mentioned method, such provisions should be recognised as non-binding and the limit for working hours beyond which the employee would be entitled to remuneration for overtime work would be calculated based on the above-described method.

4 Other Relevant Information

4.1 Bill on COVID-19 testing in the workplace

On 27 January 2022, a bill to protect the life and health of citizens during the COVID-19 pandemic was submitted to Parliament (see [here](#) for the draft and its substantiation, and [here](#) for information on the legislative process).

Pursuant to this bill:

- Employers will be able to require employees and persons working for them under civil law contracts to provide proof of a negative COVID-19 [diagnostic] test result;
- An employee will be able to take a test, free of charge, once a week; at the same time, as has been pointed out, this frequency can be adapted to respond flexibly to the changing epidemiological situation and availability of tests. The tests will be financed from state funds;

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- An employee who has not undergone a [diagnostic] test will continue to work for the employer under the same conditions as before; he/she will not, therefore, be assigned to work outside his/her permanent place of work or to another type of work. However, in the situations provided for in the bill, he/she may be required to pay compensation for infecting other employees with SARS-CoV-2.

An employee who has been confirmed infected with SARS-CoV-2 and who has a reasonable suspicion that the infection occurred in the workplace or other place designated for work may request initiation of proceedings for compensation due to infection with SARS-CoV-2 from an employee who has not been tested.

As emphasised in the substantiation of the draft, the procedure for obtaining compensation due to infection with SARS-CoV-2 will only apply when the employer has decided to use the opportunity provided for in the draft to require the employee to provide information about being in possession of a negative test result. If, however, the employer has not used the solution provided for in the bill, and an employee who has been confirmed to be infected with SARS-CoV-2 has a justified suspicion that he or she was infected in the workplace or another place designated for work, the employee will be able to apply to the province governor to initiate proceedings for compensation from the employer for the infection.

In addition, the bill allows an employer who has exercised his or her option to require an employee to provide proof of a negative SARS-CoV-2 diagnostic test result to seek compensation due to infection with SARS-CoV-2 from an employee who has not taken the diagnostic test. The employer will be able to claim this compensation if employees who have had contact with the employee who was not tested are found to be infected with the virus, as a result of which the employer's business is substantially impaired.

This bill differs from previous drafts (see August, September, November and December 2021 Flash Reports). The major difference is that the employer would lose the right to modify systems of working time organisation, or to instruct an employee or service contractor to perform work at another location than stipulated in the contract, or to entrust an employee or civil law contractor to conduct another type of work in the event that a person fails to present a negative COVID-19 test. Additionally, in the new draft, being vaccinated will be irrelevant for the employee's situation.

According to the information provided by the media, the bill appears to have low chance to be enacted.

Portugal

Summary

(I) An amendment to the Portuguese Labour Code increases the number of days of justified absence in the event of death of certain family members.

(II) The conditions of publishing the work schedules and recording of working time applicable to workers in road transport activities have been regulated.

(III) The government has created and regulated an extraordinary measure of financial support for the hiring of unemployed people.

(IV) A recent judgment clarifies that the application of the transfer of undertaking regime depends on the existence of an economic unit and the maintenance of its identity in the sphere of the new operator of the activity based on an indicative method.

1 National Legislation

1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Work-life balance

On 03 January 2022, [Law No. 1/2022](#) was published in the Official Gazette (*Diário da República*), which amends the Portuguese Labour Code as regards the duration of justified absences from work in the event of the death of a family member.

In particular, the abovementioned law increases the period of justified absence from 5 to 20 consecutive days in the event of the death of an employee's children, stepchildren, son-in-law, and daughter-in-law. This law entered into force on 04 January 2022.

1.2.2 Recording of working time for road transport activities

[Ordinance No. 7/2022, of 04 January](#) regulates the conditions of publishing the work schedules and the procedure of recording the working time of certain categories of workers:

- workers assigned to the operation of a motor vehicle;
- mobile workers in road transport activities not subject to the recording equipment provided for in the applicable European Union Regulations and in the European Agreement concerning the Work of Crews of Vehicles engaged in International Road Transport (AETR);
- self-employed drivers in mobile road transport activities not subject to the recording equipment provided for in the applicable European Union Regulations or in the AETR.

This regulation is also applicable to drivers engaged in the activity of transport in an unmarked vehicle from an electronic platform in accordance with Article 10 (12) of Law No. 45/2018, of 08 August, which regulates said activity.

1.2.3 Financial support for hiring unemployed persons

On 17 January 2022 [Ordinance No. 38/2022](#) was published, which creates and regulates an extraordinary and temporary measure called 'Commitment for Sustainable

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Employment' (*Compromisso Emprego Sustentável*), which consists of granting the employer financial support to hire unemployed persons under a permanent employment contract. This regime entered into force on 18 January 2022.

2 Court Rulings

2.1 Transfer of undertaking

Guimarães Court of Appeal, Process No. 678/20.9T8BRG.G1, 20 January 2022

In this [ruling](#), the plaintiff claimed that he was employed by the first defendant, and worked as a security guard at a railway station. The first defendant informed him that the provision of the security services had become the responsibility of the second defendant and, due to the transfer of undertaking regime, the claimant became an employee of the latter. The second defendant did not, however, recognise the plaintiff as its employee and only agreed to hire him if he entered a new employment contract, without recognition of the rights he had acquired during the years he worked for the first defendant.

