Flash Reports on Labour Law October 2022

Summary and country reports

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

October 2022

EUROPEAN COMMISSION

Directorate DG Employment, Social Affairs and Inclusion

Unit C.1 – Labour Law

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Flash Report 10/2022 on Labour Law

Manuscript completed in October 2022

Luxembourg: Publications Office of the European Union, 2022

PDF ISSN 2600-3252 KE-CC-22-010-EN-N

Flash Report 10/2022 on Labour Law

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Executive Summary

National level developments

In October 2022, 24 countries (all but **Denmark**, **Hungary**, **Iceland**, **Latvia**, **Lithuania** and **Poland**) reported some labour law developments. The following were of particular significance from an EU law perspective:

Developments related to the COVID-19 crisis

This month, the extraordinary measures to mitigate the COVID-19 crisis played only a minor role in the development of labour law in many Member States and European Economic Area (EEA) countries.

In **Austria**, the COVID-19 Special Care Leave for employees was reintroduced in a slightly limited form.

In **France**, a decree sets down the criteria to identify vulnerable employees who are entitled to an allowance because they are prevented from working due to the pandemic.

Transposition of EU law

Directive (EU) 2019/1158 on Work-life Balance for Parents and Carers and Directive (EU) 2019/1152 on Transparent and Predictable Working Conditions were transposed in **Belgium**, **Romania** and **Slovakia**. **Malta** has also transposed Directive (EU) 2019/1152.

In **Germany** and **Finland**, the government has proposed implementing the provisions of Directive (EU) 2019/2121 on employee participation in cross-border transformations, mergers and divisions.

Directive 2019/1937/EU on the protection of persons who report breaches of Union law was implemented in **Ireland**.

Transfer of undertakings

In **Greece**, the Supreme Court ruled that the provisions on exceptions to the application of the rules on transfers of undertakings due to bankruptcy or other insolvency proceedings must be narrowly interpreted.

In **Spain**, according to the Supreme Court, in case of a transfer of undertaking, workers' representatives retain their position and the rights previously agreed with the former employer.

In **Portugal**, the Oporto Appeal Court ruled on the concept of transfers of an economic unit.

Working time

In **Spain**, a Supreme Court ruling concerns the reduction of working hours for legal guardianship, which cannot affect wage supplements for attendance and punctuality.

In **France**, a ruling of the Court of Cassation clarified when on-call duty is not considered working time.

Annual leave

In **Austria**, the Act on Paid Annual Leave has been amended, limiting the entitlements granted by the CJEU's ruling in C-233/20 to four weeks annually.

In **Germany**, the Infection Protection Act was amended to ensure that if an employee is quarantined during his or her leave, the days of isolation shall not be counted towards the employee's annual leave.

Fixed-term work

In **France**, the Court of Cassation ruled on the exhaustion of grounds for concluding successive fixed-term contracts for professional athletes.

In **Norway**, the Supreme Court ruled that the regulations on maximum total

duration of successive temporary appointments do not apply to fixed-term teaching staff.

In **Sweden**, the use of fixed-term employment contracts was restricted from two to one years.

Temporary agency work

In **Sweden**, a duty to offer temporary agency workers permanent employment once they have worked for a client for more than two years has been introduced.

In **Germany**, the Federal Labour Court held that if a temporary agency worker is illegally hired-out to Germany, this does not lead to the invalidity of the temporary employment contract if it is governed by the law of another European Member State.

In **Italy**, two rulings of the Court of Cassation deal with temporary agency work.

Other atypical work

In **France**, the Court of Cassation has ruled on an increase in working hours in a part-time employment contract.

In **Malta**, the legislator has introduced a presumption of employment status for digital platform workers.

In **Finland**, a government proposal includes clarifications on the definition of an employment relationship in unclear situations.

Posting of workers

In **Liechtenstein**, an amendment to the Posting of Workers Act implements Directive (EU) 2018/957 concerning the posting of workers in the framework of the provision of services.

In the **Netherlands**, the Supreme Court has ruled in the FNV/SiloTank case after submitting preliminary questions to the CJEU that were addressed in case C-815/18, 01 December 2020, *Federatie Nederlandse Vakbeweging*.

Other developments

The following national developments in October 2022 were particularly relevant from an EU law perspective:

In **Croatia**, the Regulations on Inspection and Testing of Work Equipment and the Regulations on Testing of the Working Environment have been amended.

In **Estonia**, Parliament has adopted an amendment to the Act on Occupational Health and Safety and to the Act on Employment Contracts.

Table 1: Major labour law developments

Topic	Countries
Collective bargaining	HR CY FI DE IE SI UK
Minimum wage	HR IE LU NL SI
Transparent and predictable working conditions	BE MT RO SK
Work-life balance	BE RO SK
Fixed-term work	FR NO SE
Temporary agency work	DE IT SE
Working time	FR SE EE
Transfer of undertakings	EL ES PT

Cross-border mergers	DE FI
Posting of workers	LI NL
Occupational safety and health	HR EE
Measures to respond to COVID-19	AT FR
Employment status	FI
Platform work	MT
Part-time work	FR
Labour inspectorate	BG
Dismissal	ES
Whistleblowers	IE

Implications of CJEU Rulings

Workers' participation

This Flash Report analyses the implications of a CJEU ruling on the role of employee representatives in European companies (SE).

CJEU, case C-677/20, 18 October 2022, IG Metall and ver.di

This ruling concerned the separate ballot for the election of candidates nominated by trade unions to a company's Supervisory Board required by German legislation. In this regard, the CJEU ruled that such a procedural element established by national law must be regarded as forming part of 'all elements of employee involvement' within the meaning of Article 4(4) of Directive 2001/86/EC, and must thus be taken into account for the purposes of the agreement on the arrangements for involvement referred to in that provision whenever an SE is established by means of transformation.

Most countries report that this ruling has no implications for their legal framework.

Several countries, including **Belgium**, **Bulgaria**, **Cyprus**, **Iceland**, **Italy**, **Liechtenstein**, **Portugal**, **Romania** and **Spain**, reported that with the exception of SEs, there is no national legislation that requires workers' participation in the boards of private companies; as such, the judgment is unlikely to have any implications for national legislation and practice.

Other countries, including **Austria**, **Denmark**, **Hungary**, **Latvia**, the **Netherlands**, **Poland** and **Slovenia**, reported that while board-level employee participation is regulated in legislation, there is no separate ballot with a view to electing a certain share of candidates nominated by trade unions as employee representatives within the Supervisory Board, meaning that the ruling is also unlikely to have any implications for these countries' national legislations.

Other countries, such as the **Czech Republic**, **France**, **Norway** and **Sweden**, indicated that national legislation seems to already be in line with the ruling. The guidelines described by the CJEU on the interpretation of the Directive will, however, be relevant and clarify what the parties can agree on when it comes to employee representation in an SE company that is established by means of transformation.

The ruling has implications for **Germany**, where the Federal Labour Court will have to clarify the consequences of the invalidity of the regulation for the entire participation agreement in question.

Austria

Summary

(I) The COVID-19 Special Care Leave for Employees has been reintroduced in a slightly limited form.

(II) The Act on Paid Annual Leave has been amended, limiting the entitlements granted by the CJEU ruling in C-233/20 to four weeks annually.

1 National Legislation

1.1 Special care leave

The COVID-19 Special Care Leave for up to three weeks has been reintroduced. Parents are again entitled to the special care leave in case their children contract COVID-19, and can therefore not attend school, kindergarten or another childcare facility due to applicable traffic restrictions or—for children up to the age of 14—in case childcare facilities are closed due to COVID-19. The same applies to employees who are responsible for the care of persons with disabilities in case they cannot attend their care facilities due to having contracted COVID-19 or in case their care facilities are closed due to COVID-19. Employers are again reimbursed by the COVID-19 crisis management fund for the costs of leave. There is no option to agree on a voluntary COVID-19 special care leave on the basis of § 18b AVRAG (BGBI. I Nr. 162/2022), as was the case in previous versions of the COVID-19 Special Care Leave.

Entitlement to COVID-19 special care leave has been reintroduced retroactively as of 05 September 2022 and will remain in force until 31 December 2022. The National Assembly passed the bill on 12 October 2022, and the Federal Assembly on 20 October 2022.

1.2 Paid annual leave

The CJEU ruled in C-233/20, 25 November 2021, *WD v job-medium GmbH*, in liquidation, that the Austrian provision under which no allowance is payable in lieu of paid annual leave not taken in case a worker unilaterally terminates his or her employment relationship early (e.g. in violation of the applicable notice period and termination dates) and without cause is precluded by Article 31 (2) of the Charter of Fundamental Rights and Article 7 of Directive 2002/88/EC.

The Austrian High Court has since consistently ruled that this judgment applies to the four weeks of annual holiday as guaranteed by EU law, but not to any entitlements beyond that. Austrian law goes beyond the entitlement to paid annual leave as provided for by EU law and generally provides for five weeks of paid annual leave in the private sector; after 25 years of service with the same employer, entitlement to paid leave increases to six weeks of leave annually.

The national legislator has now referred to both the CJEU's judgment and the Austrian High Court's case law and has amended the Act on Paid Annual Leave to codify the Austrian High Court's case law on the matter.

§ 10 (2) Act on Paid Annual Leave that formerly read

> "*No compensation in lieu of paid annual leave shall be payable if the employee resigns early without good cause*"

now reads

> *"[…] in the event of unjustified early resignation, no compensation in lieu of paid annual leave shall be paid for the fifth and sixth week of the entitlement to paid annual leave from the current leave year"*.

The Act hence limits the effects of C-233/20 to the minimum entitlement of paid annual leave as granted by EU law.

The Act passed the National Assembly on 12 October 2022, and the Federal Assembly on 20 October 2022, and will enter into force the day after its official publication (in accordance with 627/BNR).

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

In Austria—similar to the case in Germany—employees of a company with a Supervisory Board have the right to delegate a number of employee representatives, in particular one-third of representatives. The number of representatives and the selection procedure is regulated in § 110 Labour Constitution Act (*Arbeitsverfassungsgesetz*, *ArbVG*; for more general information, see here).

The employee representatives on the Supervisory Board are chosen by ballot by the central works council if there is more than one workplace or, if there is only one workplace, by the works council. They must be works council members and employees of the business. Unlike in Germany, there is no separate ballot with a view to electing a certain share of candidates nominated by the trade unions as employee representatives within the Supervisory Board. The same applies to the Supervisory Board of an SE.

The CJEU's ruling in the *IG Metall and ver.di*-case therefore has no implications for Austria.

4 Other Relevant Information

Nothing to report.

Belgium

Summary

(I) The ordinary procedure for the introduction of temporary unemployment benefits has again entered into force.

(II) Directive 2019/1152 on transparent and predictable working conditions and Directive 2019/1158 on work-life balance have been transposed into Belgian legislation.

1 National Legislation

1.1 Temporary unemployment

The Law of 30 July 2022 containing various provisions on temporary unemployment has been introduced (see *Moniteur belge*, 28 September 2022).

As of 01 July 2022, the ordinary procedures for introducing temporary unemployment due to force majeure will once again apply. In fact, during the COVID-19 pandemic, a simplified procedure was in force, and workers can still apply for it until 31 December 2022 in case it is impossible for their child to attend nursery, school, or care centres for persons with disabilities due to a government decision to introduce measures to contain the COVID-19 pandemic. In that case, workers have the right to be absent from work without retaining pay, but with the right to receive benefits through temporary unemployment due to force majeure.

Regarding the procedure for economic unemployment, the law contains additional relaxations until 31 December 2022. These include a derogation on (1) the minimum prior notice period when economic unemployment is shortened, (2) the criteria of a company in difficulty, and (3) the mandatory work week following the full suspension of the performance of the employment contract.

Furthermore, the law contains a regulation on unlawfully paid benefits in case of temporary unemployment. If an employer does not provide its employees with work supported by a temporary unemployment scheme and no force majeure, technical disorder, inclement weather or lack of work related to economic causes on the temporary unemployment scheme can be claimed, the employer will be liable to pay its employee his/her regular wage for the days during which no such temporary unemployment applied. This should limit the unlawful use of this regime. The latter measure will apply until 31 December 2022, subject to extension by Royal Decree.

1.2 Transparent and predictable working conditions

The law of 07 October 2022 partially transposes EU Directive 2019/1152 of 20 June 2019 on transparent and predictable terms of employment in the European Union, and has been published in the *Moniteur belge* of 31 October 2022.

This Law partially transposes Directive (EU) 2019/1152 of 20 June 2019 on transparent and predictable terms and conditions of employment in the European Union.

This law comprises three major parts:

- it guarantees the right to information on essential terms and conditions of employment for private and public sector employees (including statutory civil servants);
- it creates a number of new rights or extends existing rights for private sector workers and public sector contractual employees ('minimum rights');

- it introduces new additional dismissal protection and a number of new criminal sanctions in the Social Criminal Code.

Information on the employment relationship

The information to be provided relates to the 'key aspects' of the employment relationship.

For the information elements that are 'individual' in nature and differ for each employee, the employer can choose in which document to provide the information: the individual employment contract or another document. This information must be provided to the employee no later than the first working day.

The information elements that are 'collective' in nature and applicable to all employees of an enterprise is provided in the work rules at company level, i.e. no new document type has to be created for this purpose (except for exceptions).

The law also provides for the employer's obligation to provide certain additional information to employees sent to work abroad before their departure.

Finally, any change made to these information elements must be communicated by the employer to the employee in the form of an amendment to the relevant document, no later than the day on which the change takes effect.

Information of an individual nature

Under the Law of 31 October 2022, the employer must provide the employee with information on the main aspects of his/her employment relationship. More specifically, it concerns the following elements (Article 4, §2) :

- the identity of the parties to the employment relationship;
- the location of the work;
- information about the function the employee primarily performs for the employer;
- the start date of the employment relationship;
- the end date or expected duration if the employment relationship is of a fixed duration;
- the salary, including the initial amount, other components, fringe benefits, payment method and frequency of payments;
- very extensive information on the fixed or variable working hours and time schedules for the employee's work ;
- the duration and details of the probation period, if applicable (employment contracts for students: see also Article 10 of the Law of 07 October 2022, amending Article 124 of the Employment Contracts Law of 03 July 1978).

When the employee is sent to work in another country for more than four consecutive weeks, the employer must provide additional information to the employee before his/her departure. In case of posting, the employer must provide additional information to the employee (Article 6, see also Article 18).

This information shall be provided to the employee in one or more documents no later than the first day of employment. The most obvious way for providing this information is, of course, the employment contract itself. However, the employer can also deliver the information through a document prepared unilaterally by him/her. In this case, the law requires the employer to keep proof of transmission or receipt of the document. Thus, a simple Word file sent to the employee by e-mail is acceptable (Memory of

Understanding of the Legislative Proposal, *Parliamentary Documents*, Chamber of Representatives, 2021-2022, No. 55-2811/001, p. 9-10).

A separate document containing the prescribed information cannot replace the mandatory content of the employment contract. Thus, the employment contract will have to contain at least a provision on pay; after all, this is a core part of the employment contract. In a fixed-term employment contract, the start and end date need to be mentioned (Memory of Understanding of the Legislative Proposal, *Parliamentary Documents*, Chamber of Representatives, 2021-2022, No. 55-2811/001, p. 9-10).

From the date of entry into force of this Law on 10 November 2022 (Article 34), employers will have to provide the said information in the employment contract or any other document only in case of conclusion of a new employment contract after 10 November 2022. As regards employment contracts that already existed before the Law entered into force, the employer must only provide the relevant information 'within the period provided for by the aforementioned chapter' when the employee expressly requests it (Article 47).

Many templates of employment contracts often already contain extensive information on the employment relationship, limiting the impact of the law. If standard company contracts are more concise, more action will be required. As a rule, extending the text of the employment contract will be the simplest solution, but caution is called for. If the employee explicitly names (fringe) benefits (such as meal vouchers, group insurance, etc.) in the employment contract, it might be advisable for an employer to include a right of withdrawal.

Information of a collective nature

The law of 31 October 2022 also amends the law on the work rules at company level of 08 April 1965 and modifies the mandatory disclosures in the labour regulations or work rules at enterprise level. The following four elements must be mentioned in the labour regulations:

- the procedure, including the formal requirements and notice periods, which the employer and employee must observe if the employment relationship is terminated as well as the periods within which dismissal can be appealed or the reference to the legal or regulatory provisions regulating these points (Article 13);
- the reference to the collective bargaining agreements and/or collective agreements concluded in the company and applicable to working conditions. As regards collective bargaining outside the company, reference to the competent sectoral joint committee in which they were concluded must be made (Article 14);
- the social security institution to which social contributions in the context of the employment relationship are made;
- the right to training offered by the employer or reference to the legal or regulatory provisions or collective bargaining agreements that regulate it (Article 15).

It should also be highlighted that points 1 and 2 were already provided for in the current legislation.

The reference to the deadlines within which dismissals can be appealed by a reference to the deadline referred to in Article 15 of the Employment Contracts Law.

The reference to the competent joint body in which the collective bargaining agreements were concluded seems to add relatively little in practice. Indeed, most of the work rules already refer to the competent joint committee(s).

No deadline is set for bringing existing work rules into line with the new legislation. Moreover, for points 1 and 2 mentioned above, Articles 16 and 17 of the new law explicitly provide that the normal legal procedure of worker participation in amending the work rules should not be followed.

Minimum rights

A number of minimum rights are provided for.

Article 20 of the new Transparent and Predictable Conditions of Employment Law now provides that the employer cannot prohibit his/her employee from working outside his/her work schedule for one or more other employers and subject him/her to unfavourable treatment for that reason.

This transposes Article 9 of Directive 2019/1152 into Belgian law (see Memory of Understanding of the Legislative Proposal, Parliamentary Documents, Chamber of Representatives, 2021-2022, No. 55-2811/001, p. 17).

The employer cannot impose exclusivity, hence prohibition of the employee to work for other employers during the employment relationship, is subject to exceptions provided for by law (Article 20).

The Explanatory Memorandum (see Parliamentary Documents, Chamber of Representatives, 2021-2022, No. 55-2811/001, p. 18) provides the following examples:

- Article 1135 of the old Civil Code and Articles 16 and 17, 4° of the Employment Contracts Law of 03 July 1978 which stipulates that during the term of his/her employment contract, an employee is bound by non-competition, even if it is fair competition;
- Article 17, 3° of the Employment Contracts Law, which stipulates that the employee must refrain from disclosing a trade secret or secrets relating to personal or confidential matters of which he/she may have knowledge in the performance of his/her professional work, committing or participating in acts of unfair competition both during the contract and after its termination.

This is not an exhaustive list. For example, an employer can prohibit an employee with a security function from performing a large number of working hours with another employer, if it tires the employee to such an extent that the proper performance of the security function is compromised. The legal basis for this is Article 17, 4° of the Employment Contracts Law, which obligates the employee from refraining from any activity that may cause damage either to his/her own safety or to that of his/her colleagues, employer or third parties.

Compulsory training

The guarantee of the free provision of training for employees and which the employer is required to provide to perform the work for which he or she was hired. This obligation only applies to training that is necessary for the performance of the work for which the employee was hired and when it must be provided in application of a legal regulation or a collective bargaining agreement (Article 21). Such compulsory training courses cannot be the subject of a contractual training clause (Article 22 amending Article 22bis of the Employment Contracts Law of 03 July 1978).

The training must be considered as working time. This training must be organised during working hours, except if it can be shown that its organisation is not possible during working hours.

Transition to another form of employment

The Law of 31 October 2022 gives an employee with at least six months of seniority with the same employer the right to request, in writing or electronically, a form of work with more predictable and secure working conditions. The employee must specify concretely and precisely what exactly he/she is requesting (Article 23). In this regard, as far as the application of this right to private sector employees is concerned, the social partners concluded Collective Bargaining Agreement No. 161 on the right to request a form of work with more predictable and secure working conditions (see September 2022 Flash Report).

The right to request the performance of work with more predictable and more secure working conditions is thus reserved to employees with at least six months' seniority and entails the obligation on the part of the employer to give a reasoned response in writing.

Article 23 transposes Article 12 of the Directive 2019/1152.

Directive 2019/1152 does not define what is to be understood by 'work under more predictable and secure working conditions'. Recital No. 36 of Directive 2019/1152 states that 'where employers have the option of offering full-time or open-ended contracts to employees with atypical forms of work, a transition to more secure forms of work should be encouraged'. More predictable and secure forms of work could include, for example:

- an open-ended employment contract instead of a fixed-term employment contract;
- a full-time employment contract instead of a part-time employment contract;
- a part-time employment contract with a larger number of hours instead of a part-time employment contract with a smaller number of hours;
- an employment contract with a fixed schedule instead of an employment contract with a variable schedule.

It is up to the employee to determine what constitutes a job with more predictable and secure working conditions. This is therefore always a subjective assessment on the part of the employee concerned. In his/her request, however, the employee must precisely clarify what kind of work with more predictable and secure working conditions he/she envisages.

The employer has one month from the date of receipt of the request to respond to the employee. However, the employer of an enterprise with fewer than 20 employees has two months from the date of receipt of the request to respond to the employee. The response must be made in writing or electronically. The frequency of the request is limited to one request per 12-month period. The employee can only exercise the right to request a form of work with more predictable and secure working conditions for the purpose for which it was established. He/she must refrain from any unlawful use of it.

In other words, the request must actually be aimed at obtaining a form of work with more predictable and secure working conditions. This provision precludes any abuse of it, for example making repeated requests purely for the purpose of the associated dismissal protection (Memorandum of Understanding, Parliamentary Documents, Chamber of Representatives, 2021-2022, No. 55-2811/001, p. 22).

If the employer fails to give a reasoned written or electronic response to the employee's request, he/she risks a criminal fine of between EUR 400 to EUR 4 000 or an administrative fine of between EUR 200 to EUR 2 000.

Probation period

In Belgian labour law, probation periods are only possible in employment contracts for the performance of temporary work, for temporary agency work and for student employment.

The trial period in employment contracts for temporary work and for the performance of temporary agency work is set at 3 days. It is specified that a different probation period may be provided if the duration of the agreed probation period is proportionate to the expected duration of the contract and the nature of the work. It is also added that successive probation periods are prohibited when an employee is employed in the same job through successive contracts to perform temporary work (Article 24, amending Article 5 of the Temporary Agency Work Law of 24 July 1987).

The same rule of non-renewal in case of the same job is applied to the employment contract of students. Article 127 of the Law of 03 July 1978 is amended accordingly (Article 25).

