Flash Reports on Labour Law January 2020

Summary and country reports

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

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Executive Summary

National level developments

In January 2020, important developments in labour law took place in several Member States and European Economic Area (EEA) countries (see Table 1). EU law was particularly relevant for the following legislative initiatives and judicial decisions:

Minimum Wage

In **Denmark**, the government and a broad political coalition has reached a political agreement according to which all drivers (of freight or bus in Denmark) are entitled to a salary equivalent to the most representative salary in the road transport sector. The political agreement is the foundation for a legislative proposal. There is no timeline available for the legislative proposal to be placed before parliament. In **Ireland**, the Minister for Employment Affairs and Social Protection has made the National Minimum Wage Order 2020, increasing the national minimum hourly rate of pay from EUR 9.80 to EUR 10.10. In **Poland**, a regulation on the amount of minimum remuneration for work and the amount of minimum hourly rate in 2020 was passed on 1st January 2020. The minimum remuneration amounts to PLN 2.600 with regard to employment contract (around EUR 610), as well as 17 PLN per hour with regard to civil law contracts. The change implies the raise of minimum remuneration by 15.6 per cent. In **Spain**, the Royal Decree-Law 2/2020 raises the salaries of public employees of all public Administrations (at the state, regional and local level) and business entities invested or controlled by said Administrations. This Royal Decree-Law complies with the commitments assumed by the Government of Spain with the unions in an Agreement of March 9, 2018.

Part-time work

In **Belgium**, the Collective bargaining Agreement No. 103 has introduced the right for a part time career break for old employees under certain conditions. It means that an "older" worker is entitled, without a maximum duration, to a career reduction consisting in the reduction of his work performance by half or by one fifth. In **France**, the Court de cassation overruled a decision by the Court of Appeal that had decided that a part-time work arrangement was valid despite lacking any indication of the planned weekly or, monthly duration and the distribution of the working time between the days of the week or the weeks of the month. The Court of cassation decided that this lack of indication did not allow the worker to plan her work and considered that the decision by the Court of Appeal had no legal basis. In **Hungary**, a reform on the Labour Code has been made with a impact in some rules on part-time work for workers with children under three and six years old.

Employment Policies

In **Hungary**, an amendment on the Labour Code made it easier to employ persons under 16 to work in culture, art, sport or model activities. In **Italy**, the new Budgetary Law No 160 of 27 December 2019 introduced several incentives in form of social security reductions and subventions for the employment of several categories of young workers. In **Luxembourg**, the bill No. 7517 has been deposited for the ratification of ILO Convention n° 122 on Employment Policy. There will be, however, no legislative changes, as the existing employment law is considered to be sufficient.

Implications of CJEU or EFTA Court Rulings and ECHR

Posting of Workers

This FR analyses the implications of the Grand Chamber decision in CJEU case C-16/18 of 19 December 2019, Dobersberger, for national law in the Member States.

In this judgment, the Court found that the Posting of Workers Directive does not apply under the circumstances described in the case (catering workers in

international trains) since there is no sufficient connection with the territory (in the case, Austria) to consider the situation posting of workers.

In this respect, some countries (AT, LU) will construct the connection to their territory in circumstances similar to the ones in the case in a broader way that the CJEU does, thus considering the existence of posting of workers. This will likely challenge the legal basis of the exceptions of posting provisions in those national laws.

Other countries (BE, BG, CZ, LT, RO) report that a similar case has not arisen (yet) and therefore is not easy to foresee the implications for national law

In several countries (HR, DK, DE, HU, IT, NL, PL, ES) the national understanding of posting of workers would be close to the position of the CJEU in this case.

Finally, some other report (CY, EE, FI, HE, IS, EI, LT, MT) refer no practical impact whatsoever due to the non-existence of railways or international connections with other EU countries.

Employer Insolvency

The implications of the CJEU case Case C-168/18, of 19 December 2019 Sicherungs-Verein, were also analysed.

