Flash Reports on Labour Law May 2019

Summary and country reports

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

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Executive Summary

1 National level developments

In May 2019, important developments in labour law took place in several Member States and European Economic Area (EEA) countries (see Table 1), whereas a number of countries reported an interruption of legislative activity due to elections and/or government resignations. Legislative initiatives and case law focused specifically on the following issues:

Transfer of undertaking

In **Belgium**, the Constitutional Court pronounced a limitation to the applicability of a collective agreement following a transfer of undertaking to be contrary to the constitutional principle of equality before the law. In **France**, the Court of Cassation found a number of dismissals to have been connected with a transfer of undertaking and declared that they were thus unlawful. In the **Netherlands**, the Supreme Court ruled in a case that a transfer of undertaking had not taken place, even though the new establishment hired a considerable amount of the predecessor's workforce. In **Portugal**, the Supreme Court issued a ruling on a transfer of undertaking, rejecting the claims brought by the employees concerned – in this case, due to the limitations of joint liability.

Dismissal protection

In **Greece**, a recent law for the first time provides that the employer must justify the dismissal of an employee who has a contract of indefinite duration. In **France**, a recently enacted law restricts, inter alia, the dismissal compensation entitlements of 'risk takers' in the finance sector. A ruling of the Court of Cassation confirmed the lawfulness of a dismissal based on an employee's failure to accept an alternative job offer in the employer's undertaking within the set period. In the **Netherlands**, Parliament adopted the WAB, amending dismissal law and the rules on flexible work.

2 Implications of CJEU or EFTA Court rulings and ECHR

In May 2019, a large number of labour law-related cases has been decided by the CJEU. This summary focuses on a case related to working time for which four questions were analysed for all EU and EEA countries.

Working time

CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure

Q 1: Are reference periods for the purpose of the calculation of the average weekly working time in national legislation and practice organised as fixed or as rolling, or are both possible and existing?

The method of calculation is described as unclear or disputed in a number of countries:

Country	Fixed	Rolling	Both
Austria			(disputed)
Belgium	x (general)	x (by derogation)	
Bulgaria			x
Croatia		x	
Cyprus			x
Czech R.	x		
Denmark		x	
Estonia			x
Finland			(unclear)
France			(unclear)
Germany			(disputed)
Greece			(unclear)
Hungary	x		
Iceland			(unclear)
Ireland			(unclear)
Italy			(unclear)
Latvia		x (in practice)	(unclear)
Liechtenst.		x	
Lithuania			(unclear)
Luxemb.	x		
Malta		x	
Netherl.		x	
Norway			x (disputed)
Poland		x (in practice)	x
Portugal			(unclear)
Romania		x	
Slovakia	x		
Slovenia			x
Spain			(unclear)
Sweden	x (four-month period)	x (seven-day period)	
UK			(unclear)

Q 2: Does the system allow for reference periods of up to 4 months (Article 16 (b) of the WTD), of up to 6 months (Articles 18 and 19 (1) of the WTD), and or of up to 12 months (Article 19 (2) of the WTD)?

Most countries closely follow the provisions of the WTD, setting the legal reference period to four months and allowing for an extension by collective agreement to six or, respectively, 12 months:

Country	up to 4 months (Article 16 (b))	up to 6 months (Articles 18 and 19)	up to 12 months (Article 19 (2))
Austria	x	x	x
Belgium	x		x
Bulgaria		x	
Croatia	x	x	
Cyprus	x		x
Czech R.	x	x	x
Denmark	x		
Estonia	x	x	x
Finland			x
France	x		
Germany		x	x
Greece	x	x	x
Hungary	x	x	x
Iceland	x	x	x
Ireland	x	x	x
Italy	x		
Latvia	x		
Liechtenst.	x		
Lithuania	x	x	x
Luxemb.	x		x
Malta	x		x
Netherl.	x		
Norway			x
Poland	x		x
Portugal	x		x
Romania	x	x	x
Slovakia	x	x	x
Slovenia	x	x	x
Spain	x	x	x
Sweden	x		X
UK	x	x	x

Bulgarian, **Estonian**, **Finnish**, **Maltese**, **Lithuanian**, **Norwegian**, **Slovenian**, **Spanish** and **UK** regulations appear to deviate from the WTD by stipulating **reference periods that are longer than four months in laws** rather than in collective agreements (in the case of Bulgaria, this only applies to rescue service workers; in Malta, to the manufacturing and tourism sectors). Only in the case of the UK, is this possibility explicitly linked to the application of the opt-out. The **German** report expressly indicates that the current provisions are considered to constitute a violation of the WTD. For **Hungary**, reference is made to the disputed new provision allowing for reference periods of 36 months, as described in detail in an Ad Hoc Request in early 2019.

Q 3: Does the country apply the 'opt-out' from Article 22 of the WTD to reference periods for the purpose of the calculation of the average weekly working time?

OIt is difficult to compare the answers provided in the country reports. There was **no case** in which a report referred to an **opt-out that stipulates a longer reference period** exceeding the general limitations of the law. Only for **Sweden**, it is mentioned that the scope of the opt-out would allow for an introduction of reference periods longer than four months (without mentioning whether this option is currently being used by the competent authority). In **Spain**, where specific reference periods for all opt-outs applied are mentioned, none of these periods exceeds the one-year period that is generally applicable in sectors to which no opt-out is said to apply (see supra Q 2). Where a country has made use of the opt-out to allow for a weekly working time beyond 48 hours without specific reference to the duration of the reference period, it appears that some experts answered the question with 'yes', while others with a comparable regulation claim 'no'. The **table below therefore does not necessarily provide an accurate picture** of the differences between countries:

Country	'Opt-out' applied	Not applied	Not mentioned
Austria		x	
Belgium	x		
Bulgaria	x		
Croatia		x	
Cyprus			x
Czech R.		x	
Denmark		x	
Estonia			x
Finland		x	
France	x		
Germany	x		
Greece	x		
Hungary			x
Iceland			x
Ireland			x
Italy		x	
Latvia			x
Liechtenst.		x	
Lithuania		x	
Luxemb.		x	
Malta	x		
Netherl.		x	
Norway	x		
Poland		x	
Portugal		x	
Romania		x	
Slovakia	x		
Slovenia		x	
Spain	x		
Sweden	x		
UK	x		

Again, doubts about compatibility with EU law exist in **Germany**.

Q 4: Is it allowed under national legislation and practice to require a worker to undertake, over two consecutive fixed reference periods, an extremely long period of work consequently making that worker exceed, on average, the maximum weekly working time over a period which, since it straddles those two fixed periods, corresponds to a rolling reference period of the same duration?

As can be seen in the table below, several countries' legislation would indeed allow for such arrangements, and for a larger number of countries, the current regulation is considered unclear on this question.

Country	Yes	No	Unclear
Austria			x
Belgium		x	
Bulgaria	x		
Croatia		x	
Cyprus		x	
Czech R.	x		
Denmark		x	
Estonia			x
Finland			x
France			x
Germany			x
Greece			x
Hungary	x		
Iceland	x		
Ireland			x
Italy		x	
Latvia		x	
Liechtenst.		x	
Lithuania			x
Luxemb.		x	
Malta	x		
Netherl.		x	
Norway			x
Poland	x		
Portugal	x		
Romania		x	
Slovakia	x		
Slovenia			x
Spain			x
Sweden			x
UK			x

Among the countries in the 'yes' column, the **Czech** report mentions that legislation seemed to be in line with the CJEU's findings in case C-306/16, while any frictions with the ruling in C-254/18 are not further discussed. The **Bulgarian**, **Hungarian** and **Norwegian** reports point out that while there is no specific provision prohibiting such a working time arrangement, an employer requiring extremely long working hours would violate basic legal obligations of health and safety protection.

Also for countries in the 'no' column, it is **not always clear how such arrangements are prevented,** particularly as many of them basically apply a fixed calculation for the reference period as mentioned in Q 1.

Similarly, in several of the reports that state that domestic regulations on this point are 'unclear', it is stressed that an **interpretation in line** with the CJEU's findings is

possible and can be expected to be adopted by the jurisdictional bodies in charge in the countries.

Other decisions

In the light of the large number of labour law-related CJEU rulings in May, it was agreed that the cross-country impact of the following cases will be discussed in the June FR:

- C-431/17: access to the profession of lawyer
- C-494/17: fixed-term work
- C-507/17: transfer of undertakings
- C-55/18: working time
- C-161/18: sex discrimination
- C-194/18: transfer of undertakings
- C-486/18: parental leave

To the degree that these cases have already been discussed for some countries in the May Flash Report, the description will be considered for the comparative analysis in the June Flash Report Summary.

Table 1. Main developments (excluding implications of CJEU or EFTA-Court rulings)

Topic	Countries
Transfer of Undertakings	BE FR NL PT
Dismissal protection	EL FR NL
Annual leave	DE LU
Health and safety	FR HR
Minimum wage	DE PL
Parental leave	BE RO
Tax	FI SI
Automatic termination	RO
Occupational pensions	FR
Equal pay	FR
Equal treatment (age)	DK
Equal treatment (nationality)	LU
Fixed-term employment	FI
Part-time work	BE
Posting of workers	DK
Retirement	RO
Sick leave	CZ
Social enterprises	BG
Social security	SI
Subcontracting	IS
Third country nationals	CZ
Trainees	DE
Wage	EE
Working time	DE

Austria

Summary

No relevant labour legislation has been passed in May, and no decisions of the Supreme Court of relevance for EU labour law have been published.

1 National Legislation

Nothing to report.

Due to current political events, which have led to various changes in the government, and a vote of no confidence against the most recent government, no new legislation has been passed, or is likely to be passed in the near future.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR rulings

3.1 Working time

CJEU Case C 254/18, Syndicat des cadres de la sécurité intérieure, 11 April 2019

Q1: Are reference periods for the purpose of the calculation of the average weekly working time in your respective national legislation and practice organised as fixed or as rolling, or are both possible and existing?

Answer to Q1: There is no explicit reference how the reference periods are to be organised. The relevant legislation in § 9 (4) Working Time Act (*Arbeitszeitgesetz* – AZG) reads as follows (unofficial translation by the author):

> "*If the provisions of this Act permit a weekly working time of more than 48 hours, the average weekly working time within a reference period of 17 weeks may not exceed 48 hours. The collective agreement may permit an extension of the reference period up to 26 weeks. The collective agreement may permit an extension of the reference period up to 52 weeks for technical or organisational reasons.*"

There is no legislation on this issue yet; in practice, fixed reference periods are used.

The opinions in the legal literature diverge: *Felten* (in *Auer-Mayer/Felten/Pfeil*, AZG fourth edition 2019 § 9, recital 9) argues in favour of a rolling reference period, taking into account the provision's purpose (avoiding long weekly working hours over longer periods), specifically mentioning the case of straddling two consecutive fixed reference periods. He also points out, however, that the Austrian legislator obviously advocated fixed reference periods for other working time provisions involving the carrying over of time credits for overtime. *Schrank* (*Arbeitszeitgesetze* fifth edition 2018 § 9 AZG, recital 12) argues for fixed reference periods on the same basis.

Q2: Does your system allow for reference periods of up to four months (Article 16 (b) of the WTD), of up to six months (Articles 18 and 19 (1) of the WTD), and or of up to 12 months (Article 19 (2) of the WTD)?

Answer to Q2: As pointed out in the answer to Q1 (see the quoted text of § 9 (4) AZG), the Austrian system allows for a general reference period of 48 hours within a 17-week reference period. This is generally considered to be in line with the four months mentioned in the WTD (see e.g. *Felten*, in *Auer-Mayer/Felten/Pfeil*, AZG fourth edition 2019 § 9, recital 6). A collective agreement may include an extension of the reference period up to 26 weeks. It may also allow an extension of the reference period up to 52 weeks for technical or organisational reasons.

Q3: Does it apply the "opt-out" from Article 22 of the WTD to reference periods for the purpose of the calculation of the average weekly working time?

Answer to Q3: No, the Austrian system does not apply the "opt-out" to reference periods stipulated in Article 22 of the WTD for the purpose of calculating the average weekly working time.

Deviations based on an "opt-out" is only possible in hospitals which are covered by special legislation, namely the Hospital Working Time Act (*Krankenanstalten-Arbeitszeitgesetz* – KA-AZG). Pursuant to § 4 (4b) KA-AZG), average weekly working times of 55 hours are possible until 30 June 2021 if a works agreement with the works council has been concluded or (in the case of public employers) the employee representatives have agreed to it. Additionally, each individual worker must consent to it. It should be mentioned, however, that this provision does not directly affect the reference periods, but the average weekly working time.

Q4: The key issue: Is it allowed by your national legislation and practice to require a worker to undertake, over two consecutive fixed reference periods, an extremely long period of work consequently making that worker exceed, on average, the maximum weekly working time over a period which, since it straddles those two fixed periods, corresponds to a rolling reference period of the same duration? If yes, are there any mechanisms making it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods? If yes (there are mechanisms), what is their effectiveness?

Answer to Q4: It was unclear so far whether the legislation refers to fixed or rolling reference periods, as the wording of the legislation allows for either interpretation. A court or labour inspectorate could potentially have interpreted the AZG in a way that required the worker to work for an extremely long period over two consecutive fixed reference periods, which means that the worker, on average, exceeds the maximum weekly working time over a period which—since it straddles those two fixed periods—corresponds to a rolling reference period of the same duration.

Following the CJEU's ruling, the provision of § 9 (4) AZG must now be interpreted in line with the Court's decision. Such long working hours resulting from the straddling of two consecutive fixed reference periods would very likely be considered illegal by the courts and administrative authorities. As this is only the result of an interpretation of the AZG in line with the CJEU's ruling, there are no mechanisms in place yet making it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods. Hence, nothing can be said about their effectiveness.

3.2 Fixed-term work

Judgment of the CJEU C-494/17, Ministero dell'Istruzione, dell'Università e della Ricerca v Fabio Rossato, 08 May 2019

This judgment has no impact on Austrian legislation. According to Austrian law, the abuse of successive fixed-term employment contracts or relationships is prevented by the general notion that successive fixed-term contracts not justified by objective reasons are converted into an employment relationship of indefinite duration. It should be reiterated that the author does not consider that Austria has adequately transposed the measures to prevent the abuse of fixed-term contracts established in the Fixed-Term Directive 1999/70/EC, as the reference to general clauses and case law is not sufficiently transparent (c.f. *Risak/Jöst*, Aktuelle Neuerungen im Arbeitsrecht, *ZAS* 2002, 97). The only explicit prohibition of consecutive fixed-term contracts and exemptions is § 109 Austrian University Act 2002 (*Universitätsgesetz 2002*), which only applies to persons employed by universities.

It was concluded that the permanent contract started with the first fixed-term contract. There is no right to compensation in addition to the conversion of the fixed-term employment relationship into one of indefinite duration.

3.3 Access to legal professions

Judgment of the CJEU case C-431/17, Monachos Eirinaios, kata kosmon Antonios Giakoumakis tou Emmanouil v Dikigorikos Syllogos Athinon, 07 May 2019

This judgment has no impact on Austrian legislation. The Austrian Act on the free movement of services and the establishment of European lawyers and the provision of legal services by international lawyers in Austria (*Bundesgesetz über den freien Dienstleistungsverkehr und die Niederlassung von europäischen Rechtsanwältinnen und Rechtsanwälten sowie die Erbringung von Rechtsdienstleistungen durch international tätige Rechtsanwältinnen und Rechtsanwälte in Österreich*, EIRAG) is fully compliant with Directive 98/5. The EIRAG allows any EU national, who is a lawyer and obtained her professional qualifications in another Member State, to register with the Austrian bar association to practise under his (national) professional title under the condition that he provides proof of certification of his professional qualification (§ 10 EIRAG). Trustworthiness, which is a criterion that must be assessed before an Austrian national is admitted to the Austrian bar association as an attorney, is not assessed in this case (§ 11 EIRAG). Like all Austrian attorneys, a lawyer who has obtained her professional qualification in another Member State must prove that she has professional liability insurance, either in Austria or a comparable coverage in another Member State (§§ 10, 15 EIRAG), and is subject to the disciplinary rules of the Austrian bar association (§ 21 EIRAG).

4 Other relevant information

Nothing to report.

Belgium

Summary

(I) A Royal Decree regulates the priority given to part-time workers to obtain a full-time or a more extensive part-time job with their employer in more detail.

(II) A Royal Decree facilitates the taking of parental and medical assistance leave.

(III) The Constitutional Court identified a limitation to the applicability of a collective agreement after a transfer of undertaking contrary to the constitutional principle of equality before the law.

1 National Legislation

The government has resigned, which has led to reduced legislative activity.

1.1 Part-time work

The Royal Decree of 02 May 2019 transposes the provisions of the Programme Law of 22 December 1989 on the priority given to part-time workers to obtain a full-time job with their employer (see '*Moniteur belge'* on 15 May 2019).

The Programme Law of 22 December 1989 contained a priority scheme for part-time workers to obtain full-time or more extended part-time employment with their employer. The King was able to exclude certain employees from this scheme. The Royal Decree excludes the following categories:

- workers who do not fall within the scope of the Collective Labour Agreement Act;
- temporary workers employed by a temporary employment agency with a temporary employment contract;
- workers employed on the basis of service vouchers; and
- workers employed as occasional workers.

The law stipulates that the employer must, at the employee's request, inform her of any full-time or more extensive part-time vacancy for a post that is similar to her current one and for which she has the necessary qualifications. The Royal Decree clarifies that the employer must only notify the employee of such a vacancy if it results in an increase in the agreed working arrangement for an uninterrupted period of at least one month or for an indefinite period of time.

The Royal Decree further clarifies the procedure to be followed, such as the information to be provided by the employer, as well as the 'contribution for accountability'. The law already stipulated that an employer who does not comply with the legal provisions for part-time employees, who retain their rights and benefit from an income guarantee benefit, must pay an 'accountability contribution'.

1.2 Parental and medical assistance leave

The Royal Decree of 05 May 2019 amending various provisions on thematic permits facilitates the taking of parental leave and full-time leave for medical assistance (see '*Moniteur belge'* on 22 May 2019).

Full-time parental leave could already be taken, as could half-time parental leave by reducing the break in employment to a half-time job or by 1/5th.

The Law of 02 September 2018 (see also September 2018 Flash Report) amending the Recovery Law of 22 January 1985 on social provisions on parental leave introduced the right to parental leave in the amount of 1/10th of the normal working hours of a full-time job. When exercising the right to a reduction in working hours, the employee is employed on the basis of a part-time working arrangement. The Royal Decree elaborates this possibility.

It is now also possible to split full-time parental leave into individual weekly periods, to take half-time parental leave for individual months and to take full-time leave for medical assistance for periods of either one, two or three weeks.

From 01 June 2019, employees can apply for such leaves. The employer may reject such requests. If the employee's request is approved, the employee becomes entitled to benefits paid by the National Employment Office.

2 Court Rulings

2.1 Transfer of undertaking

Constitutional Court, No. 59/2019, 08 May 2019

Mrs. K.S. was employed by a company in the cleaning sector. She worked at a specific site of a client. The client, however, assigned another cleaning company to perform the work. At the time this company concluded the maintenance contract, it did not yet have any employees.

The employer terminated the employment contract with K.S., but informed her that she was entitled to a new employment contract with the new company in accordance with the collective bargaining agreement of 12 May 2003 on the transfer of staff following transfers of maintenance contracts concluded in Joint Committee No. 121 for the cleaning industry.

However, the new company refused to conclude an employment contract with K.S. because at the time the maintenance contract was taken over, the company did not have any employees and could therefore not be considered an employer in accordance with the meaning of Article 2 of the Collective Bargaining Agreement Law of 05 December 1968 (CBA Law). The company referred to the case law of the Court of Cassation of 02 June 2014, in which the Court confirmed that "the employer within the meaning of the CBA Law is generally only the person who employs at least one person under an employment contract" (see Arresten van het Hof van Cassatie 2014, p.1388).

This case was not considered a transfer of undertaking.

The question this case raises is whether this interpretation of the concept of employer causes (unconstitutional) unequal treatment between cases in which the transferee of a maintenance contract does or does not already engage employees. In the former case, the employee's employment contract shall be transferred to the new employer while in the latter case the employee's contract does not have to necessarily be transferred.

The Constitutional Court underlined that the concept of employer is not clearly defined in the CBA Law and that the scope of application of collective bargaining agreements is in fact determined by the collective agreements themselves. In its assessment, the Constitutional Court also took the parliamentary documents on the CBA Law into consideration, which state that the term 'employer' must be interpreted in a very broad sense. Moreover, the term 'collective bargaining agreement' and their content must also be interpreted very broadly. Finally, the Constitutional Court stated that employees involved in a case of a transfer of undertaking are in a precarious situation, and shall benefit from the protection of current collective agreements. The Constitutional Court concluded that a restrictive interpretation of the concept of employer in terms of whether or not employees were already employed by the transferee at the time of the

transfer (see the Court of Cassation's case law) did in this case indeed breach the constitutional principle of equality and non-discrimination. On the other hand, the interpretation of Article 2 of the CBA Law advocated by the Council of Ministers, in which the concept of employer is interpreted broadly without consideration for whether the transferee was already employing employees, coincides with the principle of equality.

The ruling of the Constitutional Court contains a more important innovative interpretation of the concept of 'employer' which contradicts the Court of Cassation's interpretation.

3 Implications of CJEU rulings and ECHR

3.1 Working time

CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure / Premier ministre

Q1: Are reference periods for the purpose of the calculation of the average weekly working time in your respective national legislation and practice organised as fixed or as rolling, or are both possible and existing?

Q2: Does your system allow for reference periods of up to four months (Article 16 (b) of the WTD), of up to six months (Articles 18 and 19 (1) of the WTD), and or of up to 12 months (Article 19 (2) of the WTD)?

Answer to Q 1-2: According to Belgian labour law, the average working time must, in principle, be calculated across a three-month period (Article 26, §1, paragraph 1 of the Labour Law of 16 March 1971). The reference period can, however, be extended to one year by royal decree if recommended by the Joint Committee, a collective bargaining agreement or the labour regulations at company level (Article 26bis, §1, paragraph 3 juncto Article 47 of the Labour Law).

According to national legislation, the reference periods are in principle fixed (see S. De Groof, *Arbeidstijd en vrije tijd in het arbeidsrecht*, Bruges, Die Keure, 2017, p. 117-119, 215-226). Rolling reference periods are not common in Belgium. However, in view of the tremendous number of derogations, it is not surprising that these derogations may also occasionally include rolling reference periods.

Q3: Does it apply the "opt-out" from Article 22 of the WTD to reference periods for the purpose of the calculation of the average weekly working time?

Answer to Q 3: The individual opt-out was used in exceptional cases in Belgium in a number of cases of organisation of working time in the health sector, for doctors, dentists, veterinarians, junior doctors in training, junior dentists in training and health professions trainees (Law of 12 December 2010 determining the working hours of doctors, dentists, veterinarians, junior doctors in training, junior dentists in training and health professions trainees). This law does not provide for rolling reference periods (see S. De Groof, *Arbeidstijd en vrije tijd in het arbeidsrecht*, Bruges, Die Keure, 2017, p. 207-209).

Q4: The key issue: Is it allowed by your national legislation and practice to require a worker to undertake, over two consecutive fixed reference periods, an extremely long period of work consequently making that worker exceed, on average, the maximum weekly working time over a period which, since it straddles those two fixed periods, corresponds to a rolling reference period of the same duration? If yes, are there any

mechanisms making it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods? If yes (there are mechanisms), what is their effectiveness?

Answer to Q 4: No, Belgian labour law does not allow a worker to work for an extremely long period over two consecutive fixed reference periods which would, on average, exceed the maximum weekly working time over a period which—since it straddles those two fixed periods—corresponds to a rolling reference period of the same duration.

3.2 Parental leave

CJEU case C-486/18, 09 May 2019, RE v Praxair MRC SAS

The CJEU ruled:

> *"1. Clause 2.6 of the framework agreement on parental leave concluded on 14 December 1995, which is annexed to the Directive 96/34, must be interpreted as precluding, where a worker employed full-time and for an indefinite duration is dismissed at the time he is on part-time parental leave, the compensation payment for dismissal and the redeployment leave allowance to be paid to that worker being determined at least in part on the basis of the reduced salary which he receives when the dismissal takes place.*
>
> *2. Article 157 TFEU regarding equal pay for male and female workers must be interpreted as precluding legislation such as that in the main proceedings which provides that, where a worker employed full-time and for an indefinite duration is dismissed at the time he is on part-time parental leave, that worker receives a compensation payment for dismissal and a redeployment leave allowance determined at least in part on the basis of the reduced salary being received when the dismissal takes place, in circumstances when a far greater number of women than men choose to take part-time parental leave and when that difference in treatment which results therefrom cannot be explained by objective factors unrelated to any sex discrimination".*

This ruling has no implications for Belgian labour law. Following the CJEU's ruling in the Belgian case C-116/08, 22 October 2009, *Meerts*, the compensation for dismissal, equal to the amount of the employee's 6-months' salary, and any dismissal compensation due to the absence of the applicable notice period for a full-time employee who is dismissed during her part-time parental leave, shall be based on her full-time salary, without prejudice, regardless whether this involves a female or male employee (Article 105 of the Social Recovery Act of 22 January 1985 as amended by the Law of 30 December 2009).

3.3 Transfer of undertakings

CJEU case C-194/18, 08 May 2019, Jadran Dodič v Banka Koper

The CJEU ruled:

> *"Article 1(1) of the Directive 2001/23 on the transfers of undertakings, must be interpreted as meaning that the transfer, to a second undertaking, of financial instruments and other assets of the clients of a first undertaking, following the cessation of the first undertaking's activity, under a contract the conclusion of which is required by national legislation, even though the first undertaking's clients remain free not to entrust the management of their stock market securities to the second undertaking, may constitute a transfer of an undertaking or of part of an undertaking if it is established that there was a transfer of clients, that being a matter for the referring court to determine. In that context, the*

> *number of clients actually transferred, even if very high, is not, in itself, decisive as regards classification as a 'transfer' and the fact that the first undertaking cooperates with the second undertaking as a dependent stock-exchange intermediary, is, in principle, irrelevant".*

This case involved a transfer of undertaking in the financial sector in which the transferor's clients were not bound by the transfer agreement entered into with the transferee and could freely decide to transfer their securities to the latter or not. This cannot, in itself, preclude the classification of the transfer as a 'transfer of part of an undertaking' within the meaning of Article 1(1) of Directive 2001/23. The CJEU considered, among other things:

> *"the Directive 2001/23 must be interpreted as meaning that the transfer, to a second undertaking, of financial instruments and other assets of the clients of a first undertaking, following the cessation of the first undertaking's activity, under a contract the conclusion of which is required by national legislation, even though the first undertaking's clients remain free not to entrust the management of their stock market securities to the second undertaking, may constitute a transfer of an undertaking or of part of an undertaking if it is established that there was a transfer of clients, that being a matter for the referring court to determine."* (See Point 46)

The Court built on its earlier case law; there is no Opinion of the Advocate General in this case. Belgian case law on Article 1(1) on the concept of 'transfer of undertaking' is in conformity with Directive 2001/23 and will, if necessary, take the conclusions of this ruling into account.