Minimal predictability of the work

Part-time workers may be employed under a variable hourly schedule. The legislation provides for certain time limits within which the hourly schedule must be communicated to these part-time workers. This is a deadline of seven working days or a shorter deadline set by the sectoral collective bargaining agreement with a minimum of three working days (Article 159 Programme Law of 22 December 1989 referring to the Law of 08 April 1965 on the Work Rules).

However, a limited number of workers, such as domestic servants, for example, do not fall within the personal scope of the Law of 08 April 1965 on the work rules at company level and are therefore not entitled to a minimum statutory period of notification of the variable schedule (Memorandum of Understanding, Parliamentary Documents, Chamber of Representatives, 2021-2022, No. 55-2811/001, p. 24). The Law, therefore, introduces an additional paragraph in Article 159 of the Programme Act of 22 December 1989, stipulating that these employees are also entitled to a minimum statutory period of notification of the variable schedule according to a scheme analogous to that included in the Law of 8 April 1965 on the Work Rules.

The Law of 07 October 2022 (Article 27) allows part-time workers to refuse, without adverse treatment, to perform a service when:

- this service does not fit into a work schedule that was notified to them in time and/or;
- the service does not fall within the daily period during which work can be performed and the days of the week on which work can be performed.

This latter condition exists in addition to the rule of Article 38bis of the Labour Code of 16 March 1971, which contains the general prohibition of the employer to allow employees to work outside the working time set out in the work regulations. The right of refusal included in this article for employees employed under a variable hourly schedule is therefore ancillary to this general principle of Article 38bis of the Labour Code (Memorandum of Understanding, Parliamentary Documents, Chamber of Representatives, 2021-2022, No. 55-2811/001, p. 25).

In the event of late cancellation by the employer of a service provided for in the part-time variable work schedule, the employer must pay for this service as if it had been performed (Article 28).

The purpose of employing part-time workers on the basis of variable hours is obviously to accommodate, with a reasonable degree of flexibility, increases in production and work. These additional constraints make reliance on variable hours schedules less workable.

Protection against adverse treatment and dismissal

The Transparent and Predictable Conditions of Employment Law contains a regulation that protects the employee from adverse treatment and dismissal after a complaint has

been filed by an employee for a violation of his/her rights arising from Directive 2019/1152.

If the employee filed a complaint against the employer for a violation of the rights discussed, the employer may not subject the employee to adverse treatment. The employer may, of course, take action based on reasons extraneous to the complaint. Within 12 months of filing the complaint, the burden of proof rests on the employer.

For violation of the protection scheme, the employer must pay compensation equal to the amount of 6 months' gross salary. In case of adverse treatment, compensation for the actual damage suffered is also an option (Article 31).

The legislator links dismissal protection to the new rules as well. Indeed, an employer may not dismiss an employee 'who makes use of these rights' on pain of the payment of a compensation of six months' gross wages, except for reasons foreign to this complaint. This severance payment may not be enjoyed together with other payments determined under a special protection procedure against dismissal (Article 32).

Consequently, an employer who files the aforementioned complaint or a request for more predictable and secure work is protected from dismissal. If other motives, such as poor performance, are present, the employer can proceed to dismiss without being liable for protection compensation, provided he/she can prove these reasons. However, it might be expected that employees fearing dismissal can use these tools provided by the law to make dismissal more difficult.

The Law also provides for many broadly formulated criminal sanctions for the employer.

The Social Criminal Code of 06 June 2010 has been supplemented with a general provision penalising disregard for the prohibition with a level 2 sanction, i.e. a criminal fine of minimum EUR 400 and maximum EUR 4 000 or an administrative fine of minimum EUR 200 and maximum EUR 2 000, after application of the so called '*opdeciemen'*. The fine is multiplied by the number of employees involved. The infringement of rules on the protection against adverse treatment and dismissal can thus also generate criminal sanctions for the infringing employer (Article 33; Articles 34, 37,§2, 38, 39, 40, 43,§2, 46).

Sometimes, the penal sanctions are heavier. Article 43, §1, with the introduction of Article 188/4, §1 of the Social Criminal Code, penalises failure to provide the employee with the elements of information on the key aspects of their employment relationship mentioned in Articles 4, 5 and 6 of the Law. Sanctions of level 3 consist of administrative fines of between EUR 400 and EUR 4 000 or criminal fines of between EUR 800 and EUR 8 000. The same Article penalises in §2, 1° 2°, and 3° the employer for providing incomplete or incorrect information to the employee of the aforementioned elements of information as well as failure to provide it within the time limits imposed by the Law with a level 2 penalty.

A different observation is made about non-compliance with the rules of providing information of a collective nature. Incomplete work rules are punishable by an administrative fine of between EUR 80 and EUR 800, to be multiplied by the number of employees concerned.

Entry into force

The 10th day after the publication of this law on 31 October 2022, the law will enter into force. Thus, the Law on the Transparent and Predictable Terms of Employment will enter into force on 10 November 2022. On 01 October 2022, Collective Bargaining Agreement No. 161 of 27 September 2022 also entered into force.

1.3 Work-life balance

The Law of 07 October 2022 partially transposes EU-Directive 2019/1158 of 20 June 2019 on work-life balance for parents and informal carers and repeals Directive 2010/18 and regulates certain other aspects of leave, and the implementing Royal Decree of 07 October 2022 partially transposes Directive 2019/1158 of 20 June 2019 on work-life balance for parents and informal carers: the transposition of Directive 2019/1158: changes to leave arrangements for parents and family carers, *Moniteur belge*, 31 October 2022.

Directive 2019/1158 establishes minimum rules and individual rights with regard to paternity leave, parental leave, care leave, time off work on grounds of force majeure and flexible working arrangements for employees who are parents or carers and links the exercise of these rights to a number of protective measures.

Even though existing regulations already complied with the minimum provisions of this Directive in many areas, certain changes were necessary.

This Law and Royal Decree therefore introduce changes to parental leave and birth leave, introduce a new care leave within the existing framework of leave for compelling reasons, provide a new right to apply for flexible working arrangements for care purposes and strengthen protection under a number of leaves for parents and informal carers, e.g. parental leave, birth leave and the new care leave, but also adoption leave and maternity leave.

The Law (2) of 07 October 2022 amends many important Belgian labour laws, such as the Employments Contracts Law of 03 July 1978, the Labour Code of 16 March 1971, the Programme Law of 22 January 1985, and the Social Criminal Code of 06 June 2010.

These measures mainly apply to employees employed under an employment contract and will enter into force on 10 November 2022.

Care leave

Until now, employees could request a suspension of the employment contract for compelling reasons for 10 days per year. This 'compassionate leave' or 'family leave' is in principle unpaid, although employers and employees may agree otherwise. A compelling reason is understood as any unforeseen, non-work-related event that requires the urgent and necessary intervention of the employee and this insofar as the execution of the employment contract makes this intervention impossible.

With the Law of 07 October 2022, the legislator has introduced a new form of 'care leave' intended to provide personal care and support to a family member or relative who needs significant care or support for a serious medical reason. A family member is any person living with the employee. Family members include the employee's parents and children.

Employees are entitled to up to 5 days of care leave per calendar year, consecutive or not. The days of care leave taken by the employee are counted as compassionate leave and are therefore also unpaid by definition. The law does leave the possibility of providing for an allowance for each day of care leave taken by the employee via a Royal Decree.

The employee who wishes to exercise the right to care leave must notify his/her employer in advance and, in support of his/her absence, provide the employer as soon as possible with a certificate issued by the attending physician of the family member or relative concerned showing the family member's need for care or support (Article 7 amending Article 30bis of the Employment Contracts Law).

Maternity leave

In case of death or hospitalisation of the mother, maternity leave can be converted into leave for the employee who is the father or co-parent. The law now also provides this option for the co-mother (Article 3 of the Law (2) of 07 October 2022).

Birth leave

Since 01 January 2021, employees are entitled to 15 days of paternity leave/birth leave. From 01 January 2023, employees will be entitled to 20 days of leave for births taking place after 01 January 2023.

From now on, the Law mentions 'birth leave' and no longer about paternity leave (Article 6).

Parental leave

To be entitled to parental leave, the employee wishing to apply must have a certain amount of seniority within the company. Specifically, during the 15 months preceding the written notification stating that the employee wishes to exercise his/her right to parental leave, the employee must have been linked by an employment contract with the employer for at least 12 months.

The Law of 07 October 2022 stipulates that from now on, previous periods of employment that the employee carried out with the employer as a temporary worker will also be taken into account when calculating the seniority condition (Article 19).

Some things will also change for the application procedure. The employer's failure to make a decision will be treated as an agreement by the employer. The employer's decision must be a reasoned decision.

Whereas previously—for postponing the take-up of parental leave—justified reasons related to the functioning of the company could suffice, postponement is now only possible if the take-up of parental leave would seriously disrupt the proper functioning of the company. In certain cases, the employer will be able to invoke postponement if he/she offers alternatives that are fully or partly within the period requested by the employee.

After an employee has taken (unpaid) parental leave under Collective Bargaining Agreement No. 64, the employee may take a further two months (paid) parental leave for the same child under the form of complete suspension of the performance of the employment contract.

Flexible working arrangements

Following Article 9 of Directive 2019/1158, the Law creates an autonomous legal regime concerning a right to flexible working arrangements for parents of young children and carers (Articles 20 to 28). In principle, this new scheme applies to employees employed under an employment contract.

Flexible working arrangements refer to the possibility for employees to adjust their working patterns for care purposes, including through teleworking arrangements, flexible work schedules or reduced working hours. These measures should encourage parents and informal carers to remain active in the labour market (Memory of Understanding, Parliamentary Documents, Chamber of Representatives, 2021-2022, No. 55-2808/001, p. 8).

This regulation in the law is not discussed further because it does not apply to private sector employees (Article 20). For these employees, the provisions of Collective Bargaining Agreement No. 162 apply (see September 2022 Flash Report).

Dismissal protection

The Law of 07 October 2022 not only provides for a possibility to take care leave but at the same time introduces special dismissal protection for employees exercising this right.

The employer may not terminate the employment contract during the protection period, except for reasons foreign to the taking of care leave. The protection period starts when the employer is notified of the take-up of care leave and ends one month thereafter (Article 7).

The employee may request the employer to notify him/her in writing of the reasons for dismissal. It is up to the employer to prove that the dismissal is extraneous to the take-up of the care leave. If the employer fails to do so, it will owe the employee a lump-sum compensation of six months' gross pay (Article 8).

To be on par with dismissal protection for pregnancy and maternity leave, the protection allowance under birth leave and for adoption leave will be increased from three to six months' gross pay (Article 14).

From now on, employees will also enjoy protection against dismissal after the protection period, especially when the employer prepared the dismissal during the protection period.

Any act of the employer after the protection period that aims to unilaterally terminate the employment relationship and for which some preparation was made during the protection period will be equated with dismissal during the protection period. Taking the dismissal decision during the protection period is also considered preparation for dismissal.

This equivalence applies in the context of dismissal protection in case of conversion of maternity leave, maternity leave, birth leave, care leave and career break, including parental leave (Articles 4, 6, 7, 15, §3, 28, §2).

Fixed-term and temporary agency contracts

Where an employee who is linked to the employer by a fixed-term contract and who has informed his/her employer of the take-up of birth or adoption leave does not renew his/her employment contract, the non-renewal is deemed to be related to the take-up of the birth or adoption leave. Temporary agency workers also enjoy similar protection in case of non-renewal of their temporary contract. Where applicable, the user is considered the employer.

The employee may request the employer to inform him/her in writing of the reasons for non-renewal of the employment contract. It is up to the employer to prove that the non-renewal of the employment contract in question is foreign to the taking of the birth or adoption leave. If the employer fails to do so, it must pay the employee a lump-sum compensation of three months' gross salary.

This special dismissal protection for fixed-term and temporary employment contracts also applies in case of pregnancy and conversion of maternity leave.

Protection period for birth leave

Finally, the period during which the employee enjoys dismissal protection as a result of the birth leave taken is also extended. Previously, the employee enjoyed dismissal protection from the written notification to the employer until 3 months after this notification.

With the law amendment, dismissal protection starts from the notification to the employer, and not later than the first day of the birth leave, and the protection period ends five months from the day of the birth (Article 6).

Suspension of the employment contract

During certain periods when the employment contract is suspended, e.g. in case of incapacity for work, the employee can give notice of termination of the employment contract, with the notice period continuing to run even during the suspension.

This possibility for the employee is now also provided during suspension periods in case of birth leave, leave for compelling reasons, care leave and adoption leave (Article 9).

Severance pay during a period of reduced work performance

If the employment contract was terminated during a period of reduced work performance, for instance in the case of time credit, the severance payment had to be calculated based on the (reduced) salary to which the employee was effectively entitled at the time of the termination of the employment contract.

In the case of parental leave, the situation was different, and severance pay had to be calculated on the basis of the salary to which the employee would have been entitled if he/she had not reduced his/her work performance.

The (former) exception in the case of parental leave is now extended to all periods of reduced work performance. The Law of 07 October 2022 adds a new provision to the Employment Contracts Law, stipulating that when an employment contract is terminated during a period of reduced work performance, the severance payment must be calculated based on the salary to which the employee would have been entitled under his/her employment contract if he/she had not reduced his/her work performance (Article 10).

Criminal sanctions

The Social Criminal Code already provided for a penalty (level 2) for employers who did not respect the right to maternity and paternity leave (now: birth leave). Henceforth, maternity leave and paternity leave are separated.

Whereas previously only the non-granting of paternity leave to an employee who was entitled to it was sanctioned, from now on, failure to respect the duration or conditions of birth leave will also be sanctioned. Henceforth, failure to grant converted maternity leave will also be sanctioned.

Finally, failure to grant care leave to an employee who is entitled to and failure to observe the duration or conditions of care leave will also be sanctioned with a level 2 sanction.

The level of sanction 2 amounts to a fine of between EUR 400 and EUR 4 000. For each infringement, the fine should be multiplied by the number of employees involved.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

The CJEU clarifies the role of employee representatives in the European company. Directive 2001/86 of 08 October 2001 supplementing the Statute for a European company with regard to the involvement of employees provides that when a company is converted into a European company (SE), the involvement of employees' representatives must continue to be provided for in every aspect to the same extent as before the conversion to the SE.

In Germany, discussion arose about employee representatives on a reduced or slimmed-down board of a company. When converting to a European company, room was still provided for (ordinary) employee representatives, but no guaranteed places for employee representatives nominated by employee organisations. For companies under German law, however, such guaranteed representation is provided for because the representatives nominated by the employees' organisations can be deemed to be extremely familiar with the needs of a company and thereby possess external know-how.

Since Directive 2001/86 provides that the role of the employees' representatives must continue to be guaranteed 'in every aspect' when a company is converted into a European company, the representation of the representatives nominated by the employees' organisations must also continue to be guaranteed in the process.

In Belgium, the appointment and role of employee representatives who sit on the supervisory or administration board of the European company is governed by Collective Bargaining Agreement No. 84 of 6 October 2004 on the involvement of employees in the European company and the Law of 10 August 2005 on dismissal protection. The German legal regime, which was the subject of the preliminary question, is not comparable to the regime in Belgian law in Collective Bargaining Agreement No. 84 of 06 October 2004 on the involvement of employees in the European company (see more specifically Articles 34 and 53). Therefore, the C-677/20 ruling on the scope of Article 4(4) of Directive 2001/86 seems to have little relevance for the Belgian legal order.

4 Other Relevant Information

Nothing to report.

Bulgaria

Summary

A new regulation on the General Labour Inspectorate, particularly as regards its international activities, has been introduced.

1 National Legislation

1.1 General Labour Inspectorate

On 05 October 2022, the Council of Minsters adopted Decree No. 313 Rules of Procedure of the Executive Agency 'General Labour Inspectorate' (promulgated in State Gazette No. 81 of 11 October 2022).

This act regulates the establishment, activity, composition, structure, functions and organisation of work of the executive agency 'General Labour Inspectorate' under the Minister of Labour and Social Policy. The Agency's structure includes a special 'Labour Mobility' Directorate. This Directorate shall:

- develop methodological guidelines, procedures and rules and provides methodological guidance for the territorial divisions in the exercise of their control over compliance, with the legislation regulating the promotion of employment, labour migration and labour mobility and the secondment of workers and employees within the framework of the provision of services in the territory of other countries, and under other normative acts, the control of which is assigned to the agency;
- have specialized control over the territory of the entire country of persons performing intermediary activities or services and of enterprises that provide temporary work and over the lawful employment/acceptance of the employment of citizens of the EU and of third countries, including illegal residents, employed on the territory of the Republic of Bulgaria, as well as under other normative acts, the control over which is assigned to the agency;
- participate through its representatives in interdepartmental working groups to prepare projects on normative acts in the field of employment promotion, labour migration and labour mobility and other normative acts in the field of employment and legislation in connection with the posting of workers and employees within the scope of providing services on the territory of other countries;
- issue opinions on amendments and additions to laws and bylaws related to the control of employment promotion, labour migration and labour mobility, and other normative acts in the field of employment and legislation in connection with the posting of workers and employees within the provision of services on the territory of other countries and under other normative acts;
- prepare an annual analytical report on its activities on the basis of which it provides proposals for programmes and measures to monitor the promotion of employment, labour migration and labour mobility and the posting of workers and employees within the framework of the provision of services on the territory of other countries to be included in the annual and long-term plans of the agency;
- examine, summarize and report the gaps, bottlenecks or problems identified during the supervision carried out by the directorate and by the territorial divisions of the legislation regulating the promotion of employment, labour migration and labour mobility, and of the legislation in relation to the secondment of workers and employees within the framework of the provision of services on the territory of other countries and to make proposals to resolve these;

- collect, summarize and provide information on the implementation of normative acts of the EU in the Republic of Bulgaria in the field of the free movement of people, illegally staying persons, as well as on the secondment of workers and employees within the framework of the provision of services and the implementation of control over enterprises providing temporary work;
- exchange information with competent authorities from the Member States, perform the functions of the '*Liaison Bureau'* under Article 4 of Directive 96/71/EC on posting of workers;
- actively participate in the exchange of information through the Information System of the Internal Market (IMI) with the competent authorities of other Member States of the EU, of state parties to the Agreement on the European Economic Area, or of the Swiss Confederation;
- prepare responses, give opinions, information and consultations on requests and inquiries received in connection with supervision and on the most effective methods of compliance with the legislation regulating the promotion of employment, labour migration and labour mobility and the posting of workers and employees within the scope of providing services on the territory of other countries;
- interact with other state bodies and cooperate with social partners on issues related to control in the field of legislation regulating the promotion of employment, labour migration and labour mobility and the posting of workers and employees within the framework of providing services on the territory of other countries;
- organise and coordinate the Agency's international activities;
- prepare the conclusion of international agreements and conventions to which the Agency is a party, including developing draft agreements and conventions and organising their coordination and signing;
- organise and coordinate the implementation of international agreements and conventions to which the Agency is a party;
- organize and ensure the informational participation of the Agency's employees in international events;
- lead the Agency's international correspondence.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

The ruling C-677/20 of 18 October 2022 does not have any implications for Bulgarian legislation and national practice. Bulgarian legislation does not regulate the ballot of trade unions and employee representatives separately.

Bulgarian legislation has transposed Directive 2001/86/EC in the Information and Consultation of Employees in Community-Scale Undertakings, Groups of Undertakings and European Companies Act (ICA), Labour Code (LC), Commercial Act (CA) and Ordinance No. 1 of 2007 on Keeping, Preservation and Access to the Commercial Register and to the Register of Non-governmental Judicial Bodies.

Article 19 ICA establishes standard rules for participation of employee representatives in the activity of SE. It provides that in the case of establishment of a European company that has its registered office in the Republic of Bulgaria, the employees of the European company, of the subsidiaries and establishments thereof, as well as the representative body of the said company have the right to elect, appoint, recommend or oppose the appointment of a number of members of the administrative or supervisory body of the said company equal to the level of participation in the management before registration of the said company. This provision does not apply if none of the participating companies was governed by participation rules before registration of the European company in the Republic of Bulgaria. In case a European company that has a registered office in the Republic of Bulgaria is established by transformation, the rules relating to participation of employees in the administrative and supervisory bodies, which applied before registration of the said company, continue to apply after registration thereof. The representative body decides on the allocation of seats within the administrative or supervisory body among the members representing the employees from the various Member States, or on the procedure that the employees may recommend or oppose the election of members of these bodies according to the proportional representation thereof in each Member State. If the employees of one or more Member States are not covered by this proportional criterion, the representative body shall appoint a member from one of those Member States. Every member of the administrative or supervisory body of the European company who has been elected, appointed or recommended by the representative body or by the employees has the same rights and obligations as the representatives of the shareholders, including the right to vote.

Where any rules other than the standard rules for participation have been established in Bulgarian legislation, the former rules shall not apply.

Special rules are established in Article 265q CA. When one of the transforming companies, the acquiring or newly incorporated company has its registered office in the Republic of Bulgaria, the rules on employees' participation of ICA are applicable. When the acquiring or newly incorporated company has its registered office in the Republic of Bulgaria, the management bodies of the transforming companies and of the acquiring company may choose, without any prior negotiation, to directly apply the standard rules under ICA. When the acquiring or newly incorporated company has its registered office in another Member State, the bodies may choose to directly apply the standard rules adopted in the legislation of that Member State in accordance with Council Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees. When the acquiring or newly incorporated company has its registered office in the Republic of Bulgaria and one of the transforming companies has applied rules on the involvement of employees, within the meaning given by the acquiring or newly incorporated company, the exercise of the rights, arising from these rules, must be ensured. These rules are applicable furthermore upon a subsequent transformation for not more than three years after the date of entry in the commercial register.

4 Other Relevant Information

Nothing to report.

Croatia

Summary

(I) A new Act regulates the employment of university teachers and research assistants.

(II) An Amendment to the Health Care Act contains rules on the representativeness of unionised physicians for the purpose of collective bargaining.

(III) The Regulations on inspection and testing of work equipment and the Regulations on testing of the working environment have been amended.

1 National Legislation

1.1 Change of official currency

From 01 January 2023, the official currency in Croatia will be euro. Therefore, all laws that mention amounts in *kuna* (HRK) need to be adjusted accordingly. Among others, the Act on posting of workers to the Republic of Croatia and cross-border implementation of decisions on financial penalties has been amended accordingly, i.e. the amounts in HRK have been replaced by amounts in euros (Official Gazette No. 114/2022).