The Appeal Court of Guimarães examined whether a transfer of an economic unit, in accordance with Article 285 of the Portuguese Labour Code had occurred. According to the Court, the concept of economic unit should be interpreted in line with the CJEU's case law. In this case, the Court considered that there was a set of factors that were of little relevance for assessing whether a transfer of an economic unit had occurred, such as the maintenance of the client and the identification of the service to be provided, the location where services were to be provided and the timetables, as it related to the service requested by the client and previously defined by the latter. The Court also mentioned that the absence of a time gap was not relevant in the situation at stake. In this case, no transfer of goods, whether tangible or intangible, had taken place between the two companies. Also, both companies were qualified to provide surveillance services, having the required licence.

According to the Appeal Court of Guimarães, the application of the transfer of undertaking regime depends on the existence of an economic unit and the maintenance of its identity within the sphere of the new operator of the activity, using an indicative method. In this case, the court ruled that:

"the fact that a provider of security services changes without a time break following a tender procedure, even if the service to be provided is exactly the same, at the same locations and timetables and by the same number of workers, does not imply in itself a transfer of an economic unit". The Court held that *"in this case, there was no integration of most of the first defendant's workers and it did not result from the facts that the staff integrated have special knowledge or a position in the structure of the previous operation, so that it can be considered that the economic unit is maintained".*

In this ruling, the Appeal Court of Guimarães also analysed the recent amendment to the TUPE regime included in the Portuguese Labour Code, introduced by Law No. 18/2021, of 08 April 2021, which states that this regime is applicable to all situations of transfers of undertakings or establishments by the adjudication of service contracts arising from a public tender procedure or through other procedures of selection in the public or private sector, namely surveillance, food, cleaning or transport services. According to the referred appeal court, this amendment to the Portuguese labour law did not aim to modify the legal regime but to clarify the meaning of the law and the possibility of its application to these specific situations. Considering the controversial case law, the aim of this legislative amendment was to clarify that the TUPE regime applies not only to cases of external private contracting (outsourcing), but also to cases of adjudication through public tenders and, furthermore, that all sectors are potentially included, namely those which generate more litigation, such as surveillance, catering,

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cleaning and transport. However, even in these cases, a transfer only occurs if an economic unit maintains its identity.

The change of a security service provider and the potential application of the TUPE regime to these cases have led to several decisions of Portuguese courts, sometimes in opposite directions (see the December 2021 Flash Report for a reference to other recent judgments regarding this matter).

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

Under Portuguese law, a worker is entitled to a paid annual leave of at least 22 working days ([Article 238 \(1\) of Portuguese Labour Code](#)). According to [Article 264 \(1\) of Portuguese Labour Code](#), "the remuneration of annual leave corresponds to the pay the employee would have received if he were effectively working".

Portuguese doctrine and case law have interpreted the concept of 'remuneration' for purposes of paid annual leave in the sense that it corresponds to everything that, by virtue of the regularity and foreseeability of its attribution, would be due to the worker in case of effective provision of work during the annual leave period. In this context, this CJEU case law may contribute to the interpretation of the said provision of the Portuguese Labour Code, stressing that during annual leave, the worker shall receive the remuneration he/she would be entitled to if he/she were not taking annual leave.

4 Other Relevant Information

4.1 Retirement pension in case of disability

[Law No. 5/2022, of 07 January 2022](#) establishes the age for eligibility of retirement pension in case of disability. For access to this regime, people must meet the following eligibility conditions:

- age equal to or greater than 60 years old;
- a degree of disability equal to or greater than 80 per cent;
- at least 15 years of contributions to disability insurance for a degree of disability equal to or greater than 80 per cent.

In this case, people can access old-age pension without any penalty for early retirement and the sustainability factor shall not apply to the calculation of the pension amount. This law should be finalised within 180 days and will enter into force with the Budget State Law subsequent to its publication.

Romania

Summary

(I) The financial support for the technical unemployment benefit for employees was extended until 31 March 2022.

(II) The High Court of Cassation and Justice has issued a generally binding decision, stating that when determining the annual leave allowance for prison officers, consideration should be given to an increase for difficult, harmful or dangerous working conditions they have been exposed to during the period of activity.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Wage support scheme

Government Emergency Ordinance No. 2/2022 on the introduction of social protection measures for employees and other professional categories in the context of prohibiting, suspending or limiting economic activities as a result of the epidemiological situation caused by the spread of SARS-CoV-2 coronavirus, as well as amending and supplementing some normative acts, published in the Official Gazette of Romania No. 61 of 20 January 2022, provides for the resumption of the payment of the technical unemployment benefit by the State. The previous regulation expired on 31 December 2021.

Thus, until 31 March 2022, during the period of temporary suspension of the employment contract at the initiative of the employer, for economic or for health-related reasons, employees shall receive 75 per cent of their salary, a compensation paid from the unemployment insurance budget. The allowance amounts up to 75 per cent of the average gross wage provided by law for 2022 (which is RON 6 095).