3.4 Fixed-term work

CJEU case C-494/17, 08 May 2019, Ministero dell'Istruzione, dell'Università e della Ricerca v Fabio Rossato

The CJEU ruled:

> *"Clause 5(1) of the Framework Agreement on fixed-term work, (…), which is annexed to the Directive 1999/70, is to be interpreted as not precluding legislation which, as applied by the national supreme courts, precludes any entitlement to financial compensation on account of the misuse of successive fixed-term employment contracts for public-sector teachers whose employment relationship has been converted from a fixed-term relationship into one of indefinite duration, with limited retroactive effect, if such conversion is neither uncertain nor unpredictable or fortuitous and the limited account taken of the period of service completed under those successive fixed-term employment contracts constitutes a measure that is proportionate for the purpose of punishing that misuse, which is a matter for the national court to determine".*

Belgian law on general employment contracts in Articles 10 and 10bis of the Employment Contracts Law of 03 July 1978 on fixed-term employment contracts is in line with this ruling. The misuse of successive fixed-term employment contracts of public sector employees results in the conversion of the fixed-term relationship into one of indefinite duration, without any entitlement to financial compensation on account of the misuse.

Directive 1999/70 also applies to temporary public servants, as determined by the Court in, among other decisions, case C- 177/10, 08 September 2011, *Rosado Santana*. The Belgian public sector has numerous regulations on the special legal status of 'temporary' public servants, although it is not always certain that the Directive will actually be respected.

The Court of Justice's ruling concerns the education sector. The Framework Agreement is also applicable to employment relationships in the education sector (see CJEU joint cases C- 22/13, C-61/13-C-63/13 and C-418/13, 26 November 2014). At present, legislation in Belgium on employment relationships in education is particularly complex because a number of legal regulations on primary, secondary and higher education coexist for each of the three communities (the Flemish Community, the German Community and the French Community).The Legal Status Decrees of 27 March 1991 apply to Flemish primary and secondary education. According to the decrees, fixed-term employment relationships can be concluded without any restrictions. Such successive fixed-term employment contracts are possible under either a so-called 'temporary appointment of limited duration' or a so-called 'temporary appointment of continuous duration'. 'Priority schemes' offer the possibility of being promoted to a permanent appointment more quickly, but this is not a guarantee that successive fixed-term employment contracts will not be misused. Problems with successive fixed-term employment relationships are also prevalent in the higher education sector (see, for instance, the Brussels Appeal Labour Court, 05 July 2018, *Rechtskundig Weekblad* 2018-2019, p. 1465).

3.5 Access to the profession of lawyer

CJEU case C-431/17, 07 May 2019, Monachos Eirinaios, kata kosmon Antonios Giakoumakis tou Emmanouil v Dikigorikos Syllogos Athinon

The CJEU ruled:

> *"Article 3(2) of Directive 98/5/EC of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained must be interpreted as precluding national legislation which, on account of the incompatibility under that legislation between the status of monk and practice of the profession of lawyer, prohibits a lawyer who has the status of monk, and who is registered as a lawyer with the competent authority of the home Member State, from registering with the competent authority of the host Member State in order to practise there under his home-country professional title".*

The free movement of lawyers enshrined in Directive 98/5 of 16 February 1998 was transposed in Belgium in Articles 477bis-477nonies of the Judicial Code, as amended by the Law of 22 November 2001.

The independence of lawyers in Belgium has traditionally been of major significance (see J. Stevens, 'De uitoefening van het beroep van advocaat in dienstverband', *Rechtskundig Weekblad* 2005-2006, p. 1-21). For example, the Rules of the Order of the Flemish Bar Associations and Law Societies prohibit lawyers from working under an employment contract (Art. III.2.10.1 Code of Ethics for Lawyers of 23 September 2015). The CJEU's ruling involved a case in which a monk, who was registered as a lawyer at a Cypriot bar association, wanted to register at a Greek bar association. The CJEU's ruling has important implications for the Belgian legal order in the exceptional case that a member of the clergy or a monk registered at a bar association of another EU member state wants to register as a lawyer at a Belgian bar association.

4 Other relevant information

Nothing to report.

Bulgaria

Summary

The only important labour law act in Bulgaria published in May 2019 concerns social enterprises.

1 National Legislation

1.1 Social enterprises

The Council of Ministers adopted the Regulation for the Implementation of the Law on social enterprises (promulgated in State Gazette No. 40 of 17 May 2019). It regulates the conditions and procedure for registering and unregistering social enterprises from the register and the conditions and procedures for obtaining funding for the training of persons employed in social enterprises in A+ classes and schemes for minimum financial assistance in accordance with the requirements of Regulation (EU) No. 1407/2013.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Working time

CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure

Q 1: Are reference periods, for the purpose of the calculation of the average weekly working time in your respective national legislation and practice organized as fixed or as rolling, or are both possible and existing.

Answer to Q 1: Both types of calculation of working time exist in Bulgaria – fixed and rolling reference periods are provided for in Bulgarian legislation (Article 142 of the Labour Code – hereinafter: LC). The calculation is based on daily work days. The employer may, however, base the calculation of working time on a longer reference period: one week, one month, or over a specific reference period, which may not be longer than six months.

Q 2: Does your system allow for reference periods of up to 4 months (article 16 (b) of the WTD), of up to 6 months (Articles 18 and 19 (1) of the WTD), and or of up to 12 months (Article 19 (2) of the WTD)?

Answer to Q 2: Bulgarian legislation allows for reference periods up to 6 months (Article 142 (2) LC).

Q 3: Does it apply the "opt-out" from Article 22 of the WTD to reference periods for the purpose of the calculation of the average weekly working time?

Answer to Q 3: Bulgarian legislation applies the "out-out" of Art. 22 of the WTD. The maximum duration of one work shift based on a calculation of working time of one week or longer may be up to 12 hours, while the total duration of the work week may not exceed 56 hours. For workers who work reduced hours, the maximum duration of the

work shift may be up to one hour beyond their reduced working time (Article 142 LC).

Q 4: The key issue: Is it allowed by your national legislation and practice to require a worker to undertake, over two consecutive fixed reference periods, an extremely long period of work consequently making that worker exceed, on average, the maximum weekly working time over a period which, since it straddles those two fixed periods, corresponds to a rolling reference period of the same duration? If yes, are there any mechanisms making it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods? If yes (there are mechanisms), what is their effectiveness?

Answer to Q 4: Such derogation from Article 6 of the WTD is possible in cases of summarised calculations of working time and cases of employment under employment contracts for additional work. Such a contract may be concluded with the employer in addition to the main employment contract or with another employer (Articles 110—111 LC). In such cases, the maximum duration of working time under an employment contract for additional work, together with the duration of working time under the main employment contract for which working time is calculated on a daily basis, may not exceed:

- 40 hours for workers who are under the age of 18 years;
- 48 hours for all other workers.

With their explicit written consent, workers aged 18 years and older may work more than 48 hours. In case the worker refuses to consent to overtime work exceeding 48 hours, she cannot be required to work more than 48 hours weekly, and any such refusal may not result in any disadvantage for said worker. The duration of working time is calculated over a reference period that does not exceed four months. These rules are established in Article 113 LC.

The general principles of protection of the safety and health of workers must be respected in all cases of derogation. The labour inspector may prohibit or restrict the possibility of exceeding the weekly duration of working time by referring to the workers' safety and/or health (Article 113 (7).

4 Other relevant information

Nothing to report.

Croatia

Summary

Based on the Act on Occupational Health and Safety, the Minister for Labour and Pension System has issued Regulations on occupational health and safety measures.

1 National Legislation

1.1 Health and safety

Based on the Act on Occupational Health and Safety, the Minister for Labour and Pension System has issued the Regulations on occupational health and safety measures (see Official Gazette No. 50/2019). They regulate the conditions under which an employer and a natural or legal person is authorised to implement occupational health and safety measures, issue, cancel and revoke such measures, the professional supervision over the performance of the measures for which authorisation has been granted, entry and updating of data and reports which the authorised persons must submit to the Ministry of Labour and Pension System and to the Occupational Health and Safety Information System, continued professional training of the occupational health and safety experts and the obligation and procedure to register authorisations.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Working Time

CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure / Premier minister

Q 1: Are reference periods for the purpose of the calculation of the average weekly working time in your respective national legislation and practice organised as fixed or as rolling, or are both possible and existing?

Answer to Q1: They are organised as rolling reference periods (see, for instance, Article 66(8) of the Labour Act which refers to 'consecutive four months').

Q 2: Does your system allow for reference periods of up to 4 months (article 16 (b) of the WTD), of up to 6 months (Articles 18 and 19 (1) of the WTD), and or of up to 12 months (Article 19 (2) of the WTD)?

Answer to Q2: The standard reference period is four months. Article 66 (8) of the Labour Act states: "*Where the working time is unevenly distributed, the employee may not, in any period of four successive months, work more than 48 hours a week on average, including overtime work*." Article 66 (9) of the Labour Act states: "*Uneven distribution of working time may be regulated under collective agreement as a total number of working hours during the period of uneven distribution of working time, with no restrictions referred to in paragraphs 6 and 7 of this Article applicable, but the total number of working hours, including overtime work, may not exceed the average of 45 hours a week within the four-month period*."

If the working time is regulated by collective agreement, the reference period may be six months. Article 66 (10) of the Labour Act states: "*The period referred to in paragraphs 8 and 9 of this Article may be six months under collective agreement*." Article 67(8) of the Labour Act states: "*The redistributed working time in the period during which it exceeds either the full-time or part-time work may last up to four months, unless otherwise provided for in collective agreement, in which case it may not exceed six months.*"

Q 3: Does it apply the "opt-out" from Article 22 of the WTD to reference periods for the purpose of the calculation of the average weekly working time?

Answer to Q3: It does not apply the opt-out to the reference period. Even in the health sector, where the total duration of the weekly working time may exceed the average of 48 hours, but only if the employee has given prior written consent to this. The general principle is that the maximum weekly working time, including overtime, may not exceed 48 hours in any consecutive four-month period (Articles 193(8) and 193(9) of the Healthcare Act).

Q 4: The key issue: Is it allowed by your national legislation and practice to require a worker to undertake, over two consecutive fixed reference periods, an extremely long period of work consequently making that worker exceed, on average, the maximum weekly working time over a period which, since it straddles those two fixed periods, corresponds to a rolling reference period of the same duration? If yes, are there any mechanisms making it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods? If yes (there are mechanisms), what is their effectiveness?

Answer to Q 4: No, it is not allowed (see Article 67 of the Labour Act on the redistribution of working time, which allows working up to 60 hours a week but only over a period that cannot exceed 6 months and only if this is established in the collective agreement; the statutorily prescribed redistributed working time may not exceed 56 hours a week over a 4-month period).

3.2 Parental leave

CJEU case C-486/18, 09 May, 2019, RE v Praxair MRC SAS

In its recent judgment, the CJEU decided that Clause 2.6 of the Framework Agreement on Parental Leave concluded on 14 December 1995, which is annexed to Council Directive 96/34/EC of 03 June 1996 on the Framework Agreement on Parental Leave concluded by UNICE, CEEP and the ETUC, as amended by Council Directive 97/75/EC of 15 December 1997, must—where a full-time worker employed under a contract of indefinite duration is dismissed while he is on part-time parental leave—be interpreted as precluding compensation payment for dismissal and a redeployment leave allowance to be paid to the worker based at least in part on the reduced salary he received when he was dismissed. Furthermore, Article 157 TFEU must be interpreted as precluding legislation which provides that where a full-time worker employed under a contract of indefinite duration is dismissed while he is on part-time parental leave, he shall receive compensation for dismissal and a redeployment leave allowance determined at least in part on the basis of the reduced salary he received when he was dismissed, in circumstances when a far greater number of women than men choose to take part-time parental leave and when the difference in treatment that results therefrom cannot be explained by objective factors unrelated to gender discrimination.

Article 32 of the Labour Act contains a presumption of full-time work, among others, when the employee takes part-time parental leave. It states:

'Where the previous length of employment relationship is of relevance for acquiring certain rights arising from the employment relationship or pertaining thereto, periods of maternity, parental or adoption leave, part-time work, periods of short-time work due to intensified childcare, the leave of pregnant women or a breastfeeding mother, and the periods of leave or short-time work having to care for a child with serious developmental disabilities shall be regarded as full-time work.'

There are no provisions in Croatian law on redeployment leave allowance.

The national law seems to be in line with the CJEU's ruling in case C-486/18.

3.3 Transfer of undertakings

CJEU case C-194/18, 08 May 2019, Jadran Dodič v Banka Koper

In its recent judgment, the CJEU decided that Article 1(1) of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, must be interpreted as meaning that the transfer to another undertaking, of financial instruments and other assets of the clients of a first undertaking, following the cessation of the first undertaking's activity, under a contract the conclusion of which is required by national legislation, even though the first undertaking's clients remain free to not entrust the management of their stock market securities to the second undertaking, may constitute a transfer of undertaking or of a part thereof if it is established that a transfer of clients has occurred, that being a matter for the referring court to determine. In that context, the number of clients actually transferred, even if very high, is not, in itself, decisive as regards classification as a 'transfer' and the fact that the first undertaking is collaborating with the second undertaking as a dependent stock-exchange intermediary is, in principle, irrelevant.

The provisions of Directive 2001/23/EC have been transposed into Croatian law by the Labour Act (Article 137). However, it is up to the national courts to decide each case individually based on the facts to determine whether a transfer of undertaking has taken place. Since the Supreme Court of the Republic of Croatia publishes its case law very selectively, a proper insight into national case law is not possible and the national law can therefore not be compared with the CJEU's case law. The case law of national courts needs to be in line with the CJEU's case law and among others, with the ruling in case C-194/18.

3.4 Fixed-term work

CJEU case C-494/17, 08 May 2019, Ministero dell'Istruzione, dell'Università e della Ricerca v Fabio Rossato

In its recent judgment, the CJEU decided that Clause 5(1) of the Framework Agreement on fixed-term work, concluded on 18March 1999, which is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on fixed-term work concluded by ETUC, UNICE and CEEP, is to be interpreted as not precluding legislation which, as applied by the national supreme courts, precludes any entitlement to financial compensation on account of the misuse of successive fixed-term employment contracts for public sector teachers whose employment relationship has been converted from a fixed-term relationship into one of indefinite duration, with limited retroactive effect, if such a conversion is neither uncertain nor unpredictable or fortuitous and the limited

account taken of the period of service completed under those successive fixed-term employment contracts constitutes a measure that is proportionate for the purpose of punishing that misuse, which is a matter for the national court to determine.

Article 12(7) of the Labour Act regulates the consequences of abuse of fixed-term contracts. It states:

> *"Where an employment contract is not concluded in compliance with the provisions of this Act or where an employee continues to work at the employer's after the expiry of the contract, it shall be deemed that the concluded contract was of indefinite duration."*

Separate acts that regulate the employment relationships of teachers in the public sector (Act on primary and secondary education of 2008, amended in 2018; Act on scientific activity and higher education of 2003, amended in 2018) do not contain provisions on the abuse of fixed-term contracts. Therefore, the above-cited provision of the Labour Act applies as *lex generalis*.

It can be concluded that the national law is in line with EU law and that the judgment in case C-494/17 has no implications on national law.

3.5 Access to the profession of lawyer

CJEU case C-431/17, 07 May 2019, Monachos Eirinaios, kata kosmon Antonios Giakoumakis tou Emmanouil v Dikigorikos Syllogos Athinon

In its recent judgment, the CJEU decided that Article 3(2) of Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate the practice of law on a permanent basis in a Member State other than that where the qualification to work as a lawyer was obtained must be interpreted as precluding national legislation which, on account of the incompatibility under that legislation between being a monk and practicing law, prohibits a lawyer who is also a monk and who is registered as a lawyer with the bar association in his home Member State, from registering with the competent authority of a host Member State to practice law there under the professional title he obtained in his home country.

Access to the profession of lawyer is regulated in Croatia by the Act on the Profession of Lawyer (*Zakon o odvjetništvu*; see Official Gazette No. 9/1994, 117/2008, 50/2009, 75/2009, 18/2011). Articles 36a to 36h prescribe the conditions under which lawyers from other EU Member States are allowed to practice law in Croatia. According to Article 36a(1), they can be register in the Register of Foreign Lawyers who can works as attorneys if they meet certain conditions as defined in Article 48 (the conditions Croatian lawyers who want to work as attorneys need to fulfil). One of the conditions is that they 'may not perform any work that is incompatible with the profession of lawyer' (Article 48(1)(11) of the Act on the Profession of Lawyer). The Act does not contain details on what type of work is considered incompatible with the profession of lawyer. Even the Codex of Lawyers' Ethics does not provide more detailed information in this context. It states: "An attorney shall not accept jobs that are inconsistent with his profession and which could be detrimental to his independence and good will, honour and reputation as a lawyer." (see General principles I(10) of the Codex of Lawyers' Ethics). It can be concluded that the above-mentioned provisions of Croatian law should be read in line with the judgment in case C-431/17 without the need to amend them.

4 Other relevant information

Nothing to report.

Cyprus

Summary

There were no developments in labour law in Cyprus in May.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Working time

CJEU case C-254/18, Syndicat des cadres de la sécurité intérieure, 11 April 2019

CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure / Premier minister determined that national legislation may, for the purpose of calculating the average weekly working time, establish reference periods that start and end on fixed calendar dates. Such legislation must, however, contain mechanisms that make it possible to ensure that the maximum average weekly working time of 48 hours is respected over a six-month period straddling two consecutive fixed reference periods.

Q1: Are reference periods for the purpose of the calculation of the average weekly working time in your respective national legislation and practice organised as fixed or as rolling, or are both possible and existing?

Answer to Q1: According to the Cypriot WT law (Ο Περί της Οργάνωσης του Χρόνου Εργασίας Νόμος του 2002 (63(I)/2002) both are possible.

Q2: Does your system allow for reference periods of up to 4 months (article 16 (b) of the WTD), of up to 6 months (Articles 18 and 19 (1) of the WTD), and or of up to 12 months (Article 19 (2) of the WTD)?

Answer to Q 2: The reference period is four months (Article 7 (3) of the Cypriot WT law). However, subject to the general principles of the protection of the safety and health of workers, these do not apply. The Cypriot WT law provides that each worker shall have a rest period of at least 11 consecutive hours per 24-hour period (Article 4 (1) of the Cypriot WT law) and the 24-hour period begins at 00:01 and ends at 24:00 hours (Art. 4 (2) of the Cypriot WT law). The same law provides that every worker is entitled to a weekly rest period, subject to certain provisions (Subsection (1) of Article 4 of the Cypriot WT law), consisting of a minimum of a continuous 24-hour period per week. Article 6(2) of the Cypriot WT law provides that if justified for objective or technical reasons or by the conditions of work organisation, a minimum rest period of 24 hours may be established. The employer may also decide that the employee is entitled to either two rest periods of 24 consecutive hours over a 14-day period (Article 6(3)(a) of the Cypriot WT law), a continuous minimum rest period of 48 hours per 14-day period (Article 6(3)(b) of the Cypriot WT law). A statutory standard maximum explicitly refers to overtime. The WT Law contains a maximum weekly working time of

48 hours on average, including overtime (Article 7(1), subject to the provisions of any laws or regulations that contain more favourable arrangements for workers).

The reference period is four months (Article 7(3) of the Cypriot WT law), however, this is subject to the general principles of the protection of workers' safety and health. The reference period does not apply in the following conditions:

- if the worker consents to performing this work (Article 7(3)(a) of the Cypriot WT law);
- the worker does not suffer any consequences should she refuse to perform such work (Article 7(3)(b) of the Cypriot WT law);
- the employer keeps a record of all workers who provide such work (Article 7(3)(c) of the Cypriot WT law);
- the file is at the disposal of the competent authority, which is entitled to prohibit or restrict the possibility of exceeding the maximum weekly working time for reasons of safety and / or health of workers (Article 7(3)(d) of the Cypriot WT law);
- at the request of the competent authority, the employer must provide proof of the workers' consent (Article 7(3)(e) of the Cypriot WT law).

Q 3: Does it apply the "opt-out" from Article 22 of the WTD to reference periods for the purpose of the calculation of the average weekly working time?

Answer to Q 3: The standard reference periods for the application of Article 6 of the WTD are as follows: the 24-hour period begins at 00:01 and ends at 24:00 hours (Article 4(2) of the Cypriot WT law). Every worker is entitled to a continuous minimum of 24 hours of rest per week (Subsection (1) of Article 4 of the Cypriot WT law) or the employer may decide that the employee shall be entitled to either two rest periods of 24 consecutive hours each over a 14-day period (Article 6(3)(a) of the Cypriot WT law), a continuous minimum rest period of 48 hours per 14-day period (Article 6(3)(b) of the Cypriot WT law).

The Department of Labour Relations has tabled an amendment of the WT law to extend the weekly reference day from Monday to the following Tuesday. Trade unions, however, object to this proposal, arguing in favour of the current reference period, i.e. from Monday to Sunday. The Department of Labour Relations has also proposed amending the daily reference period (Article 4 of the Cypriot WT law), which has received conditional support from trade unions. The largest trade unions would only consent if the amendment specifies that no worker who performs shift work will be required to provide more than one-hour services on a 24-hour basis. This is currently defined as covering the time period 00.01-24.00 of the same day. Unions are concerned that the proposed amendment may result in worse treatment of workers who perform shift work.

Q 4: The key issue: Is it allowed by your national legislation and practice to require a worker to undertake, over two consecutive fixed reference periods, an extremely long period of work consequently making that worker exceed, on average, the maximum weekly working time over a period which, since it straddles those two fixed periods, corresponds to a rolling reference period of the same duration? If yes, are there any mechanisms making it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods? If yes (there are mechanisms), what is their effectiveness?

Answer to Q 4: Under the current system, such a situation is not permissible. However, the current system does not provide for adequate and effective mechanisms, as the inspectorate is heavily overloaded with work.

The WT law provides for derogations, but asserts that the option to derogate may not result in a reference period that exceeds six months (Article 16(3) of the Cypriot WT law). It is further explicitly stipulated that in accordance with the general principles of the protection of the safety and health of workers, reference periods may be established in collective agreements or in agreements between employers and employee representatives for objective or technical reasons or for reasons of work organisation, but should not necessarily exceed 12 months.

- For shift work, whenever a worker changes shifts and cannot rest between the end of a shift and the beginning of the next daily and / or weekly rest period (Article 16(3)(a) of the Cypriot WT law);
- For activities characterized by part-time periods of work, in particular, staff engaged in cleaning activities (Article 16(3)(b) of the Cypriot WT law);
- Specialised doctors are excluded (Article 16(4)(1) of the Cypriot WT law); this is a constant problem for doctors working in the public sector, a problem that has intensified as Cyprus is preparing to implement a national health system for the first time.

4 Other relevant information

Nothing to report.

Czech Republic

Summary

Two new acts have introduced a special long-term residence permit for the purpose of seeking employment and the electronic submission of 'e-sick notes' certifying the employee's temporary incapacity for work.

1 National Legislation

1.1 Employment of Foreigners

Draft Act amending Act No. 326/1999 Sb., on the Residence of Foreign Nationals in the Czech Republic and related Acts is in the legislative procedure.

This Draft Act was discussed in the April 2018 Flash Report. Following approval from the Chamber of Deputies, this Draft Act was debated in the Senate, which approved some minor amendments to this Draft Act (related to the issue of how students will prove that she has sufficient resources to live in the Czech Republic), and returned it to the Chamber of Deputies.

The Chamber of Deputies will discuss the Draft Act as amended by the Senate. If the Senate's amendment is not passed, the Chamber of Deputies will discuss the bill without this amendment. The preliminary effective date has been set to the 15th day following its publication (with exceptions).

The Chamber of Deputies will first discuss the Senate's amendment as well as the act without the Senate's amendment (if the former is not approved). The preliminary effective date is set to the 15th day following its publication (with exceptions).

1.2 Sickness leave

Draft Act amending Act. No. 187/2006 Coll., on Sickness Insurance, as amended and Act No. 259/2017 Coll., amending Act. No. 589/1992 Coll., on social security and state employment policy premiums, as amended and other related Acts.

As regards Act No. 32/2019 Coll., amending Act. No. 262/2006 Coll., the Labour Code, as amended and other related acts, which, as of 01 July 2019, repeals the 'waiting period', i.e. the first three working days (or the first 24 hours during which no work was performed), during which the employer need not pay the employee compensation during the employee's temporary incapacity for work (this Act was discussed in the September 2018, January 2019 and February 2019 Flash Reports). The Czech legislator intends to streamline the checks of employees who are temporarily incapacitated for work.

The attending physician is currently required to announce her decision on the employee's temporary incapacity for work within the days after it is issued. He may do so electronically or in writing (by post); the latter option is preferred by 96 per cent of physicians. The district social security administration is often not informed about a sick employee until a week after the physician has issued the decision. According to the Draft Act, physicians should send the necessary information to the district social security administration electronically within one day after the decision on the temporary incapacity for work is issued; the government refers to this process as 'e-sick notes'. The district social security administration, based on the employer's request, shall provide the employer with all the necessary data verifying the temporary incapacity for work within 8 days. In practice, the system will be automated, and the employer would thus be able to receive a response almost immediately. The proposed amendment would simplify the process for employers who need to quickly determine whether the

employee's claim of temporary incapacity for work is valid. The Draft Act will go into effect on 01 July 2019 and will repeal the 'waiting period'. The Chamber of Deputies approved the Draft Act to take effect as of 01 January 2020 (with exceptions).

Due to the postponed date of effect of the Draft Act and the repealed waiting period, employers do not have the possibility to check or verify whether an employee is temporarily incapacitated for work in a timely manner. The Draft Act will now be discussed in the Senate.

The Chamber of Deputies approved the Draft Act, which will be discussed in the Senate. The preliminary date of effect is set to 01 January 2020 (with exceptions).

The Draft Act introduces the possibility of e-sick notes, which will streamline the communication between the respective parties. The employers will be able to immediately verify whether the employee is temporarily incapacitated for work. This is unlikely to have implications for the transposition of EU law.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Working Time

CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure/Premier minister

In the Czech Republic, reference periods for the purpose of calculating average weekly working times are fixed.