1.2 University teachers and research assistants

The new Act on Higher Education and Scientific Activity has been adopted (Official Gazette No 119/2022). Similar to the previous one, it contains certain provisions related to the employment of university teachers and research assistants. A new regulation on the employment of university teachers who have reached pensionable age. Until now, when a university teacher reached pensionable age, s/he could continue working based on a successive two-year employment contract until the age of 70. Their salaries were funded by the Ministry of Science and Education. Not all university teachers who reached pensionable age could continue working, only those who fulfilled the criteria of excellence. The new Act on Higher Education and Scientific Activity abandons the criteria of excellence. Such criteria no longer apply for the continuation of work of university teachers aged 65 and over. Their employer (faculty or research institute) may conclude a fixed-term contract with these university teachers until they reach the age of 70 years if the institution has own funds for the payment of the university teacher's salary. Since the majority of scientific institutions do not have sufficient funds to pay such salaries, the new regulation basically translates into the mandatory retirement of university teachers who reach pensionable age.

1.3 Trade union representativeness

The Amendment to the Health Care Act contains provisions on the representativeness of physicians for collective bargaining (Official Gazette No. 119/2022). The Act on Representativeness of Employers' Associations and Trade Unions of 2014 (amended in 2015) stipulates that a representative union is considered one that, at the level for which representativeness is determined, has at least 20 percent membership from the total number of unionised employees employed at the level at which representativeness is determined. The unionised physicians were not able to achieve representativeness to participate in negotiations for a collective agreement in the field of health care because they did not meet the requirement of representativeness in accordance with the aforementioned Act. According to the Amendment to the Health Care Act, an exception to the criterion of representativeness has been established. In addition to trade unions

being determined as representative in accordance with the provisions of the Act on Representativeness of Employers' Associations and Trade Unions, a representative union will also be considered a union if it has at least 20 per cent membership of the total number of physicians employed in institutions in the area of negotiations.

Two trade unions' umbrella associations (Association of Croatian Trade Unions and Union of Autonomous Trade Unions of Croatia) have criticised this Amendment. They rightfully warn that the Health Care Act is not the piece of legislation that should regulate the representativeness for collective bargaining since the Act that regulates this issue is the Act on Representativeness of Employers' Associations and Trade Unions. Regulating representativeness of trade unions for collective bargaining in the Health Care Act which is not *sedes materiae* contributes to legal uncertainty. The umbrella associations claim that this may be a precedent for introducing new exceptions to the general rules by regulating representativeness of trade unions of different occupations in separate laws.

1.4 Occupational health and safety

The Regulations on Inspection and Testing of Work Equipment and the Regulations on Testing of Working Environment have been amended (Official Gazette No. 120/2022, 1853 and 1854). The Amendments (the number refers to the person in charge of inspection and testing of work equipment/ the person in charge of inspection of the working environment and her/his qualifications). Furthermore, the novelty refers to the content of the records of the inspection carried out, which should be based on the occupational safety information system.

1.5 Minimum wage

The Government of the Republic of Croatia has determined the amount of minimum wage for the period from 01 January to 31 December 2023. The monthly minimum wage will amount to EUR 700.00 gross (Official Gazette No. 122/2022).

1.6 Collective bargaining in the construction sector

The Amendments to the Collective Agreement for the Construction Sector concluded in July and September 2022 have been extended at the national level by ministerial decree (Official Gazette No. 122/2022).

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

In order to establish the repercussions of this CJEU judgment for Croatian law, it is necessary to determine how the participation of employees in the supervisory board of a public limited-liability company is regulated in Croatia, and whether employees retain that right to the same extent after its transformation into a European company.

Article 4(4) of Directive 2001/86 has been transposed into Croatian law by Article 16(1) of the Act on involvement of employees in a European company (SE) and in a European economic interest grouping (EEIG) of 2014 which states that, in the case of the establishment of a European company by means of transformation, an agreement on

the arrangements for the involvement of employees applicable to a European company must ensure at least the level of involvement of employees in decision-making that exists in the transformed company.

According to Article 164 of the Labour Act of 2014 (last amended in 2019), employees' representatives in the supervisory board are appointed and recalled by the works council. If no works council has been established, employees' representatives are appointed and recalled by the employees by, among the workers employed by the undertaking, in free and direct elections and by secret ballot. Article 254 of the Companies Act of 1993 (last amended in 2022) regulates the total number of members of a supervisory board in a public limited-liability company (from three to 21 members, depending on the amount of share capital): according to Article 164(1) of the Labour Act, only one member of the supervisory board must be a workers' representative.

The mentioned provisions of Croatian law should be read in line with the judgment of the CJEU in the case C-677/20. This means that the agreement on arrangements for the involvement of employees applicable to a European company (SE) established by means of transformation must provide for at least one employees' representative in the supervisory board of a European company, and that the appointment of the employees' representative the procedure by Article 164 of the Labour Act should be obeyed.

4 Other Relevant Information

4.1 Average salary

The average monthly net salary per employee in legal entities of the Republic of Croatia for the period January - August 2022 amounts to HRK 7 583. The average monthly gross salary per employee in legal entities of the Republic of Croatia for the period January - August 2022 amounts to HRK 10 301 (Official Gazette No. 125/2022).

Cyprus

Summary

The Social Insurance Law was amended to address age discrimination for persons in employment after the age of retirement.

1 National Legislation

1.1 Amendment of the Social Insurance Law

On 10 October 2022, an important amendment of the Social Insurance Law came into effect. This legislation aims to address age discrimination in relation to sickness benefits against those who seek to continue employment after reaching retirement age. The fact that persons who choose to continue working after reaching retirement age do not enjoy protection against dismissal (see Law on Termination of Employment, 24/1967, Article 4 explicitly provides that the right to compensation for termination of employment is lost once a person reaches pensionable age) raises many problems of discrimination against such persons. Moreover, persons over the age of 63 face increased risk of sickness, particularly since the outbreak of the pandemic, and there is a high possibility that they will face unemployment due to age discrimination, which is prevalent in Cypriot society. Instead of addressing such vulnerability issues, social insurance law has excluded these persons from benefits that are available to younger workers. Moreover, the government has introduced eligibility conditions related to contributions that have created further discrimination.

It resolves an ongoing dispute between social partners and political parties in Cyprus. Since 2017, the opposition parties have repeatedly raised the issue of age discrimination in terms of access to certain public benefits for persons who have reached the age of 63 years and who choose to continue working and claim their statutory pension, as this category of persons is not entitled to unemployment or sickness benefits. It resolves a matter that follows the decision of the Supreme Court of 20 July 2022, which finds that laws addressing age discrimination are unconstitutional because they lead to an increase of the state budget (see Article 80.2, Constitution of the Republic of Cyprus).

In 2020, the government presented a bill purporting to address this gap but instead, introduced new eligibility criteria relating to contributions made by the applicants to the state Social Insurance Fund. According to the government bills, to be eligible for a sickness benefit, persons aged 63+ who chose to continue working:

- must have been engaged in insured employment immediately prior to the commencement of the sickness period which was not terminated;
- must have completed at least 13 weeks of continuous employment prior to commencement of the sickness period and must have paid the corresponding contributions to the state Social Insurance Fund.

The opposition parties opposed the new eligibility conditions on the ground that they represented another type of age discrimination: their contributions to the state Social Insurance Fund would be treated differently on the sole criterion of age. MPs in the Parliamentary Labour Committee argued that this was unacceptable and would inevitably force persons who reach the age of 63 and who fell sick, to apply for the statutory pension on which a 12 per cent penalty applies by virtue of another law. The parliamentary committee removed the eligibility conditions from the government bill and adopted it without them. Parliament also adopted another amendment to the basic law on social insurance to the effect that persons who have reached the age of 63 are temporarily unemployed and who do not claim a statutory pension are entitled to unemployment benefits. On this basis, persons entitled to an early statutory pension before the year of retirement and who choose to not receive it, and who until then were

not eligible for unemployment benefits, were rendered eligible as a result of this amendment.

In May 2021, the President of the Republic referred both laws back to Parliament for reconsideration under a procedure prescribed by the Constitution on the grounds that the extension of the sickness benefit to all persons eligible for a statutory pension without the qualifications inserted by the government and the extension of unemployment benefits to this same category of workers would lead to increased expenditure, consequently weakening the measures put in place to ensure the social security system's sustainability. The President of the Republic argued that the law, as adopted, infringed Article 80 of the Constitution as it would lead to increased expenditures as a result of the increase in the number of eligible sickness benefit receivers. On 20 May 2021, all opposition parties reconsidered the laws referred back to Parliament by the President and refused to revise them to meet the government's demands.

The President then lodged an application to the Supreme Court requesting a ruling on whether the two laws, as adopted by Parliament, complied with Articles 80.2 and 179 of the Constitution. The Supreme Court held that the respective laws did not comply with Articles 80.2 and 179 of the Constitution and infringed the principle of the separation of powers. Furthermore, the Supreme Court held that the respective laws interfered with the powers of the executive to assess the conditions for the provision of benefits in the exercise of its administrative function and its power to assess the financial consequences that such provision would have on the Social Security Fund.

Parliament adopted the bill regulating the eligibility to sickness benefits as presented by the government on 30 November 2022. The bill adopted the preconditions for access to sickness benefits as initially proposed by the government. The largest opposition trade union PEO expressed its disagreement with these provisions because they resulted in less preferential treatment of persons over the age of 63 years, who choose to not take statutory pension so as not to sustain the 12 per cent deduction from their pensions. DEOK, another smaller trade union, also expressed its disagreement with the government's eligibility conditions noting that all insured persons should receive the same treatment up to the age of 65.

The opposition parties in Parliament sought to amend the eligibility conditions for sickness and unemployment benefits that result in a disadvantage on account of age, but their efforts were annulled by the government, triggering constitutional processes that block changes that may lead to increases in the state budget. The Court was not presented with and did not consider age discrimination and the predominance of the EU acquis over the national Constitution; this perspective was also absent from the parliamentary debates on these laws. There was no consideration of whether this difference in treatment was objectively and reasonably justified by a legitimate aim.

The matter yet again raises the issue of the Supreme Court's failure to uphold the supremacy of EU law over national law, particularly over questions on discrimination. The fact that the Constitution provides for the annulment of laws that lead to an increase in the state budget essentially limits all permissible changes to laws that can be realised without an increase in expenditure ought to not outweigh those laws that purport to implement EU law. Another issue of concern is the fact that the compatibility of this provision with Article 16(a) of Directive 2000/78/EC did not come into play at all, nor was an effort made either at the level of parliamentary debates or at the judicial level, to justify this measure as serving a legitimate aim. Cyprus maintains in force a legislative provision that allows dismissal without compensation of employees who have reached retirement age, even though it was found by the Equality Body to be discriminatory; the government's argument that this measure was justified because employees aged 65 or older are financially secure due to their pension and provident fund benefits was rejected by the Equality Body at the time. It is presumed that the unspecified increase in the state budget, which the government invoked in this case, is unlikely to meet the definition of 'legitimate aim' as laid down by the CJEU in case C-

388/07, 05 March 2009, *Age Concern England*, as it falls short from amounting to a social policy objective. This is neither the first nor the last time that the executive has used its constitutional powers to block measures adopted by the legislature by invoking the risk of increasing the state budget, essentially restricting parliamentary activity to legislating rights that can be implemented without an increase in expenditure.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

In the present case, the Court (Grand Chamber) ruled that Article 4(4) of Council Directive 2001/86/EC of 08 October 2001, supplementing the statute for a European company with regard to the involvement of employees, must be interpreted as meaning that the agreement on arrangements for the involvement of employees applicable to a European company (SE) established by means of transformation, as referred to in that provision, must provide for a separate ballot with a view to electing, as employees' representatives within the SE's Supervisory Board, a certain proportion of candidates nominated by the trade unions, where the applicable national law requires such a separate ballot as regards the composition of the company's Supervisory Board to be transformed into an SE, and it is necessary to ensure that in the context of that ballot, the employees of that SE, of its subsidiaries and of its establishments are treated equally and that the trade unions represented therein are treated equally.

This case is unlikely to have any major implications for Cyprus. Workers' participation in strategic decision-making is very limited in Cyprus, despite an otherwise strong tripartite tradition. Since colonial times, Cyprus has had well-developed traditions for tripartite cooperation, with the established tripartite system institutionalising labour relations at different levels and establishing norms where there is a strong trade union presence. The system of industrial relations in Cyprus dates back to the period of the British Colonial Administration, and still retains some 'British' characteristics. The most prominent features are tripartite cooperation and voluntarism (see JH Slocum, *The Development of Labour Relations in Cyprus* (Nicosia, PIO, 1972); *M Sparsis, Tripartism and Industrial Relations: the Cyprus Experience* (Nicosia, 1998)). The EU initiative to broaden industrial democracy via the representation and participation of workers in large corporations, utilising the traditions of the European Works Council (EWC) is rather problematic in the Cypriot context, firstly because around 93 per cent of undertakings are micro-enterprises (under 10 employees) employing 38.6 per cent of all employees, about 5.9 per cent or 3 365 are small (11-49), employing 25.3 per cent of all employees, and 1 per cent or 493 enterprises are medium-sized, employing 19.8 per cent of employees, while only 1 per cent, representing 58 undertakings, are large enterprises.

The situation since the pandemic is similar, despite the closure of many SMEs; it is estimated that the number of SMEs has been increasing (Appendix, Number of persons employed in SMEs). Secondly, there is a well-established tradition of unionisation and a tripartite system of workers which operates on a level of consultation and participation that is superior to EWCs in terms of worker rights. In 2015, there was only one company with an EWC headquartered in Cyprus, reflecting the low number of EWCs set up in companies headquartered in the new Member States that joined the EU after 2004 (see further information here).

Whilst legislation underpins board-level employee representation (BLER) in 18 EU Member States, but Cyprus like other EU countries does not have legislation that makes

BLER mandatory (Belgium, Bulgaria, Cyprus, Estonia, Italy, Latvia, Lithuania, Malta, Romania and the UK (prior to Brexit)). Social interlocutors in Cyprus strongly favour and express their commitment to the substance of Article 27 of the EU Charter of Fundamental Rights, i.e. for 'guaranteed information and consultation within the undertaking' to be readily available 'in good time' as well as other ILO and international labour law instruments, there is no consensus how this ought to translate when it comes to worker participation in decision-making at enterprise level (Trimikliniotis, N. (2021) ECE Thematic Review 2021: Workers participation – Board Level Representation and beyond, Cyprus, 2021).

4 Other Relevant Information

4.1 Collective action

The dispute between baggage handlers and the companies LGS and Swissport has resulted in work stoppage after 156 staffers were handed redundancy letters at Larnaca airport. The workers decided to hold an impromptu two-hour strike on Tuesday 01 November 2022.

In September, after the ground staff company LGS lost its contract, staff called for an impromptu strike at Paphos airport over fears that they would be made redundant. Their representative union claimed that the jobs of 70 workers at Paphos airport and 40 workers at Larnaca airport were at risk. The workers carried out a spontaneous work stoppage from 10 am until 12 noon following a decision taken during a meeting of the workers in the two companies, LGS and Swissport, after more competition was introduced to the ground handling services at the airport, according to trade unionists.

The Minister of Transport stated at the time that the rights of the workers of companies offering ground services at Cyprus airports were protected, explaining that redundant employees would be given priority when new contractors hired staff. Unions are not satisfied with the answers provided.

Czech Republic

Summary

(I) The amount of gross income employees must earn to become participants in the state sickness insurance scheme has been increased.

(II) New reduction limits for the purpose of calculating sickness insurance benefits have been introduced.

1 National Legislation

1.1 Sickness insurance scheme

The Communication of the Ministry of Labour and Social Affairs No. 320/2022 Coll., on the increase of the amount necessary for employees to participate in the state sickness insurance scheme, has been published and will enter into effect on 01 January 2023.

The Communication is available here.

The amount of relevant gross income employees must earn to participate in the state sickness insurance scheme has been increased to CZK 4 000 (i.e. approx. EUR 163).

This change is implemented on regular basis.

1.2 Calculation of sickness benefits

The Communication of the Ministry of Labour and Social Affairs No. 319/2020 Coll., on the amounts of reduction limits for the calculation of daily assessment basis in 2023 for the purpose of sickness insurance, has been published and will enter into effect on 01 January 2023.

The Communication is available here.

The Ministry of Labour and Social Affairs has issued new reduction limits for the purposes of calculating sickness insurance benefits in 2023. The first reduction limit is CZK 1 345, the second reduction limit is CZK 2 017, and the third is CZK 4 033.

These limits will also affect the salary compensation paid by the employer, who is required to pay salary compensation to employees from the first to the 14th day of employees' sickness leave. The reduction limits for the purpose of calculating salary compensation (calculated on an hourly basis) in 2023 will be as follows: the first reduction limit will be CZK 235.38, the second reduction limit CZK 352.98, and the third CZK 705.78.

This change is implemented on a regular basis.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

The CJEU ruled that Article 4(4) of Council Directive 2001/86/EC of 08 October 2001 supplementing the Statute for a European company with regard to the involvement of

employees must be interpreted as meaning that the agreement on arrangements for the involvement of employees applicable to a European company (SE), established by means of transformation, as referred to in that provision, must provide for a separate ballot with a view to electing, as employees' representatives within the SE's Supervisory Board, a certain proportion of candidates nominated by the trade unions, where the applicable national law requires such a separate ballot as regards the composition of the Supervisory Board of the company to be transformed into an SE, and it is necessary to ensure that, in the context of that ballot, the employees of that SE, of its subsidiaries and of its establishments are treated equally and that the trade unions represented therein are treated equally.

In the Czech Republic, involvement of employees in decision-making within a trade company in the form of electing employee representatives into supervisory bodies is stipulated for joint-stock companies (so-called *akciové společnosti* in Czech) by Act No. 90/2012 Coll., on business corporations. It states that a Supervisory Board shall have three members, unless otherwise stipulated. Further, if a joint-stock company employs over 500 employees, one-third of these members is elected by employees of the company (the rest is elected by the general meeting). However, this only applies to join-stock companies with a dualistic system of governance; there is no such employee co-determination in monistic joint-stock companies.

The elections of such members are governed by electoral codes which boards of directors are required to adopt; prior to adoption, they must consult with trade unions and works councils.

Candidates for members of the Supervisory Board elected by employees may be proposed by (a) the board of directors, (b) trade unions, (c) works councils, or (d) jointly by 10 per cent of employees. The elections are held by the board of directors after consultation with trade unions or works councils to ensure the highest possible employee participation.

Section 53(3) of Act No. 627/2004 Coll., on European Companies, states that if the European company was established by means of transformation from a joint-stock company, Section 64 applies if the company's employees had, on the date of the transformation, a right to influence the composition of its bodies. As described above, in some cases, such rights exist – in such cases, Section 64 therefore applies; paragraph 1 of this provision states that where the European company was established by transformation from a joint-stock company, the company's employees have the right to influence the composition of its bodies in the same manner and to the same extent as in the transformed joint-stock company under the applicable law on the date of the transformation. This statutory provision cannot be excluded by an agreement on arrangements for the involvement of employees.

To summarize: if certain statutory conditions are met, joint-stock companies' employees have the right to influence the composition of the companies' bodies by way of electing one-third of the members of the Supervisory Boards in separate ballots; where a European company was established by means of transformation from a joint-stock company, the company's employees have the right to influence the composition of its bodies in the same manner and to the same extent as in the transformed joint-stock company.

With a view to the above, the Czech legislation is already in line with the CJEU's ruling.

4 Other Relevant Information

Nothing to report.

Denmark

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

The ruling concerned the interpretation of Article 4(4) of Directive 2001/86/EC. The provision sets down requirements for the agreement on arrangements for employee involvement when an SE company is established by means of transformation. The agreement shall provide for at least the same level of employee involvement as that already in place within the company to be transformed into an SE.

In the present case, the national German rules required that a separate ballot had to be carried out with a view to electing, as employee representatives within the SE company's Supervisory Board, a certain proportion of candidates nominated by the trade unions. The CJEU clarified that such a separate ballot was one of the 'elements' required by Article 4(4) in the agreement on arrangements for employee involvement in SE companies established by means of transformation. Furthermore, the CJEU clarified that it is necessary to ensure that in the context of such ballots, the employees of that SE company, of its subsidiaries and of its establishments are treated equally and that the trade unions represented therein are treated equally.

Under Danish law, Directive 2001/86/EC has been transposed into Act No. 281 of 26 April 2004 on employee involvement in SE companies. Article 4(4) is reproduced in the Danish Act, Section 18. The question is whether the general Danish rules on employee involvement in Supervisory Boards are similar or comparable to the present case.

The Danish rules are stipulated in the Company Act, Sections 140-143, and the Ministerial Order on Employee Involvement. Where the German rules ensured that a certain proportion of candidates is nominated by the trade unions, the Danish rules on employee involvement do not give any special rights, including rights to nominate candidates, to trade unions. Any employee of legal age, who has been employed in the company over the last 12 months, is electable and may run as a candidate for the election of employees' representatives in the company's management.

In conclusion, the situation in the present case would not arise in a Danish context, as the rules on employee involvement differ from those in Germany.

4 Other Relevant Information

Nothing to report.

Estonia

Summary

The Parliament has adopted an amendment to the Act on Occupational Health and Safety and the Act on Employment Contracts.

1 National Legislation

1.1 Occupational health and safety

On 26 October 2022, Parliament adopted amendments to the Act on the Amendment of the Act on Occupational Health and Safety and the Act on Employment Contracts. The main changes are:

- The organisation and quality of the occupational health service and the cooperation between employers and occupational health doctors will be improved to more systematically ensure a safe working environment and to more effectively prevent work-related health problems. In the future, the employer must organise the provision of occupational health services in such a way that the company's occupational health situation is analysed as a whole. The occupational health doctor must analyse the company's occupational health situation and make proposals for improving the working conditions, as well as advising employers on improving the work environment and giving recommendations to employees to improve their health.
- The principle of data processing is more clearly defined with regard to employees' health data to ensure occupational health and safety. The processing of employees' health data may be necessary to mitigate health risks caused by chemical and biological hazards, to organise occupational health services, to investigate occupational accidents and occupational diseases, etc.
- The administrative burden on employers in investigating work accidents and occupational diseases is reduced. Employers will have the opportunity to prepare and keep investigation reports on occupational accidents and occupational diseases in the work environment database, which will reduce the administrative burden associated with the preparation, transmission and storage of paper documents.
- The employer's obligations in case of remote working have been introduced, namely the remote workplace shall be furnished by agreement between the employee and the employer. The employee is also required to ensure a safe workplace and working conditions when working remotely based on the instructions given by the employer.