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Annual leave

High Court of Cassation and Justice, No. 23/2021, 20 January 2022

In Decision No. 23/2021, published in the Official Gazette of Romania No. 62 of 20 January 2022, the High Court of Cassation and Justice ruled on the holiday allowance of prison officers. The decision was handed down in an appeal in the interests of the law, henceforth it is binding for all courts in the country.

The Court determined that the practice with regard to the holiday allowance prison officers was not uniform:

- Some courts have ruled that bonuses paid for work being performed under difficult, dangerous or harmful conditions shall not be included in the calculation of holiday allowance. These bonuses are not permanent but are granted in proportion to the working time performed under difficult, dangerous or harmful working conditions. However, when the prison officers are on leave, they do not perform work under adverse working conditions, therefore, it has been held that the corresponding bonuses should not be included in their annual leave allowance, the justification being that the worker is not exposed to difficult,

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harmful and dangerous conditions when he or she is on leave, hence, the salary increase related to such adverse working conditions is temporary in nature and variable, not permanent;

- By contrast, other courts have held that bonuses for workers who work under difficult, dangerous or harmful conditions should be included in the holiday allowance of prison officers. These increases relate to actual time worked under such conditions, but only as a way of quantifying the amount of the bonus. The fact that the bonuses of the prison officers are variable and linked to actual presence in the workplace does not mean that they are temporary bonuses, because they are permanent as they only apply when work is performed under specific working conditions. Therefore, the right of prison officers to benefit from the inclusion of such bonuses in the calculation of their holiday allowance applies for as long as such benefits are included in the wage they receive for their actual activity.

The High Court of Cassation and Justice upheld the appeal in the interests of the law and opted for the second solution, ruling that when determining the annual leave allowance of prison officers, consideration should be given to the increase they are entitled to for performing work under difficult, harmful or dangerous working conditions, which corresponds to the time worked in the respective workplaces.

In the reasoning of its decision, the High Court of Cassation and Justice referred to the nature of these increases and described them as permanent. It pointed out that determining whether the working conditions for which an increase is paid are indeed difficult, harmful or dangerous is made based on aspects related to the general characteristics of certain categories of activities and workplaces, and not based on each individual worker and each of their duties. Moreover, the increases cover long periods of time and are not set daily or monthly. The fact that these increases are granted in proportion to the actual time worked under difficult, harmful and dangerous working conditions is only a way of quantifying the increases during periods of activity, without having any influence on their qualification as a permanent bonus. In other words, the variable/fixed character of the increase aims at its quantification, while the permanent/temporary character refers to the conditions for granting the increase, which are two distinct aspects.

From this perspective, the High Court of Cassation and Justice considered the interpretation given in Article 7 (1) of Directive 2003/88 in the case law of the Court of Justice of the European Union in several cases, in particular in case C-155/10 Williams and Others, where it was held that an airline pilot is entitled not only to the maintenance of his basic salary during annual leave, but also, first, to all the components intrinsically linked to the performance of the tasks he is required to carry out under his contract of employment and in respect of which a monetary amount, included in the calculation of his total remuneration, is provided and, second, to all the elements relating to his personal and professional status as an airline pilot.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

According to Article 120 (1) of the Romanian Labour Code, overtime is performed in addition to the normal duration of weekly working time. Article 112 (1) provides that for full-time employees, the normal duration of working time is 8 hours per day and 40 hours per week.

Therefore, the assessment of the work performed by the employee as overtime is made in relation to the working week as a time unit, and not in relation to the month. If the employee works more than 40 hours a week, the difference is overtime.

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However, the Labour Code does not expressly provide for a specific calculation for overtime, if the employee was on annual leave for part of the week. In practice, the leave days taken during the week are not considered when determining the employee's normal working hours. For example, if the employee has benefited from 1 day of rest leave, overtime is considered to be work performed over a 32-hour week. This interpretation is based on the provisions of Art. 112 of the Labour Code, which reports the normal working hours, cumulatively, as being 8 hours/day and 40 hours/week.

There is no express provision according to which leave days during the week shall not be considered in the calculation of the normal duration of working time for the purpose of determining overtime. Therefore, it is presumed that the decision of the Court of Justice of the European Union in case C-514/20 will provide practitioners with a more solid basis for interpreting the Romanian regulations applicable to the calculation of overtime.

4 Other Relevant Information

Nothing to report.

Slovakia

Summary

(I) A new regulation encourages the use of teleworking to the extent possible and requires employees present in the workplace to certify that they are either vaccinated or have recovered from COVID-19. Alternatively, they can undertake regular testing.

(II) A decision of the Supreme Court clarifies that overtime work can be performed, and must be remunerated as such, when the work is carried out without an explicit order of the employer.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Teleworking

On 12 January 2022, the government, with effect from 19 January 2022, approved the Resolution of the Government of the Slovak Republic No. 29/2022 on [the draft measures](#) against SARS-CoV-2 (Omicron variant).

The measures have been approved with effect at national level for a maximum of four weeks after the peak of the Omicron wave.