Derogations according to Articles 18 and 19 of the WTD are possible and reference periods are established in weeks and not in months. The reference period is up to 26 weeks and can only be extended up to 52 weeks by collective agreement.

The Czech Republic has not implemented Article 22 of the WTD. Formerly, section 93 a) of the Labour Code regulated exceptions in cases of additional (agreed) overtime of employees in the health sector. This exception only applied until 31 December 2013. Despite the fact that the provisions of Section 93 a) are no longer applicable, they have not yet been removed from the Labour Code. This is unfortunate, as those who are not lawyers are not aware that these provisions no longer apply and there is little possibility for non-lawyers to familiarize themselves with the applicable legislation.

Q 4: Is it allowed by your national legislation and practice to require a worker to undertake, over two consecutive fixed reference periods, an extremely long period of work consequently making that worker exceed, on average, the maximum weekly working time over a period which, since it straddles those two fixed periods, corresponds to a rolling reference period of the same duration? If yes, are there any mechanisms making it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods? If yes (there are mechanisms), what is their effectiveness?

Answer to Q4: Czech law allows for such a construction, provided that other rules are observed, namely an uninterrupted rest period of minimum 35 hours between the two weeks and an 11-hour rest period between the days. Such a scenario should also be in line with the ECJ's case C-306/16. How the compensatory period is set up will be of significance as well, as the maximum working time per compensatory period (up to 26 weeks without a CBA or up to 52 weeks with a CBA) must be observed.

4 Other relevant information

Nothing to report.

Denmark

Summary

(I) Companies that post workers to Denmark must register the workers in the RUT registry. Much of the data registered are accessible to the general public. A Western High Court ruling found this to be an excessive measure violating Article 56 TFEU.

(II) A claim seeking compensation for age-related discrimination was rejected by the Supreme Court due to the statute of limitations.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Posting of workers

Western High Court, No. V.L. S-1077-15, 15 May 2019

A Polish company providing services in Denmark and posting employees was fined for violating section 7a(1) of the (then) Posting of Workers Act due to not having submitted timely and accurate information to the RUT registry.

The Polish company claimed that the duty of registering violated the freedom to provide services (Article 56 TFEU), as the duty to register was excessive since all registrations in the RUT registry are publicly accessible, and not limited to the authorities and social partners.

The court found that full public access to registered information was excessive, and not proportionate for ensuring the general objective of fighting social dumping.

Consequently, the Polish company was acquitted from paying the fine for not registering its posted workers in the RUT registry.

The issue of social dumping and the posting of workers is a politically sensitive topic.

This case was dealt with prior to the implementation of the Enforcement Directive.

The ruling deviates from the regulations of the (then) Act on Posting of Workers and the Executive Orders on the RUT registry issued under this Act.

The implementation of the Enforcement Directive has adjusted the legal framework for RUT registrations as well, but has not amended the right of individuals to access the basic information of registered service providers, as stipulated in the Executive Order on the RUT registry sections 11 and 12, which was at issue before the High Court in this ruling.

The ruling thus has implications for the current state of law as well, as the public can still—following the amendment implementing the Enforcement Directive—access basic information about the service providers in the RUT registry, as provided in the Executive Order on the RUT registry section 12.

This ruling is new and can still be appealed. An appeal requires a dispensation from the appeals board, as the question was heard in the first instance by a municipal court. To bring the dispute before the Supreme Court would require a dispensation in this case. A dispensation requires the question to hold principal value.

The legal implications of the ruling are pending depending on whether the case will be appealed.

If an appeal is not granted, the ruling would mean that the legislator would have to amend the Executive Order on the RUT registry accordingly.

Sources:

The full text of the ruling is not yet available, but a press release is available here.

The current Posting of Workers Act following its amendment is available here.

2.2 Discrimination on the grounds of age

Supreme Court, No. BS-23798/2018-HJR, 03 May 2019

The statute of limitations of three years is applicable to cases concerning state liability for lack of proper implementation of EU rights for workers:

The final ruling in the Ajos case: this ruling concerned an employee's claim for damages (severance in the amount of three months' salary) from the government. The court determined that the employee was not entitled to severance under Danish state law due to his entitlement to receive old age pension. This law violates protection against age discrimination provided for in EU law, and the employee thus claimed damages from the state.

The Danish state claimed that the claim was not permissible, as it had not been filed within the three-year limitation period for ordinary claims in accordance with the statute of limitations. The employee claimed that a five-year limitation period should apply, as his claim related to employment rights, and alternatively that the limitation period had been extended or suspended by the long proceedings, including a preliminary ruling from the CJEU.

The Supreme Court ruled that the normal three-year limitation for claims for damages was applicable in this case, as the dispute between the employee and the Danish state did not relate to employment rights.

This right was established at the end of the claimant's employment relationship on 30 June 2009, and not at any later point during national or EU proceedings. The claim against the state was filed on 30 June 2014. As the employee had not notified the state at any earlier point in time, the three-year limitation period had not been suspended during the proceedings.

The court found no other grounds for suspending or extending the limitation period.

On this basis, the employee was not entitled to receive damages from the Danish state on account of the loss of severance payment.

3 Implications of CJEU Rulings and ECHR

3.1 Working time

CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure

Q 1: Are reference periods for the purpose of the calculation of the average weekly working time in your respective national legislation and practice organised as fixed or as rolling, or are both possible and existing?

Answer to Q 1: Reference periods for the purpose of calculating weekly working time is provided in the Working Time Act:

> *"**§ 4.** Den gennemsnitlige arbejdstid i løbet af en syvdagesperiode beregnet over en periode på 4 måneder må ikke overstige 48 timer inkl. overarbejde. Perioder med årlig betalt ferie og perioder med sygeorlov medtages ikke i eller er neutrale i forhold til beregningen af gennemsnittet."*

The derogation has not been used, and the only reference period allowed is four months. The provision has been interpreted by the courts. Clarification of the reference period and the calculation of working hours was the subject of the first ruling:

> *"**U2008.1246Ø** (Eastern High Court ruling): This ruling involved the clarification of the reference period in the Working Time Act. The Eastern High Court stated that according to the wording of section 4 of the Working Time Act compared with the purpose of the Act and the EU Working Time Directive, the reference period of four months must be understood as the number of calendar days that can be calculated four months ahead of any starting day chosen by the worker. The worker is entitled to choose the starting day. The four months are then calculated from that starting day, the number of calendar days within those four months are calculated – in casu 122 calendar days from 4 April to 3 August – which is then divided by 7, to arrive at the number of 7-day periods within the reference period – in casu 122 days divided by 7, equalling 17.43 7-day periods. The number of registered working hours within that same reference period is 877.5 hours. All regular working hours based on the collective agreement (7.5 hours per day from Monday-Thursday, 7 hours per day on Fridays) are included in the working hours, whereas periods of paid annual leave (11.5 hours) and periods of paid sick leave (23 hours) are not included. Likewise, bank holidays (22 hours), extra paid annual leave days (15 hours) and dental visits (4 hours) are not included. This means a reduction of the 877.5 working hours of 175.5 hours to a total of 702 hours worked at the employer's disposal within the reference period. Likewise, a reduction was made to the number of 7-day periods in the reference period to neutralise the reduced working hours. The reference number of 7-day periods was reduced to 17.43 x 702.0/877.5 = 13.94 7-day periods within the reference period."*

The average working time in each 7-day period can be calculated as 702.0/13.94 = 50.36 hours per 7-day period. This represents the statutory maximum limit of 48 hours, including overtime work.

The Eastern High Court emphasised that the employer can use a reference period of four months in accordance with the Act, during which the employer can request the worker to work overtime up to an average of 48 hours within a 7-day period without having to pay compensation. The Eastern High Court underlined that the worker is free to choose the reference period.

The ensuing rulings, U2010.2619V (Western High Court ruling) and U2018.763H (Supreme Court Ruling) have upheld the principles outlined by the Eastern High Court in 2008. This ruling has thus not been disputed.

Working time is also regulated in collective agreements. The Working Time Act does not apply if the worker is covered by a collective agreement, which as a minimum implements, inter alia, Article 6. This means that provisions in collective agreements that do not provide the minimum protection established in Article 6(b) of the Directive, do not derogate from the Working Time Act, and in this case, the protection in the Working Time Act applies. The question is well-known and well-established in Danish case law as a general issue of the right to implement the interrelationship between implementing agreements and implementing statutory acts in collective agreements, and the limitation of the freedom of contract to providing as a minimum the rights and obligations provided for by EU law. When this is not the case, the statutory acts implementing EU law provide the legal basis for workers.

Q 2: Does your system allow for reference periods of up to 4 months (article 16 (b) of the WTD), of up to 6 months (Articles 18 and 19 (1) of the WTD), and or of up to 12 months (Article 19 (2) of the WTD)?

Answer to Q 2: No.

Q 3: Does it apply the "opt-out" from Article 22 of the WTD to reference periods for the purpose of the calculation of the average weekly working time?

Answer to Q 3: No.

Q 4: The key issue: Is it allowed by your national legislation and practice to require a worker to undertake, over two consecutive fixed reference periods, an extremely long period of work consequently making that worker exceed, on average, the maximum weekly working time over a period which, since it straddles those two fixed periods, corresponds to a rolling reference period of the same duration? If yes, are there any mechanisms making it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods? If yes (there are mechanisms), what is their effectiveness?

Answer to Q 4: No – this is not permitted in the legislation and has been interpreted accordingly in case law. Case law clearly provides the legal basis that the reference period is a rolling period, and as protection benefits the worker, she is entitled to determine the starting point of the reference period on any given day.

4 Other relevant information

4.1 General election 2019

Denmark had parliamentary elections on 05 June, and for this reason, all legislative activities have been on 'stand-by' since early May.

Estonia

Summary

The average monthly wage in the first quarter was EUR 1.341 gross.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Working Time

CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure / Premier ministre

The case involved the reference periods for the calculation of the average weekly working time. The implications of the ruling are modest.

The reference period for calculating the weekly average working time is regulated in the Estonian Employment Contracts Act (*'töölepingu seadus';* hereinafter ECA).

Section 46 stipulates:

> *"(1) The summarised working time shall not exceed, on average, 48 hours over a period of seven days for a calculation period of up to four months, unless a different calculation period has been provided by law.*
>
> *(2) The calculation period specified in subsection (1) of this section may be extended up to 12 months by a collective agreement for health care professionals, welfare workers, agricultural workers and tourism workers."*

The general reference period is four months and can be extended by a collective agreement. Neither the law nor case law stipulates how the reference period shall be calculated: the beginning of the reference period can specify a fixed date and can also be flexible. This general rule is inter alia applied to both activities:

- activities based on an employment contract; and
- activities performed in public service (as an official).

An exception applies to rescue services. According to the Rescue Service Act (*'Päästeteenistuse seadus'*) Section 20 (2), the reference period for the calculation of average weekly working time is six months.

3.2 Access to the profession of lawyer

CJEU case C-431/17, 07 May 2019, Monachos Eirinaios, kata kosmon Antonios Giakoumakis tou Emmanouil v Dikigorikos Syllogos Athinon

The case concerned possible restrictions for lawyers from other EU Member States to offer legal services in an EU host state. It addressed the national restrictions regarding who can be excluded from the bar association. The case has no implications for the

Estonian legal system. In Estonia, the requirements for becoming a member or an associated member of the bar association are specified in the Bar Association Act (*'advokatuuri seadus'*).

According to Section 65 of the Bar Association Act, a person who has the right to practice law in a foreign state is admitted to the bar association as a sworn attorney on the basis of a written application and without passing the respective examination, if his professional qualifications are verified in an aptitude test. According to Section 66 of the Bar Association Act, the right to become an associated member of the bar association is granted based on an application, to individuals who want to permanently practice law in Estonia, who are citizens of an EU Member State and who have the right to practice law in an EU Member State.

When applying for the right to act as an associated member, the individual must submit a certificate issued by the competent authority of an EU Member State certifying that the person has the right to practise law in that EU Member State. The certificate shall be valid if it is issued not more than three months prior to the submission to the Board of the Bar Association.

Serving as a monk does not constitute an obstacle to becoming an associated member of the Estonian Bar Association.

3.3 Parental leave

CJEU case C-486/18, 09 May 2019, RE v Praxair MRC SAS

The present case concerned the calculation of the benefits in case of termination of an employment contract. The main question was whether the fact that an employee who was on part-time child care leave affects the amount of the calculated benefit.

This case has little implications on Estonian legislation.

According to the Estonian Employment Contracts Act, employees are entitled to child care leave until the child reaches the age of three years. There are no rules about part-time child care leave.

According to the ECA S 93 (1), it is not allowed to dismiss an employee during child care leave. Giving notice of dismissal during child care leave is also not permissible.

This means that the current legal regulation in Estonia does not allow for a situation as described in the above-mentioned case.

The ruling might be of relevance for the calculation of benefits. According to the rules on the calculation of the average wage (the average wage is the regular amount that is paid when the employment contract is terminated), the employee's last six-months' wage will be taken into account. If the employee has changed his post over the last six months due to family reasons and he is earning a lower wage, his average wage will also be lower. The method of calculation of the employee's average wage in such a situation might not be in line with the clarification in case C-486/18.

4 Other relevant information

4.1 Monthly average wage in the first quarter

The monthly average wage in the first quarter of 2019 was EUR 1,341 gross. In January, the average wage was EUR 1,309, in February it was EUR 1,317 and in March it was EUR 1,396. The highest monthly average wage was in the finance and insurance branch, the lowest monthly average wage was in service sector.

More information can be found here.

Finland

Summary

The Supreme Court has issued a ruling on temporary agency workers and fixed-term contracts.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Judgment of the Supreme Court on temporary agency work

Supreme Court, Judgment Number 45, Record Number S2017/2942019:45, 16 May 2019

A temporary agency had concluded several consecutive fixed-term contracts with the claimants. The fixed-term periods were to end when the user company's need for the worker's services ceased. The Supreme Court determined that the need for the workforce was permanent, and that no legal grounds existed to conclude fixed-term contracts. When the employment contracts were terminated by the employer, the employees were entitled to a salary and annual leave benefits during the period of notice.

The judgment can be found here.

3 Implications of CJEU Rulings and ECHR

Q 1: Are reference periods for the purpose of the calculation of the average weekly working time in your respective national legislation and practice organised as fixed or as rolling, or are both possible and existing?

Answer to Q 1: Regular working hours shall not exceed eight hours a day or 40 hours a week. The regular weekly working hours can also be arranged in such a way that the average is 40 hours over a period of no more than 52 weeks. (52 weeks = not a calendar year, but any 12-week period).

Legislation on daily and weekly rest periods also applies. This leads to practical restrictions to work organisation, so as a general rule, a shift can be 10-11 hours per day. The maximum weekly working hours as a general rule are 48 hours.

Q 2: Does your system allow for reference periods of up to 4 months (article 16 (b) of the WTD), of up to 6 months (Articles 18 and 19 (1) of the WTD), and or of up to 12 months (Article 19 (2) of the WTD)?

Answer to Q 2: 12 months.

Q 3: Does it apply the "opt-out" from Article 22 of the WTD to reference periods for the purpose of the calculation of the average weekly working time?

Answer to Q 3:

Not under the current Working Hours Act, but under the New Working Hours Act, which will enter into force on 01 January 2020, for medical doctors in hospitals and veterinarians in veterinary hospitals.

Q 4: The key issue: Is it allowed by your national legislation and practice to require a worker to undertake, over two consecutive fixed reference periods, an extremely long period of work consequently making that worker exceed, on average, the maximum weekly working time over a period which, since it straddles those two fixed periods, corresponds to a rolling reference period of the same duration? If yes, are there any mechanisms making it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods? If yes (there are mechanisms), what is their effectiveness?

Answer to Q 4:

See answer 1. The legislation on daily and weekly rest periods prohibits arrangements for extremely long working periods. This is the situation in the current Working Hours Act, which is in line with the Working Time Directive. A new Working Hours Act will enter into force on 01 January 2020, which takes account of the directive and the Commission's instructions, as well as the legal practice of the CJEU.

4 Other relevant information

4.1 Parliamentary Election

Following the parliamentary elections on 14 April 2019, Mr. Antti Rinne is forming a new government. The government programme has been finalised. The ministerial positions are under negotiation. The parties participating in the government will be the Social Democrats, the Central Party, the Greens, the Left Wing, and the Swedish People's Party.

The Coalition (Conservatives) will be in opposition as will the Christian Democrats and the populist party True Finns.

France

Summary

(I) The Act on Growth and Transformation of Enterprises contains new regulations on the dismissal of certain employees who work for credit institutions or finance companies, on retirement savings plans, and on the calculation of companies' workforce for the purposes of labour law and social security.

(II) A decree has introduced measures to enhance transparency and address the gender pay gap within undertakings.

(III) The Court of Cassation has issued rulings on dismissal protection, health and safety committees and transfers of undertakings.

1 National Legislation

1.1 Act on growth and transformation of enterprises

Law No. 2019-486, of 22 May 2019, '*relative à la croissance et la transformation des entreprises*' has been published in JO of 23 May.

1.1.1 Dismissal of 'risk takers'

Certain employees of credit institutions or finance companies may be required to return all or part of their variable remuneration as a result of their actions or behaviour (see C. mon. fin. Art. L. 511-86). The Act on Growth and Transformation of Enterprises has introduced this provision which specifies that this return of the employee's variable remuneration is made by way of derogation from the prohibition of pecuniary penalties provided for in Article L. 1331-2 of the Labour Code. The new text provides that this sanction applies in the event of failure to comply with the rules laid down by the institution on risk-taking or in the event of failure to comply with the obligations of good repute and competence. In addition, severance pay, or pay awarded by the courts in the event of unfair dismissal, will no longer take into the variable part of risk takers' remuneration into account (see C. mon. fin. Art. L. 511-84). The employees concerned are specified in Articles 3 and 4 of Commission Regulation (EC) No. 604/2014 of 04 March 2014, supplementing Directive 2013/36/EU.

1.1.2 Retirement savings plan

A major reform of retirement savings schemes was initiated with the PACTE law ('*Plan d'Action pour la Croissance et la Transformation des Entreprises*'; 'Action Plan for Business Growth and Transformation'; see also April 2019 Flash Report) and is expected to enter into force on 01 January 2020 (at the latest). The collective retirement plan PERCO (*plan d'épargne pour la retraite collectif*) is an integral part of this reform, as are other group retirement savings products (Article 83 pension scheme and PER) and individual retirement savings products (Perp and Madelin contract). In the long term, PERCO will be absorbed together with the other retirement savings products into a single product, PER. In the meantime, the Law on Growth and Transformation of Enterprises contains three measures concerning the existing PERCOs. Two measures of immediate application are permanent, while the third is a transitional measure. To set up a PERCO, the company had to thus far give employees the possibility to opt for a shorter plan or a PEI (*plan d'épargne interentreprises*). To facilitate the use of this retirement savings product, this condition has been eliminated. Article L. 3334-5 of the Labour Code, which

referred to it, was repealed by Article 161 of the Law on Growth and Transformation of Enterprises

The account maintenance fees paid by former employees who retained their employee savings plan after leaving the company increased considerably. These costs will now be capped, but only for PERCO (C. trav., Art. L. 3334-7 mod. by the Law on Growth and Transformation of Enterprises, Art. 155, I, 23). More details will become available when the decree is published.

Today, if PERCO offers default management and invests at least 7 per cent in securities eligible for SMEs' equity savings plans (PEA-PME; *Plan d'Epargne en Actions* – petites et moyennes entreprises), the social security flat rate applicable to the employer's contribution is reduced to 16 per cent (PERCO +). The PACTE law extends this mechanism to the future PER and increases the percentage of securities eligible for the PEA-PME from 7 per cent to 10 per cent (CSS, Art. L. 137-16 mod. by Loi PACTE, Art. 71, III). These amendments are expected to come into force no later than 01 January 2020.

1.1.3 Workforce calculation

The rule for calculating the staff threshold for the Social Security Code, which is currently laid down in Article R. 130-1 of the Social Security Code, has now been enshrined at the legal level in Article L. 130-1 of the Social Security Code.

The application of this method for calculating the number of employees:

- continues to apply to nearly all provisions of the Social Security Code with membership thresholds;
- is extended to certain Labour Code provisions and other legislation (see summary table below).

To assess the total number of employees, section I of the new Article L. 130-1 of the Social Security Code, which incorporates the terms of the current Article R. 130-1, takes the 'average annual number of employees' into account. It specifies that "the annual number of employees of the employer, including a legal person with several establishments, corresponds to the average number of persons employed during each month of the previous calendar year". As a result:

- the company represents the scope for calculating the workforce is the company (and not the establishment). Article L 130-1, I provides for the calculation of the number of employees at the level of 'the legal person comprising several establishments';
- the reference period for calculating the number of employees is the previous calendar year. The number of employees is therefore assessed on 31 December of year N-1 on the basis of the average of each month of year N-1. It should be noted that the consequence of exceeding the required threshold does not automatically go into effect on 01 January of year N towing to the threshold effect mitigation mechanism, which requires the threshold to be exceeded for five consecutive years in order to have a binding effect.

The only exception is the reference period for pricing the risk of 'accidents at work and occupational diseases': the workforce taken into account for the calculation is that of the last known year, i.e. year N-2. In addition, the clarification that 'the number of employees to be taken into account for the year of the establishment of the 1st paid job corresponds to the number of employees present on the last day of the month in which this first hiring was made' is maintained.

1.2 Equal pay

Decree No. 2019-382 of 29 April 2019 implements the provisions of Article 104 of Act No. 2018-771 of 05 September 2018 on the freedom to choose one's professional future with regard to obligations arising from professional equality between women and men in the company, and was published in JO of 30 April 2019.

The Act of 05 September 2018 on the freedom to choose one's professional future requires companies with at least 50 employees to calculate and publish the pay gap indicator between women and men, i.e. 'the pay gap index', and to take corrective measures, in particular when this gap exceeds 75. At the same time, companies in which at least one trade union delegate has been appointed are required to enter into negotiations on professional equality between women and men and draw up an action plan if the gap exceeds 75. Taking into account the pay gap index's indicators will be one of the components of mandatory negotiations on professional equality. The main objective of Decree No. 2019-382 of 29 April 2019 concerns the link between these two obligations.

In addition, the decree includes the obligation to calculate the index on remuneration differentials within the scope of control by the administration over the company's obligations as well as in the calculation of the penalty due, if any, in the event of default.

The agreement on professional equality, or action plan, entails three progress objectives (companies with less than 300 employees) or four progress objectives (companies with 300 or more employees) chosen from a list of eight action themes. Effective remuneration is an objective of progress imposed in all cases.

During the next negotiations on professional equality, or during the annual review in the case of a multiannual agreement, the index on pay gaps will be one of the components provided to the social partners.

If a company's pay gap exceeds 75, the employer is required to enter into negotiations on corrective measures during the negotiations on professional equality or, failing that, to take the corresponding decisions alone after consulting the CSE (Labour Code, Article L. 1142-9).

The summary of the action plan, which informed employees of its content, is correlatively deleted (C. trav., Art. R. 2242-2-2-2). In the absence of an agreement on professional equality, the action plan is deposited on the teleprocedure platform of the Ministry of Labour, as is the agreement itself (C. trav., Art. R 2242-2-1).

1.2.1 Control by the administration and determining the penalty

When a screening officer finds that a company:

- is not covered by a professional equality agreement or, failing that, by an action plan;
- has not published the result of the equal pay index for women and men;
- has not defined corrective measures, if they are mandatory,

she shall request the company to remedy this situation within a period compatible with the nature of the breach and the company's situation, which may not be less than one month. This formal notice is sent to the employer by any means allowing a certain date to be proposed for its receipt (C. trav., Art. R. 2242-3).

In response, the employer shall, within the time limit set, provide evidence of either compliance with these obligations by sending the agreement on professional equality or an action plan, or by proof of publication of the company's overall score, and, where applicable, by agreement on corrective measures or of the decision taken unilaterally.

In the absence of such justifications, the employer must indicate the reasons for failure to provide them (C. trav., Art. R. 2242-4).

The penalty imposed on an employer who has not met the above requirements is calculated on the basis of the turnover that corresponds to the full month following the end of the formal notice. It is due for each full month that elapses between this term and the receipt by the labour inspector of the justification for failure to meet the requirements (C. trav., Art. R. 2242-7). The calculation of the penalty will apply to formal notices issued after 01 May 2019.

2 Court Rulings

2.1 Working time; information and consultation

Constitutional Council, No. 2019-781, 16 May 2019

The draft government law, which was finally adopted on 11 April 2019, includes several measures relating to labour law and social security contributions. This draft was referred to the Constitutional Council, which issued its decision on the conformity of the text on 16 May 2019.

The Constitutional Council declared the measures relating to social aspects to be in conformity with the law, with the exception of two measures considered to be 'legislative riders' (unrelated to the themes of the bill):

- The measure authorising a derogation from the general law on night and evening work for food retail businesses (Article 19 of the draft law);
- Requiring a reasoned response from the Board of Directors to the CSE (Social and Economic Committee) regarding the company's strategic orientations (Art. 191).

The other measures of the social component of the Pacte law were validated and await the promulgation of the law to be implemented. The entry into force of most of the provisions is set for 01 January 2020 and requires the publication of implementing decrees:

- Employee thresholds, in particular as regards the application of the calculation method based on the Social Security Code to some of the provisions of the Labour Code, and a 'freeze' over a 5-year period on the crossing of many thresholds;
- Employee savings schemes;
- Retirement savings schemes;
- International corporate volunteering.

2.2 Dismissal

Labour division of the Court of Cassation, No. 17-21.175, 17 April 2019

In the present case, an employee dismissed for economic reasons brought a claim for damages before the labour court for breach of the re-employment priority to which she was entitled. The employer had, in fact, selected another employee for the position of sales engineer, even though the claimant had responded favourably to the proposal for re-employment that had been communicated to her.

The Court of Appeal did not grant the employee's request on the grounds that the position offered to her had been filled on the day she received her acceptance. The proposal had been sent on 23 April 2014 with a 10-day acceptance period. The employee accepted the proposal on 28 April 2014 by registered letter, but this reply was not

received by the company until 06 May 2014, i.e. after the deadline set by the employer. While the employee did not deny the possibility offered to the employer to unilaterally set a reasonable time limit for acceptance of the proposal, she criticised the judges of the merits for not having retained the date of dispatch of the acceptance letter to render their decision, namely 28 April 2014.

The Court of Cassation confirmed the Court of Appeal's decision because 'the employee had sent her response to the re-employment proposal after the deadline set by the employer'. It thus seems that this decision implicitly asserts that it is the date of presentation of the letter, and not the date of dispatch, that suspends the deadline unilaterally set by the employer to respond to the re-employment proposal.