The procedure related to the registration of employees aged between 7 and 12 years has also been specified. The employer, through the work environment database or in a form that allows for written reproduction, shall submit data on the consent of the minor's legal representative, the minor's working conditions and work obligations, as well as his or her compulsory education. The labour inspector shall then determine whether the minor is permitted to perform the respective work, that the minor's working conditions adhere to the requirements laid down in the law, and whether the minor wants to actually work.

Some of the provisions will enter into force on 01 January 2023 and some in November 2022.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

The present case addressed the interpretation of Article 4(4) of Council Directive 2001/86/EC of 08 October 2001 supplementing the statute for a European company with regard to the involvement of employees, in case a European company (SE) is established by means of transformation.

The law in force in Estonia does not conflict with the CJEU's interpretation. This means that all requirements for the involvement of employees must be ensured during the transformation, and if the transformation entails changes among the employee representatives in the SE's Supervisory Board, a separate ballot must be held to meet the requirements. In addition, the equal treatment mentioned in the judgment is ensured through the basic requirements for the involvement of employees.

Community-scale Involvement of Employees Act (*Töötajate üleühenduselise kaasamise seadus*) focuses on agreements on the involvement of employees in § 62. According to section 4 of the corresponding paragraph, if an SE or SCE has been established by way of transformation, the agreement shall guarantee that the involvement of employees shall continue at least at the same level as in the legal entity being transformed into an SE or SCE, taking into account, inter alia, the provisions of subsection 41(4) of this Act.

Pursuant to subsection 2 of the same paragraph, taking into consideration the specifications provided for in subsection (4) of this section, the written agreement referred to in subsection (1) between the competent bodies of the participating legal persons and the special negotiating body shall specify, amongst others:

- 1) the composition, number of members and allocation of seats of the representative body, and who will be the negotiation partner of the competent body of the SE or SCE in relation to the procedure for information and consultation of the SE or SCE's employees, and of its sub-undertakings and enterprises;
- 2) if, during the negotiations, the parties decide to establish a procedure for the participation of employees, the substance of that procedure, including, if necessary, the number of members in the SE's or SCE's supervisory, administrative or management board whom the employees will be entitled to elect, appoint, recommend or oppose, and the procedure for electing, appointing, recommending or opposing those members, and the rights of the members;
- 3) the date of entry into force of the agreement and the duration of the agreement, as well as the circumstances upon the occurrence of which the agreement shall be renegotiated, and the procedure for the renewal of the agreement.

Separate amendments were introduced in 2007 on the application of provisions regulating employee participation, which specify in more detail the conditions under which they must be applied.

More specifically, § 64 (2) of the Act establishes that the provisions regulating employee participation shall be applied in the establishment of an SE or SCE by way of transformation, if the rules of a Member State relating to employee participation in the supervisory, administrative or management board were applied with regard to a legal person being transformed into an SE or SCE.

At the same time, these provisions must be implemented in conjunction with § 75 of the Act, which stipulates employee participation in European companies and European cooperative societies. According to section 1 of the aforementioned paragraph, if an SE or SCE has been established by way of transformation and before the registration of the SE or SCE, the provisions of a Member State's legislation were applied to employee participation in the supervisory, administrative or management board, the application of all provisions concerning employee participation shall continue with regard to the SE or SCE. Subsections (2) to (6) of this section shall be applied to employee participation, taking account of the specifications arising from the establishment of the SE or SCE.

4 Other Relevant Information

4.1 Payment of sickness benefit by the employer

Amendments to the Act on Amendments to the Act on Occupational Health and Safety and the Act on Amendments to Other Acts are being coordinated.

The purpose of amending the Occupational Health and Safety Act and the Act on Amendments to Other Acts is to continue the payment of sickness benefits from 01 January 2023, in accordance with the currently valid regulation as follows: by the employer from the second day of illness to the fifth day of illness and by the Estonian Health Insurance Fund from the sixth day of illness onwards. Early compensation for sick leave days allows employees to stay at home even when the first symptoms of illness arise. Thereby, the risk of others contracting infectious diseases also decreases.

4.2 Working time

Representatives of the Central Union of Employers, the Minister of Health and Labour (state representative) and the Central Union of Trade Unions signed a tripartite agreement on 17 October 2022, which covers the new rules on safe working hours. Based on the agreement, the Ministry of Social Affairs will prepare amendments to the law.

The agreement aims to make the rules of on-call time for employees in the field of information and communication more flexible and introduce the concept of an employee with independent decision-making competence into the employment contract law.

According to the agreement, on-call time will be more flexible in the future for those employees whose main task is the provision of information and communication technology services. In the future, ICT employees can perform up to 130 hours of on-call work per month, and the employer must guarantee at least two weekends off per month.

In addition, the partners agreed that the regulation of the employee with independent decision-making competence will be included in the employment contract law. In the future, these employees will be able to organise their working hours more freely. According to the agreement, flexible working time arrangements can be applied to those employees who earn at least the Estonian average wage.

Finland

Summary

(I) A Government Proposal implementing Directive 2019/2121 concerning certain aspects of company law concerning limited liability companies has been submitted.

(II) Another Government Proposal includes clarifications on the definition of an employment relationship in unclear situations.

(III) A third Government Proposal proposes a system of labour dispute mediation.

1 National Legislation

1.1 Cross-border restructuring of companies

On 13 October 2022, the government submitted a proposal to Parliament (HE 213/2022 vp) concerning the implementation of provisions on safeguarding the position of employees under EU Directive 2019/2121 relating to certain aspects of company law concerning limited liability companies.

The aim of the proposal is to safeguard the position of employees when the employer company plans or implements a cross-border merger, division or transfer of registered office. The provisions would ensure the continuity of employees' rights based on the employment relationship. In principle, Finnish legislation would apply to companies that result from a cross-border restructuring with the registered office in Finland. In certain situations, however, the procedures applicable to European companies would apply.

The Directive requires employees to be informed in a timely manner and that they are consulted on the planned corporate restructuring. The government proposes companies to inform employees and consult them before the general meeting to discuss a report or plan on the position of employees in a corporate restructuring. The employees should also be given a reasoned reply to comments they have made to the report or plan before a decision is made on the restructuring.

The employer's obligations would include the payment of wages as determined in the collective agreement and obligations related to labour law, occupational safety and health, and the funding of social security. The Government Proposal would ensure that these obligations continue to apply in cross-border restructurings.

In a transfer of undertaking, the provisions on transfers of undertakings under the Employment Contracts Act (*Työsopimuslaki*, 55/2001) and the Seafarers' Employment Contracts Act (*Merityösopimuslaki*, 756/2011) would apply. According to the proposal, a company formed in a merger and a company transferring its registered office will be responsible for the employer's obligations in other cases as well.

The amendments proposed would enter into force on 31 January 2023.

1.2 Employment status

The Government Proposal (HE 215/2022 vp) aims to provide those applying the Employment Contracts Act with tools to distinguish between work performed in the context of an employment relationship and self-employment. The objective is to prevent the disguising of an employment relationship as a different form of work and reduce uncertainty in working life. The Government Proposal was submitted to Parliament on 13 October 2022.

The criteria for an employment relationship are specified in the Employment Contracts Act. The government proposes specifying the provision on the scope of the Act's application by adding a provision that would require overall consideration to be made in

situations that are unclear and open to interpretation. An overall consideration would be required if, following an assessment of the basic criteria, the nature of the legal relationship remains unclear. No changes are proposed by the government on the basic criteria of an employment relationship.

The proposal implements the Government Programme's objectives that prohibit the disguising of employment relationships, reduce uncertainty in working life, and assess the need for legislative review due to the transformation of work.

The amendments proposed would enter into force on 01 July 2023.

1.3 Labour dispute mediation system

The Government Proposal (HE 214/2022 vp) relating to changes to the labour dispute mediation was submitted to Parliament on 13 October 2022. According to the Act on Mediation in Labour Disputes (*Laki työriitojen sovittelusta*, 420/1962) mediation normally starts on the basis of a notice of a party to the labour dispute. According to the proposed provisions, the national conciliator could, upon the parties' request, begin to mediate a labour dispute also in cases that do not involve work stoppage or a threat thereof. Voluntary mediation, which would be a new mechanism in the Act on Mediation in Labour Disputes, would require approval from all parties to the dispute. The aim is to develop the labour dispute mediation system and make mediation of labour disputes more efficient.

The amendments proposed would enter into force on 01 March 2023.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

According to the Finnish Act on Employee Involvement in European Companies (SE) and European Societies (SCE) and cross-border mergers and divisions (*Laki henkilöstöedustuksesta eurooppayhtiössä* (SE), *ja eurooppaosuuskunnassa* (SCE), *sekä rajat ylittävässä yhtiöiden sulautumisessa ja jakautumisessa*, 758/2004), the point of departure is that members of the representative body shall be elected or appointed in proportion to the number of employees employed in each Member State by the participating companies and concerned subsidiaries and establishments.

4 Other Relevant Information

Nothing to report.

France

Summary

The Court of Cassation has ruled on the exhaustion of grounds for successive fixed-term contracts for professional athletes, on an increase in working hours in a part-time employment contract, and on the boundary between on-call duty and actual working time.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Decree No. 2022-1369 of 27 October 2022 specifies the provisions on the partial activity scheme for vulnerable employees of Law No. 2022-1157 of 16 August 2022 (see also September 2022 Flash Report). This Decree sets down criteria to define vulnerable employees. It also provides for increased protection measures that can be established by the employer.

1.2 Secondment for travelling employees

Order No. 2022-1293 of 05 October 2022 completes Law No. 2021-1308 of 08 October 2021, which created a special regime on secondment for travelling and flying employees carrying out international deliveries. Since then, transport companies have to issue travel certificates that are different from the declarations required for secondment under ordinary law. Among the key measures of the Order are a redefinition of the scope of travel certificates issued by transporters. This scope shall, in the future, only affect international deliveries carried out by light commercial vehicle. It follows that current travel certificates will be equivalent to a declaration of secondment under ordinary law. Certificates issued before 01 January 2023, i.e. before the order's entry into force, will be considered valid until the end of their period of validity.

2 Court Rulings

2.1 Fixed-term work

Social Division of the Court of Cassation, No. 21-12.590, 21 September 2022

In the present case, a professional rugby player was hired under two fixed-term employment contracts, 'contrats de travail à durée déterminée d'usage', for 11 sports seasons.

On 19 July 2017, the player brought claims before the Employment Tribunal for the reclassification of his fixed-term employment contract into an employment contract of indefinite duration and for the payment of various amounts related to the termination of employment relationships.

According to Article L. 1242-1 of the French Labour Code, a fixed-term employment contract, regardless of its grounds, cannot have the purpose or effect of permanently filling a job related to the company's normal and permanent activity. Yet Article L. 1242-2 of the French Labour Code allows for the conclusion of fixed-term employment contracts in business sectors where there is a tradition to not conclude employment contracts of indefinite duration due to the nature of the activity and the temporary nature of the job.

The Court of Appeal upheld the player's claims. Appealing to the Court of Cassation, his employer asked the Court to refer the case to the Court of Justice of the European Union

(CJEU) for a preliminary ruling on whether the specific characteristics of professional sport, in the light of Article 165 of the Treaty on the Functioning of the European Union (TFUE), constituted 'objective reasons' within the meaning of a) paragraph 1 of clause 5 of the Framework Agreement on Fixed-term Work annexed to Council Directive 1999/70/EC of 28 June 1999. On another ground, the employer argued that specific characteristics of professional sport constituted 'objective reasons' justifying the use of successive fixed-term employment contracts.

The Court of Cassation replied that there was no need for such interpretation from the CJEU. Indeed, the concept of 'objective reasons' has already been clearly interpreted. Transferring the question on this ground would have favoured the possible dilatory nature of its author.

In its decision of 21 September 2022, the Court of Cassation verified the lawful application of Article L. 1242-1 of the French Labour Code. According to established case law (see Social Division of the Court of Cassation, No. 18-11.989, 04 December 2019), the judge must verify the existence of 'objective reasons', which are to be understood as concrete elements establishing the temporary nature of a job. Several arguments aiming to demonstrate such concrete elements, rejected in appeal, were not examined by the Court of Cassation. These arguments were risk of injury, result of competitions, specificity of the competitions, fairness and equity of the competitions and the player's interests.

The remaining series of arguments were based on the physical incapacity of an athlete to exercise his or her profession beyond a certain age and the development of his/her performance. The first argument was rejected for being discriminatory. Moreover, age is related to a person, not to the job. Hence, it cannot justify an 'objective reason'. The physical incapacity of an employee to perform his or her duties falls under the regime of unfitness.

The Court of Cassation also endorsed the Court of Appeal's analysis of the expectations of the public, the impact on ticket sales and tactical choices of the coach. These were considered to be unrelated to the job held by the athlete.

Considering the employer's activities, the Court of Cassation refused to accept the latter's arguments since it would transfer the company's risk on the player.

In this regard, the Court of Cassation took a strong position against successive fixed-term employment contracts for professional athletes. Every argument, even those previously recognised by the Court, was dismissed. Based on this reasoning, there are no longer any objective grounds to exclude professional athletes from a possible reclassification of successive fixed-term employment contracts into contracts of indefinite duration. This resolve raises the question how case law will from now on deal with the notion of *'contrats de travail à durée déterminée d'usage'.* Will it this only be the answer for professional athletes? Or will the Court of Cassation continue to limit its scope?

Another question arose from this decision, namely what would have happened if the Court of Cassation had asked the CJEU for a preliminary ruling. Authors such as Gaylor Rabu (see RABU, G., *Contrat de travail à durée déterminée, L'épuisement des motifs justifiant les CDD successifs des sportifs professionnels*, La Semaine Juridique - Edition sociale n°41, Lexisnexis), think that the CJEU would have sided with the employer. That is the reason the Court of Cassation did not ask for a preliminary ruling of the CJEU, namely to grant professional athletes more protection.

2.2 Part-time work

Social Division of the Court of Cassation, No. 20-10.701, 21 September 2022

In the present case, a part-time employee, had signed a rider to her contract, increasing her monthly working hours to 152 hours for the period from 01 January to 06 November

2015. This rider increased the working hours provided for in the employee's part-time contract, to the level of the legal working hours. The employment contract was subsequently transferred to another company.

Since the introduction of the Law of 14 June 2013 (Loi n°2013-504), employers can temporarily increase the working hours of part-time employees with a rider on additional working hours, provided it is permitted by collective bargaining agreement applicable to signatory and non-signatory companies. The main advantage of the system is that it frees the employer from wage increases and the limits applicable to part-time jobs for additional hours, that is 1/10 or even 1/3 of the contractual duration (see Articles L. 3123-28 and L. 3123-29 of the French Labour Code). In fact, as outlined in Article L. 3123-22 of the French Labour Code, it is up to the collective bargaining agreement to provide for a possible increase of wages when a rider is concluded, or the maximum of riders that can be concluded each year.

On 21 April 2016, the employee brought a claim before the Employment Tribunal for reclassification of her part-time employment contract into a full-time employment contract retroactively since 01 January 2015, and the payment of various sums.

Dismissed by the Court of Appeal, the employee appealed to the Court of Cassation. Thus, the Court had to answer whether a rider to a part-time employment contract could have the effect of increasing the agreed working hours to a level equal to the legal working hours or equal to the hours fixed by the collective bargaining agreement.

In its decision of 21 September 2022, the Court of Cassation was very firm: a rider to a part-time employment contract cannot have the effect of increasing the agreed working hours to a level equal to the legal working hours or equal to the hours fixed by the collective bargaining agreement.

To reach this solution, the Court of Cassation combined the interpretation of two Articles of the French Labour Code:

- Article L. 3123-22 of the French Labour Code, as previously described;
- Article L. 3123-9 of the French Labour Code, which states that additional hours cannot have the effect of bringing the working time accomplished by a part-time employee to the level of the legal working time or, if it is lower, to the level of the working time fixed by the collective bargaining agreement.

Thus, the Court of Appeal should have reclassified her part-time contract into a full-time employment contract.

By this decision, the Court of Cassation continues to strengthen its case law on part-time employment contracts. Aiming to protect part-time employees, the Court of Cassation applies a penalty that is regularly used. Indeed, when the performance of additional hours increases the working time of a part-time employee to the level of a full-time employee, the sanction incurred is the reclassification of the contract into a full-time employment contract (see also Social Division of the Court of Cassation, No. 04-43.180, 05 April 2006).

The Court of Cassation provides an answer to the silence of the 2013 law applying the same penalty in case of a rider for additional hours that temporarily raises the part-time work of an employee to the level of full-time work.

In fact, the Court of Cassation has already admitted that reclassification is incurred if the working time of an employee is increased to the level of the legal or conventional working time for only one week (see Social Division of the Court of Cassation, No. 12-15.014, 12 March 2014).

2.3 On-call duty

Social Division of the Court of Cassation, No. 21-14.178, 26 October 2022.

In the present case, an employee was regularly on on-call duty for his employer. When he was on on-call duty, he was equipped with a telephone and had to respond 'without delay' to any request for assistance made by a dispatcher.

According to Article L. 3121-9 of the French Labour Code, on-call duty consists of requesting an employee to be ready to intervene, when he/she is not at work and not at the permanent and immediate disposal of his/her employer. On-call duty must be compensated by time or money, but it is not considered actual working time. On the other hand, the response time constitutes actual working time.

As outlined in Article L. 3121-1 of the French Labour Code, when the employee is at the disposal of the employer and complies with his or her instructions without being able to freely pursue his/her personal interests during on-call duties, it must be qualified as actual working time.

The employee brought his claim to the Employment Tribunal to obtain the judicial cancellation of his employment contract. Regarding on-call duty, the employee appealed to the Court of Appeal, arguing that the requirement to respond within a short time meant that the on-call duty fell within the scope of actual working time and consequently claimed payment for it. The Court of Appeal rejected the employee's request because it considered that, given the conditions under which the on-call duty was performed, the employee could not claim that he was at his employer's permanent and immediate disposal, without being able to freely attend to his personal interests. The employee appealed to the Court of Cassation.

In its decision of 26 October 2022, the Court of Cassation overruled the Court of Appeal's decision and clarified, in the light of European law, the boundary between on-call duty and actual work.

The Court of Cassation referred to the judgment of the CJEU in case C-344/19, 09 March 2021, *Radiotelevizija Slovenija*, which answered a preliminary question on Article 2 of Directive 2033/88/EC of 04 November 2003 'concerning certain aspects of the organisation of working time', with regard to Slovenian legislation. The case concerned an employee who had to intervene within a very short time to maintain a television transmitter in a difficult-to-reach area. On this occasion, the CJEU specified that on-call duty during which the constraints imposed on the worker are of such a nature that they objectively and very significantly affect his or her ability to freely attend to his or her own interests should be considered actual working time.

The CJEU mentioned the intensity of the constraints imposed on the employee as indicators: the period he or she has during the on-call duty to resume his/her professional activities, starting from the moment the employer requests him or her to take up duties, conjugated, if necessary, to the average frequency of interventions that he/she will actually be called upon to provide during this period. In very concrete terms, the CJEU notes that

> *"a period of on-call time during which the time limit imposed on the worker to return to work is limited to a few minutes must, in principle, be regarded in its entirety as actual working time, [within the meaning of [Directive 2003/88], the worker being, in the latter case, in practice, strongly dissuaded from planning any leisure activity, even of short duration".*

Echoing European case law, the Court of Cassation criticised the Court of Appeal for not considering the argument raised by the employee, namely

> *"the short period of time he had to arrive on site after the user's call". The judges should have "verified whether the employee had been subjected, during his on-call duty, to constraints of such intensity that objectively and very significantly affected his ability to freely manage, during these periods, the time during which*

his professional services were not required and to go about his personal business".

Hereby, the Court of Cassation takes a position that is similar to that supported by the CJEU. Yet it remains to be seen whether the Court of Cassation will be as pragmatic as the CJEU. Indeed, the CJEU has specified that the impact of such a response time must be assessed on the basis of a concrete evaluation, taking into account, where appropriate, other constraints imposed on the worker, as well as the facilities granted to him/her during the on-call duty.

Furthermore, it is still uncertain how the Court of Cassation will balance the personal choice of employees. Indeed, the CJEU invites national courts not to take into consideration organisational constraints that are the consequence of natural elements or the employee's free choice. For example, an employee who has chosen to live relatively far from his or her workplace is, by assumption, fully aware of the difficulties this may cause to ensure possible on-call duty. He or she, therefore, cannot blame the employer for this.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

In a ruling handed down on 18 October 2022, the Court of Justice of the European Union ruled in favour of the German trade unions IG Metall and ver.di, specialised in the metalworking and services sectors respectively. In its process of transformation into a European company (SE), SAP, a software company, no longer guarantees the position of trade union representatives in the share reserved for employee representatives on the Supervisory Board. The Federal Labour Court, urged by the trade unions, referred a question to the Court for a preliminary ruling to determine whether a specific ballot could be organised for the election of trade union representatives to the Supervisory Board of an SE. The Court, sitting as a Grand Chamber, interpreted Article 4 of Directive 2001/86 on employee involvement in such a way that the election of employee representatives must provide for a separate ballot for trade union representatives where this is provided for under national law. This right must benefit all trade unions represented in the SE and not only the German trade unions. The CJEU also stated that the organisation of a separate ballot allows for the representation of 'persons with a high degree of knowledge of the conditions and needs of the undertaking and with external expertise'. However, the Court ruled out any fixed European model for the appointment of employee representatives, given 'the wide variety of rules and practices in the Member States'.

In France, employee representation is foreseen on the board of 'large companies' that employ over 1 000 employees in France (including subsidiaries) at the end of two consecutive financial years, or 5 000 employees in France and abroad (including subsidiaries).

A company of this size must have at least two employee representatives on the board when more than eight members are not employees (see Articles L. 225-27-1 and L. 225-79-2 of the French Commercial Code). However, a company can derogate from this obligation when it

- has fewer than 11 employees (the threshold for setting up an economic and social council);
- its main activity is to acquire and manage subsidiaries that have employee representatives (holding company).

Unlike the other board members, the members representing the employees are not appointed by the general meeting of shareholders. The company's articles of association

must therefore provide for one of four possible alternative appointment procedures, which assign this appointment competence to (i) the employees directly, (ii) the social and economic committee (CSE), (iii) the majority trade union organisation, or (iv) the European works council.