As regards employment, the government requires workers to take advantage of home-office as much as possible. Employees working in the workplace must either be fully vaccinated, recovered or tested for COVID-19.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Overtime work

Supreme Court, No. 5Cdo/24/2019, 25 February 2021

In this judgment ([see here](#), p. 55), the Supreme Court clarified that ordered overtime work can also encompass work performed without an explicit order by the employer, but with the knowledge of the employer who accepts and uses the results of the employee's work.

Failure to meet the condition of temporariness and urgency of the increased need for work does not affect the qualification of work performed as overtime work nor does it affect the employee's entitlement to wages and benefits for overtime work.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

The legislation in the Slovak Republic is, in principle, in line with this judgment of the Court of Justice.

According to Article 116 paragraph 1 of the Labour Code ([Act No. 311/2001 Coll.](#)), employees shall be entitled to wage compensation in the amount of 'their average earnings' for the period of annual paid holiday.

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'Average earnings' for labour law purposes is regulated in Article 134 of the Labour Code. According to Article 134 paragraph 1, average earnings for labour law purposes shall be ascertained by an employer based on the wages paid to an employee over a specified period during which the employee performed work. The period of overtime work for which wages are paid is accounted for pursuant to Article 121 paragraph 4 last sentence (according to which it can be exceptionally agreed in the collective agreement or employment contract that the wage earned for overtime work shall only be accounted for after the substitute time off is subtracted for overtime work), shall be included in a period worked by the employee in the specified period in which the wage paid for overtime work has been accounted. Pursuant to the first sentence, the total wages paid to an employee shall not include the wage paid for an inactive part of stand-by work in the workplace (Article. 96 paragraph 3) and the period the employee worked shall not be included in the inactive part of his or her stand-by work in the workplace.

'The specified period' shall be the calendar quarter preceding the quarter in which average earnings are determined. Average earnings shall always be determined by the first day of the calendar month following the specified period and shall be used during the entire quarter-year, unless this Act stipulates otherwise (Article 134 paragraph 2 of the LC).

In case an employee did not work at least 21 days or 168 hours during the specified period, probable earnings shall be used instead of average earnings. Probable earnings shall be determined in accordance with wages the employee has earned since the beginning of the specified period, or from wages he or she would have earned (Article 134 paragraph 3 of the LC).

The details of determining average earnings or probable earnings may be agreed upon with the employee representatives (Article 134 paragraph 10 of the LC). However, according to Article 4 paragraph 2 of [Act No. 2/1991 Coll.](#) on Collective Bargaining, as amended, the part of the collective agreement that contravenes generally binding legal regulations or regulates claims of employees in a lesser extent than the collective agreement of a higher degree.

4 Other Relevant Information

Nothing to report.

Slovenia

Summary

(I) Various COVID-19 measures continued to apply in January 2022.

(II) The possibility to raise the pay of medical doctors above the level prescribed by the legislation regulating public sector salaries has been challenged by some trade union confederations before the Constitutional Court.

(II) The Employment Relationships Act has been amended, introducing changes to the regulation of wage compensation in case of temporary absence from work due to illness or injury (sickness benefit).

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Public health measures

Various COVID-19 measures continued to apply in January 2022. Among others, rules governing quarantine, self-isolation, testing and the validity of the COVID-19 certificate have been changed (see, for example, Official Journal of the Republic of Slovenia (OJ RS) No. 2/2022, 06 January 2022, p.14, No. 4/2022, 07 January 2022, No. 8/2022, 17 January 2022, pp. 326-327, No. 13/2022, 31 January 2022).

A summary overview of all valid measures is published [here](#) in English on the government website.

1.1.2 Challenges to emergency pay raise

On 27 January 2022, five representative national trade union confederations initiated proceedings before the Constitutional Court to challenge the provisions of the Act on Additional Measures to Stop the Spread and Mitigate, Control, Recover and Eliminate the Consequences of COVID-19 ('*Zakon o dodatnih ukrepih za preprečevanje širjenja, omilitev, obvladovanje, okrevanje in odpravo posledic COVID-19 (ZDUPŠOP)*', OJ RS No. 206/2021, 29 December 2021, pp. 13375-13389; see also [here](#)), which introduced the possibility to raise the salaries of medical doctors above the level prescribed by the legislation regulating public sector salaries (Article 48 of the ZDUPŠOP) (see the December 2021 Flash Report).

Article 48 of the so-called PKP10 (10th package of measures to mitigate the negative impact of COVID-19) has only raised the pay ceiling in the single public sector wage system to the benefit of medical doctors and dentists. The trade unions argue that the maximum wage raise for just one group of public sector employees is not linked to the COVID-19 emergency measures; they claim that this partial solution in the public sector wage system was adopted without social dialogue and contrary to the procedure prescribed by the Public Sector Salary System Act ('*Zakon o sistemu plač v javnem sektorju (ZSPJS)*', see [here](#)). Moreover, they argue that as the said provision was included in the emergency bill, the citizens' right to a referendum was denied. See more [here](#) and [here](#).