> *"Mais attendu qu'ayant constaté qu'il était établi par la salariée que l'application des critères d'ordre des licenciements lui permettait d'obtenir dix-sept points, qu'elle était la plus ancienne dans l'entreprise après un autre salarié, qu'elle avait été désignée par le groupe Quantum Corporation comme la meilleure « channel manager », c'est-à-dire la meilleure ingénieure commerciale partenaire du groupe au cours du dernier trimestre de l'année 2013, que la lecture des contrats de travail des autres salariés concernés par la procédure de licenciement démontre que la plupart n'avait pas ou moins d'enfants que la salariée, moins d'ancienneté, une polyvalence plus modeste et une faculté d'adaptation moindre et qu'elle ne pouvait être celle obtenant le nombre de points le plus faible pour établir l'ordre des licenciements, qu'elle a été la seule femme à être licenciée, l'ensemble de ses homologues masculins ayant été épargnés par cette procédure, la cour d'appel a pu en déduire que ces faits laissaient supposer l'existence d'un licenciement discriminatoire en raison du sexe et, sans avoir à procéder aux recherches visées à la troisième branche que ses constatations rendaient inopérantes, a estimé que l'employeur n'apportait pas la preuve que sa décision était justifiée par des éléments objectifs étrangers à toute discrimination ; que le moyen n'est pas fondé ;"*

2.3 Health and Safety

Labour division of the Court of Cassation, No. 18-11.558, 17 April 2019

The Health, Safety and Working Conditions Committee was removed from the September 2017 Macron Orders. From now on, a committee in charge of health and safety issues must be set up within the CSE (*Comité social et économique*) in companies with 300 and more employees. The implementation of such a committee is optional for smaller companies.

In this case, the Health, Safety and Working Conditions Committee of a network and pipeline distribution company voted to appoint a serious risk management expert on 20 September 2017. The serious risk highlighted by the members of the body related to the presence of a high psychosocial risk in the company, supported by various elements (in particular: overwork, bullying, intimidation of managers, exposure to various risks, general malaise reported by employees, sharp increase in the number of sick leaves), which lasted several years (between 2015 and 2017). The company contested the validity of this deliberation.

The company did not expressly mention in the agenda of the meeting that an expert would attend. It simply stated that the meeting would focus on 'psychosocial risks in the company'. The Court of Cassation dismissed this argument, and ruled that as soon as the elements presented in support of the appointment of such an expert were related to the issues on the agenda, then this would not be a justification allowing the deliberation to be cancelled.

It then explained that in view of the various arguments put forward, the risk in question was neither identified, nor current, nor preliminary to the expertise (in particular, in that it was based on facts spread over time). However, these are criteria required by case law for the characterisation of a serious risk. The Court, which assesses the various facts established by the Health, Safety and Working Conditions Committee, rejected this argument, and asserted that the risk in question was well identified and relevant. It thereby maintained its official line according to which a grouping of corresponding elements can make it possible to characterise a serious risk (Cass. soc., n° 17-15.530, 13 February 2019). Moreover, it is a reminder that it does not matter whether the facts occurred in the past, as long as the risk persisted over time, and that it still existed at the time the expert was appointed. However, according to the Court of Cassation and the Health, Safety and Working Conditions Committee, the facts reported, which began in 2015, continued, since the psychosocial risk was still present in the company in 2017, at the time of the deliberation. It had already ruled on a chemical risk that was identified even when the employees were no longer exposed to dangerous products, since the risk to the health of the employees existed at the time of the deliberation (Cass. soc., n° 13-13.561, 07 May 2014). The appeal was therefore dismissed.

2.4 Transfer of undertaking

Labour division of the Court of Cassation, No. 17-17.889, 17 April 2019

A company based in Orléans took over the activity of selling and marketing flowers via the Internet for a production site located in Nantes. Wishing to pool human and technical resources in a single place of production, the transferee closed the establishment located in Nantes, moved the establishment's activity to Orléans and proposed a change in the workplace in the employment contracts of the transferred employees. Many of them rejected this change and were dismissed for real and serious grounds.

The employees disputed the validity of their dismissal. They argued that when the application of Article L. 1244-1 of the Labour Code results in a change in the employment contract other than a change of the employer, the employee is entitled to object. If the transferee has the possibility of drawing the consequences of this refusal by initiating a dismissal procedure, it cannot be a dismissal for personal reasons.

The Court of Appeal ruled in the claimants' favour. Having noted that the redundancy letter itself indicated that the transfer of employees to the Orléans plant was justified solely by the company's desire to keep only one production site in order to reduce costs, the court ordered the redundancies to be reclassified as redundancies for economic reasons and that they had no real and serious cause.

The assessment was contested by the buyer who lodged an appeal. Taking up the solution put forward by the Court of Cassation in a judgment of 01 June 2016 (Cass. soc., n°14-211.43, 01 June 2016), he argued that when the application of Article L. 1224-1 of the Labour Code leads to an amendment of the employment contract other than a change of employer, the employee is entitled to reject it. It is then up to the transferee, if he is unable to maintain the previous conditions, to either formulate new proposals or to draw the consequences of this refusal by initiating a dismissal procedure. The employee's refusal under these circumstances constituted a real and serious cause for the transferee for dismissal not covered by the provisions relating to dismissal for economic reasons.

The transferee argued that in this case, the transfer of undertaking itself had led to a change in the transferred employees' contracts, as the transferee did not have an establishment in Nantes. The refusal of the employees to continue the performance of work in Orléans in accordance with their contract constituted a real and serious cause for dismissal not covered by the provisions relating to economic dismissal.

This analysis was rejected by the Court of Cassation, which argued that when the application of Article L. 1224-1 of the Labour Code leads to an amendment of the employment contract other than a change of the employer, the employee is entitled to object, and on the other hand, that the termination resulting from the employee's refusal to accept a change to his employment contract proposed by the employer for a reason not inherent to his person, constitutes a dismissal for economic reasons.

In the present case, the Court of Appeal noted that the amendment of the employees' employment contracts was part of the company's desire to only keep one production site to reduce costs and that the stated objective was to ensure the continuity of its Internet activity. It concluded that the real reason for the dismissal was the result of the reorganisation of the transferee following the takeover of the florist business. These dismissals had the legal nature of dismissals for economic reasons. Having been pronounced for personal reasons, they were, therefore, devoid of any real and serious cause.

> *"Mais attendu, d'une part, que lorsque l'application de l'article L. 1224-1 du code du travail entraîne une modification du contrat de travail autre que le changement d'employeur, le salarié est en droit de s'y opposer et, d'autre part, que la rupture résultant du refus par le salarié d'une modification de son contrat de travail, proposée par l'employeur pour un motif non inhérent à sa personne, constitue un licenciement pour motif économique ;*
>
> *Et attendu que la cour d'appel, qui a constaté que la modification du contrat de travail de la salariée s'inscrivait dans la volonté de l'entreprise de ne conserver qu'un seul lieu de production dans le but de réaliser des économies, que l'objectif affiché était la pérennisation de son activité internet et que le motif réel du licenciement résultait donc de la réorganisation de la société cessionnaire Bloom Trade à la suite du rachat d'une branche d'activité de la société Le Bouquet Nantais, en a exactement déduit, sans être tenue de répondre à un moyen que les termes de la lettre de licenciement rendaient inopérant, que le licenciement avait la nature juridique d'un licenciement économique, ce dont il résultait qu'ayant été prononcé pour motif personnel il était dépourvu de cause réelle et sérieuse ;"*

3 Implications of CJEU Rulings and ECHR

3.1 Working time

CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure / Premier ministre

Articles L 3121-20 and L 3121-22, which fix the maximum work week at 44 hours over 12 consecutive weeks and 48 hours over the same week are in line with the Community Directive, which provides that the average working time within each 7-day period may not exceed 48 hours, including overtime (Directive 2003/88/EC of 4-11-2003 Art. 6 § 2), the duration of the reference period for the application of these provisions is not to exceed four months (Directive 2003/88/EC of 4-11-2003 Art. 16. b).

By way of exception, this 44-hour period may be extended to 46 hours by an agreement or arrangement of a company or establishment or, failing that, by an agreement or arrangement of a branch (Labour Code, Art. L. 3121-23). If no agreement is reached, exceeding the average maximum weekly working time provided for in Article L. 3121-22 shall be authorised by the administrative authority under conditions determined by a decree of the Council of State within the limit of a total maximum working time of 46 hours (Labour Code, Article L. 3121-24; Labour Code, Article R. 3121-10).

In addition, this 46-hour period may also be waived for specified periods, on an exceptional basis, in certain sectors, regions or companies under the following conditions:

- exceeding the average weekly working time of 46 hours over a period of 12 consecutive weeks;
- distribution of this same average over a period of more than 12 weeks;
- combination of the two previous modalities.

Authorisation specifies the method, extent and other conditions of the authorised overrun (Work Code, art. R. 3121-12).

In principle, the maximum working time is 48 hours during the same week (C. trav., Art. L. 3121-20).

In exceptional circumstances, the labour inspectorate may authorise an extension of this time limit by up to 60 hours per week (Labour Code, Art. L. 3121-21). The Social and Economic Committee shall issue its opinion on applications for authorisation in this regard. This notice is forwarded to the Labour Inspection Control Officer.

Derogations may be accompanied by compensatory measures, as laid down in the decision granting the derogation. These can impose:

- a reduction of the average weekly working time to less than 46 hours during a specified period after the expiry date of the derogation;
- provide for additional rest periods for workers;
- reduce the maximum working time for a limited period of time.

The nature and conditions of this compensation are determined by the authorisation decision (C. trav., art. R. 3121-9).

In exceptional circumstances and for their duration, exceeding the maximum duration may be authorised by the administrative authority. This only applies to exceptional circumstances that temporarily lead to an extraordinary increase in work. The employer sends the authorisation request to the labour inspector. It must be accompanied by justifications regarding the exceptional circumstances and specify the duration for which the derogation is requested. The opinion of the Social and Economic Committee, if any, on this overrun shall accompany the request. The Regional Director of Enterprise, Competition, Consumer Affairs, Labour and Employment shall take a decision on the basis of a report drawn up by the labour inspector, indicating in particular whether the situation of the applicant company justifies an authorisation thereof. The decision specifies the scope of the authorisation as well as the duration for which it is granted (C. trav., art L. 3121-10).

4 Other relevant information

Nothing to report.

Germany

Summary

The government plans to introduce a statutory minimum remuneration for trainees. According to the Federal Administrative Court, the Working Time Act applies to educators who work in residential groups as part of the so-called alternating care of children and youth. According to the Financial Court Hamburg, a payment in lieu of holiday is subject to income tax. The ruling of the CJEU in case C-254/18 will have considerable implications in Germany.

1 National Legislation

1.1 Minimum remuneration for trainees

On 15 May 2019, the Federal Cabinet reached a consensus in developing legislation aiming to introduce minimum remuneration for trainees. According to the new law, trainees will receive at least EUR 515 per month in their first year of training starting in 2020. By 2023, the minimum remuneration will gradually increase to EUR 620. The Federal Government has announced that the minimum remuneration for trainees will apply to new training contracts concluded as of 01 January 2020 that are not subject to a collective agreement.

More information can be found here.

2 Court Rulings

2.1 Working Time

Judgment of the Federal Administrative Court Case– 8 C 3.18, 08 May 2019

According to the Federal Administrative Court, the Working Time Act (*Arbeitszeitgesetz*) applies to educators who work in residential groups as part of the so-called alternating care of children and youth.

In the present case, the employer ran residential groups in which six children and youth are regularly cared for by three educators. Within the framework of the alternating care practised here, one of the educators lives in the residential group for two to seven days. The second educator is on duty during the day, the third enjoys free time.

In the view of the Court, the applicability of the Working Time Act to the educators was not excluded under Section 18(1) No. 3 of the Working Time Act. Pursuant to Section 18(1) No. 3 of the Working Time Act, the law does not apply to workers "who live in a domestic community with the persons entrusted to them and who educate, care for or care for them on their own responsibility". According to the Court, this exception presupposes. among other things, that the employees concerned live together in a domestic community with the persons entrusted to them. In addition, common living for a longer period is necessary which aims at personal continuity as well as nearly permanent availability of the employee, and is characterised by the fact that work and rest periods cannot be separated from one another. The Court expressly held that this understanding of Section 8(1) No. 3 *Arbeitszeitgesetz* is in line with Union law, namely Directive 2003/88/EC.

A summary of the judgment can be found here.

2.2 Payments in lieu of holiday

Judgment of the Financial Court Hamburg Case– 6 K 80/18, 19 March 2019

According to the Financial Court Hamburg, a payment in lieu of holiday does not constitute damages. It represents a subsequent wage payment by the employer. Accordingly, such a payment is subject to income tax.

In the present case, the employee had not been able to use his holiday entitlement for a longer period of time due to incapacity for work and subsequent severe disability. His employer made a payment in lieu of annual leave. According to Section 47(4) of the Federal Holiday Act (*Bundesurlaubsgesetz*), annual leave is to be compensated if it can no longer be granted in whole or in part due to the termination of the employment relationship.

The Court ruled that in the present case, the payment was the result of the work performed by the employer. The worker had received the payment from the employer because of his work, not because of a breach of the employer obligations.

Or, as the Court put it: "(…) the employer pays the allowance in the broadest sense in return for the employee making his individual labour available. Compensation for leave not granted is a subsequent wage payment". Moreover, the Court clarified that the classification of the claim under labour law or social law is not decisive for taxation purposes.

The judgment can be found here.

3 Implications of CJEU Rulings and ECHR

3.1 Working time

CJEU case C-254/18, Syndicat des cadres de la sécurité intérieure / Premier ministre, 11 April 2019

Q 1: Are reference periods for the purpose of the calculation of the average weekly working time in your respective national legislation and practice organised as fixed or as rolling, or are both possible and existing?

Answer to Q1: Pursuant to section 3 of the Working Time Act (*Arbeitszeitgesetz*), working hours may not exceed eight hours. Working hours may be extended to up to ten hours only if, within six calendar months or within 24 weeks, an average of eight hours is not exceeded on working days. Compensation for working time extensions must be made in such a way that an average of eight hours per working day are not exceeded within the reference period chosen for the company. This condition is fulfilled if the total hours worked by the individual employee do not exceed the total hours allowed during this period. With regard to the reference period, the employer can choose between a period of six months and a period of 24 weeks (*ErfKomm/Wank*, § 3 ArbZ G note 6). In the legal literature it is disputed whether section 3 sentence 2 refers to time months (rolling period) or to calendar months. (cf. *Kock*, in: Rolfs a. o. (ed.), BeckOK Arbeitsrecht, 51st ed., § 3, note 10 with further references).

Q 2: Does your system allow for reference periods of up to four months (Article 16 (b) of the WTD), of up to six months (Articles 18 and 19 (1) of the WTD), and or of up to 12 months (Article 19 (2) of the WTD)?

Answer to Q2: The reference period under Section 3 sentence 2 of the Working Time Act amounts to six months or 24 weeks, respectively. According to prevailing opinion, this period infringes Article 16 lit. b of the Working Time Directive (*ErfKomm/Wank*, § 3 ArbZ G note 6; *Ulber*, in: Preis/Sagan (ed.), *Europäisches Arbeitsrecht*, second edition

2019, § 7 note 7.173; *Gallner, in: Franzen a.o. (ed.), Europäisches Arbeitsrecht*, second edition 2018, Article 16 RL 2003/88/EC note 5 each with further references).

Section 7(8) sentence 1 of the Working Time Act allows for a reference period that is fixed in a collective agreement (or based on such agreements) of up to 12 months. However, this provision is widely considered to be contrary to Union law because it is generally applicable rather than related to only "objective or technical reasons or reasons concerning the organisation of work" within the meaning of Article 19(2) of the Working Time Directive (*Ulber*, in: Preis/Sagan (ed.), *Europäisches Arbeitsrecht*, second edition. 2019, § 7 note 7.258)

Q 3: Does it apply the "opt-out" from Article 22 of the WTD to reference periods for the purpose of the calculation of the average weekly working time?

Answer to Q3: In Germany, Article 22 of the Working Time Directive is applied in section 7(2a) of the Working Time Act which reads as follows:

> *"Notwithstanding sections 3, 5 (1) and § 6 (2), it may be permitted in a collective agreement or on the basis of a collective agreement in a works agreement or service agreement to extend the working day working time by more than eight hours without compensation, if the working time regularly and to a considerable extent includes readiness for work or standby duty and special regulations ensure that the health of the employees is not endangered".*

The conformity of the provision with Union law is questioned by many in the legal literature (see, for instance, *ErfKomm/Wank*, § 7 ArbZ G note 18). Above all, parts of the legal literature argue that a referral to the CJEU is necessary if national provisions (such as section 7(2a)) are based on Article 22 of the Directive and collective bargaining provisions are based solely on such provisions. Accordingly, it is argued that collective agreements are inapplicable if they, based on section 7(2a) of the Working Time Act, increase the average working time to over 48 hours (see *Ulber*, in: Preis/Sagan (ed.), *Europäisches Arbeitsrecht*, second edition 2019, § 7 note 7.287). The Federal Labour Court (of 23.06.2010 – 10 AZR 543/09), however, has explicitly denied an obligation to refer the issue to the CJEU's note 36:

> *"The incompatibility of a national rule of law with directives under Union law does not, however, in principle lead to the rule being disregarded. In contrast to standards of primary law and regulations in EU regulations, a directive has no direct effect. It is based on Art. 288 TFEU to the Member States and obliges them to implement the relevant provisions in national law. Directives do not work directly between citizens (...)".*

Note 38:

> *"Accordingly, with regard to the compatibility of section 7(2a) of the Working Time Act with Art. 22 of Directive 2003/88/EC no referral to the ECJ is required. There is an obligation to refer the matter to the ECJ under Art. 267(2) and (3) TFEU only if the question of interpretation is relevant to the decision from the point of view of the national court (...). Section 7(2a) of the Working Time Act could not, however, remain unapplied even in the event of a violation of the Working Time Directive, including the collectively agreed working time regulation based on it".*

4 Other relevant information

Nothing to report.

Greece

Summary

A recent Law (4611/17.5.2019) provides for the first time in Greece that the employer must justify the dismissal of an employee who has concluded a contract of indefinite duration.

1 National Legislation

1.1 Dismissal protection

Under Greek labour law, the lawfulness of the dismissal of an employee with an open-ended contract did not depend on the existence of any particular grounds. An employer might unilaterally terminate an employment relationship without presenting reasons for the termination, unless the employee benefits from special protection from dismissal as provided either by law, a collective agreement or her individual contract. On the legislative basis of the general prohibition of an abusive exercise of a right (Article 281 of Civil Code), significant restrictions on the freedom to dismiss had been imposed by the courts. The employee could challenge the dismissal if the employer dismissed her for reasons that constituted an abuse of a right. Thereby, grounds for dismissal were indirectly controlled by the application of the above principle of the prohibition of abuse of rights. In the event of a trial, the competent court would evaluate the grounds for the dismissal to determine whether it was abusive, as claimed by the plaintiff (employee).

On the other hand, as the revised European Social Charter of the Council of Europe (Article 24) has been ratified by Greece (Law 1426/1984, Law 4359/2016), a debate has been initiated whether the Greek legal system should adopt the regulation of the employer's obligation to justify dismissals. Some legal scholars argued that the employer ought to justify an employee's dismissal, while others argued that employers did not have this obligation, as Greek law provides for the payment of severance pay if an employee with a contract of indefinite duration is dismissed. The Greek Supreme Court stated that the ratification of the revised ESC (European Social Charter) does not require any legislative change.

A recent Law (4611/17.5.2019) completely modified the entire system and provides that the employer must justify the dismissal of an employee with a contract of indefinite duration. This constitutes one of the most important labour law changes in recent years.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Working time

CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure / Premier ministre

Q 1: Are reference periods for the purpose of the calculation of the average weekly working time in your respective national legislation and practice organised as fixed or as rolling, or are both possible and existing?

Answer to Q1: Reference periods for the purpose of calculating the average weekly working time in Greek legislation (Art 6 of P.D. 88/1989) are not specified as a rolling or as a fixed period.

Q 2: Does your system allow for reference periods of up to 4 months (article 16 (b) of the WTD), of up to 6 months (Articles 18 and 19 (1) of the WTD), and or of up to 12 months (Article 19 (2) of the WTD)?

Answer to Q2: The statutory standard maximum weekly working time according to Article 6 of Presidential Decree 88/1989, which transposed Article 6 of WTD, is 48 hours per week.

The standard reference period for the application of Article 6 of Presidential Decree 88/1989, which transposed Article 6 of WTD, is four months.

In the Greek legal system, it is not possible to use a reference period that exceeds 6 months for the purpose of calculating the average weekly working time.

However, derogations from Article 4 of Presidential Decree 88/1989, which transposed Articles 6 and 16 of the WTD, may be introduced in collective agreements at any level or in agreements concluded between the two sides of industry in conformity with the rules laid down by them. Derogations shall be possible on the condition that equivalent compensatory rest periods are granted to the workers concerned or, in exceptional cases where it is not possible for objective reasons to grant such periods, the workers concerned must be afforded appropriate protection pursuant to the legislation on health and safety of workers.

There are two systems of such derogation. The first system provides a reference period of 6 months, including an average working time of 48 h per week. The second system provides a reference period of 12 months with an average working time of 48 h per week of overtime and a maximum overtime of 256 h per calendar year over a 32-week period.

Q 3: Does it apply the "opt-out" from Article 22 of the WTD to reference periods for the purpose of the calculation of the average weekly working time?

Answer to Q3: No, there is no general possibility to derogate from Article 6 of Presidential Decree 88/1989 (which transposed Article 6 of the WTD), which applies to all sectors.

Yes, Art 3 para 4 of Law 4498/2017 provides that in the event of a weekly working time of medical doctors which exceeds 48 hours, the general principles of the protection of the safety and health of workers shall be respected. More specifically:

- Art 3 para 4 a of Law 4498/2017 provides that no employer (hospital or medical centre) may require a worker to work more than 48 hours over a seven-day period, calculated as an average for the reference period of 4 months, unless she has first obtained the worker's agreement to perform such work. This agreement shall be exceptional, in writing and signed by the employee and can be revoked at any time;
- Art 3 para 4 a of Law 4498/2017 provides that no worker shall be subjected to any detrimental treatment by his employer because he is unwilling to agree to perform such work;
- Art 3 para 4 b of Law 4498/2017 provides that the employer shall keep up-to-date records of all medical doctors who carry out such work;

- Art 3 para 4 b of Law 4498/2017 provides that the records shall be placed at the disposal of the Minister of Health, which may, for reasons connected with the safety and/or health of doctors, prohibit or restrict the possibility of exceeding the maximum weekly working hours;
- Art 3 para 4 b of Law 4498/2017 states that the employer (hospital or medical centre) shall regularly provide the competent authorities with information (statistical data) on cases in which agreement has been given by doctors to perform work exceeding 48 hours over a period of seven days and particularly on the agreement or the revocation of the agreement to perform such work.

3.2 Parental leave

CJEU case C-486/18, 09 May 2019, RE v Praxair MRC SAS

Severance pay is calculated on the basis of the dismissed employee's regular remuneration in her last month of employment (Article 5(1) of Law 3198/1955). This remuneration shall include all allowances and all additional payments, such as the annual leave bonus, Easter and Christmas bonuses, remuneration for regular overtime, night and Sunday work.

Where a full-time worker employed for an indefinite duration is dismissed at the time he is on part-time parental leave, the severance pay will not be determined, at least in part, on the basis of the employee's reduced salary at the time of dismissal, as it does not corresponds to his 'ordinary' remuneration.

Therefore, this judgment does not have any implications for Greek legislation.

4 Other relevant information

Nothing to report.

Hungary

Summary

No relevant labour law developments occurred in Hungary in May.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working time

CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure / Premier ministre

Q1: Are reference periods for the purpose of the calculation of the average weekly working time in your respective national legislation and practice organised as fixed or as rolling, or are both possible and existing?

Answer to Q1: There are two solutions on the basis of the regulations of Act I of 2012 in the Labour Code (hereinafter: LC)

The 'fixed' reference period is regulated in Section 93-94, and Section 97 Sub 3, Section 99 Sub 2, 5-7. The so-called 'rolling' period (account/settlement period) is regulated by Section 99 Sub 2, 5-7. According to the latter solution, the period pf the average calculation starts again for every week affected. However, under Section 98 Sub 4 certain provisions on the reference period apply. The two solutions cannot be applied together. Section 98 Sub 1 states:

> *"Apart from working time banking, work may also be scheduled in such a way whereby the employee completes the weekly working time scheduled based on the daily working time and the standard work pattern over a longer period, which the employer has determined, beginning on the given week (payroll period)."*

Note: The two above mentioned solutions were presented in detail in the answer to an Ad Hoc Request on working time in Hungary (delivery 05. 15. 2019).

The legal status of the professional staff of law enforcement bodies is regulated in Act XLII of 2015 on the legal status of the professional staff of law enforcement bodies (hereinafter: (HSZT). The regulation includes the legal status of members of police.

Section 134 Sub 2 regulates the so-called 'fixed' reference period. Under Section 134 Sub 2 the working time (period of service) may be determined—considering the weekly working time—within a reference period of several weeks, but more than four months or sixteen weeks. The permanent stand-by duty or on-call duty may be determined—considering the weekly working time—within a reference period of several weeks, but no more than six months.

The general weekly working time is 40 hours.

Section 139 Sub 2 and Section 139 Sub 4 of HSZT contain additional provisions in connection with the above mentioned rules. Under Section 139, overtime work may be ordered on the basis of service interests. The duration of weekly working time and the

above mentioned overtime may not together exceed the duration of the period defined in Article 6b) in Directive of 2003/88/EU. Under Section 139 Sub 4 of HSZT it is possible to order more overtime work than postulated in Sub 2 for members of professional staff of law enforcement bodies in the case of accidents, disasters or prevention of serious damage.

Q2: Does your system allow for reference periods of up to 4 months (article 16 (b) of the WTD), of up to 6 months (Articles 18 and 19 (1) of the WTD), and or of up to 12 months (Article 19 (2) of the WTD)?

Answer to Q2: Section 94 Sub 1 of the LC states that the maximum duration of the reference period (working time banking) is four mounts or sixteen weeks. Under Sub 2, the maximum duration of the reference period is six months or 26 weeks in the case of employees:

a) working in continuous shifts;

b) working in shifts; and

c) employed for seasonal work;

d) working in stand-by jobs; and

e) in jobs defined in Subsection (4) of Section 135.