Articles L. 225-27-1, III of the Commercial Code for public limited companies with a board of directors and L. 225-79-2, III of the Commercial Code for public limited companies with a management board and supervisory board offer four alternative methods of appointment for directors representing employees, whose appointment is compulsory and must be specified in the company's articles of association.

The mechanism for choosing employee representatives is decided by an extraordinary shareholders' meeting, after consultations with existing bodies representing the employees, the group committee, the central Social and Economic Committee (CSE) or the company CSE, as appropriate. The meeting can choose between four options:

- elections, either direct or indirect, with nominations made by the unions;
- appointment by the existing bodies representing the employees – the group committee, central CSE or CSE;
- appointment by the union with the largest share of the vote in the CSE elections (the two unions with the highest votes, if two employee representatives are to be selected); or
- a combination of one of the three options set out above, plus an appointment by the European Works Council or, in a European company, the SE representative body (this option is only available if at least two employee representatives are being selected).

With respect to Article 4(4) of Directive 2001/86/EC as interpreted in the light of the CJEU's decision in case C-677/20, 18 October 2022, *IG Metall and ver.di*, that an agreement on arrangements for the involvement of employees applicable to a European company (SE) established by means of transformation, implying a French company, must provide for a separate ballot with a view to electing, as employees' representatives within the SE's Supervisory Board, a certain proportion of candidates nominated by the trade unions, as soon as an appointment by the union has been foreseen in the statutes of the French company as French law requires such a separate ballot for the composition of the company's Supervisory Board to be transformed into an SE. The same will have to be ensured that in the context of that ballot, the employees of that SE, of its subsidiaries and of its establishments are treated equally and that the trade unions represented therein are treated equally.

4 Other Relevant Information

Nothing to report.

Germany

Summary

(I) The Infection Protection Act was amended to ensure that if an employee is quarantined during his or her leave, the days of isolation shall not be counted towards the employee's annual leave.

(II) The Federal Government has submitted a draft law which implements the provisions of EU Directive 2019/2121 on employee participation in cross-border transformations, mergers and divisions.

1 National Legislation

1.1 Paid annual leave and domestic quarantine

On 16 October 2022, the Federal Labour Court requested the CJEU to give a preliminary ruling on the following question:

> *"Are Article 7 of Directive 2003/88/EC and Article 31(2) of the Charter of Fundamental Rights of the European Union to be interpreted as precluding a national rule or practice according to which paid annual leave requested by the employee and granted by the employer, which overlaps in time with a domestic quarantine ordered after leave has been granted by the competent authority on account of suspected infection is not to be granted, where the employee is not incapacitated for work on account of illness during the quarantine?".*

In the meantime, the Infection Protection Act (*Infektionsschutzgesetz*, IfSG) has been amended. Section 59(1) of the Infection Protection Act now reads as follows:

> *"If an employee is isolated or has to be isolated (...) during his or her leave, the days of isolation shall not be counted towards the annual leave."*

Following approval by the Bundesrat, the adopted Act was promulgated on 16 September 2022. The new version of Section 59(1) IfSG entered into force on the day after promulgation, i.e. on 17 September 2022.

The new provision clarifies the previously disputed legal situation for the period from 17 September 2022. As the law does not have retroactive effect, the new regulation will not have a direct impact on previous cases in which the use of leave days for isolation ordered until 16 September 2022 is disputed. The reference for a preliminary ruling continues to be of significance for these cases.

1.2 Employee participation in cross-border mergers

The Federal Government has submitted a draft law which implements the provisions of EU Directive 2019/2121 on employee participation in cross-border conversions, mergers and divisions.

2 Court Rulings

2.1 Illegal hiring-out of workers from abroad

Federal Labour Court, 9 AZR 228/21, 26 April 2022

The Federal Labour Court held that if a temporary agency worker is hired-out to Germany from abroad without permission within the meaning of section 1 of the Act on Temporary Agency Work (*Arbeitnehmerüberlassungsgesetz*, AÜG), old version, the violation of the obligation to obtain a permit does not lead to the invalidity of the

temporary employment contract pursuant to section 9 No. 1 of the AÜG, old version, if the temporary employment relationship is governed by the law of another Member State of the European Union. The requirements for a change of employer under section 10(1) sentence 1 of the AÜG, old version, are not met in this case (see April 2022 Flash Report).

The decision has been sharply criticised in the literature. It is pointed out that the most severe sanction in the AÜG for illegal hiring-out is not the fictitious employment relationship itself. The most severe sanction in the case of illegal hiring-out is rather the resulting liability of the temporary agency for contributions. In practice, it is discovered by customs and enforced by the social security institutions – completely independently of the workers concerned. Especially in the case of illegal hiring-out from abroad, the consequences are extreme. Specifically, they are much harsher than in the case of illegal hiring out without crossing the border, because in this case, the domestic contributions paid by the temporary work agency are deducted. On the other hand, contributions paid by the temporary work agency abroad to the local social security systems would not be taken into account. The author considers the Federal Labour Court's decision to be incompatible with the Constitution (Schüren*, juris PraxisReport* 43/2022 No. 7).

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

The Court ruled that

> *"Article 4(4) of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees must be interpreted as meaning that: the agreement on arrangements for the involvement of employees applicable to a European company (SE) established by means of transformation, as referred to in that provision, must provide for a separate ballot with a view to electing, as employees' representatives within the SE's Supervisory Board, a certain proportion of candidates nominated by the trade unions, where the applicable national law requires such a separate ballot as regards the composition of the Supervisory Board of the company to be transformed into an SE, and it is necessary to ensure that, in the context of that ballot, the employees of that SE, of its subsidiaries and of its establishments are treated equally and that the trade unions represented therein are treated equally."*

The question decided by the CJEU has been answered differently in Germany. For example, the solution ultimately determined by the Court that the purpose of the negotiated solution was to enable an 'SE law emancipated from national provisions' was objected to. It was also argued, for example, that although European Union law had not harmonised the law, it had established by means of the participation agreement and the fall-back solution as a result of a political compromise 'independent European Union law values for dealing with national participation law' (Knoche*, Gesondertes Wahlverfahren für die von Gewerkschaften vorgeschlagenen Arbeitnehmervertreter bei Beteiligungsvereinbarung einer durch Umwandlung gegründeten SE, in: Neue Zeitschrift für Gesellschaftsrecht* 2022, 801 (807); along the same lines Arnold*, Vorabentscheidungsersuchen zur Unternehmensmitbestimmung in der SE, ArbAktuell* 2020, 506: "*The more the special German features apply compulsorily to the SE in the context of a conversion, the more the idea of European co-determination is undermined*.").

This dispute has now been settled.

Employers point out that the Federal Labour Court must now clarify the consequences of the invalidity of the regulation for the entire participation agreement. A pragmatic solution is being demanded.

4 Other Relevant Information

4.1 Co-determination

In a motion, the parliamentary group *Die Linke* in the German *Bundestag* has demanded that gaps in the co-determination law be closed.

In particular, the demand is for the Federal Government to present a draft law which, in view of the cross-border mobility of European companies, extends the scope of co-determination laws to companies of foreign legal forms with administrative headquarters in Germany. The SE Participation Act shall stipulate that co-determination must be renegotiated in the event of structural changes to the group or when the threshold values of the German co-determination laws are exceeded, and that a catch-all provision adapted to the threshold value exceeded is to be introduced.

4.2 Collective bargaining

Only about half of the employees in Germany still work in a company with a collective agreement. This is the result of an answer by the Federal Government to a question from the *Bundestag*. According to the Federal Government, in 2021, 42.7 per cent (2020: 42.8 per cent) of employees worked under the terms of a sectoral collective agreement and 9.4 per cent (2020: 8.2 per cent) under the terms of a company collective agreement. In 2002, 59.7 per cent of employees were still working under the conditions of a sectoral collective agreement. By contrast, the number of in-house collective agreements increased slightly during this period.

Greece

Summary

The Supreme Court ruled that the provisions concerning exceptions to the application of the rules for transfers of undertakings due to bankruptcy or other insolvency proceedings must be narrowly interpreted.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Transfer of undertakings

Supreme Court, No. 317/2022, 09 November 2022

The Court stated that the provisions concerning exceptions to the application of the rules for transfers of undertakings due to bankruptcy or other insolvency proceedings must be narrowly interpreted. Thus, the enforcement proceedings related to a public auction of a company as a whole, to a liquidation and to its acquisition by the successful tenderer with the maintenance of the company as a unit constitutes a transfer of undertaking and does not fall under the exceptions linked to bankruptcy or other insolvency proceedings.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

Greek law does not provide for a separate ballot for the composition of the Supervisory Board of SE companies with a view to electing, as employees' representatives within the Supervisory Board of the company, a certain proportion of candidates nominated by the trade unions.

Therefore, the judgment is of limited significance for Greece.

4 Other Relevant Information

Nothing to report.

Hungary

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

In Hungarian law, there is no separate ballot for trade unions for the composition of the Supervisory Board of a company to be transformed into an SE. Act 45 of 2004 on European Public Limited-Liability Companies contains the respective rules. Articles 20-22 contain the rules on the 'Formation of a Special Negotiating Body', the rules of which also apply to the 'representative body' (see Article 35 (3) of Act 45 of 2004). These rules are equally applicable in all formations of an SE, including an SE established by means of transformation. In all cases, the same rules apply, namely a part of the representatives are elected by the employees and the other part are nominated by works councils without a ballot (see Article 21 of Act 45 of 2004).

Therefore, the judgment has no implications for Hungarian law.

4 Other Relevant Information

Nothing to report.

Iceland

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

Icelandic law does not stipulate employee participation in the board level in undertakings, with the exception of SEs. The rules deriving from Directive 2001/86/EC were transposed by Act No. 27/2004 on Employee Participation in European companies. It is therefore not likely that the judgment will have any implications for Icelandic law.

4 Other Relevant Information

Nothing to report.

Ireland

Summary

New legislation implements Directive 2019/1937/EU on the protection of persons who report breaches of Union law.

1 National Legislation

1.1 Minimum wage

The Minister for Enterprise, Trade and Employment has issued an Order implementing the majority recommendation of the Low Pay Commission (LPC No. 18/2022) that the minimum hourly rate of pay should be increased by 7.6 per cent (i.e. by EUR 0.80). The minority recommendation of the two trade union nominees to the Commission was for an annualised increase of 10.7 per cent. The National Minimum Wage Order 2022 (S.I. No. 500 of 2022) provides that, with effect from 01 January 2023, the minimum hourly rate of pay will increase from EUR 10.50 to EUR 11.30.

1.2 Whistleblowers

The Minister for Public Expenditure and Reform has issued an Order bringing the entirety of the Protected Disclosures (Amendment) Act 2022 into operation with effect from 01 January 2023: Protected Disclosures (Amendment) Act 2022 (Commencement) Order 2022 (S.I. No. 510 of 2022). The Act amends the Protected Disclosures Act 2014, which provides protection against penalisation for workers alleging wrongdoing, so as to implement Parliament and Council Directive 2019/1937/EU on the protection of persons who report breaches of Union law. The Act requires all private sector organisations employing 250 workers or more to establish a formal reporting channel for making protected disclosures. This requirement will be extended, on 17 December 2023, to all organisations employing at least 50 workers.

Other features of the 2022 Act include additional categories of persons to whom the protections apply—such as volunteers—and the reversal of the burden of proof in penalisation claims.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

Council Directive 2001/86/EC was implemented in Irish law by the European Communities (European Public Limited-Liability Company) (Employee Involvement) Regulations 2006 (S.I. No. 623 of 2006). Article 4(4) of the Directive, being the provision at issue in this case, would appear to have been transposed by Regulation 5(5). No reference is made therein or in the First Schedule, providing for any proportion of employees' representatives having to be nominated by trade unions.

4 Other Relevant Information

4.1 Non-EEA fishing crew

An Atypical Working Scheme for non-EEA Crew in the Irish Fishing Fleet was established in February 2016. It was the main recommendation in the Report of the Government Task Force on Non-EEA Workers in the Irish Fishing Fleet to address claims of exploitation and trafficking of undocumented non-EEA workers in the fleet. The scheme has been the subject of ongoing criticism from, amongst others, the International Transport Workers Federation and a cross-departmental group was established to carry out a review of the scheme. In its Report of Review of Atypical Working Scheme for non-EEA Crew in the Irish Fishing Fleet, the group's key recommendation was that the employment of non-EEA crew should be provided for under the employment permit system operated by the Department of Enterprise, Trade and Employment and not under the Atypical Working Scheme, the original purpose of which was to provide a mechanism to deal with short-term employment not governed by the employment permits legislation.

4.2 Collective bargaining

In March 2021, a High-Level Working Group was set up to review collective bargaining and the industrial relations landscape. Membership comprised six senior employer and trade union representatives (including the Chief Executive Officer of the employers' organisation, Ibec, and the General Secretary of the Irish Congress of Trade Unions) and four government nominees under an independent chair. The group was cognisant that the central theme of the proposed Directive on an Adequate Minimum Wage, as stated in Recital 19, is the emphasis on the key institutional role that collective bargaining plays in ensuring adequate minimum wage protection for workers. When implemented, the Directive will require those Member States, such as Ireland, with a collective bargaining coverage rate below 80 per cent to adopt measures with a view to enhancing collective bargaining. Consequently, the focus of the group's work was on proposing means by which plans and frameworks, developed by the social partners in conjunction with the State, could be put in place so that Ireland was 'well-positioned' to meet its EU obligations.

In its Final Report, the group took as a starting point, in exploring means to facilitate and promote 'good faith engagement' between employers and trade unions, that it was neither possible nor desirable to seek any mechanism whereby parties could be required to reach a collective agreement. Accordingly, the group proposed a process to promote engagement between employers and trade unions, which cannot be disregarded, but which does not result in the imposition by a third party of any outcome.

The process would be triggered by a request from a trade union with a meaningful threshold of membership to an employer to engage in relation to pay and terms and conditions of employment. If the employer does not accede to the request or, having acceded, does not engage in good faith, the matter would be referred to the Labour Court which would be empowered to set out what the employer should do to comply with the good faith engagement obligation under the process. Ultimately, an application could be made to the Circuit Court and employers who do not comply with that court's Order would be subject to a fine.

The group made a range of other recommendations in relation to the operation of Joint Labour Committees, the appointment of technical assessors and training.

The ICTU General Secretary, speaking at the launch of the Report, said that if the recommendations are implemented, 'it will change the face of industrial relations in Ireland'. IBEC's director of employee relations explained that its involvement in the proposal was tied to the social component of ESG corporate responsibility.

Italy

Summary

Two rulings of the Court of Cassation deal with temporary agency work.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Temporary agency work

Corte di Cassazione, No. 29576 and No. 29570, 11 October 2022

On 11 October 2022, two rulings were handed down by *Corte di Cassazione* regarding temporary agency work.

Both judgments concern events that occurred before the 2015 reform, and both referred to Directive 2008/104 to resolve the dispute.

According to the first ruling (No. 29567), the reasons that justify the application of the time limit must be specified in a fixed-term contract between the temporary work agency and the worker, even if the contract between the agency and user undertaking is also fixed term. In fact, according to the Court, the lawfulness of the employment contract must be assessed separately from that of the commercial contract.

The second ruling (No. 29570) concerns multiple missions and recalls European case law on temporary agency work (CJEU C-681/2018, *KG*). According to the Court, in case of multiple missions, even if the worker can no longer challenge one of them, the multiple missions as a whole can always be considered by the Court as ascertaining the violation of the temporariness of the agency work.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

CJEU case C-677/20, 18 October 2022 concerned German law and has no implications for Italy, because there are no bodies such as the German 'Supervisory Board' in the Italian legal system.

In Italy, protection of employees' representatives in the establishment of an SE is regulated in Article 10, Legislative Decree 19 August 2005 No. 188, according to which all employee representatives involved in the procedure for the establishment of an SE have "*the same protection and guarantees provided for employees' representatives by law and by collective agreements in force in the Member States in which they are employed*".

4 Other Relevant Information

Nothing to report.

Latvia

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Employees' representatives in the Supervisory Board

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

Directive 2001/86/EC is implemented in Latvian law by the Law on Employees' Involvement in Decision Making in European Statute Companies, European Level Cooperative Societies and Cross-Border Mergers (see Official Gazette No. 23, 10 on February 2010).

The national law does not envisage a separate ballot, however, Article 19 (4) of the said law requires proportionate representation based on the founding companies in the Member States and number of their employees.

4 Other Relevant Information

Nothing to report.

Liechtenstein

Summary

An amendment to the Posting of Workers Act implements Directive (EU) 2018/957 concerning the posting of workers in the framework of the provision of services.

1 National Legislation

1.1 Posting of workers

The present amendment serves to implement Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. Directive (EU) 2018/957 amends the Posting of Workers Directive in a number of key areas.

Some of these innovations have already been applied in Liechtenstein for some time. However, to achieve full compliance with the Directive, an amendment of national law was indispensable.

Liechtenstein has therefore adopted an amendment to the national law to implement Directive (EU) 2018/957 (see below).

The aim of the amendment is, as mentioned, to adapt Liechtenstein law to Directive (EU) 2018/957. This is to be achieved through three central points:

- Posted workers shall not only be granted the minimum wage applicable in the host member state, but the entire remuneration as it results from the law applicable in the host member state;
- Postings lasting longer than 12, respectively 18, months shall in principle be subject to the entire labour law of the host member state;
- The obligations of the parties involved in temporary agency work are to be clarified.

The changes have been introduced in the Posting of Workers Act (*Gesetz über die Entsendung von Arbeitnehmern im Rahmen der grenzüberschreitenden Erbringung von Dienstleistungen, Entsendegesetz*, EntsG, LR 823.21).

The amendment of this Act will likely also entail an adaptation of the ordinance law: Posting of Workers Ordinance (*Verordnung über die Entsendung von Arbeitnehmern im Rahmen der grenzüberschreitenden Erbringung von Dienstleistungen, Entsendeverordnung*, EntsV, LR 823.211.1).

The amendment is based on a government draft law with an accompanying report, which was sent for consultation. The consultation lasted until 23 June 2021, after which the government evaluated the comments received. Based on the results of the consultation, the government produced a Report and Motion for the Parliament regarding the Amendment of the Posting of Workers Act (*Bericht und Antrag der Regierung an den Landtag des Fürstentums Liechtenstein betreffend die Abänderung des Entsendegesetzes*, BuA 2022/15).

On 02 September 2022, the Liechtenstein Parliament (*Landtag*), with approval of the Prince, enacted the amendment of the Posting of Workers Act (*Gesetz über die Entsendung von Arbeitnehmern im Rahmen der grenzüberschreitenden Erbringung von Dienstleistungen, Entsendegesetz*, EntsG, LR 823.21).

The amendment can be found in *Liechtenstein Landesgesetzblatt* of 28 October 2022, No. 292

Subject to the unused expiry of the referendum period, this Act shall enter into force on 01 January 2023, otherwise on the day following its promulgation.

See here for Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

The amendment is of considerable importance. It is an important issue for the economy, the labour market, workers and employers. In the area of posting, some important issues have been newly regulated.

The amendment departs from previous lines of reasoning because no new laws are created per se, but the existing structures are used to implement the changes. The posting of workers is already regulated in Liechtenstein law (see the remarks above about the Posting of Workers Act). These provisions shall simply be adapted and expanded.

The purpose of the consultation of municipalities, courts, business and employers' associations, the Liechtenstein Trade Union and other organisations is precisely to give the government an idea of the likely implications in the legal and political sphere. For this reason, the government always adapts, depending on the outcome, the original draft law to the results of the consultation process where necessary before it is submitted to Parliament.

The main purpose of the amendment is to implement Directive (EU) 2018/957. An initial review of the enacted amendment reveals that Parliament is seeking implementation in line with the mentioned Directive.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

In the judgment *C-677/20*, the following sections are particularly important for a better understanding of the judgment: if a procedural element established by national law, such as in the present case, the separate ballot for the election of candidates nominated by trade unions to a defined number of seats on a company's Supervisory Board as employees' representatives within that board constitutes an element that characterises the national system of participation of employees' representatives, introduced with a view to strengthening employee participation in the undertaking, and if that legislation makes it, as in the present case, mandatory in nature that the procedural element must be regarded as forming part of 'all elements of employee involvement' within the meaning of Article 4(4) of Directive 2001/86 (CJEU C-677/20 No. 39). The EU legislature sought to eliminate the risk that the establishment of an SE, in particular by means of transformation, might lead to a reduction, or even disappearance, of the rights of involvement which the employees of the company to be transformed into an SE enjoyed under national law and/or practice (CJEU C-677/20 No. 44). In the same spirit, Recital 18 of Directive 2001/86 formulates the following: it is a fundamental principle and stated aim of this Directive to secure employees' acquired rights as regards involvement in company decisions. Employee rights in force before the establishment of SEs should provide the basis for employee rights of involvement in the SE (the 'before and after' principle). Consequently, that approach should apply not only to the initial establishment of an SE but also to structural changes in an existing SE and to the companies affected by structural change processes.

In the present case, German law was at issue. The Act on Involvement of Employees in a European Company (*Gesetz über die Beteiligung der Arbeitnehmer in einer Europäischen Gesellschaft*) and the Act on Employee Participation (*Gesetz über die Mitbestimmung der Arbeitnehmer*) formed the decisive law.

Liechtenstein also has an Act on Involvement of Employees in a European Company (*Gesetz über die Beteiligung der Arbeitnehmer in der Europäischen Gesellschaft, SE-Beteiligungsgesetz*, SEBG, LR 216.222.2), which was adopted by implementation of Directive 2001/86/EC. An important provision in the present context is Article 45(3), which stipulates the following: if none of the participating companies had provisions on employee participation prior to the registration of the European company (SE), the European company is not required to introduce an agreement on employee participation. Although Liechtenstein is a small country with about 38 700 inhabitants, the commercial register shows that several European companies are registered in Liechtenstein (*liechtensteinisches Handelsregister*/*Zusätzliche Suchkriterien*/*Rechtsform*).

Unlike Germany, however, Liechtenstein does not have an Act on Employee Participation *('Mitbestimmung')* by which national statutory participation rights are established, but only an Act on Information and Consultation of Employees *('Mitwirkung') (Gesetz über die Unterrichtung und Anhörung der Arbeitnehmerschaft in den Betrieben, Mitwirkungsgesetz, MWG, LR 822.11)*. On the basis of this legal constellation, which clearly differs from the one in Germany, it is therefore not to be assumed that a case comparable to that which was the subject of the main proceedings under German law could arise in Liechtenstein.

4 Other Relevant Information

Nothing to report.