1.2 Other legislative developments

1.2.1 Amendments to sickness benefit compensation

The Employment Relationships Act ('*Zakon o delovnih razmerjih (ZDR-1)*', OJ RS No. 21/13 et subseq.), Article 137 on wage compensation during temporary absence from

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work has been amended, as have the corresponding provisions of the Health Care and Health Insurance Act regulating sickness benefits.

The National Assembly adopted these amendments on 26 January 2022. The proposal can be found [here](#).

The amendments concern the rules governing the payment of wage compensation in case of temporary absence from work due to illness or injury (sickness benefit). The adopted amendments reduce the period of sick leave when compensation is covered by the employer or by self-employed persons themselves from 30 days to 20 work days and the total within each calendar year from 120 to up to 80 days (beyond those periods, the sickness benefit is paid by the mandatory health insurance), and thus reduce the cost of sickness benefit for the employer at the expense of the Health Insurance Institute (*Zavod za zdravstveno zavarovanje Slovenije*), the public health insurance fund to which both employers and employees make mandatory health insurance contributions. The trade unions and the Health Insurance Institute strongly opposed these amendments. The new rules will start to apply as of 01 March 2022. For further information, [see here](#), the joint opinion of all major representative national trade union confederations can be read [here](#).

1.2.2 Employment for persons with disabilities

The rules on employment centres have been amended (*'Pravilnik o spremembahj Pravilnika o zaposlitvenih centrih'*, OJ RS No. 11/2022, 28 January 2022) and the amount of co-financing by the State adjusted.

The employment centre employing 5 to 10 persons with disabilities shall receive EUR 3400.00 per month by the competent Ministry and EUR 950 per month by the Disability Fund; the centre shall receive an additional EUR 220 per month for each additional person with a disability employed by the employment centre in sheltered employment.

Employment centres that offer sheltered employment to persons with disabilities are regulated by the Vocational Rehabilitation and Employment of Persons with Disabilities Act (*'Zakon o zaposlitveni rehabilitaciji in zaposlovanju invalidov (ZZRZI)'*, OJ RS 63/2004 et subseq.), in particular in Articles 43 et subseq.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

The CJEU judgment has no implications for Slovenian law.

No such provision is found in Slovenian law according to which the total hours of overtime hours worked, entitling the employee to overtime pay, are not taken into account as hours worked for the calculation of working time for the period of paid annual leave. According to Article 142 of the Employment Relationships Act (*'Zakon o delovnih razmerjih (ZDR-1)'*, OJ RS No. 21/13 et subseq.), working time encompasses effective working hours, breaks and periods of justified absences from work in accordance with the law and collective agreement and/or a general act.

The period of annual leave is a justified absence from work and therefore considered as hours worked.

4 Other Relevant Information

4.1 Adjustment of minimum wage and minimum hourly rate

On the basis of Article 6 of the Minimum Wage Act ('*Zakon o minimalni plači (ZMinP)*', OJ RS No. 13/10 et subseq.), the minimum wage has been adjusted (Minimum Wage Amount, '*Znesek minimalne plače*', OJ RS No. 5/2022, 12 January 2022, p. 141).

From 01 January 2022 onwards, the minimum wage will amount to EUR 1 074.43 gross (monthly rate for full-time work). It was EUR 1 024.24 in 2021 and EUR 940.58 in 2020.

Consequently, the minimum hourly rate for occasional and temporary work of students was also adjusted by the Minister of Labour (Order on the Adjustment of Minimum Gross Hourly Pay for Temporary and Occasional Work, '*Odredba o uskladitvi najnižje bruto urne postavke za opravljeno uro začasnih in občasnih del*', OJ RS No. 6/2022, 16 January 2022, p. 275-276).

From 15 January 2022 onwards, the minimum hourly rate for occasional and temporary work of students will amount to EUR 6.17 gross.

4.2 Sickness benefit for self-employed persons in the cultural sector

The daily amount of sickness benefit for self-employed persons in the cultural sector for full-time work in 2022 was set at EUR 25 ('*Uredba o določitvi višine dnevnega nadomestila za čas zadržanosti od dela zaradi bolezni za samozaposlene v kulturi za polni delovni čas za leto 2022*', OJ RS No. 11/2022, 28 January 2022). The daily amount of this sickness benefit is set by the government annually on the basis of Article 82.a of the Exercising of the Public Interest in Culture Act ('*Zakon o uresničevanju javnega interesa na področju culture (ZUJIK)*', OJ RS No. 96/2002 et subeq.).

According to Article 82.a, paragraph 4, self-employed persons in culture may, for a period of absence from work due to illness of at least 31 working days, receive daily compensation (sickness benefit) for working days up until and including the 30th working day of the illness; this compensation may be received for not more than one absence from work due to illness in a particular year and shall be granted by the ministry responsible for culture upon the application of the self-employed person. From the 31st working day onwards, the sickness benefit for self-employed persons is paid by the health insurance.