Section 94 Sub 3 of the LC regulates—where justified by objective or technical reasons or for reasons related to work organisation—the maximum duration of the reference period fixed in the collective agreement is 36 months. (This provision is established in Act CXVI of 2018 on the Amendment of the Labour Code. This regulation came into force on 01 January 2018.)

Section 99 Sub 7 regulates that in case of an irregular work schedule, the duration of the average scheduled weekly working time shall be taken into account:

a) within the time periods defined under Subsections (1) and (2) of Section 94, or

b) where justified by objective or technical reasons or reasons related to work organisation, within a 12-month period according to the collective agreement.

Note: The anomalies of interpretation of the above mentioned two provisions have been set out in detail in FR 1/2019, subsection 'Act on the amendment of certain acts regarding organisation of working time and minimal rental fee in the case of the temporary agency work'.

In connection with HSZT, reference needs to be made to Section 134 Sub 2 in the HSZT (see above).

Q3: The key issue: Is it allowed by your national legislation and practice to require a worker to undertake, over two consecutive fixed reference periods, an extremely long period of work consequently making that worker exceed, on average, the maximum weekly working time over a period which, since it straddles those two fixed periods, corresponds to a rolling reference period of the same duration? If yes, are there any mechanisms making it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods? If yes (there are mechanisms), what is their effectiveness?

Answer to Q3:

Concerning Labour Code

Under Section 96 Sub 1, the rules relating to work schedules (work pattern) shall be laid down by the employer. The employer must take into account the provisions of reference periods, the maximum duration of 'scheduled daily working time' and 'scheduled weekly working time', the daily rest period and the weekly rest period.

The LC formulates two requirements to avoid the hypothetical situation (see page 11 of the opinion of the Advocate General and in the question.

a) Section 97 Sub 1 states that employers shall ensure that the work schedule of employees is drawn up in accordance with occupational safety and health requirements and in consideration of the nature of the work.

b) Under Section 6 Sub 3 employers shall take into account the interests of employees under the principle of equitable assessment; where the mode of performance is defined by a unilateral act, it shall be done so as to not cause an unreasonable disadvantage to the employee affected.

Consequently, the employer's decision may not be unlimited as regards the schedule of working time. Nevertheless, these rules merely formulate the general requirements. In addition, other provisions cannot be found in the LC.

Concerning the HSZT

Under Section 101 Sub 1a) the tasks of professional staff must be formulated in the job's description; it is necessary to inform the members of professional staff about their tasks; it is necessary to employ the professional staff, to secure the healthy and safe working conditions.

In addition, no other provision can be found in the HSZT.

4 Other relevant information

Nothing to report.

Iceland

Summary

An act regulating subcontracting liability in public procurement has been passed.

1 National Legislation

1.1 'Chain of Responsibility'

On 06 May 2019, Act No. 120/2016 was amended to include a so-called 'chain of responsibility' in Article 88(a) Law on Public Procurement. According to this rule, the primary contractor must ensure that all employees, whether they are placed by a subcontractor or an employment agency, will receive remuneration and other rights in line with the law and collective agreements. The public agency, i.e. the buyer, can additionally pay unpaid payments to subcontractors and other employees on behalf of and at the expense of the primary contractor in the event of non-payment by the primary contractor.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working time

CJEU case C-55/18, 14 May 2019, CCOO

Following this ruling of 14 May 2019, the Icelandic Confederation of Labour (hereinafter: ASÍ) decided to file an infringement procedure against the Icelandic State before the EFTA Surveillance Authority on 17 May. According to ASÍ, the tendency of Icelandic courts to shift the burden of responsibility for rules on maximum working time and a weekly free day are respected and the inadequate implementation of the Working Time Directive, constitutes a violation of the EEA Agreement in light of the judgment. In this respect, they criticised, inter alia, the precedent of Icelandic courts that a claim for insufficient pay can be lost due to 'indifference' or 'inactivity' ('*ísl. Tómlæti*') of the employee, stating that it moves the burden of rectification from the employer to the employee.

CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure

The Working Time Directive was transposed into Icelandic law through amendments of Act No. 46/1980, on Working Environment, Health and Safety at Work. Additionally, the social partners concluded an agreement on certain aspects of working time on 30 December 1996 ('Agreement on Certain Aspects Concerning Working Time' between the Icelandic Confederation of Labour and Business Iceland of 30 December 1996 ('*Samningur um ákveðna þætti er varða skipulag vinnutíma milli Alþýðusamband Íslands og Vinnuveitendasambands Íslands*')).

Icelandic legislature has transposed Art. 6 and 16 of the Working Time Directive into the above act. According to Art. 55(1) of the Act, the average weekly working hours should not exceed 48 hours within a four-month period. However, the social partners may derogate from this rule and extend this reference period up to six months with an agreement (Art. 55(2)). If objective or technical reasons or the nature of the work

requires it, the reference period may be extended by up to 12 months in such an agreement (as regards the principles of the Law on Safety and Health of Employees (Art. 55(3)). These previous two provisions are in line with Art. 19 of the Working Time Directive.

Art. 6 of the aforementioned agreement between the social partners stipulates certain rules in this regard. Art. 6(1) reaffirms the principle that the average weekly working time should not exceed 48 hours and that working hours should preferably be as consistent as possible from one week to the next. The reference period is defined in Art. 6(2). The provision states that the reference period for average weekly working hours is six months, from January to June and from July to December.

Therefore, although the Icelandic legislature has not defined the reference periods, the social partners have, and due to the *erga omnes* effects of collective agreements in Iceland, those rules dictate the vast majority of jobs in Iceland's labour market.

The wording of Art. 6 of the agreement between the social partners does not rule out that an employee, who works over two consecutive reference periods (i.e. from March to September), could work over 48 hours a week on average within that period. There are no particular mechanisms to prevent this from occurring. The same can be said of the provision in Act No. 46/1980.

4 Other relevant information

Nothing to report.

Ireland

Summary

There were no labour law developments in Ireland in May.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working time

CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure / Premier ministre

Article 6 of the Directive is implemented by section 15 of the Organisation of Working Time Act 1997. As can be seen from the wording of the section, it is unclear as to whether the reference periods are to be/can be organised as fixed or rolling.

The section provides for reference periods of up to four months for most employees, of up to six months for those employed in the activities referred to in Article 17(3)(a) to (e) of the Directive, and up to 12 months for employees covered by a collective agreement approved by the Labour Court under section 24 of the Act.

Section 15 of the 1997 Act does not explicitly address whether it is allowed to require an employee to undertake an extremely long period of work over two consecutive fixed reference periods, consequently making that employee exceed, on average, the maximum weekly working time over a period which, since it straddles those two fixed periods, corresponds to a rolling reference period of the same duration. The section does not require the employer to stipulate defined reference periods for the calculation of the weekly working hours and in the event of a dispute, the practice of the Labour Court would be to look back over the six months prior to referral of the complaint to establish whether, during that period, the employee worked in excess of the average weekly working hours.

In interpreting the section in relation to future cases, the Workplace Relations Commission (WRC) Adjudication Officers and the Labour Court on appeal will have to have regard to the CJEU decision.

3.2 Transfer of undertakings

CJEU case C–194/18, 08 May 2019, Jadran Dodič v Banka Koper

Provided a significant number of clients, weighted by numbers and extent of their securities, transferred, this would have been found to be a transfer of undertaking pursuant to the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003.

3.3 Fixed-term work

CJEU case C–494/17, 08 May 2019, Ministero dell'Istruzione, dell'Università e della Ricerca v Fabio Rossato

Section 14 of the Protection of Employees (Fixed-Term Work) Act 2003 (as substituted by section 52 of the Workplace Relations Act 2015) provides that redress for misuse of successive fixed-term contracts may include either requiring the employer to reinstate/reengage the employee (including on a contract of indefinite duration) or requiring the employer to pay compensation of such amount as is just and equitable, having regard to all the circumstances, capped at two years remuneration or both.

4 Other relevant information

Nothing to report.

Italy

Summary

No labour law developments took place in Italy in May.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working time

CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure

Q 1: Are reference periods, for the purpose of the calculation of the average weekly working time in your respective national legislation and practice organized as fixed or as rolling, or are both possible and existing?

Answer to Q 1: The maximum duration of weekly working time is defined in collective agreements (Art. 4, para. 1 Legislative Decree No. 66 of 2003). In any case, it cannot exceed an average duration of 48 weekly hours over a period of 7 days, including overtime hours (Article 4, para. 2 Legislative Decree No. 66 of 2003).

Q 2: Does your system allow for reference periods of up to 4 months (article 16 (b) of the WTD), of up to 6 months (Articles 18 and 19 (1) of the WTD), and or of up to 12 months (Article 19 (2) of the WTD)?

Answer to Q 2: The standard reference period for the application of maximum weekly working time is four months (Article 4, para. 3, Legislative Decree No. 66 of 2003).

Q 3: Does it apply the "opt-out" from Article 22 of the WTD to reference periods for the purpose of the calculation of the average weekly working time?

Answer to Q 3: Italy does not apply the 'opt-out' under Article 22 of the WTD.

Q 4: The key issue: Is it allowed by your national legislation and practice to require a worker to undertake, over two consecutive fixed reference periods, an extremely long period of work consequently making that worker exceed, on average, the maximum weekly working time over a period which, since it straddles those two fixed periods, corresponds to a rolling reference period of the same duration? If yes, are there any mechanisms making it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods? If yes (there are mechanisms), what is their effectiveness?

Answer to Q 4: It is not permitted under national legislation and practice to require a worker to perform an extremely long period of work over two consecutive fixed reference periods which exceeds, on average, the maximum weekly working time over

a period which, since it straddles those two fixed periods, corresponds to a rolling reference period of the same duration.

3.2 Fixed-term work

CJEU case C-494/17, 08 May 2019, Rossato

Mr Rossato worked as an accordion teacher for the F.A. Bonporti Music Academy under fixed-term contracts, the first of which was concluded on 18 November 2003. That employment relationship continued without interruption on the basis of 17 successive fixed-term employment contracts for the same post. On 02 September 2015, during the proceedings before the appeal court, Mr Rossato's employer granted him tenure with retroactive effect from 01 January 2014, thus making his employment relationship one of indefinite duration.
In those circumstances, the '*Corte d'appello di Trento*' (Appeal Court, Trento) decided to stay the proceedings and to refer the following question to the Court:

> "*Must Clause 5(1) of the Framework Agreement … be interpreted as precluding the application of Article 1(95), (131) and (132) of Law No 107/2015, which provide for the conversion of temporary teachers' fixed-term contracts into contracts of indefinite duration with respect to the future, without retroactive effect and without compensation for damage, as measures that are proportionate, sufficiently effective and a sufficient deterrent to ensure that the measures laid down in the Framework Agreement are fully effective as regards breach of that agreement resulting from the misuse of successive fixed-term employment contracts during the period prior to that in which the measures set out in the provisions in question are intended to have legal effect?*"

Clause 5(1) of the Framework Agreement is to be interpreted as not precluding legislation which, as applied by the national supreme courts, precludes any entitlement to financial compensation on account of the misuse of successive fixed-term employment contracts for public sector teachers whose employment relationship has been converted from a fixed-term relationship into one of indefinite duration, with limited retroactive effect, if such conversion is neither uncertain nor unpredictable or fortuitous and the limited account taken of the period of service completed under those successive fixed-term employment contracts constitutes a measure that is proportionate for the purpose of penalising that abuse, which is a matter for the national court to determine.

The referring court will now have to assess whether the conversion corresponds to the criteria indicated by the CJEU, i.e. that for the employee concerned, they are 'neither uncertain nor unpredictable or fortuitous and the limited account taken of the period of service completed under those successive fixed-term employment contracts constitutes a measure that is proportionate for the purpose of punishing that abuse'.

4 Other relevant information

Nothing to report.

Latvia

Summary

There were no new labour law developments in Latvia in May.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working time

CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure / Premier ministre

The calculation of average weekly working time in Latvia is regulated in the Labour Law (*'Darba likums'*). Specifically, Article 136(5) provides that weekly overtime work may not exceed 8 hours within a reference period of four months. The Labour Law does not further specify whether such reference periods must be fixed on particular calendar dates or on a rolling basis. However, in practice, it is usually applied on a rolling basis. Therefore, it may be concluded that Latvian law complies with the interpretation of the CJEU.

3.2 Fixed-term work

CJEU case C–494/17, 08 May 2019, Ministero dell'Istruzione, dell'Università e della Ricerca v Fabio Rossato

The only sanction or remedy provided for under the Labour Law in case of misuse of fixed-term contract(-s) is conversion of such fixed-term contracts into one of indefinite duration (Article 44(5) of the Labour Law). No other remedies are provided since according to the Supreme Court's case law, the only case in which a worker is entitled to compensation for non-pecuniary damage is a case of discrimination. Therefore, the remedies/sanctions under Latvian law might not always be proportionate.

3.3 Transfer of undertakings

CJEU case C–194/18, 08 May 2019, Jadran Dodič v Banka Koper

The definition of transfer of undertaking is provided in Article 117(1) of the Labour Law. As regards the concept of 'undertaking' and 'transfer of an undertaking', the Labour Law is not very concise – it stipulates such concepts in a very general manner, without more detailed explanation on what is to be understood, for example, as an 'independent economic unit' or how the retention of identity of a business should be assessed. Such a regulation is most likely not very effective for the enforcement of respective rights, taking into account only several cases brought before a court on the basis of the rights deriving from Directive 2001/23/EC. The decision in case C-194/18 provides an additional interpretation of such concepts. No similar cases (similar type of transfer of

undertaking) have been decided yet in Latvia.

3.4 Working time

CJEU case C-55/18, 14 May 2019, CCOO

Article 137(1) of the Labour Law explicitly requires employers to record all working times, i.e. also those that are performed outside regular working time – overtime work, night work, work during weekly rest periods and work during bank holidays. Therefore, Latvian law complies with the interpretation of Directive 2003/88/EC provided by the CJEU in the present case.

However, there is a very important statement in the judgment that applies to the Latvian context, namely, as pointed out by the CJEU in para.55 "*witness evidence cannot be regarded, in itself, as an effective source of evidence capable of guaranteeing actual compliance with the right at issue, since workers are liable to prove reluctant to give evidence against their employers owing a fear of measures being taken later which might affect the employment relationship to their detriment*". This aspect is indeed problematic in cases brought before Latvian courts, as national courts have to 'believe' that workers who provide evidence after having pledged the oath in Church always speak the truth and that all relevant information is in their possession.

4 Other relevant information

Nothing to report.

Liechtenstein

Summary

No new labour law developments occurred in Liechtenstein in May.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working time

CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure / Premier ministre

Q1*:* Are reference periods for the purpose of the calculation of the average weekly working time in your respective national legislation and practice organised as fixed or as rolling, or are both possible and existing?

Answer to Q1:

In Liechtenstein, reference periods for the purpose of calculating the average weekly working time are organised as rolling.

The reference period for the average maximum weekly working time including overtime is four months, Article 12(2) of the Employment Act (*Arbeitsgesetz,* LR 822.10). In the case of so-called uninterrupted operations (*ununterbrochener Betrieb*), the reference period is 16 weeks, Article 24(4) of the Employment Act.

These reference periods are not bound by the law to the calendar. Specifically, there is no link between the general four-month reference period and calendar trimesters.

Unless a duty roster or shift schedule suggests otherwise, these provisions are normally applied in practice as follows: compliance with the reference period is checked from Monday of the first week to Sunday of the 16th week. In this respect, there is a marginal link to the calendar in practice, namely to the beginning of each week.

The Employment Act can be found here.

Q2: Does your system allow for reference periods of up to 4 months (article 16(b) of the WTD), of up to 6 months (Articles 18 and 19(1) of the WTD), and or of up to 12 months (Article 19(2) of the WTD)?

Answer to Q2:

In principle, the Liechtenstein system allows for reference periods of up to four months according to Article 16(b) of the WTD (see No. 1 above).

Deviations by way of collective agreements within the meaning of Article 18 of the WTD could not be found.

An exception according to Article 19(1) of the WTD can be found in Article 8 of the Ordinance on the working, driving and rest time of drivers of motor vehicles for the transport of goods and passengers (*Verordnung über die Arbeits-, Lenk- und Ruhezeit der Führer von Motorfahrzeugen zum Güter- und Personentransport,* LR 741.173). The average weekly working time of drivers shall not exceed 48 hours. The maximum weekly working time may be up to 60 hours, provided that the weekly average over a period of four months does not exceed 48 hours. In exceptional cases, the government may extend the reference period up to six months if it is not possible for other employees to replace the employee and if the employer cannot reasonably be expected to involve external staff.

The Ordinance on the working, driving and rest time of drivers of motor vehicles for the transport of goods and passengers can be found here.

In some cases, there are also significantly shorter reference periods, for example, in Ordinance II to the Employment Act concerning special provisions for certain groups of establishments or employees (*Verordnung II zum Arbeitsgesetz, Sonderbestimmungen für bestimmte Gruppen von Betrieben oder Arbeitnehmern,* LR 822.101.2). According to Article 5, the maximum weekly working time may be extended by four hours in any given week, provided that it is observed on an average of three weeks and that the five-day week is guaranteed.

Ordinance II to the Employment Act concerning special provisions for certain groups of establishments or employees can be found here.

Q3: Does it apply the "opt-out" from Article 22 of the WTD to reference periods for the purpose of the calculation of the average weekly working time?

Answer to Q3:

No, it does not.

Q4: The key issue: Is it allowed by your national legislation and practice to require a worker to undertake, over two consecutive fixed reference periods, an extremely long period of work consequently making that worker exceed, on average, the maximum weekly working time over a period which, since it straddles those two fixed periods, corresponds to a rolling reference period of the same duration? If yes, are there any mechanisms making it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods? If yes (there are mechanisms), what is their effectiveness?

Answer to Q4:

No, this is not allowed. This consequence results from the above remarks to question No. 1.

Conclusion: Liechtenstein law is in accordance with CJEU ruling C-254/18.

4 Other relevant information

Nothing to report.

Lithuania

Summary

There were no labour law developments in Lithuania in May.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working Time

CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure / Premier minister

Article 115 of the Labour Code states that in case of summary (in Lithuanian legislation it is referred to as 'summary' recording of working time (*suminė darbo laiko apskaita*)) refers to situations in which the reference period is longer than one week. The maximum general reference period is set to three months for 'recording' working time (this corresponds to work shifts). Work shall be performed in compliance with the time specified in the work (shift) schedule and in compliance with the maximum working time requirements (Article 114 of the Labour Code). The employer is required to organise work (shift) schedules in such a way to allocate employees' working time across the reference period as evenly as possible. It is prohibited to assign an employee to work two successive shifts (Article 115 (3) of the Labour Code). The employer must ensure an even rotation of the employees' shifts. Employees who have a child under the age of 3 years are entitled to choose a shift two days from the publication of the shift schedule and employee who have a child under the age of seven years shall also be entitled to this right wherever possible (Article 115 (2) of the Labour Code).

The above-mentioned statutory provisions aim to protect the employee from excessive concentrations of workloads during various periods within a reference period. The law does not, however, indicate whether the legislator allows or prohibits fixed or rolling periods for the purpose of calculating the average weekly working time.

In practice, shifts (the output of work with the summary recording of working time) are organised on the basis of calendar weeks/calendar months. The law does not state that the recording of working time must be organised on the basis of a rolling period. This means that in practice, there are no supervisory mechanisms in place that would ensure that the maximum working time requirements (e.g. seven consecutive days) are being adhered to when the work is organised on the basis of calendar weeks.

There is no possibility for individual 'opt-outs' (Article 22 of the WTD). The employer cannot individually allow or the employee cannot request the application of different rules to the calculation of average weekly working time.

The employee and the employer may agree on an 'individual working time scheme', i.e. a unique individual work schedule (Article 1 113 (2) No. 5 of the Labour Code). This schedule may theoretically contain another (individual) pattern of the calculation of working time and may to some degree set a fixed or rolling reference period for the

calculation of working time. There is no evidence that this is being widely used in practice and whether violations of the maximum working time requirements, as laid down in Article 114 of the Labour Code, are taking place.

The maximum general reference period is set to three months (Article 113 (1) of the Labour Code). Resolution No. 496 of the government of 21 June 2017 (Registry of Legal Acts, 2017, No. 2017-10853) allows longer maximum reference periods:

- mobile workers in rail transport – up to 6 months, rail transport-related services – up to 4 months;
- civil aviation mobile workers, seagoing and domestic vessels – up to one year;
- sea transport-related services in harbours – reference period established by collective agreement (no maximum length restriction);
- postal workers, employees of electronic communications operators and providers of electronic communications services – up to 4 months;
- employees of agricultural enterprises engaged in crop production, as well as employees of agricultural machinery repair shops of these companies, including car repair shops, warehouses and agriculture service companies – up to one year;
- workers in peat mining, agricultural processing companies, automotive companies and automotive repair shops, warehouses and other food service companies – up to one year;
- employees in health care and social care institutions - up to 4 months, unless otherwise provided for in a collective agreement (no maximum length restriction for collective agreements);
- employees of energy companies operating continuously – up to one year.

The above-mentioned exceptions were already in place in the Soviet era. They are very broadly formulated and allow for excessive usage of longer maximum reference periods. No demands for their revision have been requested by the social partners so far.

4 Other relevant information

Nothing to report.

Luxembourg

Summary

The Court of Appeal has recognised the 'right to be disconnected' during paid leave, and ruled that the requirement for employees to acquire language skills if they work with local frail elderly people was justified and non-discriminatory.

1 National Legislation

No new labour laws or decrees have been published.

As regards the pending bills, no developments have been made with regard to Bill No. 7265 on the regulation of internships ('*stage en entreprise*') (see also February 2018 Flash Report); it was recently announced that a political agreement has been found and that all internships will be remunerated in the future.

2 Court Rulings

2.1 Annual leave

Court of Appeal (CSJ), No. 45230, 02 May 2019

In a recent case, the Court of Appeal recognised the right to not be disturbed, specifically right to be 'disconnected' ('*droit à la déconnection*') during paid annual leave. The Court stated that "during his paid leave, [the employee] was not able to resolve the problem, regardless whether he is the director of a restaurant, he has the right to be disconnected and to not be contacted by his superior during the night" ("*Il s'ajoute que [le salarié], en congé de recréation ne pouvait de toute évidence matériellement pas intervenir pour régler le problème, de même qu'il avait droit pendant son congé, fut-il directeur du restaurant au Kirchberg, à la déconnexion et non être approché pendant la nuit par son supérieur hiérarchique (…)*").

2.2 Discrimination based on language skills

Court of Appeal (CSJ), No. CAL-2018-00247, 24 April 2019

There is a lot of debate in Luxembourg about language skills, especially the use of Luxembourgish at work. The Court of Appeal dealt with a case involving a waitress hired to work at a retirement home, whose contract mentioned that she had to reach a B1-level in Luxembourgish within a certain deadline to keep her job. She was dismissed because she did not meet this objective. The Court stated that, as a contractual obligation, the employee had the obligation to learn the language, which would have been easy to achieve because the legislation provides for extra leave days and financial support to learn Luxembourgish ('*congé linguistique*'). Due to the specific group of people living in retirement homes, i.e. fragile elderly people who for the most are Luxembourg nationals, the language requirement was objectively justified.

The employee based her claim on discrimination law (Art. L. 251-1 of the Labour Code implementing European directives on discrimination), which was, however, rejected, because adequate language skills are not mentioned in law as a prohibited ground of discrimination. Her dismissal was thus declared to be fair and justified.

This decision is interesting because it clarifies that the requirement of adequate language skills is not discriminatory and because it recognised the possibility to insert

clauses in an employment contract stating that the employee must acquire specific skills within a given deadline.

3 Implications of CJEU rulings and ECHR

3.1 Obligation to record working time

CJEU case C-55/18, 14 May 2019, CCOO

According to the present case, national legislation must require employers to set up a system that enables them to record the daily working time of each worker.

This case will have no major legal implications in Luxembourg, as the Labour Code already provides for a general obligation of all employers to maintain a register indicating the starting and end times and the duration of each employee's daily working hours, as well as any additional working hours, such as work on Sundays, public holidays, night shifts or overtime (Art. L. 211-29 of the Labour Code). This register can be accessed by the labour inspector. On the basis of the Regulation on Data Protection, the employee is also entitled to access his data.

This obligation was introduced in 2017 (*Loi du 14 mars 2017 portant modification du Code du travail*) transposing Directive 2914/67/EU (enforcement of the positing directive). It was decided that the obligation to keep time sheets indicating the starting and end times and the duration of each employee's daily working time (Art. 9 (1) b) of the Directive) shall apply to all employees.

In practice, however, the implementation of this new legislation, supplemented by the new case law of the CJEU, is difficult. Whereas in larger companies, work plans or flextime schemes are in place and working time is recorded, it is unclear how this obligation can be enforced in smaller companies.

Failure to maintain the register can be fined up to EUR 15 000 (Art. L. 211-36).

3.2 Working time

CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure / Premier ministre

Reference periods can be implemented in companies by either using work schedule plans (*plan d'organisation du travail*) or by implementing flextime schemes (Art. L. 211-5ff. of the Labour Code).

Reference periods are organised as fixed periods, not as rolling periods. This derives from the way the legislation is conceived. For example, any work plan must indicate the 'start and end of the reference period' (L. 211-7 (1)). Before a new period begins, the work schedule must be submitted to the employee representatives. Other obligations arise at the 'end' of the reference period. Such obligations would be impossible to implement in a rolling system. Moreover, the main purpose of work schedules is to increase the predictability of working time for employees.

The legislation, which was substantially amended in 2016, offers the possibility to implement reference periods up to 12 months:

- Without any specific requirements, any undertaking can implement a period of reference of up to 4 months.

  If the employer implements working plans with reference periods of more than one month, the employees are entitled to additional leave days to compensate for the increased flexibility. This additional leave is not due in case of flextime schemes, as the flexibility benefits the employees;

- In a collective agreement negotiated with social partners (representative trade unions), a reference period of up to 12 months can be agreed (L. 211-9). It will be up to the social partners to decide whether any additional free days or other means of compensation are due.

Period of reference	Additional free days per year
< 1 month	0
> 1 month and <= 2 months	1,5
> 2 months and <= 3 months	3
> 3 months and <= 4 months	3,5

The opt-out of Art. 22 Working Time Directive does not seem to have been used for weekly working times.

Within the period of reference, the average working time may not exceed, on average, 40 (not 48) hours. Article L. 211-6 (1) of the Labour Code states that employees can work longer than the regular limit (8 hours/day, 40 hours/week) if their average weekly working time over the reference period does not exceed 40 hours ("*les salariés peuvent toutefois être occupés au-deà des limites fixées (…) à condition que la durée hebdomadaire moyenne de travail, calculée sur la période de référence applicable, ne dépasse pas (…)quarante heures*").