In this judgment, the Court found that on the grounds of Article 8 of the Directive 2008/94 The ECJ ruled that Member States must guarantee protection against obviously excessive cuts in the benefits of occupational pension schemes.

This finding seems to be in line with previous case law and legislation in Austria.

Other experts report that the impact of the ruling is different to assess or absent due to legal differences in the construction of occupational pensions (BE, HR, CZ, DK, ET, EE, IS, LU, ES)

Other countries report that there are no provisions for reduction of occupational old-age pensions or the issue has not been regulated/debated (BG, HU, LU, NL)

The case will likely have implications in Ireland, where the topic has been debated and central in political debates.

In Italy, the Guarantee Fund does not apply to supplementary social security benefits, which have not been paid by the insolvent employer. in the event that, for the omission or partial payment of the contributions by the employer, the benefit to which the employee would have been entitled cannot be paid, the worker may request the Guarantee Fund to integrate the resulting omitted contributions into the complementary pension management concerned.

Finally, Germany reported that the case will help in the debates and reforms that are currently taking place in relation with this issue.

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

Topic	Countries
Minimum wage	DK, EI, PL, ES
Part-time work	BE, FR, HU
Employment policies	HU, IT, LU
Social dialogue	IS, LU
Health and safety	HR, LU
Harassment/Bullying	FR, DE
Platform work	DE, IT
Fundamental rights	DE, ES
Social security	FR, PT
Posting of workers	LU
Equal pay	FI
Working time	ES
Fixed-term employment	ES
Collective bargaining	FI
Dismissal law	IT
Holiday/Sunday work	PL
Insolvency	LV
Paternity leave	IT
Employee representatives	FR
Transfer of Undertakings	FI
Zero hours contract	UK
Brexit	UK
Protective professions	BG
Budget law	IT
Strike law	HU
Retirement	BE
Mobility allowance	BE
Disability	SE
Forced labour	LU
Termination of employment	RO

Austria

Summary

(I) No legislation of relevance for EU labour law was passed in January 2019.

(II) No Supreme Court decision of interest from the EU labour law perspective has been published.

(III) This FR includes an impact assessment of the decisions of the CJEU in cases C-16/18 and C-168/18.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

Austrian legislation on the posting of workers (§ 7b ff Act on the Adaption of Contractual Labour Law – *Arbeitsvertragsanpassungsgesetz* - AVRAG, since 1.1.2017 replaced by §§ 1ff Act to Combat Wage and Social Dumping – *Lohn- und Sozialdumping-Bekämpfungsgesetz* - LSD-BG) stipulates that notifications (so-called ZKO notifications) for workers need to be submitted prior to any posting, and that workers are entitled to the minimum wage during their period of work in Austria, as set out in the applicable collective agreement for the respective sector. The legislator introduced some explicit exceptions to these obligations in both laws. Currently, the law only provides for exceptions in case of very short postings and if some explicit additional criteria (e.g. attending meetings, or seminars, etc.) are met. In case C 16/18, the facts of the case did not allow for the application of any of the exceptions provided for in the law.

The CJEU's decision in C 16/18 was largely based on the Court's view that there was no sufficient connection with the territory of Austria in the present case and that the Posted Workers Directive 96/71/EC therefore did not apply. This understanding challenges the legal foundation of the posting provisions' exceptions in current law: the Austrian legislation only envisages a lack of sufficient connection in very limited circumstances, hence the understanding of when there is sufficient connection with the Austrian market is quite broad, and bases exceptions on the applicable laws with reference to that understanding. It follows from case C 16/18 that the CJEU's understanding of a sufficient connection to the national market is much narrower, especially in the area of international transport.

Despite the clear impact of the decision in the present case, namely that catering service workers on international trains are not subject to the Austrian posting legislation in the AVRAG/LSD-BG under the given circumstances, it therefore remains to be seen how far the CJEU's understanding of a sufficient connection to the national market has an effect on the exceptions explicitly provided by the AVRAG/LSD-BG legislation. A practical effect of the CJEU's decision on service providers is expected as well, namely that companies are likely to take economic advantage of contracting out to service providers in

neighbouring countries with a lower wage level, and organise these services in such a way that the criteria the CJEU has set out in C 16/18 are likely to be met.