4.3 Compensation for occupational diseases due to asbestos exposure

On the basis of Article 6 of the Act Concerning Remediating the Consequences of Work with Asbestos ('*Zakon o odpravljanju posledic dela z azbestom (ZOPDA)*', OJ RS 38/2006 et subseq.), the Minister of Labour published the new scheme for determining compensation for particular types of occupational diseases due to asbestos exposure ('*Shema za določanje odškodnine za posamezne vrste poklicnih bolezni zaradi izpostavljenosti azbestu*', OJ RS No. 6/2022, 14 January 2022, p. 274-275).

4.4 Collective bargaining

Annex No. 5 to the Collective Agreement for the Paper and Paper-converting Industry, concluded on 21 December 2021 was published and entered into force ('*Aneks št. 5 h Kolektivni pogodbi za papirno in papirno-predelovalno dejavnost*', OJ RS No. 5/2022, 01 January 2022, p. 142).

Amendments to the Collective Agreement for the Construction Industry, concluded on 13 December 2021, were published and entered into force ('*Spremembe in dopolnitve Kolektivne pogodbe gradbenih dejavnosti*', OJ RS No. 6/2022, 14 January 2022, p. 276).

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Both concern the adjustment of minimum amounts of wages and certain other payments, such as reimbursement of work-related costs.

Spain

Summary

- (I) The government has issued a regulation amending the rules on vocational training.
- (II) The Supreme Court has rendered a decision clarifying that legal rules on transfers of an undertaking apply even when only a succession of subcontractors occurs in the case of 'succession of staff'.
- (III) A decision confirms that fixed-term workers have the same right to financial benefits linked to seniority as permanent workers.
- (IV) Two decisions of the Supreme Court clarify that any temporary lay-offs and working time reductions must have proven links to the COVID-19 crisis.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Vocational education

Spain has introduced profound modifications in the field of vocational education in recent years, with the aim of bringing together theoretical and practical training as close to each other as possible to ensure that students can quickly find a job. Every year, some aspect of vocational education is reformed with the purpose of improving its effectiveness and attractiveness as an alternative to university studies.

The aim of this [Royal Decree 62/2022](#) of 25 January 2022 is to make the requirements more flexible:

- for centres interested in offering vocational education;
- for the courses included in the catalogue of vocational education;
- for those who provide such training (trainers or educators).

The aim is to ensure that vocational education can be quickly adapted to the needs of the productive sector.

2 Court Rulings

2.1 Transfer of undertakings

Supreme Court, STS 4834/2021, 15 December 2021

Transfers of undertakings have been a key issue in Spanish case law in recent years. The Supreme Court has aimed to adapt its doctrine to CJEU case law, but this is not an easy task. There are many CJEU rulings on transfers of undertakings, and experience proves that the Supreme Court has not always been able to fully comply with them, at least initially. The Supreme Court has adapted its doctrine to CJEU case law, even in cases concerning the succession of staff through collective bargaining.

Therefore, the Supreme Court stated that the legal rules on the transfer of an undertaking (Article 44 of the Labour Code) do not apply when only a succession of subcontractors occurs and there is no transfer of material resources, except in the case

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of 'succession of staff'. Specifically, Supreme Court usually refers to the CJEU ruling in case C-60/17, 11 July 2018, *Somoza Hermo*, which states:

"the directive applies to a situation in which a contracting entity has terminated the contract for the provision of services relating to the security of buildings concluded with one undertaking and has, for the purposes of the provision of those services, concluded a new contract with another undertaking, which takes on, pursuant to a collective agreement, the majority, in terms of their number and skills, of the staff whom the first undertaking had assigned to the performance of those services, in so far as the operation is accompanied by the transfer of an economic entity between the two undertakings concerned".

This Supreme Court ruling of 15 December 2021 is relevant because five workers were affected and the new subcontractor decided to continue the activity with only two of them (not the majority). The Supreme Court asserted that the rules on transfers of undertakings, if applicable, require the succession of all workers of the former undertaking. If the situation qualifies as a transfer of an undertaking, the Directive and Article 44 of the Labour Code should apply to all workers, not only to those selected by the new subcontractor. Workers not selected are dismissed on objective grounds, so the new employer must follow the relevant procedure (or a collective dismissal if the number of dismissed employees requires it). Workers have the right to severance pay and the dismissal will be considered unfair if no procedure has been followed because the new subcontractor has simply discounted those workers.

In the present case, the Supreme Court asserted that two of five employees, i.e. 40 per cent of the total workforce, was sufficient (assessing the circumstances of the case) to meet the legal requirements of a transfer of an undertaking. Therefore, the new subcontractor's action (discounting three of the five workers who had provided services for the former subcontractor) was qualified as an unfair dismissal for three of the workers.

2.2 Fixed-term employment

Supreme Court, STS 4873/2021, 15 December 2021

It has been very common in Spain for a long time to limit certain wage supplements to permanent workers only, excluding fixed-term employment contracts. Temporary workers have often been excluded from seniority supplements, even in public administrations. The CJEU has played a significant role in the development of Supreme Court doctrine and temporary workers now have the right to supplements linked to seniority.

The [present ruling](#) reconfirms this doctrine.