In (nearly) no case may the weekly working time exceed 48 hours (Art. L. 211-12), i.e. in each week, not only on average.

The same applies in the public sector: working time may not exceed 48 hours per week (Art. 18-2 of the Law of 16 April 1979).

There is no risk that a situation could arise where the average weekly working time of 48 hours is exceeded over a six-month period straddling two consecutive reference periods because of the fixed reference periods.

3.3 Parental leave

CJEU case C-486/18, 09 May 2019, RE v Praxair MRC SAS

No case law relating to this specific issue seems to have been published, but two other cases should be mentioned in this regard:

- The Court of Appeal ruled that compensation in lieu of notice (*indemnité compensatoire de préavis*) to be paid in case an employee has been unfairly dismissed during a part-time parental leave is only calculated on 50 per cent of the employee's salary (CSJ, 8e, 40351, 11 May 2017).
- In another case, the employee was dismissed shortly before taking parental leave. The dismissal was declared unfair, but no damage for economic loss (*prejudice matériel*) was granted. The courts argued that six months of parental leave are sufficient to find a new job (CSJ, No. 27602, 02 February 2006).

This approach of the courts might not be in line with the CJEU's decision in the present case, requiring compensation to be based on the employee's full-time salary.

To better understand this approach, it should be emphasised that in Luxembourg, parental leave is remunerated by public funds, currently at the same level as the employee's salary (limited to EUR 3 451.83).

However, the legislation on severance due in case of unfair dismissal is very ambiguous and it is up to the individual judge to determine the amount. Thus, the judges will be able to adapt their calculations to the requirements of European case law.

As regards the issue of potential indirect discrimination between men and women, it seems that it belongs to the past. According to the latest data for 2018, 4 875 female workers and 4 721 male workers were on parental leave, which is a near-parity situation, i.e. 49.2 per cent vs 50.8 per cent).

Reference: Rapport d'activité du Ministère de la Famille, *page 191.*

3.4 Transfer of undertakings

CJEU case C-194/18, 08 May 2019, Jadran Dodič v Banka Koper

There is no specific case law in Luxembourg that deals with transfers of undertakings based on legal obligations and the transfer of intangible assets.

National legislation is closely follows EU legislation. The courts tend to refer to the case law of the European Court of Justice to interpret the concept of 'transfer of undertaking', so there is no doubt that they will take the ruling of this particular case into consideration.

The Court of Cassation has confirmed that a transfer of undertaking can take place without a transfer of physical infrastructure (Cour de Cassation, n° 25/16, n° 3607 du register, 03 March 2016). In practice, most cases deal with the question whether a partial takeover of staff implies that a transfer of undertaking has taken place, requiring the employer to take over the entire staff. For example, in a case in which certain banking services ('fund reporting and fund accounting') were entrusted to another company, it was determined that no transfer of undertaking had taken place because there was no transfer of material assets and no takeover of the existing staff (CSJ, 8e, 41615, 30 May 2016).

3.5 Sex discrimination

CJEU case C-161/18, 08 May 2019, Villar Láiz

The amount of pension is based on a complex set of factors, including the pensionable income (*majorations proportionnelles*) and the contribution period (*majorations forfaitaires*). The pensionable income is taken into consideration without regard of weekly working time. Art. 175 of the Social Security Code states that the contribution period of part-time workers can be reduced by a factor to be determined by grand-ducal decree. Such a decree, however, has never been published. Thus, there does not seem to be a risk of indirect sex discrimination linked to part-time work.

3.6 Fixed-term work

CJEU case C-494/17, 08 May 2019, Ministero dell'Istruzione, dell'Università e della Ricerca v Fabio Rossato

This case deals with a specific situation in Italian law.

In Luxembourg, the issue of hiring educational staff under fixed-term contracts is also a sensitive issue. Most teachers and professors are hired as civil servants. Additional

staff can be hired as lecturers (‘*chargé de cours’, ‘chargé d’éducation*’), in principle under an open-ended contract and exceptionally under a fixed-term contract. The use of fixed-term contracts is subject to the general framework of the Labour Code, implying that an objective reason must exist that justifies such a contract. According to the law, fixed-term lecturers can only be hired to replace a post that cannot be filled by regular teachers or lecturers with an open-ended contract (*Art. 3 de la loi du 23 juillet 2016 fixation des conditions d'engagement et de travail des chargés d'éducation à durée déterminée et à tâche complète ou partielle et des chargés d'enseignement à durée indéterminée et à tâche complète ou partielle*).

However, while standard fixed-term contracts can only be renewed twice and their total duration may not exceed 24 months, an exception was introduced in 1991 for school lecturers, stating that restrictions do not apply, i.e. that their fixed-term contracts can be renewed more than twice, even for a duration exceeding 24 months (see Art. L. 122-5 (3) pt. 4 of the Labour Code; introduced by the ‘*Loi du 5 juillet 1991 portant (…) dérogation à la loi du 24 mai 1989 sur le contrat de travail*’).

It could be argued that this exception leads to unequal treatment, but it does not seem to breach EU law, as the Directive is only one among multiple measures that are implemented to prevent abuse (Clause 5); the requirement of an existence of objective reasons applies to school lecturers as well.

As regards the penalty for unjustified use of fixed-term contracts, Article L. 122-9 only imposes a conversion of the fixed-term employment relationship into one of indefinite duration. No additional damages are provided for. In practice, a conversion of the contract does not always lead to a satisfactory result. There are very few cases involving fixed-term lecturers that have been brought before the court. See, for example, CSJ, No. 26369, 30 January 2003: The contract was requalified as a contract of indefinite duration because the renewal clause was missing; the employee was granted damages for unfair dismissal.

3.7 Access to the profession of lawyer

CJEU case C-431/17, 07 May 2019, Monachos Eirinaios, kata kosmon Antonios Giakoumakis tou Emmanouil v Dikigorikos Syllogos Athinon

The list of incompatibilities for admission to practice law does not mention the status of monk. The general clause that the profession of lawyer is incompatible with any ‘activity threatening the independence of the lawyer or the dignity of the profession’ (‘*toute activité de nature à porter atteinte à l'indépendance de l'avocat ou à la dignité de la profession*’) would seem to be inapplicable in terms of the freedom of belief and religious practice. Monks have no specific legal status in Luxembourg. For reference, see *Art. 1 de la loi du 10 août 1991 sur la profession d’avocat.*

4 Other relevant information

Nothing to report.

Malta

Summary

There were no labour law developments in Malta in May.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working time

CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure

Q 1 Are reference periods for the purpose of the calculation of the average weekly working time in your respective national legislation a0nd practice organised as fixed or as rolling, or are both possible and existing?

The calculation, unless otherwise agreed between the employer and the employee, is 'rolling' not 'fixed'.

Q 2 Does your system allow for reference periods of up to 4 months (article 16 (b) of the WTD), of up to 6 months (Articles 18 and 19 (1) of the WTD), and or of up to 12 months (Article 19 (2) of the WTD)?

The reference periods in the Organisation of Working Time Regulations are as follows:-

Regulation 7(3) states that subject to any relevant provisions in any applicable collective agreement in accordance with Regulation 3(4) of the Organisation of Working Time Regulations, the reference periods that apply to a worker are:

(a) in the manufacturing sector and the tourism sector, including travel and catering establishments, a period of 52 weeks;

(b) where a relevant collective agreement provides for the application of this regulation in relation to successive periods of 17 weeks, for each such period;

(c) in any other case, any period of 17 weeks in the course of the worker's employment.

Q 3 Does it apply the "opt-out" from Article 22 of the WTD to reference periods for the purpose of the calculation of the average weekly working time?

Yes. In fact, Regulation 20 states the following:-

20.(1) The provisions of Regulation 7 shall not apply in relation to a worker who has agreed with her employer in writing that it should not apply, provided that the employer takes the necessary measures to ensure that:

(a) no worker shall be required to work more than 48 hours over a seven-day period, calculated as an average for the reference period referred to in Regulation 14(b), unless the employer has obtained the worker's agreement to perform such work in advance;

(b) no worker shall be subjected to any detrimental treatment by his employer because he refuses to perform such work;

(c) the employer must maintain up-to-date records of all workers who carry out such work, which shall include the specific number of hours to be worked by the employee within a particular reference period;

(d) the records are placed at the disposal of the Director, who may, for reasons connected to the safety and/ or health of workers, prohibit or restrict the possibility of exceeding the maximum weekly working hours;

(e) the employer provides the Director at her request with information on cases in which agreement has been given by workers to perform work exceeding 48 hours over a period of seven days, calculated as an average for the reference period referred to in Regulation 7(3)(b).

(2) Any written agreement pursuant to the provisions in Sub-regulation (1)(a) shall be terminable by the worker by giving no less than seven days' written notice to his employer or any other longer period, not exceeding three months, that is stipulated in the written agreement.

(3) It shall be the duty of the employer to:

(a) keep adequate records to demonstrate that the limits specified in Regulations 7 and 9, and the requirements pursuant to Regulation 10 are being complied with in the case of any workers to whom these regulations apply, and

(b) to retain such records for at least two years from the date on which they are made.

Q 4 The key issue: Is it allowed by your national legislation and practice to require a worker to undertake, over two consecutive fixed reference periods, an extremely long period of work consequently making that worker exceed, on average, the maximum weekly working time over a period which, since it straddles those two fixed periods, corresponds to a rolling reference period of the same duration? If yes, are there any mechanisms making it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods? If yes (there are mechanisms), what is their effectiveness?

The answer is "yes". The employee and the employer can agree to vary the limits in the Directive (Regulations) as long as the measures listed above are taken into account.

4 Other relevant information

Nothing to report.

Netherlands

Summary

(I) Parliament has adopted the WAB, amending dismissal law and rules on flexible work.

(II) The Supreme Court has ruled that a transfer of undertaking did not take place, even though the new establishment hired a considerable part of the transferor's workforce.

1 National Legislation

1.1 Dismissal law

The First Chamber of Parliament (Senate) has adopted the '*Wet arbeidsmarkt in balans*' (hereinafter: WAB; Act on balance on the labour market). The WAB will enter into force on 01 January 2020.

The objective of this new legislation is to reduce the gap between flexible forms of employment and traditional employment, i.e. full-time contracts of indefinite duration. The WAB primarily contains corrections of and additions to the new dismissal laws introduced by the '*Wet werk en zekerheid*' on 01 July 2015.

The WAB contains the following measures, among others:

- Introduction of a 'cumulative ground' for dismissal; under the current rules, an employer needs to state a specific ground for dismissal as laid down in Article 7:669 section 3 of the Netherlands Civil Code. The cumulative ground, also known as the cocktail ground, makes it possible to seek a dissolution of the contract based on a combination of two or more grounds, which on their own are insufficient to justify termination, but when combined may justify the dismissal of an employee;
- Employees will be eligible for statutory severance ('*transitievergoeding*'), irrespective of the duration of their contract. To date, only employees who were employed with the same employer for two consecutive years were entitled to severance. The regulation that the employee is eligible for higher compensation after ten years of service will be abolished;
- A set of rules protecting on-call workers will be introduced, including, among others, a statutory term for cancelling a call and wage protection;
- Employers will have to pay higher unemployment insurance benefits for workers who have flexible contracts than for permanent employees;
- The maximum period for which temporary contracts may be concluded will increase from two to three years, as was the case before 01 July 2015.

The WAB touches upon limiting the (ab)use of temporary employment contracts, and therefore relates to (Framework) Directive 1999/70/EC. The new measures on on-call workers relates to some extent to the Part-time Work Directive 1997/81/EC.

The WAB contains amendments to the system introduced in 2015. The most significant change is the introduction of cumulative grounds for justifying the dismissal of an employee. It deviates from the limited system of specific grounds which was only adopted a few years ago. It remains to be seen how narrowly or broadly the new measures will be applied by the courts. The government was not entirely clear on the scope of the new measures during the parliamentary debates.

Even before the limited system was introduced, employers and lawyers acting on behalf of employers cautioned that such a system would be inflexible. Furthermore, employers argued that a time limitation of two years for fixed-term contracts was too restrictive.

Sources:

Further information on the WAB is available here.

A draft of the WBA is available here.

2 Court Rulings

2.1 Transfer of undertaking

Supreme Court, No. 28/03643, 24 May 2019

The Supreme Court decided on 24 May that the continuation of the operation of a hotel casino by another party did not qualify as a transfer of undertaking. The main question was whether or not the casino had retained its identity. The Supreme Court applied the criteria established by the CJEU, among others, in the Spijkers case (18 March 1986, C-24/85, ECLI:EU:1986:127).

According to the Supreme Court, the following circumstances justify the conclusion that identity has not been retained:

- the casino was closed for 14 months before operations resumed;
- the name of both the casino and of the hotel was changed;
- the casino was smaller (size and a substantially lower number of gaming tables (3 instead of 12) and gaming machines (119 instead of 200-210), the casino has a new colour scheme, a redecorated bar and an online accounting and security system that did not exist previously;
- the new casino did not retain the former casino's customer base.

The mere fact that the previous casino had some similarities with the new one is not decisive, since the former (and new) casino share similarities with most other casinos operated by a hotel. This factor does not counterbalance the above mentioned differences between the two casinos. The Supreme Court furthermore held that given the fact that in the old as well as in the new setting the customers were hotel guests, it cannot be argued that the regular customer base was retained.

Twenty-six of the 44 employees that worked for the former casino were hired by the new casino. The trade union that brought the case before the court argued that a casino's activity is heavily based on manpower. Hiring a majority of the former employees was therefore a strong indication that the casino had retained its identity. Due to procedural reasons (the Court of Appeal considered this factor, but given the arguments (not) put forward by the parties, it was not required to consider whether or not the activity was heavily based on manpower), the Supreme Court did not make a ruling on this issue.

It is noteworthy that the Advocate General arrived at a different conclusion and agreed that the casino's identity had been retained, and that its activity was not heavily based on manpower.

This shows that transfers of undertakings must be decided on a case by case basis. It might be inferred from this ruling that the Supreme Court has become a little more hesitant to jump to the conclusion that a transfer of undertaking has taken place, but it

remains to be seen whether this ruling marks the start of a new trend. The Supreme Court did not issue a ruling on the nature of casinos (asset of manpower).

3 Implications of CJEU rulings and ECHR

3.1 Working time

CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure

Q 1: Are reference periods for the purpose of the calculation of the average weekly working time in national legislation and practice organised as fixed or as rolling, or are both possible and existing?

Answer to Q 1: Under the Working Time Act ('*Arbeidstijdenwet*'; hereinafter: Atw), the average is calculated as rolling period.

Q 2: Does the system allow for reference periods of up to 4 months (Article 16 (b) of the WTD), of up to 6 months (Articles 18 and 19 (1) of the WTD), and or of up to 12 months (Article 19 (2) of the WTD)?

Answer to Q 2: The system allows for a reference period of 16 weeks (Article 5:7 section 2 Atw)

Q 3: Does the Netherlands apply the 'opt-out' from Article 22 of the WTD to reference periods for the purpose of the calculation of the average weekly working time?

Answer to Q 3: No.

Q 4: Is it allowed under national legislation and practice to require a worker to undertake, over two consecutive fixed reference periods, an extremely long period of work consequently making that worker exceed, on average, the maximum weekly working time over a period which, since it straddles those two fixed periods, corresponds to a rolling reference period of the same duration?

Answer to Q 4: Since the reference period is calculated as a rolling period, the question does not arise.

Sources:

I. Baijens & J. van Drongelen, 'De Arbeidstijdenwet; over 'in elke aaneengesloten periode' of 'in elke periode van […] aaneengesloten weken', *ArbeidsRecht* 2019/8.

3.2 Transfer of undertakings

CJEU case C-194/18, 08 May 2019, Dodič

This case seems to be very specific to the relevant national system and the particular circumstances of the case. It seems unlikely that it will have implications for the Netherlands, but this cannot be completely ruled out.

3.3 Access to the profession of lawyer

CJEU case C-431/17, 07 May 2019, Monachos Eirinaios

In this case, a monk was excluded from practicing law in Greece.

The case is quite unusual from the Netherlands' perspective. Those belonging to religious orders are not excluded from practicing law. To what extent it is relevant on a wider scale (what entry criteria may be required for lawyers established in another Member State) relates to the freedom of movement/services, which falls outside of the scope of labour/employment law and cannot be answered in the context of this labour law report.

3.4 Parental leave

CJEU case C-486/18, 08 May 2019, Praxair MRC

This case has no direct implications for the Netherlands, since severance *transitievergoeding*', Article 7:673 BW) are not calculated on basis of the salary actually paid to the employee, but on the (normal) salary specified in the contract of employment.

3.5 Fixed-term work

CJEU case C-494/17, 08 May 2019, Rossato

There is no specific provision restricting the possibility of a fixed-term employee to invoke 'abuse of rights'. Therefore, there does not seem to be a direct consequence

4 Other relevant information

Nothing to report.

Poland

Summary

The minimum wage in 2020 is under discussion.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working time

Case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure

Factual part

Under Polish law, working time is regulated in the Labour Code (hereinafter: LC) of 26 June 1974 (consolidated text: Journal of Laws 2018, item 917), Section Six 'Working time' (Article 128 and following).

Q 1: Are reference periods, for the purpose of the calculation of the average weekly working time in your respective national legislation and practice organized as fixed or as rolling, or are both possible and existing?

Answer to Q 1: Article 129 § 1 LC provides that the working time may not exceed 8 hours within a 24-hour period and an average of 40 hours on average over a five-day work week within a reference period of up to four months, subject to the provisions of Articles 135 to 138, 143 and 144 (the indicated provisions refer to specific systems and schedules of working time). According to Article 150 § 1 LC, systems and schedules of working time and reference periods should be determined in a collective labour agreement or in the employer's work regulations, or in an announcement if the employer is not covered by a collective labour agreement or is not required to establish work regulations.

Thus, under Polish law, the reference period is not connected to any specific calendar date. The reference period at the given undertaking should be determined according to the procedure provided by the above-mentioned Article 150 LC. It seems that in practice, rolling reference periods are common.

Q 2: Does your system allow for reference periods of up to 4 months (article 16 (b) of the WTD), of up to 6 months (Articles 18 and 19 (1) of the WTD), and or of up to 12 months (Article 19 (2) of the WTD)?

Answer to Q 2: As indicated above, the regular calculation period is four months. In addition, Article 129 § 2 LC provides that within the framework of any working time system, in cases justified by objective or technical grounds, or due to work organisation, the reference period may be extended, but no more than 12 months, while taking into account the general occupational health and safety rules.

The requirements for introducing an extended reference period are broad and can easily be met. 'Any working time system' can be proposed and the prerequisites refer to 'objective, technical or work organisation reasons'. At the same time, the 'protection of health and safety of employees' represents a statutory limitation to reference periods.

According to Article 150 § 3 LC, the extension of the calculation period shall be specified in a collective labour agreement or in an agreement reached by consultation with the trade union(s) active at the employer's establishment; or where there are no active trade unions, in an agreement with the employee representatives appointed in accordance with the standard procedure adopted by the employer.

Article 150 § 4 LC provides that a copy of an agreement on an extended calculation period must be submitted by the employer to the competent district labour inspector within 5 working days after the signing of the agreement.

Thus, under Polish law, it is possible to extend the calculation period up to 12 months.

Q 3: Does it apply the "opt-out" from Article 22 of the WTD to reference periods for the purpose of the calculation of the average weekly working time?

Answer to Q 3: There is no general derogation from Article 6 of Directive 2003/88/EC on the basis of its Article 22 that would apply to all sectors.

The only sector covered by the derogation provided by Article 22 of Directive 2003/88/EC is the health care sector. This question is regulated in Article 96 of the Law of 15 April 2011 on therapeutic activity (*'pol. ustawa o działalności leczniczej'*, consolidated text Journal of Laws 2018, item 2190).

Q 4: The key issue: Is it allowed by your national legislation and practice to require a worker to undertake, over two consecutive fixed reference periods, an extremely long period of work consequently making that worker exceed, on average, the maximum weekly working time over a period which, since it straddles those two fixed periods, corresponds to a rolling reference period of the same duration? If yes, are there any mechanisms making it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods? If yes (there are mechanisms), what is their effectiveness?

Answer to Q 4: The Labour Code does not explicitly refer to situations in which the worker is required to perform an extremely long period of work over two consecutive fixed reference periods, consequently resulting in that worker exceeding, on average, the maximum weekly working time over a period which, since it straddles those two fixed periods, corresponds to a rolling reference period of the same duration.

However, Article 131 § LC provides that weekly working time, together with overtime hours, may not exceed an average of 48 hours within the calculation period. It seems that the worker might be requested to perform duties that exceed the weekly working time at the end of the specific reference period, and to exceed those weekly working hours at the beginning of the subsequent reference period. There are no further requirements or mechanisms to ensure protection against excessive weekly working hours over each six-month period straddling two consecutive fixed reference periods.

As far as working time is concerned, the only provision that provides penalties is Article 281 LC. According to Article 281 section 4, an employer or anyone acting on the employer's behalf who violates provisions on working time is liable to a fine of between PLN 1 000 and 30 000 (around EUR 250 – 7 500).

The issue addressed in case C-254/18 is not explicitly regulated in the Polish Labour Code. There are no statutory guidelines for undertakings in terms of establishing

reference periods. No calendar dates apply to reference periods. Article 129 § 1 LC refers to 'months' as units of time. Therefore, it seems that rolling reference periods prevail in Poland.

At the same time, there is no mechanism that would in practice prohibit an employer from requiring the worker to perform work for an extremely long time over two consecutive fixed reference periods, consequently resulting in that worker exceeding the maximum weekly working time, on average, over a period which, since it straddles those two fixed periods, corresponds to a rolling reference period of the same duration. Thus, it may be questionable whether the above-mentioned Article 281 LC, which refers to a pecuniary fine in case of violation of provisions on working time, seems to be too vague to provide effective protection.

4 Other relevant information

4.1 Minimum remuneration

The minimum wage for 2020 is under discussion. According to the Law on Minimum Wage for Work of 10 October 2002 (consolidated text, Journal of Laws 2018, item 2177), the amount of minimum wage for the following year shall be determined by the Social Dialogue Council. The government will submit a proposal by 15 June.

On 29 May, the Ministry for Family, Labour and Social Policy suggested the minimum wage for 2020 to amount to PLN 2 450 (around EUR 600) in comparison to PLN 2 250 in 2019. In that case, the raise would amount to 8.9 per cent.

The social partners are expected to reach an agreement on minimum wage for 2020 within 30 days. If there is no agreement, the government will unilaterally determine the amount until 15 September.

For further information on minimum wage in 2019, see also the January 2019 Flash Report, section 1A.

Information on the current discussion provided by the Ministry for Family, Labour and Social Affairs is available here.

Portugal

Summary

(I) The Supreme Court has issued a ruling on the effects of transfers of undertakings on employment relationships.

(II) Labour Code Amendments are still under discussion before Parliament.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Transfer of undertaking

Supreme Court, No. 701/09.8TTLRS.L2.S1, 30 April 2019

In this ruling, the Supreme Court analysed a case in which, following a transfer of business—the validity of which was not challenged—the employees terminated their employment contracts, alleging just cause due to the lack of payment of remuneration by the transferee. The Court assessed whether the transferred employees, who exercised their right to terminate the employment contract with just cause in relation to their employer (i.e. the transferee), were entitled to severance by the transferor that was no longer their employer.

The Portuguese labour law that was in force on the date of the transfer (i.e. the Portuguese Labour Code, approved by Law No. 99/2003, of 27 August), established that during the one-year period following the transfer of business, the transferor has joint and several liability for all obligations applicable until the date of the business transfer. The law currently in force (Portuguese Labour Code, approved by Law No. 7/2009, of 12 February, with the amendments included in Law No. 14/2018, of 19 March) contains a similar provision, although the period during which the transferor has joint and several liability has been extended to two years.

Regarding this issue, the Supreme Court ruled that *"this joint liability of the transferor only covers the obligations due before the date of the transfer and not the ones that became due thereafter"*, as is the case for severance upon termination of the employment contract with just cause or for the breach of the employment contract that occurred after the date of the transfer.

The Supreme Court admits that in case of breach of the information duty by the transferor, the employee may claim severance pay. However, the statute of limitation set forth in Portuguese labour law, according to which the employee may claim any benefits arising from the employment contract until one year after its termination, is applicable. According to the Supreme Court, *"with the transfer of the business unit, the employer obligations of the transferor ceased, applicable from that date, as does the statute of limitation foreseen in the law to claim any benefits arising from the entry, violation and termination of the employment contract".* In the present case, although the employment contracts were not terminated on the date of the transfer of business, because they were transferred to the transferee, the transferor ceased to be the claimants' employer on the date of the transfer. Therefore, in the context of the relationship between the plaintiffs and the transferor, the one-year limitation period was to be calculated from the date of the transfer.

3 Implications of CJEU rulings and ECHR

3.1 Working time

CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure

In case C-254/18, the CJEU ruled that

> *"Article 6 (b), Article 16 (b) and the first paragraph of Article 19 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as not precluding national legislation which lays down, for the purpose of calculating the average weekly working time, reference periods which start and end on fixed calendar dates, provided that that legislation contains mechanism which make it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods".*

Portuguese legislation does not include a similar rule to the one addressed in case C-254/18, according to which the calculation of the average weekly working time should take account fixed reference periods.

Q2: Does your system allow for reference periods of up to four months (Article 16 (b) of the WTD), of up to six months (Articles 18 and 19 (1) of the WTD), and or of up to 12 months (Article 19 (2) of the WTD)?

Answer to Q2: According to Article 211 of Portuguese Labour Code, the average weekly working time, including overtime, may not exceed 48 hours in the reference period established in the applicable collective labour agreement, which shall not exceed 12 months.

In the absence of such a clause, a reference period of four months is applicable, as a rule. Such a reference period may be extended to six months in the following situations:

- Family employees;
- Employees who hold a position on the board or are at a senior management level or other persons with autonomous decision-taking powers;
- Activities where the employee's place of work and place of residence are far from one another, or where the employee's various workplaces are far from one another;
- Security and surveillance activities requiring permanent presence;
- Activities involving the need for continuity of service or production;
- Foreseeable surges of activity, particularly in agriculture, tourism and postal services;
- Persons working in railway transport, whose activities are intermittent, who spend their working time on board trains or whose activities intend to ensure the continuity and regularity of traffic;
- Random occurrence or '*force majeure*';
- Accident or risk of imminent accident.

Portuguese labour law generally seems to be in line with the provisions contained in Articles 16, 18 and 19 of Directive 2003/88/EC. However, it should be noted that regarding the maximum reference period of 12 months that can be established in collective bargaining agreements, Portuguese labour law does not make any reference

to the need of objective, technical or organisational reasons as set forth in Article 19 of the above-mentioned Directive.