3.2 Employer insolvency and company pensions

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 Dezember 2019

§ 3d (3) Act on the Protection of Wages in Case of Employer Insolvency (*Insolvenzentgeltsicherungsgesetz* – IESG) reads as follows (unofficial translation by the author):

> *"Insofar as the upper limits pursuant to paragraphs 1 and 2 do not guarantee the minimum level of protection required under Directive 2008/94/EC on the protection of employees in the event of employer insolvency, the insolvency payment shall be at least*
>
> *1. half of the cash value of the entitlement to a pension from a direct benefit commitment of the employer pursuant to § 2 (2) Act on Company Pensions in conjunction with Art. V, paragraph 3 of the Federal Act, Federal Law Gazette No. 282/1990, or the entitlement from a benefit commitment not subject to the Act on Company Pensions, or*
>
> *2. …."*

This provision was introduced fairly late in the parliamentary procedure in the Committee of Social Affairs by an amendment of the Act on the Protection of Wages in Case of Employer Insolvency in 2015 (Federal Law Gazette No. I 113/2015). It was justified as follows (ErlAB 770 BlgNR 25. GP 5) (unofficial translation by the author):

> *"The current text of the Act on the Protection of Wages in Case of Employer Insolvency does not guarantee the minimum level of 50% of claims to occupational pensions or vested entitlements required by European law. A corresponding adjustment is above all also necessary to avoid future cases of state liability.*
>
> *In its ruling of 25 January 2007, Case C-278/05 (Robins), the European Court of Justice established that, on the basis of Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer, a minimum coverage of 50% of the claims to company pensions or vested pension rights to such pensions is mandatory.*
>
> *The judgment of the CJEU was issued in response to the reference for a preliminary ruling from the High Court of Justice of England Wales concerning Carol Marilyn Robins and Others, published in OJ C 56, 10.3.2007, p. 6. The Insolvency Protection Association for Employees (ISA) Styria has already successfully established state liability, citing this CJEU judgment, for claims to insolvency remuneration for company pensions that had not been awarded upon insolvency of Neckermann Versand Österreich AG. To avoid future situations in the context of the insolvency remuneration guarantee, due to the existing legal restrictions of § 3d IESG, claims for company pensions that cannot be covered by state liability due to insufficient implementation of the Insolvency Directive can be submitted by way of state liability, an adjustment of the legal regulation is essential. There is no alternative to this.*
>
> *Additional costs will not arise because the claims not covered by insolvency remuneration must be settled by way of state liability."*

The aim of the legislation was, therefore, to bring it in line with the Insolvency Directive 2008/94/EC and its interpretation by the CJEU. The wording is very much open and refers to certain amounts as "at least", opening up some leeway for the courts to

interpret it extensively and dynamically to achieve the aim of the amendment to "*guarantee the minimum level of protection required under Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer".*

The Supreme Court has in the past (decision of 6.10.2005, 8 ObS 14/05z) interpreted the wording in § 3b (1) 1 IESG, which is similar to § 3b (3) 1 IESG "*entitlement to a pension from a direct benefit commitment of the employer pursuant to § 2 (2) Act on Company Pensions in conjunction with Art. V, paragraph 3 of the Federal Act, Federal Law Gazette No. 282/1990"* as including payments made by a former employer to guarantee a certain level of pension contributions (in the present case, 5 per cent of the respective employee's last remuneration) paid by a third party, a pension fund. It is therefore very likely that the courts will apply this judgment to interpret the wording of § 3b (3) 1 IESG in the same way and will thus include payments made by a former employer as well to offset a reduction of occupational old-age pensions. The aim of the 2015 amendment to bring Austrian national legislation in line with EU requirements would thereby also be realised.