2.3 Temporary lay-offs and working time reductions linked to COVID

Supreme Court, STS 4856/2021 and STS 4793/2021, 16 December 2021

Spain has adopted several measures to reduce the impact of the pandemic on employment. Article 22 of Royal Decree Law 8/2020 allows the employer to introduce adjustment measures that affect the workforce, as a result of force majeure. It is worth mentioning that Article 47 of the Labour Code already allowed such measures in case of force majeure, but it was unclear to date that all situations related to COVID-19 correspond to this Article. Royal Decree Law 8/2020 has now clarified this.

These pandemic regulations allow undertakings to adopt measures such as temporary lay-offs or the reduction of working hours, but must prove that these measures are related to the COVID-19 pandemic. These COVID-19 temporary lay-offs result in a reduction in social security contributions.

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These two rulings of the Supreme Court ([STS 4856/2021](#) and [STS 4793/2021](#)) address these temporary lay-offs related to COVID. The Supreme Court states that these new COVID lay-offs are only possible when the undertaking can prove that it the grounds for the lay-offs are related to COVID. If not, the undertaking has the possibility to adopt an 'ordinary' temporary lay-off, but in that case, there are no reductions in social security contributions.

Moreover, if the temporary lay-off is COVID-related, the regulations approved within the scope of the pandemic do not allow for a dismissal on objective grounds (on economic, technical, organisational or production grounds) if they were also caused by the COVID pandemic. Therefore, the possibility to dismiss a worker affected by these COVID temporary lay-offs requires the undertaking to prove that grounds exist that are not related to the COVID pandemic.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

It is unlikely that this ruling will have a direct impact on Spanish labour law. According to the Labour Code, the right to annual leave cannot be waived. Moreover, the worker does not receive a salary supplement when the number of hours worked exceeds a certain threshold, but the employer must pay a wage equal to or higher for each hour of overtime than the salary earned for an 'ordinary' hour (hours under the threshold of overtime).

However, a similar problem could arise concerning other rights not linked with overtime. If a law or collective agreement establishes that 'only hours worked can be accounted for' (or an equivalent expression), then the time taken for annual leave will not be taken into account, because it is not working time according to Spanish law. Therefore, even if this ruling will not have an impact on overtime (or that an impact is not foreseeable), it could have an impact on other salary allowances or other rights, but it is highly hypothetical and too early — without more information — to make a proper assessment.

4 Other Relevant Information

4.1 Unemployment

Unemployment has continued to decrease (76 782 unemployed less in December 2021). In December 2021, there were 3 105 905 unemployed people.

This is the best data for the month of December since 2007.

Sweden

Summary

(I) The Swedish Labour Court upheld the decision of an employing police authority that a policeman no longer fulfilled the criteria for security clearance and was therefore summarily dismissed.

(II) In a case on part-time parental leave, the Swedish Labour Court held that the employer had justifiably rejected an application as it would have caused the employer significant disturbance.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Dismissal for no longer meeting work-related requirements

Labour Court, AD 2022 No. 3, 19 January 2022

A policeman was summarily dismissed and lost his security clearance as the employer was notified that the policeman had criminal connections. In the [present case](#), the Labour Court held, with reference to ECtHR case law ([Piskin v. Turkey, application No. 33399/18](#)), that the employer's decision to remove an employee's security clearance must be able to be questioned in court.

As Swedish law provides for no separate possibility to question a decision on the removal of a security clearance, the Labour Court held that it must test the security clearance decision. It determined that in this case, the employee's silence during the security clearance interview regarding criminal connections was ground for removal of the security clearance and for summary dismissal.

The outcome of this case differs from the Labour Court's judgment AD 2021, No 63 (analysed in the December 2021 Flash Report). In the latter case, the employment contract was terminated for personal reasons. In such a situation, there is a statutory obligation for the employer to relocate the employee. This judgment shows that it is not impossible for an employer to terminate an employment agreement due to the fact that the employee no longer meets the criteria for a security clearance.

2.2 Parental leave

Labour Court, AD 2022 No. 4, 19 January 2022

The [present case](#) concerned three prisoner transport drivers who applied for part-time parental leave with a fixed starting and ending time. The employer was willing to agree to the employees' applications, but only if they were willing to be relocated to be regular prison guards. One employee opposed the relocation and the request for parental leave was thus declined.

The question before the Labour Court was whether the employer's decision was in line with the [Parental Leave Act \(föräldraledighetslagen \[1995:584\]\)](#). According to Section 14 paragraph 2 of the Parental Leave Act, an employer is required to grant an employee's application for parental leave unless it causes significant disturbance ('*påtaglig störning*') for the employer. The Labour Court held that the employer was justified in declining the application as it would have otherwise caused the employer significant disturbance.

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Even though EU Directives on parental leave exist, they were not mentioned in the Labour Court's judgment. It is to be determined whether the new Directive 2019/1158 on work-life balance for parents and carers would have changed the court's decision if it had been applicable *ratione temporis*, as Article 9 of that Directive prescribes that Member States shall grant workers the right to request flexible arrangements. However, it appears that the Swedish exception for significant disturbance for the employer is in line with the EU directive.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

The CJEU held that the Working Time Directive must be interpreted as precluding a provision that calculates working time and overtime in a manner which may deter the worker from exercising his or her right to annual leave.