Lithuania

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

The decision has no implications for Lithuania as no analogous form of participation exists in Lithuania (as in the meaning of letter k) of Article 2 of the Directive). Therefore, trade unions have no statutory right to be represented in the management or administrative boards of private or public companies.

4 Other Relevant Information

Nothing to report.

Luxembourg

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

From a legal perspective, this decision could have implications for Luxembourg; in practice, it does not, however. There are situations in which trade unions influence the appointment of employee representatives to the decision-making bodies of a company, but at present, this only applies to one company.

In 1974 (Law of 6.5.1974), Luxembourg introduced a system whereby approximately 1/3 of the members of the board of directors (*conseil d'administration)* of a public limited company (*société anonyme*) are employee representatives. This system applies to limited companies which either have more than 1 000 employees or whose main activity is based on a state concession.

Normally, all of these employee representatives are elected by the staff delegation from candidates who must be company employees.

However, a derogation was introduced in the steel industry, which was of major economic importance at the time: the nationally representative trade unions can designate three of the board members to represent the employees (Article L. 426-5 al. 1 of the Labour Code).

The practical implications are very limited. Indeed, when the law was adopted in 1974, two companies were concerned. At present, only one company remains subject to this regime.

The Board of Directors of ArcelorMittal Luxembourg S.A. has 15 members, including three representatives appointed by the trade unions and two elected staff representatives. ArcelorMittal S.A. (parent company of the worldwide group), based in Luxembourg, has not had a trade union or employee representatives on its board since 2010.

A substantial difference with the case decided by the Court of Justice is that, unlike in German law, the trade unions in Luxembourg do not simply have the right to nominate candidates for election, but directly appoint the person who will hold the position of board member.

The reference in the judgment (§ 41) to Article 4 (2) lit. (g) of the Directive ('the employees will be entitled to elect, appoint, recommend or oppose') is therefore in principle not relevant for Luxembourg, since there is no election or appointment by the employees as union representatives.

Nevertheless, the reasoning is transposable to Luxembourg and if a (the) company subject to this regime wants to transform into an SE, it would have to maintain the principle that a certain proportion of the employees' representatives in the board of directors are appointed by the trade unions.

However, it will be very difficult to implement a system that complies with European law:

- The procedural elements established in Luxembourg law must be considered as forming part of 'all elements of employee involvement' within the meaning of Article 4 (4) of Directive 2001/86 (§ 39), and thus maintained;
- employees as well as trade unions in the subsidiaries and establishments must be treated equally.

In case C-677/20 originating from German law, one can easily find a solution; for example, each trade union could present a number of candidates that is proportionate to its representativeness within the SE. However, as already mentioned, in Luxembourg, trade unions directly designate the employees' representatives.

If we suppose, for example, that an SE originating from Luxembourg will cover five Member States, it is not clear whether this would mean that the trade unions in each Member State can appoint three members: thus, there would be 15 board members appointed by trade unions, in addition to those elected by the employees.

On the other hand, the basic principle is that employees' representatives should not represent more than 1/3 of the voices. If the shareholders have to appoint a sufficient number of board members to keep up with this ratio, company boards would end up having 40, 50, 60 members which, of course, is not feasible.

Another problem would arise from the fact that the number of three representatives to be appointed by trade unions is derived from the very specific situation that prevailed in Luxembourg in the 1970s where three national trade unions dominated the country (OGBL and LCGB for blue collar workers and FED for white collar workers). In the meantime, there are only two trade unions left that are representative in the industry sector (OGBL and LCGB). The law was never adapted, hence the designation is based on a gentlemen's agreement, the OGBL having more members than the LCGB.

In a nutshell, the system in place in Luxembourg cannot really be scaled to fit the situation of an SE covering multiple jurisdictions, without giving up at least some of its basic characteristics.

Whatever system will be negotiated, there will be discussions if it provides 'the same level' of involvement and if trade unions are treated equally.

But, as already mentioned, since these rules only apply to a single company, the likelihood that this issue will ever arise seems quite limited.

4 Other Relevant Information

Nothing to report.

Malta

Summary

(I) The legislator has introduced a presumption of employment status for digital platform workers.

(II) Directive (EU) 2019/1152 on transparent and predictable working conditions has been transposed into legislation.

1 National Legislation

1.1 Platform work

Malta regulates the conditions of employment of 'persons engaged to provide paid services consisting of the delivery of any consumer product' by means of Legal Notice 268 of 2022, namely Digital Platform Delivery Wages Council Wage Regulation Order, 2022.

The scope of the Wage Regulation Order (hereinafter 'Order') is

> *"to ensure that persons engaged to provide paid services consisting of the delivery of any consumer product, gain access to labour and social protection rights by ensuring that correct determination of their employment status, by promoting transparency, fairness and accountability in algorithmic management in respect thereof and by enhancing transparency, traceability and awareness of developments in relation to said activity (see* Regulation 1(2) of the Order*)".*

The key provision is Article 4(1) which states the following:

> "*When considering the employment status of a person performing digital platform work, it shall be presumed that an employment relationship exists and that the digital labour platform for which the platform work is being performed, or the work agency that assigns such persons to or places him at the disposal of any digital labour platform, as the case may be, is the employer and that the provisions of the Act and of the regulations or orders issued thereunder apply to that relationship*".

Article 4 (3) states that if the digital labour platform or work agency claims that the relationship with the person performing the digital platform work is not an employment relationship, the onus of proof shall lie on the actual digital labour platform or the work agency and it will have to provide evidence that it does not directly or indirectly control the performance of this digital platform work because it does not meet at least four of the following criteria in relation to the person performing the platform work:

a) the effective determination of, or stipulating the maximum limits of the level of remuneration;

b) the requirement that the person performing digital platform work respects specific binding rules with regard to appearance and conduct towards the recipient of the service or the performance of the work;

c) the supervision of the performance of the work or the verification of the quality of the results of the work, including by electronic means;

d) the effective restriction of the freedom, including through sanctions, to organise one's work, in particular the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks or to use sub-contractors or substitutes;

e) the effective restriction of the possibility to build a client base or to perform work for any third party.

Provided that, any proceedings relating to such claim shall not have a suspensive effect on the application of the legal presumption.

It is also interesting to note that the person performing digital platform work can also claim that the relationship is not an employment relationship. Indeed, Article 4(3) states that where the person performing digital labour platform work claims that the contractual relationship with the digital labour platform or the work agency, as the case may be, is not an employment relationship with the digital labour platform or the work agency, as the case may be, is not an employment relationship in accordance with sub-article (1), the digital labour platform or the work agency, as the case may be, shall be required to assist the proper resolution of the proceedings, primarily by providing all relevant information held by it. The determination of the existence or otherwise of such an employment relationship shall be established by the person performing digital platform work by the application of the criteria mentioned in sub-article (3). These criteria are the ones listed above.

The definition of 'platform worker' is the following:

> a) any person performing digital platform work who has entered into a contract of employment or an employment relationship or any other form of arrangement, irrespective of the contractual designation with any digital labour platform or multiple digital labour platforms and who is engaged, whether on a regular or irregular basis, to provide services consisting of the delivery of any product; and
>
> b) any person performing digital platform work who has entered into a contract of employment or an employment relationship or any other form of arrangement, irrespective of the contractual designation with a work agency and who is assigned to, or placed at the disposal of, whether on a regular or irregular basis, any digital labour platform or multiple digital labour platforms to provide services consisting of the delivery of any product (see Regulation 2(1)).

The Order also stipulates that a person who was considered to be performing services as a self-employed person for another person, whether prior to or at any time following the date of the entry into force of this Order, and is then found to be indeed an employee in terms of Article 4, as explained above, then that person shall be considered to have been engaged as an employee of the relevant digital labour platform for which he or she was providing platform work or the work agency, as the case may be (see Regulation 5(1)) and, as a consequence:

(a) Date of engagement shall be deemed to be the date of entry into force of the Order; (Article 5(2));

(b) The engagement shall be deemed to be indefinite and full time; (Article 5(3));

(c) The worker shall be paid a salary that is payable to a comparable employee and, in any case, not lower than the national minimum wage; (Article 6(1)(a))

(d) The same conditions of employment, including statutory bonuses, income supplements and general increase in wages granted by the government to all employees shall apply to the employment which shall not, in any case, be less than the minimum conditions of employment in accordance with the Law and shall apply to the digital platform workers; 6(1)(b);

(e) The workers shall also be entitled to all rights included in the Order (Article 6(1)(c).

The Order also specifies that the employer shall be responsible for providing appropriate and adequately safe vehicles at its own expense (see Article 7(1)), all costs relative to the road use of the vehicle such as insurance, licence fees, etc. (see Article 7(2)), and all equipment, materials and tools the platform workers is required to use to perform the platform work, such as mobile phones, internet or allowance to cover relative expenses (Article 7(5)), uniforms, tools, etc. (see Article 7 (3)).

The worker, on the other hand, shall be responsible for the safekeeping of the employer's property (see Article 7(4)) and shall not be entitled to refuse to perform delivery of any product as reasonably assigned, unless there is an objective ground (Article 6(2)).

The platform worker shall also be entitled to sick leave (see Article 9), overtime rates for time worked in excess of 40 hours (see Article 8), special leave such as bereavement leave (one (1) working day), marriage leave (two (2) working days), injury leave (up to one (1) year) and jury service as necessary (see Article 10).

The Order also stipulates that in situations where the employment status of a person is deemed to be one of employment in accordance with this Order, the employer shall be bound to give or send a letter of engagement or a signed declaration to the platform worker, which shall include the information listed in the Transparent and Predictable Worker Conditions Regulations (see above Legal Notice 267 of 2022) within seven (7) business days within the coming into force of the Order (see Article 15 (1)). The platform worker also has the right to resign and sue for unfair dismissal should he or she not agree with:

(a) Any of the conditions of employment listed in the letter of engagement or the signed declaration (see Article 15 (2)(a)); or

(b) The amount of wages proposed for the performance of work (which have to be in line with the Order, see Article 15(2)(b)).

The worker has the right to receive reasons in writing for differential treatment between what the Order actually provides and the worker's actual working conditions (see Article 16).

The Order also regulates automated decision making and seeks to ensure transparency by establishing a set of rights of and obligations for workers and employers, respectively (see Article 17-19).

The platform workers are also covered by the Employee (Information and Consultations) Regulations and the employer has the express obligation to provide information on consultations with the platform workers' official representatives, or where there are no such representatives, the platform workers directly on decisions that are likely to lead to the introduction of or substantial changes in the use of automated monitoring and decision-making systems referred to in the Order (see Article 20 (1)).

The Order also provides for protection against dismissal to enforce the rights of the workers, and states that any platform worker who is dismissed or is subject to measures with equivalent effect shall be regarded for the purposes of the Order as having been unfairly dismissed if the reason for dismissal is that the platform worker has exercised the rights provided for in the Order (see Articles 26 (1) and (2)). The onus of proof lies on the digital labour platform or work agency should the worker prove that he or she was dismissed, i.e. the digital labour platform or work agency would have to prove that he/she was not dismissed due to any reason related to the worker exercising his/her rights in terms of the Order (see Article 26).

1.2 Transparent and predictable working conditions

Malta has finally transposed Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union by means of Legal Notice 266 of 2022 entitled 'Transparent and Predictable Working Conditions Regulations, 2022' (hereinafter 'the Regulations').

The text transposes the Directive literally, with a few notable points.

First, zero-hours contracts are prohibited (see Article 11(1)) save for two exceptions):

(a) where the nature of the activity concerned requires the availability of replacement workers on short notice; and as long as the zero-hours contract is not the employer's main job (see Regulation 11(1)(a)); and

(b) where the worker is a full-time student (subject to all applicable laws, regulations and administrative or statutory provisions, see Regulation 11 (1)(b)).

Furthermore, notice periods relative to a work assignment must be reasonable which the Regulations state must not be less than:

(i) thirty (30) days for a work assignment with a duration of six (6) weeks or more;

(ii) fifteen (15) days for a work assignment with a duration of two (2) weeks and up to five (5) weeks;

(iii) seven (7) days for a work assignment with a duration of more than one (1) week and up to two (2) weeks; and

(iv) three (3) days for an assignment with a duration of between five (5) and seven (8) days; and

(v) one (1) day for an assignment with a duration of less than five (5) days.

Indeed, where a worker's work pattern is entirely or mostly unpredictable, the worker shall not be required to work by the employer unless two conditions are fulfilled:

1. The work takes place within predetermined reference hours and days as required by Regulation 5(1)(n)(ii); and

2. The worker is informed by his/her employer of a work assignment within a reasonable notice period as stipulated in Regulation 5(1)(n)(ii).

Regulation 5(1)(n)(ii) states

"if the work pattern is entirely or mostly unpredictable, the employer shall inform the worker of the reference hours and days on which the worker may be required to work".

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

Maltese law transposed Directive 2001/86/EC by means of Legal Notice 452 of 2004 and is codified as Subsidiary Legislation 452.94 entitled Employee Involvement (European Company) Regulations, 2002 (hereinafter 'SE Employee Involvement Regulations')

Regulation 8(1) states that the competent organs of the participating companies and the special negotiating body are required to negotiate in a spirit of cooperation with a view to reaching an employee involvement agreement. Regulation 8 (6) also states that in case an SE is established by means of transformation, the agreement shall provide for at least the same level of employee involvement as that which existed in the company to be transformed into an SE. Consequently, given that the provision is identical, it is clear that in cases in which the facts are similar or identical to those in the case at issue, the CJEU judgment will have the same implications and application in Malta. It does not appear that the SE Employee Involvement Regulations, 2004 precludes the application of the provisions of this judgment.

4 Other Relevant Information

Nothing to report.

Netherlands

Summary

The Supreme Court has ruled in the FNV/SiloTank case, after submitting preliminary questions to the CJEU that were addressed in case C-815/18, 01 December 2020, *Federatie Nederlandse Vakbeweging*.

1 National Legislation

1.1 Minimum wage

The September 2022 Flash Report reported on the Dutch government's plans to increase the minimum wage by 10.15 per cent on 01 January 2023. In the meantime, steps have been taken to effectuate these plans. On 03 October 2022, a decree to that effect was signed and published a few days later.

2 Court Rulings

2.1 Posting of workers

Supreme Court, ECLI:NL:HR:2022:1430, 14 October 2022, FNV/Silo-tank

The FNV/Silo-tank case is a protracted case in which the Dutch Supreme Court submitted preliminary questions to the CJEU. These questions have been addressed by the CJEU in case C-815/18, 01 December 2020, *Federatie Nederlandse Vakbeweging* (ECLI:EU:C:2020:976), then rectified in the decision of 02 February 2021 (ECLI:EU:C:2021:87).

The main questions were whether Directive 96/71/EC, the Posted Workers Directive, applies to a worker who works as a driver in international road transport and thus carries out his or her work in more than one Member State and, if so, whether the term 'collective agreements […] which have been declared universally applicable', as referred to in Article 3(1) and the first subparagraph of Article 3(8) of Directive 96/71, should be interpreted as an autonomous concept of EU law.

The first question was answered affirmatively by the CJEU, the second in the negative: the question whether or not a collective labour agreement is declared universally binding must be answered by national law.

The Supreme Court applied these findings to the present case. This means that the decision of the Court of Appeal of Den Bosch, ECLI:NL:GHSHE:2017:1873, 02 May 2017, which was appealed against in cassation, was overthrown. The case has now been referred back to the Court of Appeal of Arnhem-Leeuwarden.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

If national law contains a provision stipulating a separate ballot for the election of employees' representatives in the Supervisory Board of the company that is to be transformed into an SE, this provision falls within the scope of Article 4 (4) of Directive 2001/86/EG. This means that the agreement on employee representation within that SE should contain a provision that safeguards the position of employees' representatives in the Supervisory Board.

The Dutch legal system does not contain a similar provision to the one at stake in the IG Metall case. The role of employees' representatives in the composition of a Supervisory Board is far more limited in the Netherlands.

- In a public or private limited company that falls under the structural regime, there is a role for the works council when electing a new member of the Supervisory Board. If the structural regime applies, the works council has several rights with respect to the appointment or dismissal of members of the Supervisory Board, all laid down in Article 2:158/268 DCC. In case of a one tier board, the same system applies with respect to the non-executive members of the board. The works council has an enhanced recommendation right for one-third of the supervisory board (with a minimum of one member). In addition to the enhanced recommendation right, the works council also has a regular recommendation right. The works council has the right to be consulted with respect to the drafting and amendments of the Supervisory Board profile that must be prepared by the Supervisory Board itself.
- In a public limited company ('NV'), regardless of the structural regime that applies, the works council has the right to express its opinion and clarify that opinion in the general meeting of shareholders on the appointment, suspension and dismissal of members of the Supervisory Board (Article 2:144a DCC).

'The structural regime' means that a public or private limited company meets the following three cumulative criteria (Article 2:152 et seq DCC and Article 2:262 et seq DCC):

i. the company's issued capital should be equal to at least EUR 16 million;

ii. the company has, pursuant to the WCA, established a works council either at the level of central management or at the subsidiary level, and

iii. the company should employ more than 100 persons in total within the Netherlands.

The IG Metall case implies that if such a company is transformed into an SE company, the agreement on arrangements for the involvement of employees should contain provisions that safeguard that the works council enjoys the above-described rights.

4 Other Relevant Information

Nothing to report.

Norway

Summary

The Supreme Court has ruled that the rules on maximum total duration of successive temporary appointments do not apply to fixed-term contracts based on Section 10-6 of the Education Act.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Fixed-term work

Supreme Court, HR-2022-2049-A, 25 October 2022

The case concerned a woman who had held several temporary positions in a municipality. The basis for her fixed-term contracts was Section 10-6 of the Education Act. This provision states that teaching staff without approved education can be employed temporarily if there are no applicants who meet the formal qualification requirements. The employee claimed that she had the right to a permanent position according to the rules of the Working Environment Act (WEA) Section 14-9 (7) which, among others, states that employees who have been temporarily employed for more than three consecutive years pursuant to WEA Section 14-9 (2) (a), (b) or (f), shall be deemed to be permanently employed.

The WEA applies to the education sector, and the question was whether the three-year rule in WEA Section 14-9 (7) also applied to fixed-term contracts entered into according to Section 10-6 of the Education Act. On the basis of internal legal sources, in particular the wording of WEA Section 14-9 (7) and the preparatory works to the Education Act and the Working Environment Act, the Supreme Court held that the three-year rule did not apply to temporary employment according to Section 10-6 of the Education Act.

The Supreme Court also assessed whether Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-term Work concluded by ETUC, UNICE and CEEP could lead to another result. The Court's conclusion was negative. The Court held, based on CJEU case law from the CJEU, that the quality of teaching, which is the background for teachers' competence requirements, was an objective reason that could justify repeated use of temporary employment contracts.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

The rules on employees' rights to representation in governing bodies of companies are stipulated in the Act relating to limited liability companies of 13 June 1997, No. 4 and the Act on Norwegian public limited liability companies of 20 June 1997, No. 45 and supplementing regulations. The employees, if certain conditions are met, have the right to representation in the board of a limited company and in the corporate assembly (No: *bedriftsforsamlingen*), or alternatively, the board of a public limited company.

The employees' representatives in the Supervisory Board or corporate assembly are elected by and among the employees, cf. the representation regulations (FOR-2017-08-24-1277) Section 7 and 25. Both employees and trade unions have the right to nominate

candidates. There is, however, no exclusive right for trade unions to nominate a certain number of representatives, and the ballot will comprise all nominated candidates.

The employees' right to representation in SE-companies is regulated in separate regulations (FOR-2005-04-01-273). A special negotiation body shall be established (Section 4), and this body and the participating companies shall agree on the employees' right to representation in the SE company. The regulations contain a specific provision on the agreement reducing the employees' representation (Section 3). What the agreement shall contain is further regulated in Section 8. It is expressly stated here that in the case of an SE established by means of a transformation, the agreement shall, as described in Council Directive 2001/86/EC, Article 4, provide for at least the same level of all elements of employee involvement as that existing within the company to be transformed into an SE.

Norwegian legislation does not seem to be contrary to the CJEU's conclusion in case C-677/20. The guidelines described by the CJEU on the interpretation of the Directive will, however, be relevant and clarify what the parties can agree upon when it comes to employee representation in an SE company that is established by means of transformation.

4 Other Relevant Information

Nothing to report.

Poland

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing report.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

In Poland, Directive 2001/86 has been transposed into the Law of 04 March 2005 on the European Economic Interests' Grouping and the European Company (Journal of Laws 2022, item 259).

Under Article 65 item 1 of the Law, where employees of the company or undertaking that are to become a part of a European company are employed in Poland by the same employer, the members of a special negotiating body should be designated by the workplace trade union organisation, representative under Article 25 of the Law on Trade Unions. According to this provision, the representative workplace trade union organisation is the organisation which is the unit of the supranational trade union organisation that is representative under the Law on Social Dialogue Council, has at least 8 per cent of individuals who perform paid work at the given employer; or the organisation which has at least 15 per cent of individuals who perform paid work at the given employer. If none of the trade union organisations meets these criteria, the representative workplace trade union is the one that has the highest number of persons who perform paid work at the given employer. The trade unions may also create common representation of employees. The Law of 23 May 1991 on trade unions (Journal of Laws 2022, item 854). Where there is no such trade union organisation, members of a special negotiating body should be elected at the meeting of the staff.

Where at the same employer there is more than one representative workplace trade union organisation, they should jointly indicate the members of the special negotiating body (item 2). The competent organ of the company indicates the deadline to designate the members of a special negotiating body in accordance with the abovementioned procedure (item 3).

Where the agreement between the representative workplace trade union organisations mentioned in item 2 has not been reached, the members of the special negotiating body should be elected at the meeting of the staff from among the candidates proposed by the representative workplace trade union organisations. Where the candidates have not been proposed by the trade unions, the members of the special negotiating body should be elected at the meeting of the staff (item 4).

Members of the special negotiating body can be designated from among the members of a trade union organisation that is representative under the Law on Social Dialogue Council, who are not employees of the given company or undertaking, and who are recommended by such an organisation (item 5). The majority of a special negotiating

body should consist of the employees of the involved companies or undertakings (item 6). Trade union organisations mentioned in item 5 may delegate their representatives to participate in the procedure to elect the members of the special negotiating body (item 7).

Article 83 of the Law provides that at the European company established by means of transformation, the level of employee involvement as determined by the agreement cannot be less advantageous than the level of employee involvement in the company that has been the subject of transformation.