Austrian legislation on the protection of employees in case of employer insolvency also covers payments of former employers to guarantee a certain level of pension contributions and as the limitations in the IESG shall not apply "*insofar as the upper limits (…) do not guarantee the minimum level of protection required under Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer, the insolvency payment shall be at least … half of the cash value of the entitlement to a pension".* Therefore, Austrian legislation seems to be in line with EU prerequisites, including the CJEU's ruling in C 168/18.

4 Other Relevant Information

Nothing to report.

Belgium

Summary

(I) An intersectoral collective agreement enables workers to take part-time career breaks from the age of 50 onwards, subject to further preconditions.

(II) The Constitutional Court annulled an entitlement to a mobility allowance that was considered contrary to environmentally conscious legislation.

1 National Legislation

1.1 Pre-retirement part-time scheme

The Federal Government has resigned and members of Parliament have not been very active, i.e. there was no legislative activity in the month of January. There is not new Federal Government yet. The social partners have concluded an important intersectoral collective bargaining agreement for older employees for the entire private sector.

The Collective Labour Agreement of 17 December 2019 No. 146 introduces a supplementary scheme in application of Collective Agreement No. 137 of 23 April 2019 establishing the intersectoral framework for 2019 and 2020, reducing the age limit for access to time credit (part-time career break) for older employees for workers with long careers, in physically arduous jobs or for those employed in a company that is facing substantial economic difficulties or is in the process of restructuring (www.cnt-nar.be).

The right of older employees to a part-time career break means that an "older" worker is entitled, without a maximum duration, to a career reduction consisting of a decrease in his or her working time by half or by one-fifth.

This right to "end-of-career tome credit" is laid down in Collective Bargaining Agreement (CBA) No. 103.

The right only exists if a number of conditions are met. For example, the employee must, in principle, be 55 years of age or older. Workers who have worked in physically arduous jobs for many years and workers employed by firms facing economic difficulties or in the process of restructuring can exercise the right—again under certain conditions—as early as the age of 50.

If an employee exercises his or her right to an end-of-career break time credit, the employee's salary shall be reduced by half or by one-fifth. In most cases, the loss of wages is compensated by a right to interrupt social security contributions at the expense of the National Employment Office.

The conditions the employee must meet to be entitled to such an interruption benefit are laid down in another source of law, namely in the Royal Decree of 12 December 2001.

It is confusing that different (higher) age conditions apply to the right to an interruption benefit than to the right to a time credit (part-time) career break for older employees.

In principle, an employee must be 60 to be entitled to an interruption benefit when entering a time-credit (part-time) career break. However, CBA No. 137, concluded on 23 April 2019 in the National Labour Council, sets the age limit for entitlement to interruption benefits in the period 2019-2020 for workers with long careers, in a physically arduous job or for those who are work for a company facing economic difficulty or restructuring:

- 57 years in the case of a half-time end-of-career time credit;

- 55 years in the case of a 1/5 reduction of working time within the system of end-of career time credit.

For workers employed in a company facing economic difficulties or is in a process of restructuring, the lower age limit applies unless the company has concluded a CBA expressly providing for the application of CBA No. 137.

An employee with a long career or in a physically arduous job only has access to the right to interruption benefits from the age of 57 or 55, if the joint committee to which he or she belongs has concluded a CBA that has been declared universally binding by royal decree, stating that it has been concluded in application of CBA No. 137. This means that employees who are employed in an industry that does not fall under an established joint committee cannot, at the age of 57 or 55, enter an end-of-career time credit with interruption benefits because the required sectoral CBA cannot be concluded. To remedy this problem, CBA No. 146 was concluded on 17 December 2019. The employers concerned can accede to CBA No. 146, whereas accession replaces, as it were, the necessary sectoral CBA agreement.

Accession may take the form of a CBA, the signing of a document of accession or an amendment to the labour regulations at company level.