Q3: Does it apply the "opt-out" from Article 22 of the WTD to reference periods for the purpose of the calculation of the average weekly working time?

Answer to Q3: Portugal has never applied the "opt-out" from Article 22 of the Directive 2003/88/EC, which allows a Member State to opt out of applying the respective Article 6 while respecting the general principles of the protection of the safety and health of employees and provided it implements the measures described therein.

Q1: Are reference periods for the purpose of the calculation of the average weekly working time in your respective national legislation and practice organised as fixed or as rolling, or are both possible and existing?

Q4: The key issue: Is it allowed by your national legislation and practice to require a worker to undertake, over two consecutive fixed reference periods, an extremely long period of work consequently making that worker exceed, on average, the maximum weekly working time over a period which, since it straddles those two fixed periods, corresponds to a rolling reference period of the same duration? If yes, are there any mechanisms making it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods? If yes (there are mechanisms), what is their effectiveness?

Answer to Q 1/4: Portuguese legislation does not specify whether the reference period used for the calculation of the average weekly working period shall be determined on a fixed or on a rolling basis. Furthermore, this issue has not been discussed in national courts. This CJEU ruling may be relevant in Portugal, in particular if a collective bargaining agreement establishes a fixed reference period for the purpose of calculating the average working time.

4 Other relevant information

Further to previous Flash Reports, Draft Law No. 136/XIII and 1025/XIII are still under discussion in the Portuguese Parliament.

Romania

Summary

(I) A new law allows employees to continue working for another three years with the employer's consent after meeting the conditions for retirement.

(II) The prohibition of dismissing an employee who has returned from parental leave has been reduced.

1 National Legislation

1.1 Termination of employment at retirement age

As a rule, the employment contract is automatically terminated when the employee fulfils the retirement conditions. Pensioners can continue to work, but need to be re-employed. Last year, the Labour Code was amended by Government Emergency Ordinance No. 96/2018 to extend certain terms and to modify and supplement some normative acts published in the Official Gazette No. 963 of 14 November 2018. At that time, women were given the option to continue working, even after reaching the standard age of retirement of 65 years and the minimum contribution period. This option had to be communicated to the employer 60 days prior to the fulfilment of the retirement conditions (see also November 2018 Flash Report).

Law No. 93/2019 approving Government Emergency Ordinance No. 96/2018, published in the Official Gazette No. 354 of 08 May 2019, reduces the period within which female employees must inform the employer that they wish to continue working despite fulfilling all retirement conditions to 30 days.

Law No. 93/2019 also introduced Art. 56 (4) in the Labour Code, according to which the employee can—with the employer's approval—keep her post if she submits a request 30 days prior to the date of fulfilment of the retirement conditions. The employment contract may be extended annually for a maximum of three years.

As the three-year period runs from the date on which the employee reaches standard retirement age (which differs for women and men), the new law actually perpetuates the difference in the legal regime it actually sought to remove. Thus, men's employment contract can continue until the age of 68, while for women, it has to end at the age of 65 at the latest.

After retirement, both women and men can conclude a new employment contract, and receive both a salary and their pension.

1.2 Parental leave

Law No. 89/2019 amending and supplementing the Government Emergency Ordinance No. 111/2010 on parental leave and the child-rearing monthly allowance, published in the Official Gazette No. 340 of 03 May 2019, modified some of the employer's obligations in relation to employees on parental leave. Notably, the length of the prohibition to dismiss the employee upon returning from parental leave has been reduced. So far, if the employee returned to work before the child turned two years of age, he was entitled to an insertion incentive and could not be dismissed until the child reached the age of three, or the age of four in the case of a disabled child.

At present, the employee can be dismissed once the child reaches the age of two years (or three years in case of a disabled child), but no sooner than six months after returning from parental leave.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working time

CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure / Premier ministre

According to Romanian Labour Code, the maximum weekly working time is 48 hours. This includes overtime work. According to Article 114 (2), the reference period is four months, and it is determined on a rolling basis. The law allows an extension of the reference period to 6 or even 12 months based on collective labour agreements. Such extended reference periods are also established on a rolling basis.

The reference period provided in the legislation is four months. The collective agreements may also set reference periods of up to 6 or 12 months. In practice, collective labour agreements only rarely include reference periods that are longer than four months.

Art. 114 of the Labour Code provides: "(3) For certain activities or professions established by the applicable collective labour agreement, reference periods of more than four months, but not exceeding six months, may be negotiated by the respective collective agreement.

(4) Subject to compliance with the regulations on the protection of the health and safety at work of employees, for objective, technical or work organisation reasons, collective agreements may provide for derogations from the length of the reference period set out in paragraph (3), but for reference periods which in no case exceed 12 months".

Romania has not made use of the possibility to "opt-out" of Article 22 of the Directive.

As reference periods are not fixed but determined on a rolling basis, the employee cannot work more than 48 hours a week for an excessive period of time. The Romanian legislation is in line with Directive 2003/88, as subsequently *construed* in case C-254/18.

3.2 Parental leave

CJEU case C-486/18, 09 May 2019, RE v Praxair MRC SAS

In case C-486/18, the question of the effects of part-time parental leave on compensation following dismissal and redeployment leave allowance was increased. Given that these compensatory payments and benefits were based on past wages according to national law, the Court of Justice of the European Union has ruled that exercising the right to part-time parental leave cannot have a detrimental effect on the amount of compensation.

Romanian regulations differ from those the Court of Justice of the European Union based its ruling in case C-486/18 on. In Romania, part-time parental leave does not exist; parental leave can only be taken 'full time', thus suspending the individual employment contract. During child-rearing leave, the employee does not work and is not entitled to a salary, instead receiving an allowance that does not have the legal nature of a salary. Any entitlement of the employee in relation to her wages will be calculated on the basis of her salary earned prior to parental leave. Indeed, according to Art. 49 (6) of the Labour Code, in case of suspension of the individual employment contract, all terms related to its conclusion, performance or termination shall be suspended. If redundancy

payments are based on a provision (included, for example, in the collective labour agreement) that employees are to receive severance on the basis of wages earned since becoming employed in the company or on the basis of the last 12 monthly wages, their calculation will be based on wages earned prior to the suspension of the employment contract, i.e. prior to the commencement of parental leave.

In addition, according to Art. 21 (2) of Government Emergency Ordinance No. 96/2003 on the protection of mothers at the workplace (published in the Official Gazette No. 750 of 27 October 2003), an employee who returns from parental leave cannot be dismissed for any reason for 6 months.

3.3 Transfer of undertakings

CJEU case C-194/18, 08 May 2019, Jadran Dodič v Banka Koper

In case C-194/18, the Court of Justice of the European Union ruled that the transfer to another undertaking of financial instruments and other assets of the clients of the former undertaking following the cessation of its activity, may constitute a transfer of undertaking or of part of an undertaking if it is established that a transfer of clients took place.

Council Directive 2001/23/EC has been transposed into Romania by Law No. 67/2006 on the protection of employee rights in the event of a transfer of undertaking, a business or parts thereof (published in the Official Gazette of Romania No. 276 of 28 March 2006). According to Romanian law, a transfer is defined as the transfer of ownership of an undertaking, business or parts thereof to the transferee with the purpose of continuing the main or secondary activity, whether for profit or not (Article 4 (1) d). The transposition of the Directive's scope has been continuously criticised in Romanian legal literature. It is argued that the Romanian definition of transfers only partially transposes the European norms, limiting the concept of transfer exclusively to the continuation of the activity.

Moreover, Romanian law defines transfers as a change in ownership from the hands of the transferor to those of the transferee. The reference to 'ownership' is considered by the doctrine to be restrictive in relation to the Directive's definition, since the transfer of an undertaking to another employer would not necessarily also imply a transfer of ownership.

In this context, the decision of the Court of Justice of the European Union, according to which the transfer of financial instruments and other assets of the clients of one undertaking to a transferee falls within the scope of the Directive, seems to confirm the views expressed in the Romanian legal literature on the incomplete transposition of Directive 2001/23/EC into Romanian law.

3.4 Fixed-term work

CJEU case C-494/17, 08 May 2019, Ministero dell'Istruzione, dell'Università e della Ricerca v Fabio Rossato

In case-494/17, the Court of Justice of the European Union ruled on the extent to which national law, which precludes any entitlement to financial compensation on account of misuse of successive fixed-term employment contracts, may be contrary to Clause 5(1) of the Framework Agreement on fixed-term work. The Court held that the measure of converting a fixed-term employment relationship into one of indefinite duration may be proportionate for the purpose of punishing that misuse, if such a conversion is neither uncertain nor unpredictable or fortuitous.

To regulate fixed-term work, the Romanian Labour Code introduced all three conditions

established in Council Directive 1999/70/EC**:**

- an objective reason from those explicitly listed in Article 83 of the Labour Code must be specified not only to renew a fixed-term contract, but also to conclude such a contract in the first place;
- the contract may be concluded for a maximum duration of 36 months (Art 84 (1) of the Labour Code). In case of replacement of an employee whose contract has been suspended, the fixed-term contract will terminate when the suspension of the employment contract of the employee who is being replaced ends;
- A maximum number of three successive fixed-term contracts may be concluded (Art 82(4) of the Labour Code).

The conclusion of a fourth fixed-term contract is therefore unlawful. However, there is no explicit provision in labour legislation that stipulates that a fourth fixed-term contract will automatically become a contract of indefinite duration, and no compensation is provided for an employee who has been hired under a fixed-term contract beyond the legal restriction.

A fourth fixed-term employment contract is affected by partial invalidity only in terms of its duration. In other words, the contract is valid, but the duration clause will be void and replaced with the general rule that the contract was concluded for an indefinite period. This solution is based on interpretation, from corroborating the prohibition contained in the Labour Code to the provisions of civil law that enshrine the rule of partial nullity in relation to total nullity.

3.5 Access to the profession of lawyer

CJEU case C-431/17, 07 May 2019, Monachos Eirinaios, kata kosmon Antonios Giakoumakis tou Emmanouil v Dikigorikos Syllogos Athinon

Under Romanian law, there is no incompatibility between the status of monk and the practice of law. The provisions of Directive 98/5/CE to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained were transposed by Law No. 51/1995 on the organisation and practice of the profession of lawyer (republished in the Official Gazette of Romania No. 210 of 28 March 2017). According to Article 94 and 103 of this law, lawyers practicing under the professional title of their Member State of origin may at any time request recognition of their law degrees in order to be admitted to the profession of lawyer and to practice under the professional title of lawyer in Romania. For foreign law degrees to be recognised in Romania, the applicant will have to pass an examination or complete a three-year internship in the field of Romanian law, in compliance with the provisions of the law on the exercise of civil and political rights and on cases of indignity and incompatibility. The only incompatibilities provided by Romanian law are:

- remunerated activity in professions other than the profession of lawyer;
- occupations that harm the dignity and independence of the profession of lawyer or good morals;
- direct exercise of material acts of trade.

Hence, it seems that the CJEU's decision will not have any implications for Romanian law.

4 Other relevant information

Nothing to report.

Slovakia

Summary

No legal acts were adopted and no important court decisions published in May.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working time

CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure

Q 1: Are reference periods for the purpose of the calculation of the average weekly working time in your respective national legislation and practice organised as fixed or as rolling, or are both possible and existing?

Answer to Q 1: The main legal source is the Labour Code (Act No. 311/2001 Collection of Laws – 'Coll'; hereinafter: LC) as amended. The provisions of the Labour Code are binding for all employers in the private (business) sector and in the public sector. Employment relationships in civil service are currently regulated by six Acts.

According to Article 85 paragraph 3 of the Labour Code "*for the purposes of determining the extent of working time and the planning of working time, a week shall be seven consecutive days*". (No calendar week.) As regards 'months', the Labour Code does not use the term calendar months or calendar year.

The reference periods for the purpose of calculating the average weekly working time in national legislation are 'fixed'. (See below) The Labour Code does not explicitly regulate 'both'.

There is no regulation on the possibility to ensure that the maximum average weekly working time of 48 hours is respected during each six-month (four-month, twelve-month) period straddling two consecutive fixed reference periods.

Q 2: Does your system allow for reference periods of up to 4 months (article 16 (b) of the WTD), of up to 6 months (Articles 18 and 19 (1) of the WTD), and or of up to 12 months (Article 19 (2) of the WTD)?

Answer to Q 2: The general possibility to derogate from these Articles is established in the Labour Code in the framework of the regulation of even (Article 86) and uneven distributions of working time (Article 87).

The maximum weekly working time of an employee shall be 40 hours or less (Article 85 paragraph 5 of the LC). According to Article 85 paragraph 9 of the Labour Code, an employee's average weekly working time including overtime may not exceed 48 hours.

An employer shall decide on an even distribution of working time after discussions (consultations) with the employee representatives (Article 86 paragraph 1 of the LC).

In an even distribution of working time for individual weeks, the difference in the duration of working time pertaining to individual weeks shall not exceed three hours, and the working time for individual days shall not exceed nine hours. The average weekly working time over a defined period of four-week duration at most, may not exceed the limit set for the determined weekly working time (Article 86 paragraph 2 of the LC). In an even distribution of working time, an employer shall arrange for weekly working times based on a five-day work week (Article 86 paragraph 3 of the LC).

According to Article 87 paragraph 1 of the Labour Code, if the nature of the work or operating conditions does not permit working time to be distributed evenly in individual weeks, the employer may distribute working time unevenly in individual weeks in agreement with the employee representatives or the individual employee. The average working time may not, however, exceed the established weekly working time within a maximum period of four months.

An employer may distribute working time unevenly in individual weeks for a period longer than four months, and at most over a period of 12 months, in a collective agreement or in agreement with the employee representatives, if the work requirements of the employer's activities vary over the course of the year. The agreement cannot be replaced by a decision of the employer. In the same way, working time for certain organisational units or types of work may be distributed (Article 87 paragraph 2 of the LC). Working time may not exceed 12 hours within a 24-hour period (Article 87 paragraph 4 of the LC).

According to Article 87 paragraph 3 of the Labour Code, the working time of an employee with a disability, a pregnant employee, an employee who is caring for a child that is younger than three years of age, a single employee who is caring for a child that is younger than 15 years of age, may only be arranged unevenly upon agreement with the employee.

According to Article 147 paragraph 1 of the Labour Code, an employer within the scope of her capacity shall be required to guarantee the occupational health and safety of workers, to take the necessary measures, invest the necessary funds and implement an appropriate system of labour protection management. The employer shall be required to improve the standard of labour protection in all activities and to adapt the level of labour protection to changing circumstances. The additional obligations of an employer in the area of occupational health and safety are stipulated in a special law (Article 147 paragraph 1 of the LC). The special law that is generally applicable is Act No. 124/2006 Coll. on safety and health at work.

According to Article 99 of the Labour Code, the employer must maintain documentation on working time and overtime work.

According to Article 16 paragraph 2 letter a/ of Act No. 125/20016 Coll. on labour inspection, upon request, the employer has the obligation to provide the labour inspectorate or the labour inspector with all requested documentation and information, including original documents and technical data. According to Article 239 of the Labour Code, employee representatives shall supervise adherence to labour law regulations, and shall, for this purpose, also be authorised to request the necessary information and documentation from executive employees.

A special legal regulation applies to the armed forces, police and emergency/civil protection services.

Armed forces

The main legal source is Act No. 281/2015 Coll. on the civil service of professional soldiers.

According to Article 102 paragraph 2 of the Act, the duration of weekly service time shall be 40 hours, unless otherwise stipulated in Article 106 of this Act. As a rule, service

time is distributed across five service days per week (Article 103 paragraph 1 of the Act). If required by the nature of the civil service, the commander may also divide the service time unevenly over the weeks, while the average weekly service time may not exceed a set weekly service time within a maximum of four months. As a rule, unevenly distributed working time is determined for a period of one month (Article 103 paragraph 2 of the Act).

According to Article 106 paragraph 1 of the Act, the provisions of Article 103 shall not apply to a professional soldier in cases provided for in Article 106 paragraph 1 letters a/- j/ of the Act. This is the case, for example, in the performance of tasks related to emergency and combat readiness, including the preparation and training of alert and combat readiness (letter a/), military exercises (letter b/), emergency rescue operations or when there is an immediate risk of a crisis situation or when a crisis has already occurred or during the provision of emergency, medical, technical and other necessary assistance (letter c/), the performance of tasks for the protection of state borders and guarded buildings, in the protection of public order or in the fight against terrorism and organised crime, as decided by the government (letter d/).

Police

The main legal source is Act No. 73/1998 Coll. on the 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.

According to Article 64 paragraph 1 of the Act, the duration of basic weekly service time is 40 hours, unless otherwise specified. The duration of basic weekly service time, which is unevenly distributed across the calendar month, is set at 38 hours (Article 64 paragraph 2 of the Act).

As a rule, the basic weekly service time is scheduled for five days of service, i.e. weekly rest days are preferably to be Saturday and Sunday. If required by the nature of the civil service, basic service time may be unevenly distributed (Article 65 paragraph 1 of the Act). The length of one continuous shift can be a maximum of 12 hours. An exception beyond this limitation may be established by the Minister by internal regulation (Article 65 paragraph 2 of the Act).

An uneven distribution of basic weekly service time occurs when it is distributed unevenly across different weeks, i.e. in some weeks it is shorter, in others longer than the specified basic weekly service time, but within a given period—typically four weeks, but at most one year—the average length equals the basic weekly service time (Article 65 paragraph 4 of the Act).

Emergency/civil protection services

The main legal source is Act No. 315/2001 Coll. on the Fire Fighting and Rescue Corps. This Act regulates the civil service and regulations on the establishment, modification and termination of the civil service of members of the Fire and Rescue Service and members of the Mountain Rescue Service (Article 1 paragraph 2 of the Act).

According to Article 85 paragraph 2 of the Act, a member's service time shall be 40 hours per week. A reduction of the member's weekly service time can be agreed in a higher level collective agreement.

Members' service time may be unevenly distributed. Unevenly distributed service time can be distributed for six months (Article 86 paragraph 1 of the Act). In case of uneven distribution, the length of service for each service day may not exceed 18 hours (Article 86 paragraph 2 of the Act).

Overtime may be ordered in writing in case of urgent public interest, even on free days. The continuous rest period between two service days may not be reduced to less than eight hours (Article 91 paragraph 2 of the Act). Within a calendar year, a member of

the civil service may be ordered to work overtime up to a maximum of 300 hours (Article 91 paragraph 3 of the Act).

Q 3: Does it apply the "opt-out" from Article 22 of the WTD to reference periods for the purpose of the calculation of the average weekly working time?

Answer to Q 3: There is a special provision in the Labour Code for health care providers. According to Article 85a paragraph 1 of the Labour Code, the average weekly working time of an employee, including overtime, may exceed 48 hours for a period of four consecutive months in the case of a health care provider under other relevant regulations if the employee agrees to the overtime work. The average weekly working time of such an employee shall not exceed 56 hours. According to Article 85a paragraph 2, an employer based on the cited paragraph 1 is required:

- to inform the relevant labour inspectorate or relevant supervisory body for safety and protection of health at work, if they request such information;
- to keep registers on employees, whose working time is agreed in this way and submit these registers to the relevant labour inspectorate or to the relevant supervisory body for safety and protection of health at work, if they request access to the registers.

An employee shall not be penalised or disadvantaged by the employer for refusing to work more than 48 hours per week on average (Article 85a paragraph 3 of the LC). An employee shall have the right to revoke her consent to overtime under paragraph 1; the revocation of consent comes into effect one month after notifying the employer thereof in writing (Article 85a paragraph 4 of the LC).

Q 4: The key issue: Is it allowed by your national legislation and practice to require a worker to undertake, over two consecutive fixed reference periods, an extremely long period of work consequently making that worker exceed, on average, the maximum weekly working time over a period which, since it straddles those two fixed periods, corresponds to a rolling reference period of the same duration? If yes, are there any mechanisms making it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods? If yes (there are mechanisms), what is their effectiveness?

Answer to Q 4: In national legislation, no explicit possibility exists to ensure that the maximum average weekly working time of 48 hours is respected during each six-month (four-month, twelve-month) period straddling two consecutive fixed reference periods. Such an option is not legally regulated.

There are no legal mechanisms to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods. The reference periods for the purpose of calculating the average weekly working time in national legislation are 'fixed'.

3.2 Fixed-term work

CJEU case C-494/17, 08 May 2019, Rossato

The main legal source is the Labour Code (Act No. 311/2001 Collection of Laws – 'Coll') as amended. The provisions of the Labour Code are binding for all employers in the private (business) sector and in the public sector.

As regards fixed-term employment contracts for teachers in the public sector, Act No. 317/2009 Coll. on pedagogical employees and professional employees and on

amendments to certain acts (Article 11b) legally effective until 31 August 2019 and Act No. 138/2019 Coll. on pedagogical employees and professional employees and on amendments to certain acts (Article 82 paragraph 4) legally effective since 01 September 2019, must be mentioned.

As regards the regulation of fixed-term employment contracts, both the current and the new act leave it to the Labour Code. According to Article 82 paragraph 4 of Act No. 138/2019 Coll. *"A fixed-term employment relationship with a pedagogical employee may be agreed for a minimum of one school year; this does not apply to a fixed-term employment contract agreed for a certain period on account of employee representation duties under Article 48 paragraph 4 letter a/ of the Labour Code. The fixed-term employment relationship is covered by the Labour Code."*

As regards public service, Act No. 552/2003 Coll. on the performance of work in the public interest (formerly Act No. 313/2001 Coll. on public service) does not regulate fixed-term employment contracts of such employees. They are fully regulated by the Labour Code.

An exception is, however, possible. For example, Act. No. 131/2002 Coll. on Higher Education and its Article 77 on the contract of employment. An employee with no scientific-pedagogical degree as a professor or as an associate professor (docent) may be employed as an academic teacher upon winning out the competition for a period that does not exceed five years. The employment of academic teachers terminates at the end of the academic year during which they turn 70 years of age, unless their employment relationship terminated earlier by a special regulation (Labour Code). The rector or dean may hire an employee part time in the position of academic teacher without participating in a competition for one year at most or to conclude an agreement on work performed outside an employment relationship (Article 77 paragraph 8 of the Act).

Provisions of the Labour Code on fixed-term work do not apply to the employment of civil servants. Special acts apply to civil servants. Fixed-term contracts can be concluded for temporary civil service (Articles 36 and 37 of Act No. 55/2017 Coll. on civil service, Article 30 of Act No. 315/2001 Coll. on the Fire Fighting and Rescue Corps) or temporary civil service and short-term civil service (Articles 27-28 and 30 of Act No. 281/2015 Coll. on civil service of professional soldiers).

According to Article 48 paragraph 1, an employment relationship shall be agreed for an indefinite period, if the duration of employment is not explicitly defined in the employment contract or if the legal conditions for the conclusion of the employment relationship for a certain period were not fulfilled in the employment contract or upon its modification. An employment relationship shall also be deemed as one of indefinite duration if a fixed term employment relationship was not agreed in writing (written form).

An employment relationship concluded for a fixed period shall terminate upon the expiration of the agreed period (Article 71 paragraph 1 of the LC). If the employee continues working with the employer's knowledge after the agreed period has elapsed, this employment relationship will be converted into an employment relationship of indefinite period, unless the employer agrees otherwise with the employee (Article 71 paragraph 2 of the LC).

According to Article 48 paragraph 2 of the Labour Code, a fixed-term employment relationship may be agreed for a maximum of two years. A fixed-term employment relationship may be extended or renewed at most twice within a two-year period. As regards interruptions between successive contracts in accordance with Article 48 paragraph 3 of the Labour Code, a successive fixed-term employment relationship is one that commences less than six months after the end of the previous fixed-term employment relationship between the same parties.

To prevent abuse arising from the use of successive fixed-term contracts, Article 48 paragraphs 4 and 6 of the Labour Code specifies objective reasons for concluding successive fixed-term contracts. A further extension or renewal of the fixed-term employment relationship to two years or beyond two years can only be agreed for the reasons stated in Article 48 paragraph 4 of the Labour Code:

a) substitution of an employee during maternity leave, parental leave, leave immediately linked to maternity leave or parental leave, temporary incapacity for work or an employee who has been granted long-term leave to perform a public function or a trade union function;

b) the performance of work for which a significant increase in the number of employees is necessary for a temporary period not exceeding eight months within the calendar year;

c) the performance of work that is linked to the seasonal cycle, which recurs every year and does not exceed eight months within the calendar year (seasonal work);

d) the performance of work agreed in a collective agreement.

The reason for extending or renewing a fixed-term employment relationship under paragraph 4 must be stated in the employment contract (Article 48 paragraph 5 of the LC).

Successive contracts are restricted in the relevant special acts governing them.

According to Article 48 paragraph 6 of the Labour Code, a further extension or renewal of a fixed-term employment relationship of up to two years or beyond two years can be agreed with a teacher in higher education or an employee in science, research or development if there are objective reasons relating to the nature of the activities of such employees as stipulated in special regulations (Act. No. 131/2002 Coll. on Higher Education).

A special provision also exists on the prohibition of discrimination against fixed-term workers in the Labour Code. According to Article 48 paragraph 7 of the Labour Code, a fixed-term worker may not be given either more or less favourable treatment than a comparable employee as regards working conditions and terms of employment and working conditions relating to safety and health at work. The definition of comparable employee is found in Article 40 paragraph 9 of the Labour Code.

The limitations provided in Article 48 paragraphs 2 to 7 shall not apply to employment in a temporary employment agency (Article 48 paragraph 9 of the LC).

4 Other relevant information

Nothing to report.

Slovenia

Summary

Legislative amendments on income tax, pensions and disability insurance have been adopted.

1 National Legislation

Amendments to the Personal Income Tax Act (ZDoh-2U) and the Pension and Disability Insurance Act (ZPIZ-2F) have been published in the Official Gazette of the Republic of Slovenia, No. 28/2019 of 03 May 2019 (see also April 2019 Flash Report).

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working time

CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure

Article 143(1) of the Employment Relationships Act (ERA-1) defines full-time work as working time which shall not exceed 40 hours a week or shall not be less than 36 hours a week. Overtime is not included in the provision on the (maximum) duration of (full-time) working time. Article 143(1) must be taken in conjunction with Article 144(3) on time limitations of overtime work. Article 144(3) provides that overtime work may not exceed 8 hours a week, 20 hours a month or 170 hours a year. A working day may not exceed ten hours. The sum of maximum 40 and maximum 8 hours is in compliance with the maximum weekly working time laid down in Article 6(b) of the WTD.

Q 1: Are reference periods, for the purpose of the calculation of the average weekly working time in your respective national legislation and practice organized as fixed or as rolling, or are both possible and existing.