Under Article 90 of the Law, the members of the supervisory board who represent employees employed in Poland should be elected in the manner determined by Article 65 and other provisions of the Law that concern the special negotiating body.

Thus, under Polish law, representative trade unions have the right to designate the members of a special negotiating body, and those members of the European company's Supervisory Board who represent employees. Where there are no trade unions at the company, or where they have not acted, employee representatives should be elected by the employees employed at the given undertakings. Such a scheme reflects the assumptions of Polish collective labour law, which is primarily based on workplace trade union organisation(s), and gives priority to trade unions as employee representatives.

Unlike under German law, as analysed by the CJEU, there is no separate ballot procedure that would be applicable to employee representatives in the European company. There is no difference in the election procedure prior and after the transformation of the European company. Moreover, Article 83 of the Law reflects Article 4(4) of Directive 2001/86. The regular procedure to elect members of special negotiating bodies and employee representatives in a European company's Supervisory Board seems to meet the requirements of Directive 2001/86, as interpreted by the CJEU in case C-77/20, 18 October 2022, and there is no need to amend the national legislation in force.

4 Other Relevant Information

Nothing to report.

Portugal

Summary

The Oporto Appeal Court ruled on the concept of transfer of an economic unit.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Transfer of undertakings

Ruling of the Oporto Appeal Court, No. 1340/21.0T8PNF.P, 03 October 2022

In the present case, the Oporto Appeal Court ruled that no transfer of an economic unit had taken place under Article 285 of the Portuguese Labour Code (which transposed Directive 2001/23/EC into national law) when a company ceases to provide surveillance and security services for a given customer, following the contracting by that customer of the referred services to another company, without the transfer of any employees from the previous company, nor any transfer of goods or equipment for the activity's performance. The Court explained that in such surveillance and security companies, which are essentially based on the human factor, the transfer of an economic unit must be measured by the appropriation of the alleged 'acquirer', in quantitative and qualitative terms, of know-how, special knowledge, skills and organisational techniques, valuable and differentiated working methods, which did not occur in the present case.

Consequently, the Court concluded that if the transfer of an economic unit did not take place, the communication addressed by the employer to the employee (informing the employee that the respective employment contract would be automatically transmitted to the entity that would succeed the referred service provision) should be considered an unlawful dismissal under Portuguese labour law.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

The present case concerned the interpretation of Article 4 (4) of Directive 2001/86/EC of 08 October 2001, supplementing the Statute for a European company (SE) with regard to the involvement of employees.

Pursuant to that provision, in the case of an SE established by means of transformation, the agreement on arrangements for the involvement of employees within the SE must provide for at least the same level of all elements of employee involvement as those existing within the company to be transformed into an SE.

In the present case, the CJEU analysed whether, according to Article 4 (4) of Directive 2001/86/EC, the agreement on arrangements for the involvement of employees applicable to an SE established by means of transformation must provide for a separate ballot with a view to electing, as employees' representatives within the SE's Supervisory Board, a certain proportion of candidates nominated by the trade unions, where the applicable law (in this case, the German law) requires such a separate ballot as regards the composition of the Supervisory Board of a company to be transformed into an SE.

The CJEU explained that, if a procedural element established by national law as, in the present case, the separate ballot for the election of candidates nominated by trade unions to a defined number of seats on a company's Supervisory Board, constitutes an element that characterises the national system of participation of employees' representatives, introduced with a view to strengthening employee participation in the undertaking, and if that legislation makes it mandatory in nature, that procedural element must be regarded as forming part of 'all elements of employee involvement' within the meaning of Article 4(4) of Directive 2001/86. That procedural element must be taken into account for the purposes of the agreement on the arrangements for involvement referred to in that provision.

With this provision, EU law sought to eliminate the risk that the establishment of an SE by means of transformation might lead to a reduction of the rights regarding involvement that the employees of the company to be transformed into an SE have under national law and/or practice. Apart from the preservation of employees' acquired rights in the company to be transformed into an SE, EU legislation also implies the extension of those rights to all employees of the SE, which means that all employees of the SE established by means of transformation must enjoy the same rights as those which the employees of the company to be transformed into an SE enjoyed.

Therefore, the CJEU ruled that the said Article 4(4) of Directive 2001/86 must be interpreted as meaning that the agreement on arrangements for the involvement of employees applicable to an SE established by means of transformation must provide for a separate ballot with a view to electing, as employees' representatives within the SE's Supervisory Board, a certain proportion of candidates nominated by the trade unions, where the applicable law requires such a separate ballot as regards the composition of the Supervisory Board of a company to be transformed into an SE, and it is necessary to ensure that, in the context of that ballot, the employees of that SE, of its subsidiaries and of its establishments are treated equally and that the trade unions represented therein are treated equally.

Directive 2001/86/EC was transposed into Portuguese law by Decree law No. 215/2005, of 13 December. Article 16 (2) of this decree law envisages that in the case of an SE established by means of transformation from a company in which there is a system for employee participation, the agreement must establish a system at least identical to the previous one.

This recent ruling of the CJEU contributes to the interpretation of Article 4 (4) of Directive 2001/86/EC as well as of the national law that transposed such provision, in particular Article 16 (2) of Decree law No. 215/2005. In any case, we do not anticipate that this ruling will have practical implications for Portugal, considering that the participation of employees' representatives in the governing bodies of private companies is very residual, as it is not mandatory under Portuguese law, depending on a voluntary agreement between the company and the employees/trade unions, which is unusual in practice.

4 Other Relevant Information

4.1 Amendments to labour law

The Proposal of Law No. 15/XV/1, containing several changes to the labour legislation, was presented to the Portuguese Parliament by the government on 06 June 2022 (see July 2022 Flash Report). The legislative procedure is ongoing, and the proposal will likely be voted (and approved) by Parliament in coming months.

4.2 Agreement between the government and the social partners

On 09 October 2022, the government and social partners (namely the employers' associations of industry, agriculture, tourism and commerce and services, as well as the trade union confederation 'UGT') signed a medium-term agreement on the improvement of incomes, wages and competitiveness that states four objectives to be pursued until 2026: i) to rebalance the weight of wages in national wealth, ii) to strengthen the competitiveness of companies, iii) to retain young talent, and iv) to support families and companies to deal with the crisis.

This agreement contains some employment-related objectives/measures:

(i) The objective of ensuring an increase in the average income per worker of 20 per cent between 2022 and 2026; to achieve this objective, it is estimated that a nominal appreciation of wages per worker of 4.8 per cent on average will be necessary annually between 2023 and 2026;

(ii) The objective of reaching a minimum national wage of at least EUR 900 in 2026;

(iii) Creation of an annual programme to support the permanent hiring of qualified young people;

(iv) Creation of an incentive to return long-term unemployed people to the labour market;

(v) Increase in the remuneration for overtime work rendered over 100 hours, in the following terms: (a) from 25 per cent to 50 per cent in the first hour or fraction thereof; (b) from 37.5 per cent to 75 per cent in the subsequent hour or fraction thereof on a working day; and (c) from 50 per cent to 100 per cent for each hour or fraction thereof on a weekly rest day or public holiday;

(vi) Increase of the compensation for termination of the employment contract to 14 days (instead of the currently 12 days) of the base remuneration per year of seniority in case of collective dismissal or dismissal by redundancy of the job position.

Romania

Summary

The Labour Code has been amended to transpose the Directive on Work-life Balance and the Directive on Transparent and Predictable Working Conditions.

1 National Legislation

1.1 Implementation of EU Directives

Law No. 283 of 17 October 2022 amending and supplementing Law No. 53/2003 - Labour Code, as well as Government Emergency Ordinance No. 57/2019 regarding the Administrative Code, published in the Official Gazette No. 1,013 of 19 October 2022, introduced substantial changes to the regulation of labour relations. The main object of the changes is the transposition of Directive 2019/1152 on Transparent and Predictable Working Conditions in the European Union and Directive 2019/1158 on Work-life Balance for parents and carers.

Thus, the information the employer is required to provide to the candidate shall include, in addition to the information already mentioned in the Labour Code, all the components of remuneration or the conditions regarding professional training offered by the employer. In the case of mobile workers, express mention will be made about the extent to which the employer will provide or address travel between workplaces.

In terms of working time, the employment contract shall expressly stipulate the conditions for the performance and compensation of overtime and the ways of organising shift work. The new law incorporates the definition of the work schedule and the work organisation model from Directive 2019/1152.

An employee who has completed his/her probation period and who has been with the same employer for at least six months has the right to request a transfer to a vacant position that provides him/her 'with more favourable working conditions' (while Directive 2019/1152 provides in Article 12 the employee's right to request a form of employment 'with more predictable and secure working conditions'). There is no provision limiting the frequency of requests initiating this obligation. The employer must provide reasons, in writing, within 30 days of receiving the request.

The new law, in the transposition of Article 9 of Directive 2019/1152, prohibits parallel employment at different employers, if the work schedule overlaps fully or partially.

The Romanian legal system does not regulate the possibility of an unpredictable work organisation model, therefore, the provisions of Article 10 of Directive 2019/1152 have not been transposed. Likewise, in the absence of the possibility of concluding on-demand employment contracts, the provisions of Article 11 of the Directive were not transposed.

On the other hand, the bans on dismissal were taken verbatim from the Directive, which was unnecessary, considering that the Romanian legal system already strictly regulates and limits the reasons for which an employee can be dismissed.

In the case of employment relationships not based on an employment contract, the worker will be informed, among other things, about the type of work (brief description), the rights and conditions for professional training offered by the employer. Such rules will apply, for example, to day labourers and interns.

In the transposition of Directive 2019/1158, the employee's right to requests for flexible working arrangements is enshrined, with the obligation of the employer to provide a justified answer within 5 working days of receiving the request.

The carer's leave is limited to a maximum of 5 working days per year, and entitles the employee to provide care or personal support to a relative or a person who lives in the

same household who has a serious medical problem. The rules for implementing the law have not yet been adopted, but from what has been provided so far, it does not appear that it would be a type of paid leave. In addition, the employee has the right to be absent for a maximum of 10 days per year in unforeseen situations, determined by a family emergency caused by illness or accident, which make the immediate presence of the employee indispensable, provided that the employer is informed in advance. The parties will agree on how the missing days can be counterbalanced; misunderstandings between the parties may generate new types of labour conflicts.

In the calculation of rest leave, the following is considered (in addition to the previous regulation): paternity leave, carer's leave and time off in case of a family emergency. Therefore, not only leaves granted on the basis of a medical certificate are now considered.

Article 5 (2) of Directive 2019/1158 has not yet been transposed; Romanian legislation still provides for a duration of only one month for the non-transferable period of parental leave.

Instead, the provisions on equal treatment and protection against victimisation were introduced, although such rules already existed.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

Government Decision No. 187/2007 on the procedures for information, consultation and other ways of involving employees in the activity of European companies, published in the Official Gazette of Romania No. 161 of 07 March 2007, transposed Directive 2001/86/EC into Romanian law, supplementing the Statute for a European company with regard to the involvement of employees. The government's decision stipulates that the members of the special negotiation group are appointed by the legally established trade union organisations. If there are no such trade union organisations, the members of the special negotiation group are appointed by the employees' representatives or, in the absence of these representatives, by the vote of the majority of the Romanian employees of the SE.

According to Romanian law, the methods of involvement of the representatives do not include their right to participate in the Supervisory Board of a company. As a result, the issue of reduction of the participation of union representatives in the composition of the Supervisory Board following the transformation of a Romanian company into an SE does not arise.

4 Other Relevant Information

Nothing to report.

Slovakia

Summary

An Act implementing Directive (EU) 2019/1152 on transparent and predictable working conditions and Directive (EU) 2019/1158 on Work-life Balance has been adopted.

1 National Legislation

1.1 Implementation of EU Directives

On 04 October 2022, the National Council of the Slovak Republic (Parliament) approved the Act amending Act No. 311/2001 Collection of Laws (Coll.) The Labour Code, as amended, and which amends some acts. The aim of the approved Act is mainly to transpose Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union and Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.

Within the approved Act, a total of 8 acts have been amended:

- Act No. 311/2001 Coll. Labour Code, as amended (Part I of the Act);
- Act No. 73/1998 Coll. on civil service of members of the Police Force, of the Slovak Intelligence Service, of the Prison Wardens and Judiciary Guards Corps of the Slovak Republic and of the Railway Police, as amended (Part II of the Act);
- Act No. 315/2001 Coll. on the Fire Fighting and Rescuing Corps, as amended (Part III of the Act);
- Act No. 461/2003 Coll. on social insurance as amended (Part IV of the Act);
- Act No. 571/2009 Coll. on parental allowance and on the amendment of some acts, as amended (Part V of the Act);
- Act No. 281/2015 Coll. on civil service of professional soldiers, as amended (Part VI of the Act);
- Act No. 55/2017 Coll. on civil service and on amendments to certain acts, as amended (Part VII of the Act);
- Act No. 35/2019 Coll. on financial administration and on amendments to certain acts, as amended (Part VIII of the Act).

The amendment introduced a whole series of changes, especially in the Labour Code. Among the most important are the following changes.

Elements of the employment contract

The previous wording of Article 43 of the Labour Code regulated the so-called essential elements of the employment contract (paragraph 1), regular elements of the employment contract (paragraph 2), and incidental components (paragraph 3). In view of the transposition of EU Directive 2019/1152, as well as the incompletely defined link between Article 43 (content of the employment contract) and Article 44 (written information on working conditions) and other provisions of the Labour Code, it was proposed to clarify these rules.

According to the new wording of Article 43 paragraph 2 of the Labour Code, if the wage conditions according to paragraph 1 letter d) agreed in a collective agreement in the employment contract, it is sufficient to refer to the relevant provisions of the collective

agreement, otherwise it is sufficient to refer to the relevant provisions of this Act or a special regulation.

If the wage conditions are not agreed in the employment contract and the provisions of the collective agreement referred to in the employment contract have expired, the wage conditions agreed in the collective agreement are considered the wage conditions agreed in the employment contract until new wage conditions are agreed in the collective agreement or in the employment contract, but no more than 12 months (Article 43 paragraph 3 of the LC).

According to the new wording of Article 44 of the Labour Code, other conditions that the employer and employee are interested in, especially other material benefits, can be agreed upon in the employment contract (paragraph 1). The provisions of the employment contract or other agreement between the employer and the employee are invalid,

a) by which the employee undertakes to maintain confidentiality about his/her working conditions, including wage conditions and employment conditions,

b) which prohibit the employee from performing other gainful activities outside the working hours specified by the employer; this does not affect the limitation of other gainful activity according to § 83 or according to special regulations (Article 44 paragraph 2 of the LC).

A new Article 44a was inserted after Article 44, entitled 'Necessities of the employment contract and written information from the employer when performing work outside the territory of the Slovak Republic'. According to Article 44a paragraph 1, if the place of work is outside the territory of the Slovak Republic, the employer shall also agree with the employee in the employment contract:

a) the place of work in the state or states outside the territory of the Slovak Republic,

b) period of work in the state or states outside the territory of the Slovak Republic.

According to Article 44a paragraph 2, if the place of work is outside the territory of the Slovak Republic, the employer is required to provide the employee with written information at least to the extent of the following information, if it is not included in the employment contract:

a) the currency in which the wage or part of it will be paid,

b) information on other payments connected with the performance of work in the state or states outside the territory of the Slovak Republic in money or in kind,

c) information on whether the employee's repatriation is ensured and what conditions apply.

The employer shall provide information according to paragraph 2 before the employee leaves to perform work in a country outside the territory of the Slovak Republic (Article 44a paragraph 3). The employer is not required to provide information according to paragraph 2, if the period of work in the state or states outside the territory of the Slovak Republic does not exceed four consecutive weeks (Article 44a paragraph 4). The provision of information pursuant to paragraph 2 shall not affect Article 47a (Article 44a paragraph 5).

Working and employment conditions

The new Article 38a (form of providing information) and Article 47a (information about working conditions and employment conditions) were inserted into the Labour Code.

According Article 38a, the employer shall provide the employee with information which, according to this Act or other labour law regulations, is provided in written form, in documentary form; the employer can provide this information in electronic form, if the

employee has access to the information in electronic form, he/she can save and print it, and the employer will keep a document of its sending or receipt, unless this Act or a special regulation provides otherwise. The same applies to the employer's written response if the employer is required to respond to the employee in writing.

According to Article 47a paragraph 1, the employer is required to provide the employee with written information about his/her working conditions and terms of employment, at least to the extent of the following data, if the employment contract does not contain them:

a) the method of determining the place of performance of work or the determination of the main place of performance of work, if several places of performance of work are agreed upon in the employment contract;

b) established weekly working hours, information on the method and rules for scheduling working hours, including expected working days and the compensation period according to Article 86, Article 87 and 87a, the scope and time of the provision of a break at work, continuous daily rest and continuous rest periods during the week, work rules on overtime, including a wage discount for overtime work;

c) the amount of leave or method of determining it;

d) wage maturity and wage payment, including payment dates;

e) the rules for termination of employment, the length of the notice period or the method of determining it, if it is not known at the time of providing the information, the deadline for filing a lawsuit to determine the invalidity of the termination of employment;

f) the right to professional training provided by the employer, if provided, and its scope.

According to Article 47a paragraph 2, the employer shall provide the employee with information pursuant to paragraph 1:

a) within seven days from the beginning of the employment relationship, if it concerns information according to paragraph 1 letter a), b) and d),

b) within four weeks from the beginning of the employment relationship, if it concerns information according to paragraph 1 letter c), e) and f).

If the expected duration of the employment relationship is shorter than the period according to paragraph 2, the employer shall provide the employee with the information according to paragraph 1 before the end of the employment relationship, at the latest (Article 47a paragraph 3). The employer may provide the information according to paragraph 1 in the form of reference to the relevant provision of this Act or a special regulation or to the relevant provision of the collective agreement (Article 47a paragraph 4). If the working and employment conditions are governed by a collective agreement, part of the written information according to paragraph 1 also includes the designation of the relevant collective agreement and its contractual parties (Article 47a paragraph 5).

The amendment to the Labour Code also regulates changes of the notified working and employment conditions. According to the new Article 54c, the employer is required when changing working and employment conditions specified in Article 47a paragraph 1, and when changing the information specified in Article 44a paragraph 2 (see above) and Article 54b paragraph 2 (see below) provide the employee with written information about the changed working and employment conditions and about the changed data without undue delay, but no later than on the day the change takes effect; this does not apply if the change consists only of a change in a legal regulation or a collective agreement to which the written information refers.

When changing the place of work to a state other than the state in which the employee usually works, Article 44a also applies (Article 54a).

The new Article 54b regulates in detail (paragraphs 2 – 6) the provision of relevant information about the change of working and employment conditions due to posting to perform work in the provision of services on the territory of another Member State of the European Union.

Prohibition of limitation of other earnings

Only in the case of direct competitive activity will it be necessary to request the employer's consent. According to the new Article 13 paragraph 6, the employer may not prohibit the employee from performing other gainful activities outside of the working hours specified by the employer; this does not affect the limitation of other gainful activity according to Article 83 or according to special regulations.

According to Article 83 paragraph 1, an employee may perform another earning activity that may be in competition with their employer's activity only with prior written consent of their employer. If the employer does not respond within 15 days of submission of the employee's request, the employer shall be deemed to have granted its consent. The employer's consent pursuant to paragraph 1 is not required for the performance of scientific and pedagogical activities, journalism, tutoring, lecturing and literary and artistic activity – paragraph 3.

Predictability of work

The amendment inserted a new Article 233a into the Labour Code, 'Minimum predictability of work'.

According to Article 223a paragraph 1, the employer is required to provide the employee when concluding an agreement on the temporary work of students or an agreement on work activity, written information about

a) days and time periods during which the employee may be required to perform work,

b) the period in which the employee is to be informed about the performance of work before it commences, which must not be shorter than 24 hours.

When changing the information specified in paragraph 1, the employer is required to provide the employee in writing about the changed information no later than the day the change takes effect (Article 223a paragraph 2). The employee is not obligated to perform the work if the employer requires performance of work contrary to the written information according to paragraphs 1 and 2 (Article 223a paragraph 3).

If the employer cancels the performance of work within a period that is shorter than the period of notification pursuant to paragraph 1 letter b) or according to paragraph 2, the employee is entitled to compensation of the remuneration he/she would have earned if he/she had carried out the work, in the amount of at least 30 per cent of the remuneration (Article 223a paragraph 4).

According to Article 223a paragraph 5, paragraphs 1 to 4 shall not apply if:

a) the employer proceeds according to Article 90 paragraphs 4 and 9,

b) the employer agrees with the employee that the employee shall schedule his/her own working time, or

c) the average weekly working time does not exceed three hours over a period of four consecutive weeks.

Deductions from wages

According to the new letter j/ in Article 131 paragraph 2

> *"After making the deductions specified in paragraph 1, the employer may only deduct the following from the remuneration:*
>
> *j/ unbilled advances for the employer's contributions for food or for a purpose-linked financial allowance for food".*

Documents from the employer

According to Article 38 paragraph 2:

> *"Documents delivered using a postal company shall be dispatched by the employer to the last known address of the employee, using mail service with notification of delivery "to his/her own hands.""*

The amendment inserted into Article 38 paragraph 2 the sentence "*The employer may not specify a collection period of less than ten days for the delivery*."

This Act entered into force on 01 November 2022.

1.2 Paternity leave

The biggest novelty introduced by the amendment to the Labour Code is the new paternity leave. In this context, Act No. 461/2003 Coll. on social insurance as amended (Part IV of the Act) and Act No. 571/2009 Coll. on parental allowance and on the amendment of some acts, as amended (Part V of the Act) were also modified.

Above Article 166 of the Labour Code, a new heading has been inserted 'Maternity leave, paternity leave and parental leave'.

According to Article 166 paragraph 1 last sentence:

> *"In connection with the care of a new-born child, a man is entitled to paternity leave of 28 weeks from the day of the child's birth, a single man is entitled to 31 weeks and in case of the birth of two or more children, to 37 weeks*.".

Paternity leave was also added in Article 48 paragraph 4 letter a):

> *"A further extension or renegotiation of the employment relationship for a certain period of up to two years or more than two years is possible only possible to*
>
> *a) represent an employee during maternity leave, paternity leave, parental leave, leave immediately following maternity leave, paternity leave or parental leave, temporary incapacity for work or for an employee who has been released for a long time to perform a public function or trade union function".*

Article 166 paragraph 3 was also supplemented: A woman and a man shall give their employer at least one month's notice in advance of the expected date of commencement of maternity leave, paternity leave and parental leave, the expected date of suspension, termination and any changes related to the commencement, suspension, and termination of maternity leave, paternity leave and parental leave.