CBA No. 146, according to its literal text, applies only to employers and employees covered by a sector of activity that does not fall under an established joint committee and therefore does not apply when the established joint committee does not work.

2 Court Rulings

2.1 Mobility allowance

Constitutional Court, No. 11/2020, 23 January 2020

The Constitutional Court annulled the mobility allowance, also known as the 'cash for cars' scheme. The Government of Michel I had introduced the mobility allowance with the Law of 30 March 2018 to encourage employees to exchange their company cars for a cash-for-cash allowance with a view to reducing the number of company cars on Belgian roads to fight congestion, air pollution and climate change. The mobility allowance consists of an amount that corresponds to the catalogue value on an annual basis of the user benefit of the company car the employee returns. The mobility allowance was excluded from the concept of pay, so that only solidarity contributions and no social security contributions had to be paid on it.

A number of trade unions and climate organisations submitted an elimination application on the grounds of violation of the general and fiscal equality principles in the Articles 10, 11 and 172 of the Belgian Constitution.

The Constitutional Court refers extensively to the negative opinion of the Council of State, Legislation Section. The Constitutional Court includes some elements of this criticism in its ruling. For example, it points out that the government does not provide sufficient justification for the fact that the mobility allowance creates unequal treatment with regard to employees who do not benefit from the mobility allowance and whose wages are subject in their entirety to tax and social security contributions. Indeed, where the company car is a benefit in kind and its preferential treatment can be justified, the mobility allowance is a cash benefit in the same way as normal pay. Next, the Court points out that there is no guarantee that the mobility allowance would not be used by the employee to purchase a (smaller) private car for his or her journeys, which would defeat the objective of the measure (fewer cars on the road). Moreover, the Court sees a problem with the fact that employees with two or more company cars, even if this situation is exceptional, can only exchange one company car to benefit from the mobility

allowance. As a result, the employee would still be able to drive his other company car while at the same time receiving a tax advantage in cash.

On the basis of these elements, the Court annulled the law on the mobility allowance. To give the relatively low number of employers and employees who have made use of the mobility allowance time to find another solution, the Court maintains the effects of the annulled law until 31 December 2020.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

For the period 2012-2016, the Austrian national railway company ÖBB contracted catering and other on-board services on a number of its trains to a registered Austrian company in Vienna. Through subcontracting, the tasks were performed by Henry am Zug Hungary Kft, a Hungarian company.

Henry am Zug Hungary Kft provided such services on a number of ÖBB trains running between Salzburg (Austria) or Munich (Germany) and Budapest (Hungary) as departure or arrival points, using workers who reside in Hungary, most of whom were hired out to Henry am Zug Hungary Kft by another Hungarian company. The remaining employees were directly employed by Henry am Zug Hungary Kft. In Budapest, they had to load delivered food and drinks onto the trains. They also had to check the stocks and calculate turnover in Budapest. Thus, all services were provided in Hungary, with the exception of the services provided directly in the trains.

The Court of Justice stated that workers who perform activities of an international train service, with the exception of on-board services during the train journey, in a single Member State and who start or end their service in that Member State do not have a sufficient link with the Member State(s) through which those trains pass to be considered 'posted workers' within the meaning of Directive 96/71/EC. Those workers are therefore deemed to be fully employed in Hungary, and the Posting of Workers Directive 96/71 of 16 December 1996 is not applicable.

The CJEU ruled that workers involved in catering, who carry out activities associated with international railway services in one Member State, with the exception of on-board services during the train journey, and who start or end their service in that same Member State, do not have a sufficient link with the Member State(s) through which these trains pass to be considered "posted workers" within the meaning of Directive 96/71/EC.

Similar disputes could arise for contracted catering services on planes.

This ruling seems quite logic, but it is important because there is a growing number of international trains across Europe and it is possible that services associated with the train service such as catering or cleaning are contracted out to a company such as in the dispute before the CJEU, and the employees basically work in one EU Member State, except for the services provided on the international train during the journey.