The Working Time Directive's provisions on annual leave are implemented in the Swedish [Annual Leave Act \(Semesterlagen \[1977:480\]\)](#). The provisions in this act are mandatory to the benefit of the employee, but most provisions can be set aside or replaced through collective agreements. In other words, the Swedish implementation rests on the idea of collective self-regulation. The threshold for what can be agreed in collective agreements is determined by EU law.

The current judgment will therefore most likely have an impact on the interpretation of provisions on annual leave in Swedish collective agreements.

4 Other Relevant Information

4.1 Reform of the Swedish Employment Protection Act

The legislative procedure of reforming the Swedish Employment Protection Act has been referred to the Law Council for remittance (read more [here](#)).

4.2 Industrial relations

The Swedish Trade Union Confederation (LO) has left the European Trade Union Confederation (ETUC) in protest against the ETUC's handling of the directive on adequate minimum wages (more information can be found [here](#)).

United Kingdom

Summary

(I) A decision of the Employment Tribunal upheld the dismissal of a care home employee who refused to vaccinate against COVID-19.

(II) A reform of the law that incorporates all of EU law into domestic law, which would make it easier to amend retained EU Law, has been announced.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Dismissal for refusal to vaccinate

Employment Tribunal, 1803699/2021, 10 January 2022

One of the many issues arising out of the COVID-19 crisis is the extent to which employers can insist on measures such as mask wearing and COVID vaccination.

In *Allette v Scarsdale Grange Nursing Home Ltd*, a care home employee was dismissed after refusing to be vaccinated (this was before the government introduced rules making vaccination mandatory in care homes). She successfully argued that mandatory vaccination was an interference with the employee's rights under Article 8 of the ECHR. However, the tribunal concluded that the interference was justified, and the dismissal was fair.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-514/20, 13 January 2022, Koch Personaldienstleistungen

In the present case the Court ruled that Article 7(1) of Directive 2003/88/EC concerning certain aspects of the organisation of working time, read in the light of Article 31(2) of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding a provision in a collective labour agreement under which, in order to determine whether the threshold of hours worked granting entitlement to overtime pay is reached, the hours corresponding to the period of paid annual leave taken by the worker are not to be taken into account as hours worked.

This has not been an issue in the UK. The numbers of collective agreements are declining significantly. Further, the CJEU decision in case C-539/12, *Lock*, is well known in the UK since it was a reference from the UK courts. Note, however, that the government is planning to give itself powers to make it easier to amend retained EU law and there may be changes in respect of working time going forward.

4 Other relevant information

4.1 Retained EU Law

The government announced on 31 January 2022 that it was proposing to amend retained EU Law (REUL), the law which incorporates all of EU law into domestic law. According to the [press release](#):

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"A new 'Brexit Freedoms' Bill will be brought forward by the government, under plans unveiled by the Prime Minister, Boris Johnson, to mark the two-year anniversary of Getting Brexit Done.

The Bill will make it easier to amend or remove outdated 'retained EU law' - legacy EU law kept on the statute book after Brexit as a bridging measure - and will accompany a major cross-government drive to reform, repeal and replace outdated EU law.

These reforms will cut £1 billion of red tape for UK businesses, ease regulatory burdens and contribute to the government's mission to unite and level up the country.

Many EU laws kept on after Brexit were agreed as a messy compromise between 28 different EU member states and often did not reflect the UK's own priorities or objectives - nor did many receive sufficient scrutiny in our democratic institutions."

Some more detail can be found in the '[Benefits of Brexit](#)' document published the same day:

"Now we have taken back control of these rules and regulations, there are two key priorities:

- Reviewing retained EU law to meet the UK's priorities. We must look carefully for aspects of retained EU law where the Government should prioritise reform, such as those referred to in the 'Achievements So Far' section. We have already begun a process of reviewing them to make sure they meet the UK's priorities for unlocking growth and are tailor-made for the UK market.*
- Allowing changes to be made to retained EU law more easily. There needs to be a specific approach to allow changes to be made to retained EU law more easily. Currently, many changes to these retained EU laws require primary legislation, even if amending technical details that would more usually sit in domestic secondary legislation—for example, certain energy performance certificates are in retained EU law and require primary legislation to change. This means that any changes to this, or other retained EU law, will take a lot longer to deliver, even if minor or technical in nature. The pipeline of primary legislation would dominate the legislative agenda for several Parliaments, reducing the ability to deliver more fundamental domestic reforms. We are determined to maximise the opportunities of Brexit and to rebuild the economy as we emerge from the Covid pandemic. We cannot delay much needed regulatory change, or risk baking in outdated EU law."*

It is worth noting, in particular, that the document presented as a key priority the use of a simplified mechanism which would make it easier to amend REUL, including employment law.

4.2 Mandatory vaccination in the health sector

It had been mandatory to require all health service staff to be vaccinated and anyone not vaccinated was due to be dismissed after 03 February 2022. It has been announced that the vaccine mandate could be disregarded in England for NHS staff. Given the chronic staff shortage in the NHS, dismissing a further 130 000 staff would have led to a very serious crisis ([see here](#) for further information).

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