Answer to Q 1: Article 144(3) also provides that the daily, weekly and monthly time limitations may be regarded as an average limitation over the period stipulated by an Act or collective agreement and may not exceed six months. Considering the implementation of the provision in practice, it can be maintained that the provision in the majority of cases is interpreted as providing a rolling reference period.

Article 148(2) of the ERA-1 provides:

> *"Before the beginning of a calendar or business year, the employer shall provide the yearly distribution of working time and notify the workers thereof in a manner customary to the employer (for example on a notice board at the employer's business premises or by using information technology) and also notify the trade unions at the employer."*

Accordingly, it seems that reference periods can be fixed for the purpose of calculating average working times.

Q 2: Does your system allow for reference periods of up to 4 months (article 16 (b) of the WTD), of up to 6 months (Articles 18 and 19 (1) of the WTD), and or of up to 12 months (Article 19 (2) of the WTD)?

Article 144(3) provides that the reference period for the calculation of a weekly time limitation may not exceed 6 months. This means that it can also be shorter. The Police Organisation and Work Act, for example, provides that "the daily, *weekly* and monthly limitations of overtime are regarded as average limitations over a period which may not exceed 4 months." With the consent of the employee, this may be extended up to six months (Article 72).

Article 158(1) of the ERA-1 asserts that an act or branch collective agreement may stipulate that the time limitation of a night worker's daily working time as laid down in Article 152 of the ERA-1 (night work) is regarded as an average limitation within a period exceeding four but not exceeding six months.

In the case of shift work, an Act or branch collective agreement may stipulate that the average minimum statutory daily or weekly rest period shall be guaranteed within a longer time period which, however, shall not exceed six months (Article 158(2) of the ERA-1).

A reference period up to 6 months is specified for the calculation of the average statutory minimum daily or weekly rest periods for activities or jobs, types of work or occupations referred to in the ERA-1 (Article 158(3).

According to Article 158(5) of the ERA-1, a reference period of more than 6 months is permitted in case working time is either irregularly distributed or redistributed. A branch collective agreement may stipulate that in cases in which objective or technical reasons or reasons related to the organisation of work require full working time in accordance with Article 148(5) (establishing a time limitation of 56 hours in case of irregular distribution or temporary redistribution of full working time) shall be taken into account as the average working time obligation in a period not exceeding 12 months.

Q 3: Does it apply the "opt-out" from Article 22 of the WTD to reference periods for the purpose of the calculation of the average weekly working time?

Answer to Q 3: The ERA-1 does not contain an explicit provision on "opt-out" from Article 22 of the WTD related to reference periods for the purpose of calculating the average weekly working time. Nevertheless, Article 2 of the ERA-1 allows for special regulations (read: derogations) for public sector and mobile workers. In the public sector, special regulations and /or working time limitations apply in the following sectors: health, veterinary medicine, armed forces, police, civil protection services, fire-fighting, judicial services, public prosecution, foreign affairs, maritime sector and aviation. But these regulations can at the same time be understood as an option to derogate from Article 16(b).

Q 4: The key issue: Is it allowed by your national legislation and practice to require a worker to undertake, over two consecutive fixed reference periods, an extremely long period of work consequently making that worker exceed, on average, the maximum weekly working time over a period which, since it straddles those two fixed periods, corresponds to a rolling reference period of the same duration? If yes, are there any mechanisms making it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods? If yes (there are mechanisms), what is their effectiveness?

Answer to Q 4: Long working hours have become a serious problem in Slovenia. The working hours of many workers in different sectors exceed statutorily defined full-time

work. Restrictions to overtime work are also violated and very often, overtime work is not paid in accordance with the law/collective agreements. To avoid having to fulfil their legal obligations, employers often introduce irregular distributions of working time. As mentioned above, the ERA-1, as an exception, allows branch collective agreements to include a reference period for the calculation of full working time to exceed 12 months (Article 158(5) in conjunction with Article 148). In this case, whether a worker's working hours comply with the statutory time limitations is only reviewed at the end of the 12-month period.

Working hours may also be distributed irregularly across several consecutive reference periods of up to six months. The surplus of working hours is ascertained at the end of the individual reference period. According to recent case law (Decision of the Supreme Court, No. RS VIII Ips 159/2018, 20 November 2018), in case of irregular distribution of working hours, compensation/even distribution of working hours must be realised within the reference period. Compensatory rest periods must be granted to workers within the individual reference period. Hours exceeding full-time working hours are not deemed to be (real) overtime hours as they must, as a rule, be compensated with rest periods. If compensation is not possible, the established surplus of working hours represents the employee's overtime hours and must be either paid as overtime work (supplement) or transferred to the next reference period.

4 Other relevant information

Nothing to report.

Spain

Summary

There were no relevant developments in the field of labour law, because general elections were held and an interim government.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working time

CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure

According to the CJEU ruling in case C-254/18, 11 April 2019, *Syndicat des cadres de la sécurité intérieure*, Article 6(b), Article 16(b) and the first paragraph of Article 19 of Directive 2003/88/EC of the European Parliament and of the Council of 04 November 2003 concerning certain aspects of the organisation of working time must be interpreted as not precluding national legislation which lays down, for the purpose of calculating the average weekly working time, reference periods which start and end on fixed calendar dates, provided that that legislation contains mechanisms which make it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods.

Q 1: Are reference periods for the purpose of the calculation of the average weekly working time in your respective national legislation and practice organised as fixed or as rolling, or are both possible and existing?

Answer to Q 1: This is not a question with an easy answer. The rules on working time are established in the Labour Code. However, there are specific rules on working time for several groups or workers, such as public employees (Royal Legislative Decree 5/2005), or the so-called 'labour relationships of a special nature' (senior management, domestic servants, professional athletes, artists, etc.), and Royal Decree 1561/1995 of 21 September, provides special rules on working time for some activities (mobile workers, work at sea, work in mines, etc.).

The maximum weekly working time has only been amended once since 1980. The limit was reduced from 42 hours to 40 hours of actual work in 1983, but that limitation must be measured in terms of the annual average (Article 34 of the Labour Code). That is, this maximum is 40 hours per week of actual work on average for the annual calculation. However, the law does not mention 'calendar year', 'fixed' or 'rolling' periods. It simply requires an 'annual calculation', without further clarification. Theoretically, maybe both options would be possible, but in practice, only the 'rolling' approach applies. Therefore, the reference period for a worker who is contracted today will start working today, and not on 01 January.

The actual time worked in a given week can be longer than 40 hours, but this gap must be compensated throughout the year with reductions of working hours in other weeks to comply with the annual average. Working time can be distributed irregularly, and collective agreements can regulate the distribution. The employer may distribute up to 10 per cent of the working time throughout the year (Article 34 Labour Code). The Labour Code allows the employer to require the worker to work more than 40 hours in a given week, or even more than 48 hours, provided that the weekly working time does not exceed the limit of 40 hours on average throughout the year.

Article 35 of the Labour Code regulates overtime, which is voluntary and can be compensated with rest or additional higher payment. In the absence of an agreement on the overtime, it must be compensated with equivalent rest within four months from its completion. When financial compensation is agreed, Article 35 provides that the amount for overtime may not be less than the value for ordinary working time. Overtime may not exceed 80 hours per year in total, although this limit only takes paid overtime into account, not overtime compensated with rest. Collective bargaining cannot establish a higher maximum. In any case, overtime is not included in the statutory standard maximum weekly working time.

As mentioned above, special rules on working time exist for specific workers in accordance with Royal Decree 1561/1995. This regulation implements the WTD on several activities and provides specific rules on maximum weekly working time for mobile workers in Article 10 bis, added by Royal Decree 902/2007, which transposed Directive 2003/88/EC. The duration of the weekly working time of these mobile workers may not exceed 48 hours per week on average within a 4-month period, and may not exceed 60 hours within one week.

Special rules also exist for the public health sector (Act 55/2003, 16 December). The staff of the Healthcare Service, as a general rule, are civil servants, so labour law does not apply to them. However, as a result of CJEU case law, the WTD does apply to them.

Q 2: Does your system allow for reference periods of up to 4 months (article 16 (b) of the WTD), of up to 6 months (Articles 18 and 19 (1) of the WTD), and or of up to 12 months (Article 19 (2) of the WTD)?

Answer to Q 2: The reference period is one year (Article 34 of the Labour Code), but is reduced to four months for mobile workers (Article 10 bis of Royal Decree 1561/1995) and to six months for employees in the health care sector (Article 48.2 of Act 55/2003). These reference periods cannot be extended by collective agreement or by agreement between the employer and the worker.

Q 3: Does it apply the "opt-out" from Article 22 of the WTD to reference periods for the purpose of the calculation of the average weekly working time?

Answer to Q 3:Yes, but only for the health care sector and mobile workers.

Health care sector

Articles 48 and 49 of Act 55/2003. Act 55/2003 did not implement the WTD, but refers to Directives 93/104/CE and 2000/34.

According to Article 48 of Act 55/2003, the weekly working time can be extended when uninterrupted health care services must be provided. Health care staff must perform 'additional working time'. This additional working time, which is added to their ordinary working time, may not exceed 48 hours a week on average within a 6-month period. This can be modified by agreement.

If this extended working time does not comply with the requirements of the service, Article 49 of Act 55/2003 allows an extension of working time up to 150 hours per year, but the worker's consent is mandatory. This is referred to as 'special working time'.

There is no rule on a 7-day period, as the maximum working time is referred to on an annual or several months basis, so a worker could work more than 48 hours over a specified 7-day period (this is the same for every worker when the general rule of Article 34 of the Labour Code applies).

Mobile workers

According to Article 10 bis of Royal Decree 1561/1995, the weekly working time may not exceed 48 hours per week on average within a 4-month period (and can be extended to six months by collective agreement).

Other activities

Army: 37.5 hours a week of actual work, on average, in the annual calculation. This time can be extended by 'service requirements', but this is not related to the WTD (Article 5 Order DEF/1363/2016, 28 July).

Police and emergency/civil protection services: civil servants are not governed by the Labour Law in Spain, but fall under the scope of Administrative Law. The CJEU usually includes civil servants in directives on social issues, but when such directives are implemented in Spain, only the Labour Law is modified, and the administrative provisions that regulate the work of civil servants usually remained unrevised. There were, therefore, some flaws in the compliance with EU law regarding civil servants, as was the case with the Civil Guard (CJEU case C-158/09, 20 May 2010, Commission/Spain). These seem to have been resolved after General Order No. 11 of 23 December 2014 was issued. The weekly working time is set at 37.5 hours, but the reference period is not one year, but one, three or four months, depending on the situation.

The weekly working time of civil servants is 37.5 hours on average within a period of one year (Article 3 of the Resolution, 28 February 2019).

The situation of emergency/civil protection service personnel may differ, especially with regard to firefighters, because they are not—at least not all of them—civil servants of the State. Some firefighters have an employment contract, so the Labour Law applies to them. Those who are civil servants work for the regions or city councils. Thus, the rules on working time for these activities are fragmented. The Statute of the Public Employee must coexist with rules that are promulgated by the regions and the city councils, as well as from the agreements between the firefighters and their employers. Different rules apply and there are no specific instruments to control full compliance with the WTD. Usually, the working time of firefighters is distributed in 24-hour shifts, with rest periods of two or three days thereafter.

Collective bargaining could also have a major impact. For example, collective agreements exist for ambulance drivers, and they make a distinction between 'working time' and 'attendance time'. The latter is not the same as 'period of availability', because the worker must be present in the workstation (Article 51 of the collective agreement for ambulance drivers, see here).

Q 4: The key issue: Is it allowed by your national legislation and practice to require a worker to undertake, over two consecutive fixed reference periods, an extremely long period of work consequently making that worker exceed, on average, the maximum weekly working time over a period which, since it straddles those two fixed periods, corresponds to a rolling reference period of the same duration? If yes, are there any

mechanisms making it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods? If yes (there are mechanisms), what is their effectiveness?

Answer to Q 4: This does not seem possible in Spain. Maybe a closer look at the special rules on the health care sector and mobile workers would reveal practical problems, but they have not yet arisen in Spain. As mentioned above, the Spanish rules on weekly working time do not refer to 'calendar year', but to 'annual calculation'. It therefore does not seem possible to calculate reference periods with a different criterion each time. In summary, this is not a problem in Spain yet and it does not seem likely that a problem will arise. In any case, the recording of working time (Article 34.9 of the Labour Code) could be a mechanism to ensure that the maximum average weekly working time is respected.

3.2 Parental leave

CJEU case C-486/18, 08 May 2019, Praxair MRC

According to the CJEU's ruling in case C-486/18, 08 May 2019, Clause 2.6 of the Framework Agreement on parental leave concluded on 14 December 1995, which is annexed to Council Directive 96/34/EC of 03 June 1996 on the Framework Agreement on parental leave concluded by UNICE, CEEP and the ETUC, as amended by Council Directive 97/75/EC of 15 December 1997, must be interpreted as precluding, where a worker is employed full time and for an indefinite duration is dismissed while he is on part-time parental leave, the compensation payment for dismissal and the redeployment leave allowance to be paid to that worker as being determined at least in part on the basis of the reduced salary he received when he was dismissed.

This has not been an issue in Spain since 2007, when the Law on Gender Equality was adopted. At present, Additional Provision 18 of the Labour Code and Article 237 of the Social Security Act considers workers who are on part-time parental leave to be full-time workers for the purposes of calculating severance pay and social security benefits.

3.3 Transfer of undertakings

CJEU case C-194/18, 08 May 2019, Dodič

According to the CJEU's ruling in case C-194/18, 08 May 2019, *Dodič*, Article 1(1) of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employee rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, must be interpreted as meaning that the transfer of financial instruments and other assets of the clients of one undertaking to another following the cessation of the first undertaking's activity, under a contract the conclusion of which is required by national legislation, even though the first undertaking's clients remain free not to entrust the management of their stock market securities to the second undertaking, may constitute a transfer of an undertaking or of part of an undertaking, if it is established that a transfer of clients took place, that being a matter for the referring court to determine. In that context, the number of clients actually transferred, even if very high, is not in itself decisive as regards the classification 'transfer' and the fact that the first undertaking cooperated with the second undertaking as a dependent stock-exchange intermediary, is, in principle, irrelevant.

3.4 Retirement benefits and part-time work

CJEU case C-161/18, 08 May 2019, Villar Láiz

According CJEU ruling in case C-161/18, 08 May 2019, *Villar Láiz*, Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women as regards social security must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which provides that the amount of retirement pension based on contributions of a part-time worker is to be calculated by multiplying a basic amount, established from the remuneration actually received and the contributions actually paid, by a percentage that relates to the length of the contribution period, that period itself being modified by a reduction factor equal to the ratio of the time of part-time work actually performed to the time of work performed by a comparable full-time worker, and increased by the application of a factor of 1.5, to the extent that that legislation places female workers at a disadvantage compared with male workers.

The rules on the calculation of retirement benefits for part-time workers were modified following the CJEU case C-385/11, 22 November 2012, *Elbal Moreno*. However, these new rules are not fully compatible with EU law and could cause indirect discrimination, according to the *Villar Láiz* ruling. There is currently no new law or regulation planned to adapt Spanish law to this ruling yet.

3.5 Fixed-term work

CJEU case C-494/17, 08 May 2019, Rossato

According to CJEU case C-494/17, 08 May 2019, Clause 5(1) of the Framework Agreement on fixed-term work, concluded on 18 March 1999, which is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on fixed-term work concluded by ETUC, UNICE and CEEP, is to be interpreted as not precluding legislation which, as applied by the national supreme courts, excludes any entitlement to financial compensation on account of the misuse of successive fixed-term employment contracts for public sector teachers, whose employment relationship has been converted from a fixed-term relationship into one of indefinite duration, with limited retroactive effect, if such conversion is neither uncertain nor unpredictable or fortuitous, and the limited account taken of the period of service completed under those successive fixed-term employment contracts constitutes a measure that is proportionate for the purpose of penalising that misuse, which is a matter for the national court to determine.

The relevance of this case is limited, as under Spanish law the misuse of fixed-term contracts results in the conversion into an employment relationship of indefinite duration. However, the worker has the right to severance pay of 12 days per year of work at the end of the previous fixed-term contract.

3.6 Access to the profession of lawyer

CJEU case C-431/17, 07 May 2019, Monachos Eirinaios

According CJEU case C-431/17, 07 May 2019, *Eirinaios*, Article 3(2) of Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained must be interpreted as precluding national legislation which, on account of the incompatibility under that legislation between the status of monk and the practice of the profession of lawyer, prohibits a lawyer who has the status of monk, and who is registered as a lawyer with the competent authority of the home Member State, from registering with the competent authority of the host Member State in order to practice law there under his national professional title.

under Spanish legislation, there is no such incompatibility, implying no eminent relevance of this decision for Spain.

3.7 Age discrimination

CJEU case C-24/17, 08 May 2019, Österreichischer Gewerkschaftsbund and CJEU case C-396/17, 08 May 2019, Leitner

The CJEU rulings in cases C-24/17 and C-396/17 resolve a very specific problem that arises in Austria. There is no similar problem in Spain. However, it is worth noting that the exclusion of professional experience acquired before the age of 18 does not seem possible under Spanish law. The principle of equality and non-discrimination is recognised in Article 14 of the Constitution and Article 17 of the Labour Code.

4 Other relevant information

4.1 Unemployment

Unemployment declined in April (91 518 people). The total number of unemployed continued at the lowest levels over the last nine years, with 3 163 566 unemployed.

Sweden

Summary

There were no labour law developments in Sweden in May.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working time

CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure

Q 1: Are reference periods for the purpose of the calculation of the average weekly working time in your respective national legislation and practice organised as fixed or as rolling, or are both possible and existing?

Answer to Q 1: The Swedish Working Time Act (*'Arbetstidslagen 1982:673')* implements the WTD. Section 10b regulates the 48-hour limit established in the directive. The statutory period for the calculation of average weekly working time is organised as a rolling period. The 48-hour average should be based on 'any 7-day period'. The reference period of up to 4 months is, however, calculated on a fixed system, which must be determined in advance (see Prop. 2003/04:180 '*Tydligare genomförande av EG:s arbetstidsdirektiv'.* p 61-62.).

Q 2: Does your system allow for reference periods of up to 4 months (article 16 (b) of the WTD), of up to 6 months (Articles 18 and 19 (1) of the WTD), and or of up to 12 months (Article 19 (2) of the WTD)?

Answer to Q 2:

The Swedish Act (section 10b) explicitly states a statutory reference period of up to 4 months. The industrial partners can conclude collective agreements at national level with a reference period of up to a maximum of 12 months.

Q 3: Does it apply the "opt-out" from Article 22 of the WTD to reference periods for the purpose of the calculation of the average weekly working time?

Answer to Q 3: Section 19 Working Time Act contains an explicit opt-out clause authorising the Work Environment Authority (*'Arbetsmiljöverket')* to provide exemptions from the 48-hour rule and the 4-month reference period (and other features of the Act) if collective agreements with such exemptions cannot be concluded.

Q 4: The key issue: Is it allowed by your national legislation and practice to require a worker to undertake, over two consecutive fixed reference periods, an extremely long period of work consequently making that worker exceed, on average, the maximum

weekly working time over a period which, since it straddles those two fixed periods, corresponds to a rolling reference period of the same duration? If yes, are there any mechanisms making it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods? If yes (there are mechanisms), what is their effectiveness?

Answer to Q 4: Under the '*travaux preparatoire*' for the Swedish Working Time Act, the 4-month reference period should be calculated as a fixed period, defined in advance (see above). It is not clear to what extent this is actually done at workplaces. It is an empirical question for which there is limited or no public information available. At least in theory, two such fixed periods with an extremely long period of work at the end of the first period and a similar load at the beginning of the subsequent second period could be possible, resulting in periods exceeding the working time limitation of 48 hours. To the author's knowledge, this issue has not arisen, and most workplaces have local trade union representatives and work environment representatives who monitor working time.

3.2 Parental leave

CJEU case C-486/18, 08 May 2019, Praxair MRC

The CJEU decision in case C-486/18 on redundancy benefits related to parental leave has limited relevance for Swedish statutory provisions. Since the Swedish legislation does not provide for special redundancy benefits, the unfair treatment of employees on (part-time) parental leave would not be problematic. Collective agreements can include extensive unemployment support, but the main feature most similar to the ones addressed in the case would be the notice period for dismissal. The notice period of an employee who is made redundant during parental leave does not go into effect until he returns from full-time parental leave (section 11 Employment Protection Act, '*Lagen (1982:80) om anställningsskydd*', and sections 4-5 '*Föräldraledighetslagen*' (1995:584)). The notice period commences once the employee returns to work full time or part time. The law does not contain any provisions similar to the redundancy benefits addressed in the present case, but collective agreements can. From the Swedish perspective, the special provision on notice periods for redundant employees who are on full-time parental leave is more important.

3.3 Transfer of undertaking

CJEU case C-194/18, 08 May 2019, Dodič

In CJEU C-194/18 on a transfer of undertaking, the Court monitored the definition of transfer of undertaking in relation to the structure of the 'transferred' entity and concluded that the number of clients who had been transferred could be considered valid criteria in the definition of transfer of undertaking. The number of clients transferred did not in itself, however, turn out to be the decisive factor in the classification of 'transfer'. The Swedish legislation transposing the Transfer of Undertaking Directive does not specify transfers beyond the wording of the Directive. The Labour Court has litigated a number of cases that deal with the issue in general and made numerous references to the cases before the CJEU (see AD 2010 No. 88, AD 2014 No. 14, and AD 2014 No. 28, also Mulder, B., J., '*Anställningen vid verksamhetsövergång*', '*Juristförlaget*' I Lund 2004.). The decision in C-194/18, according to the author's understanding, is not likely to create any dissonance with the case law of the Swedish Labour Court.

4 Other relevant information

Nothing to report.

United Kingdom

There were no labour law developments in the UK in May.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working time

CJEU case C-55/18, 14 May 2019, CCOO

There has been a significant reaction to the Court's judgment in Case C-55/18, 14 May 2019, *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE.* Regulation 9 of the Working Time Regulations 1998 (SI 1998/1833) requires employers to keep 'adequate records' to show compliance with the 48-hour limit on the average work week and the protections for night workers but it does not require all daily hours of work to be measured and recorded nor is there an obligation to record daily or weekly rest periods:

> *"9. An employer shall—*
>
> *(a) keep records which are adequate to show whether the limits specified in regulations 4(1) and 6(1) and (7) and the requirements in regulations 7(1) and (2) are being complied within the case of each worker employed by him in relation to whom they apply; and*
>
> *(b) retain such records for two years from the date on which they were made."*

It is reported that the Health and Safety Executive (HSE) guidance states that specific records are not required and that employers may be able to rely on records maintained for other purposes, such as pay. The decision in *CCOO* casts doubt as to whether these record-keeping rules comply with the Directive's requirements.

3.2 Working time

CJEU case C-254/18, 11 April 2019, Syndicat des cadres de la sécurité intérieure

Q 1: Are reference periods for the purpose of the calculation of the average weekly working time in your respective national legislation and practice organised as fixed or as rolling, or are both possible and existing?

Answer to Q 1: The Working Time Regulations 1998 as amended deals with this issue:

Regulation 4 provides:

> *"(3) Subject to paragraphs (4) and (5) and any agreement under regulation 23(b), the reference periods which apply in the case of a worker are–*
>
> *(a) where a relevant agreement provides for the application of this regulation in relation to successive periods of 17 weeks, each such period, or*

(b) in any other case, any period of 17 weeks in the course of his employment.

(4) Where a worker has worked for his employer for less than 17 weeks, the reference period applicable in his case is the period that has elapsed since he started work for his employer."

Regulation 23 provides:

"A collective agreement or a workforce agreement may–

(a) modify or exclude the application of regulations 6(1) to (3) and (7) , 10(1) , 11(1) and (2) and 12(1), and

(b) for objective or technical reasons or reasons concerning the organization of work, modify the application of regulation 4(3) and (4) by the substitution, for each reference to 17 weeks, of a different period, being a period not exceeding 52 weeks,

in relation to particular workers or groups of workers."

Some jobs have different reference periods, e.g.:

- trainee doctors have a 26-week reference period;
- the offshore oil and gas sector has a 52-week reference period.

Q 2: Does your system allow for reference periods of up to 4 months (article 16 (b) of the WTD), of up to 6 months (Articles 18 and 19 (1) of the WTD), and or of up to 12 months (Article 19 (2) of the WTD)?

Answer to Q 2: See Reg 4 and 23 cited above.

Q 3: Does it apply the "opt-out" from Article 22 of the WTD to reference periods for the purpose of the calculation of the average weekly working time?

Answer to Q 3:The UK allows an "opt-out" from the Working Time Regulations:

Regulation 4:

"(1) [Unless his employer has first obtained the worker's agreement in writing to perform such work] [1], a worker's working time, including overtime, in any reference period which is applicable in his case shall not exceed an average of 48 hours for each seven days."

Regulation 5 — Agreement to exclude the maximum

"[...] [1]

(2) An agreement for the purposes of [regulation 4] [2] –

(a) may either relate to a specified period or apply indefinitely; and

(b) subject to any provision in the agreement for a different period of notice, shall be terminable by the worker by giving not less than seven days' notice to his employer in writing.

(3) Where an agreement for the purposes of [regulation 4][2] makes provision for the termination of the agreement after a period of notice, the notice period provided for shall not exceed three months."

It is thought that this provision is much used.

Q 4: The key issue: Is it allowed by your national legislation and practice to require a worker to undertake, over two consecutive fixed reference periods, an extremely long period of work consequently making that worker exceed, on average, the maximum weekly working time over a period which, since it straddles those two fixed periods, corresponds to a rolling reference period of the same duration? If yes, are there any mechanisms making it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods? If yes (there are mechanisms), what is their effectiveness?

Answer to Q 4: This issue has not arisen in the UK. The use of the "opt-out" has avoided many of these difficulties.

3.3 Transfer of undertakings

CJEU case C-194/18, 08 May 2019, Dodič

In UK law, the UK distinguishes between standard transfers (Regulation 3(1)(a)) and service provision changes (SPC) (Regulation 3(1)(b)).

> *"3.—(1) These Regulations apply to—*
>
> *(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;*
>
> *(b) a service provision change, that is a situation in which—*
>
> > *(i) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");*
> >
> > *(ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or*
> >
> > *(iii) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,*
>
> *and in which the conditions set out in paragraph (3) are satisfied."*

If it is a SPC, then the transfer rules apply automatically without a requirement to undertake an analysis of whether assets or non-assets have been transferred. If it is not considered an SPC, then Regulation 3(1) will apply and so *Dodič* would be considered.

4 Other relevant information

Nothing to report.

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