Due to the new paternity leave, the protection of employees against dismissal was also adjusted. According to the new wording of Article 64 paragraph 1 letter d), an employer may not give a notice to an employee during a protected period, which means that:

> d) within the period of the female employee's pregnancy, when a female employee is on maternity leave, in the period from the announcement of the expected date of commencement of paternity leave according to Article 166 paragraph 3 by the employee, but no earlier than six weeks before the expected date of childbirth, until the end of paternity leave, during the period a female or

male employee is on parental leave, or when a single female or male employee takes care of a child under the age of three.

Paternity leave was also added to Article 64 paragraph 3 letter a) point 2, as well as to letter b) and letter c).

According to the new wording of Article 68 paragraph 3

> *"An employer cannot immediately terminate the employment relationship with a pregnant employee, a female employee on maternity leave, an employee on paternity leave or a female or male employee on parental leave, with a single female or male employee caring for a child younger than three years of age, or with an employee who personally cares for a person who is close and suffers from a severe disability."*

An employer may, however, terminate an employment relationship with such an employee by giving notice, except to a female employee on maternity leave and a male employee on paternity leave, for reasons stipulated in paragraph 1.

1.3 Fixed-term work

According to the new wording of Article 45 paragraph 2, the agreed probation period for an employee with a fixed-term employment relationship may not be longer than half of the agreed duration of the employment relationship; the provision of paragraph 1 is not affected by this.

According to Article 45 paragraph 1, a probation period may be agreed in an employment contract for a maximum of three months, except in the case of an executive employee who reports directly to the statutory body or a member of the statutory body, as well as in the case of an executive employee, where the maximum shall be six months. A probation period may not be extended.

Transition to another form of employment

According to the new Article 49b paragraph 1, the employer must provide a written, reasoned answer within one month from the date of submission of the application by an employee with a fixed-term employment relationship or with a short-time employment relationship, whose employment relationship lasts more than six months and whose probation period has expired, requesting to switch to an employment relationship of indefinite duration or to establish weekly working hours; this also applies to any further employee application submitted no earlier than 12 months after the previous application was submitted. An employer who is a natural person and an employer who employs less than 50 employees is required to respond to the request according to the first sentence no later than three months from the date of submission of the request, and in the case of a repeated request, may provide an answer in oral form if the justification for the response has not changed.

For the purposes of paragraph 1, the duration of the previous employment relationship is also included in the duration of the employment relationship for a certain period, if it is a renegotiated employment relationship for a certain period (Article 49b paragraph 2).

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

In the Slovak Republic (hereafter SR), the creation of a European company is legally regulated by Act No. 562/2004 Coll. on the European Company and on amendment of certain acts as amended. Other forms of Slovak commercial companies are regulated by Act No. 513/1991 Coll. Commercial Code as amended. Currently, it is only possible to establish a European joint-stock company in the SR, other European companies are not allowed to be established according to Slovak legislation.

For cross-border mergers or cross-border fusions of companies, the provisions on mergers or fusions of joint-stock companies and, in the case of a cross-border fusion, the result of which is a successor company based in the territory of the Slovak Republic, the provisions on the establishment of the given legal form of a commercial company (Article 69aa paragraph 10 of the Act No. 513/ 1991 Coll. Commercial Code).

The agreement on the method and extent of participation of the employees of the SE is concluded by a special negotiating body with the relevant management body of the participating companies. The essential details of the agreement on the manner and extent of participation of the SE's employees are being adjusted. The level of all components of the participation of the employees of the SE established by the change of the legal form from a joint-stock company must not be reduced.

According to Article 42 of Act No. 562/2004 Coll. the agreement on the method and extent of participation of the employees of the European company is concluded by a special negotiating body with the relevant management bodies of the participating companies. The agreement on the method and extent of participation of the employees of the European company must be concluded in writing and contain, in particular, facts stated in letters a) to g).

In connection with the judgment of the Court is the key provision of Article 42 paragraph 5 of Act No. 562/2004 Coll. According to this provision, the agreement on the method and extent of participation of employees of an SE, which should be or was established by changing the legal form from a joint-stock company, must ensure at least the same level of all forms of participation of employees of the SE in the management of the SE as it exists in a joint-stock company in which the legal form is to be or has been changed.

4 Other Relevant Information

Nothing to report.

Slovenia

Summary

The government and public sector trade unions have reached an agreement on a pay raise in the public sector, which has been transposed into law.

1 National Legislation

1.1 Pay raise in the public sector

On 25 October 2022, the National Assembly passed the Amendments to the Public Sector Salary System Act (*'Zakon o spremembah in dopolnitvah Zakona o sistemu plač v javnem sektorju (ZSPJS-AA)'*, Official Journal of the Republic of Slovenia (OJ RS) No. 139/22, 02 November 2022; the consolidated text of the Public Sector Salary System Act can be found here) which transpose the agreement between the government and public sector trade unions on a pay raise in the public sector into law (see below under 4.2).

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

This CJEU judgment concerned Article 4(4) of Directive 2001/86/EC (involvement of employees in a European company – Societas Europea (SE)). The CJEU decided that the agreement on arrangements for the involvement of employees applicable to an SE established by means of transformation must provide for a separate ballot with a view to electing, as employees' representatives within the SE's Supervisory Board, a certain proportion of candidates nominated by the trade unions, where the applicable national law (in this particular case, German law) requires such a separate ballot as regards the composition of the Supervisory Board of the company to be transformed into an SE, and it is necessary to ensure that in the context of that ballot, the employees of that SE, of its subsidiaries and of its establishments are treated equally and that the trade unions represented therein are treated equally.

This case is of no particular relevance for Slovenian law, since there is no such provision in Slovenian law similar to the respective German rules reviewed in this case, which would provide for a separate ballot for the election of candidates nominated by trade unions to a defined number of seats on a company's Supervisory Board.

Nevertheless, this CJEU judgment is of relevance in that it emphasises the fundamental importance of the principle of preservation of employees' acquired rights ('before and after' principle), which implies not only the preservation of employees' acquired rights in the company to be transformed into an SE, but also the extension of those rights to all employees of the SE. When interpreting the rules governing the employee involvement in the SE, this principle must fully be taken into account.

Directive 2001/86/EC was transposed into the Slovenian legal order by the Participation of Workers in the Management of the European Public Limited-Liability Company (*'Zakon o sodelovanju delavcev pri upravljanju evropske delniške družbe (SE) (ZSDUEDD)'*, OJ RS No. 28/06, 17 March 2006).

According to Article 17 of the ZSDUEDD, which follows the wording of Article 4(4) of Directive 2001/86, in the case of an SE established by means of transformation, the agreement shall provide for at least the same level of all elements of employee involvement as those existing within the company to be transformed into an SE.

According to Article 31 of the ZSDUEDD, in an SE established by means of transformation, all forms of employee involvement that existed in the company before transformation must be applied.

According to Article 33 of the ZSDUEDD, the SE works council chooses employee board-level representatives in the SE.

The employees' representatives at board level in an SE established by means of transformation, are thus elected by the representative body, i.e. the works council of the SE. No separate ballot and a defined proportion of trade unions are envisaged in Slovenian legislation. This is in line with national practice for the boards of Slovenian companies, where employee representatives are chosen by the works council.

4 Other Relevant Information

4.1 Collective bargaining

The Confederation of Public Sector Trade Unions (*'Konfederacija sindikatov javnega sektorja (KSJS))* acceded to the Collective Agreement for the Public Sector (*'Pristop h Kolektivni pogodbi za javni sektor'*, OJ RS No 132/22, 14 October 2022, p. 9861). The collective agreement for the public sector can be found here.

An Annex to the Collective Agreement for Public Utility Services (*'Tarifna priloga h Kolektivni pogodbi komunalnih dejavnosti'*, OJ RS No 137/22, 28 October 2022, p. 10380-10381) was published. It concerns the adjustment of wages (plus 10 per cent) and some other payments, such as lunch allowance, travel expenses, etc.

4.2. Social dialogue in the public sector

Very intense negotiations between the government and the trade unions in the public sector are currently underway. There are several trade unions in the public sector, and several discussions are taking place jointly and separately. This has caused some tensions between different sectors and trade unions within the public sector. A common demand was the pay raise, but also improvements in the overall public sector pay system and its long-term reform (comparison between professions, sectors, etc.).

Slovenian doctors announced a general strike for 19 October 2022, demanding the government to exclude them from the uniform pay system in the public sector and to create a separate pay system for the profession. Following tensions and intense negotiations, an agreement between the FIDES (trade union of doctors and dentists) and the government representatives was reached on 17 October 2022, confirmed by Fides on 18 October 2022, and the strike announced for 19 October 2022 was called off (the Agreement can be found here: *'Sporazum o začasni prekinitvi stavkovnih aktivnosti'*, OJ RS No. 137/22, 28 October 2022, p. 10379).

Other trade unions have criticised this agreement, saying that it is not entirely in line with what was agreed on in the earlier agreement reached in October 2022 on the public sector pay system with other public sector trade unions, and that it could undermine the uniform public sector pay system.

On 13 October 2022, the government and the majority of public sector trade unions signed an agreement on a pay raise in the public sector (Agreement on Measures Relating to Salaries and Other Labour Costs in the Public Sector for 2022 and 2023, *'Dogovor o ukrepih na področju plač in drugih stroškov dela v javnem sektorju za leti 2022 in 2023'*, OJ RS No. 136/22, 25 October 2022, p. 10249-10252), followed by the

annexes to sectoral collective agreements in the public sector, the same OJ RS, p. 10252-10347).

Under this agreement, salaries will be increased by nearly 9 per cent for most public sector employees in two steps (first pay raise +4.5 per cent as of 01 October 2022 for all employees in all pay brackets in the public sector, and the second pay raise +4.5 per cent for the majority of public sector employees in April 2023; the second pay raise does not cover employees in healthcare and social care whose salaries were already adjusted in November 2021). It is estimated that this will increase the public sector wage bill by EUR 611 million. Some other payments have been adjusted as well (tax-free lunch allowance, additional annual leave allowance).

It has also been agreed that the overall reform of the public sector pay system will be tackled and negotiated with trade unions with the objective of reaching an agreement by the end of June 2023.

The opinion of the majority of public sector trade unions is that the uniform public sector pay system for all professions and all sectors should be kept, but improved, whereas FIDES (doctors and dentists) demands that they exit the uniform pay system so that their salaries can increase beyond the current pay ceiling.

On 27 October 2022, the Higher Education Union of Slovenia (‘*Visokošolski sindikat Slovenije – VSS’*) announced preparations for a strike. This trade union already organised a strike in the higher education sector in March this year, and there are now preparations for a continuation of the strike; according to the trade union, the government and respective Ministry do not understand the needs of higher education, unreasonably refuse strike demands and do not respect earlier commitments. One of the reasons for this reaction by the trade union was also, according to them, the discriminatory treatment of different trade unions within the public sector.

4.3 Minimum wage

The Ministry of Labour has announced an increase in the minimum wage based on the most recent report on the minimum cost of living. The negotiations with trade unions and employers’ associations are still underway.

The minimum cost of living was last determined in 2017, on the basis of data on household spending from 2015 and average monthly prices between January and October 2016. The most recent report, like the previous one, is based on research conducted by the Institute for Economic Research (see here). According to the report, the new minimum cost of living (MCL) amounts to EUR 669.83 (+9.2 per cent in comparison with the previous MCL from 2017). See here for further information.

According to the Minimum Wage Act (‘*Zakon o minimalni plači (ZMinP)’,* OJ RS No. 13/10 et subseq.), the minimum wage should be adjusted on the basis of the MCL calculation within three months and should be at least 20 per cent to 40 per cent above the amount of the minimum cost of living. Given the new minimum cost of living, the minimum wage should be at least EUR 803.80 (net amount). In addition to this, a regular annual adjustment of minimum wage is foreseen every January.

Spain

Summary

(I) A Supreme Court ruling concerns the reduction of working hours for legal guardianship, which cannot affect wage supplements for attendance and punctuality.

(II) According to the Supreme Court, in case of a transfer of undertaking, workers' representatives retain their position and the rights previously agreed with the former employer.

(III) The Supreme Court held that the end of a subcontracting agreement is a valid ground for dismissal.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Reduction of working hours for legal guardianship

Tribunal Supremo. Sala de lo Social, STS 3548/2022 - ECLI:ES:TS:2022:3548, 04 October 2022

According to Article 37(6) of the Labour Code, a worker with legal guardianship duties has the right to a reduction of working time of between one-eighth and a maximum of 50 per cent. The wage is reduced proportionally.

However, the Supreme Court states that a wage supplement of attendance and punctuality cannot be reduced during the exercise of this type of right. Among other arguments, the Supreme Court emphasises that this reduction in working time affects mostly women, hence the reduction in salary supplements could be considered discriminatory on grounds of sex.

2.2 Transfer of undertakings

Tribunal Supremo. Sala de lo Social, STS 3352/2022, ECLI:ES:TS:2022:3352, 20 September 2022

The Supreme Court noted that according to the rules on transfers of undertakings provided in Article 44 of the Labour Code, workers' representatives retain their position and even the rights or improvements previously agreed with the former employer. In this case, the workers' representatives enjoyed additional hours to perform their representation duties (to be deducted from working hours) based on an agreement with their former employer. Transfers of undertakings do not automatically override such agreements.

2.3 Dismissal and subcontracting

Tribunal Supremo. Sala de lo Social, STS 3448/2022 - ECLI:ES:TS:2022:3448, 14 September 2022

As mentioned in previous Flash Reports, the Supreme Court and the Law, following the labour reform of 2021, do not consider subcontracting to be a valid reason for concluding a fixed-term employment contract. Therefore, the worker should be hired under a permanent contract, even if the subcontracting agreement has set an expiration date.

However, the end of the subcontracting agreement is a valid ground for dismissal. In this case, the Supreme Court affirmed that the employer was not required to offer the worker a new post, hence the dismissal was fair, even if a vacant post was available, because the termination of the subcontracting agreement is considered a just cause.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

This ruling is unlikely to have any implications for Spain, at least in the short term. Directive 2001/86/EC was transposed in Act 31/2006, 18 October. The Act's Article 11(2) reproduces Article 4(4) of the Directive 2001/86/EC, i.e. that provision could theoretically lead to similar problems in Spain (and Germany).

However, the rules of involvement of employees differ considerably. Workers' participation in strategic decision-making has no tradition in Spain. In fact, information and consultation rights and direct negotiation between the employer and the workers' representatives are usual means for workers to influence the employer's decisions. Private undertakings that have developed a system of workers' participation in strategic decision-making/representation in management are rare. They are in fact non-existent in practice.

Therefore, it is highly likely that the undertaking to be transformed into a European company does not have any system of employee participation in place. Moreover, there are no 'national laws' and/or 'practices' to be undermined.

4 Other Relevant Information

4.1 Unemployment rate

Unemployment increased again in September 2022 (17 679 more unemployed persons). There are currently 2 941 919 unemployed persons and growing concerns about an economic crisis in the near future.

Sweden

Summary

The amendments to the Employment Protection Act have entered into force.

1 National Legislation

1.1 Amendments to the Employment Protection Act

As previously reported in other Flash Reports from 2022, some changes to the Employment Protection Act have entered into force as of 01 October 2022. The amendments to the legislation are the result of intense negotiations by the major trade unions and employer federations, and has since been adopted as law after a proposal from the former Social-Democrat Government. The most heavily debated changes relate to selection criteria for redundancy, the details of fairness of dismissal and limitations of sanctions during unfair dismissal litigation.

From an EU labour law perspective, two issues can be highlighted: restricted use of fixed-term employment contracts (from two to one years) and a duty to offer temporary agency workers permanent employment once they have worked for a client for more than 2 years. The client's failure to offer the temporary agency worker a permanent position is sanctioned with damages or fees corresponding to 2 months of salary (paid by the agency).

1.2 European Public Prosecutor's Office

The Swedish government has an ongoing legislative project for Sweden to join the European Public Prosecutor's Office (EPPO). In this project, an inquiry (DS 2022:25) has been made about employment protection for Swedish prosecutors delegated to the EPPO. The inquiry suggests that even if prosecutors are hired by EPPO, they shall simultaneously enjoy parallel protection from Swedish law.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

The present case submitted by the German *Bundesarbeitsgericht*, concerned the selection of workers' representatives when an SE company is formed by means of transformation, and the CJEU in its decision discusses the risks of reduced employee representation in such companies. The reform of SE companies has not gained much interest from Swedish companies. There are very few, around 10, SE companies registered in the country, but they are generally regulated in Act 2004:575 on SE companies (*lag 2004:575 om europabolag*). The Swedish Act (2004:559) om employee representation in SE-companies (*lag 2004:559 om arbetstagarinflytande i europabolag*) implements the EU Directive.

The general standard of employee representation in Sweden is organised through collective agreements (covering 90 per cent of employees) and the trade unions that are parties to the collective agreements. A similar model is applied for worker

representation in SE companies, providing for a continuously strong representation for the trade union through collective agreements, see Sections 16-18 Act 2004:559 on employee representation in SE companies. Representation can be shared between the trade unions if there are multiple collective agreements in place, such as for white collar and blue collar workers, respectively).

Based on the specifics of the case before the CJEU, it seems that the Swedish law is in line with the Court's interpretation of the Directive.

4 Other Relevant Information

4.1 General election

The Swedish General Election on 11 September 2022 resulted in a shift in Parliament and a new coalition formed a new government in October. The coalition consists of three parties represented in the government, Moderaterna (Conservatives), Christian Democrats and the Liberals, but the majority (176 - 173) relies heavily on the support of the fourth coalition partner, the nationalist Sweden Democrats. The political agenda presented for the coalition represents a clear shift in relation to migration (also labour migration), foreign aid and crime, but has only limited implications, so far, on labour law in general. In the publicly available government agreement, it is e.g. stated that the new government will improve incentive programmes for key employees in the form of personal options.

United Kingdom

Summary

A new bill will introduce minimum levels of service on transport services in case of strikes.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Share incentive plan

Employment Appeal Tribunal, EA 2021-SCO-000093-SH, 12 September 2022, Ponticelli UK Limited v Mr Anthony Gallagher

In *Ponticelli UK Ltd v Gallagher,* the EAT ruled that the benefit of a share incentive plan could be transferred under TUPE even though it was not a term in the employee's contract but part of a voluntary scheme. The EAT said the scheme arose 'in connection with' the employee's contract, as part of his broader financial package, and the right to a plan of substantial equivalence transferred under TUPE.

3 Implications of CJEU Rulings

3.1 Workers' participation

CJEU case C-677/20, 18 October 2022, IG Metall and ver.di

CJEU case C-677/20, 18 October, *IG Metal and ver.di* (available here), concerning the involvement of employees in decision-making within European companies is not relevant for the UK given Brexit.

4 Other Relevant Information

4.1 Northern Ireland Protocol

Previous Flash Reports have reported on the UK government's desire to turn off parts of the Northern Ireland Protocol. Much was put on hold pending the outcome of the Tory leadership contest. The Bill was debated in the Lords on 25 October 2022. The new Prime Minister, Rishi Sunak is said to be committed to the Bill and is prepared to use the Parliament Acts to get it through.

4.2 Retained EU Law

As was reported last month, this Bill has now been published (see Explanatory Notes here). The Bill is now at the committee stage having passed its second reading in the Commons. During the second reading debate, the government made a commitment to take necessary action to safeguard the substance of any retained EU law and legal effects required to operate international obligations within domestic law, including those under the UK-EU Trade and Co-operation Agreement, the Withdrawal Agreement and the Northern Ireland Protocol.

The Bill is to be considered not on the floor of the House but by the House of Commons Public Bill Committee for the Retained EU Law (Revocation and Reform) Bill. It has issued a call for written evidence on the Bill.

4.3 Pregnancy and Family Leave

On 21 October 2022, the government said that it would back the Protection from Redundancy (Pregnancy and Family Leave) Bill, a Private Members' Bill. The Bill gives Ministers powers to make regulations about redundancy, not just during maternity leave but also thereafter. For example, the Bill says:

> *"REDUNDANCY DURING A PROTECTED PERIOD OF PREGNANCY*
> *49D Redundancy during a protected period of pregnancy*
> *(1) The Secretary of State may, by regulations, make provision about redundancy*
> *during, or after, a protected period of pregnancy.*
> *(2) A protected period of pregnancy is a period relating to the pregnancy of an employee that is calculated in accordance with regulations made by the Secretary of State.*
> *(3) Provision made by virtue of subsection (1) may include—*
> *(a) provision requiring an employer to offer alternative employment;*
> *(b) provision for the consequences of failure to comply with the regulations (which may include provision for dismissal to be treated as unfair for the purposes of Part 10)…"*

4.4 Transport Strikes

On 20 October 2022, the government introduced the Transport Strikes (Minimum Service Levels) Bill. According to the government press release:

The Bill paves the way for the introduction of minimum levels of service on transport services, such as those already seen in other countries including France and Spain. The Bill will ensure that specified transport services—which could include, for example, rail, tubes and buses—will not completely shut down when unions impose strikes.

This Bill will balance the right to strike with ensuring commuters can get to their place of work and people can continue to make vital journeys to access education and healthcare during strikes. The Bill sets out the legal framework for establishing minimum service levels. It will allow relevant employers and trade unions to negotiate and reach agreements between themselves on minimum service levels referred to as minimum service agreements (MSAs), provide for circumstances in which the MSA can be changed and include enforcement arrangements to ensure parties follow due process in their negotiations.

The Bill also provides for an independent determination process should employers and unions fail to reach an agreement on an appropriate minimum service level after 3 months, whereby if an agreement has not been reached, the Central Arbitration Committee will determine the minimum service level.

The Bill also includes a power for the Secretary of State to set interim minimum service levels by regulations which will apply where neither an MSA has been agreed nor an independent determination has been reached. These regulations will also be consulted upon and will need to be agreed by both Houses of Parliament before they are made.

Under the Bill there will also have to be a minimum 3-month gap between these regulations being made and their coming into force. The specific details of how minimum service levels would apply to transport services will be set out in secondary legislation

following appropriate consultation. A minimum service level would only be applied to an individual transport service once that secondary legislation has been agreed by Parliament.

The provisions of the Bill extend and apply to England, Wales and Scotland. Its provisions relate to the reserved matter of employment rights and duties and industrial relations, and the subject matter of the Trade Union and Labour Relations (Consolidation) Act 1992, and do not engage the legislative consent process.

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