There are no comparable precedents in Belgian case law.

3.2 Employer insolvency and company pensions

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 December 2019

A pensioner, Mr. Bauer, struggled to get his full benefits from his company pension after cuts in these benefits. He had to accept a decrease in his pension, because the

responsible pension fund 'Pensionskasse für die Deutsche Wirtschaft' faced difficulties in 2003 and later his former employer became insolvent. Bauer claimed that the Pensions-Sicherungs-Verein has to step in and compensate his pension reductions. In Germany, this association is legally entrusted with the task of safeguarding occupational pensions in the event of company bankruptcies.

On the grounds of Article 8 of Directive 2008/94/EC, the CJEU ruled that Member States must guarantee protection against excessive reductions in the benefits of occupational pension schemes.

The EU judges decided that the Directive requires EU Member States to "guarantee a certain level of protection" if cuts in occupational pension schemes are clearly disproportionate. The Court had previously ruled that the Directive requires a former employee to receive at least half of his or her old-age benefits arising from the accrued pension rights under a supplementary occupational pension scheme in the event of the insolvency of his or her employer (see point 41). In addition, the CJEU had already ruled that even if Directive 2008/94/EC requires at least half of the old-age benefits to be guaranteed, this does not exclude that, in certain circumstances, the losses suffered by an employee or former employee may also be regarded as being manifestly disproportionate in the light of the obligation referred to in that provision to protect the interests of employees (point 42).

The CJEU provided indications as to what "manifestly disproportionate" means: for example, a former employee must receive at least half of his or her old-age pension according to the acquired rights in the event of insolvency of the former employer; in addition, the minimum security would apply if the person concerned slips below the poverty threshold due to the reductions.

As regards the identity of the person liable to provide the protection provided for in Article 8 of Directive 2008/94/EC, it is apparent that the *Pensions -Sicherungs-Verein VVaG* was designated by the Member State concerned as an institution that guarantees occupational pensions against the risk of an employer's insolvency. That private law institution is subject to prudential regulation by the State supervisory authority for financial services. In addition, it collects the mandatory contributions required for insolvency insurance from employers under procedures of public law and, like a public authority, can establish the conditions for enforcement by way of an administrative act. Article 8 of Directive 2008/94 is thus capable of having direct effect, so that it may be relied upon against an institution governed by private law that is designated by the State as the institution that guarantees occupational pensions against the risk of an employer's insolvency where, in the light of the task with which it is vested and the circumstances under which it performs the task, that institution can be treated as comparable to the State, provided that the task of providing a guarantee with which the institution is vested actually covers the type of old-age benefits in respect of which the minimum degree of protection is provided for in Article 8.

This ruling is a fairly complex one in the field of occupational pension schemes, especially in the German context.

For Belgium, the first ruling on minimum protection against cuts in occupational pension schemes is important and includes valuable details.

The second ruling on the legal accountability in the light of Article 8 of the Insolvency Directive 2008/94/EC seems less significant because no similar private law institution as the *Pensions -Sicherungs-Verein VVaG* that is competent for the supervision of occupational pension schemes exists in Belgium.

4 Other Relevant Information

Nothing to report.

Bulgaria

Summary

(I) The Council of Ministers shall determine a list of protected professions

(II) CJEU cases C-16/18 and C-168/18 are analysed

1 National Legislation

1.1 Protected professions

Under Article 6a, paras 4 and 5 of the Professional Education and Training Act, the Council of Ministers shall determine a list of protected professions for which a shortage of workers in the labour market is expected. Decree No. 352 of 31 December 2018 (Promulgated State Gazette N 3 of 08 January 2018) established this list for 2019. There are 57 professions in this list.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

Bulgarian legislation transposing Directive 96/71/EC does not regulate cases like the one dealt with in case C-16/18. Furthermore, no official data on the type of contract addressed in this case is available.

3.2 Employer insolvency and company pensions

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 December 2019

According to Bulgarian legislation, the mandatory occupational old-age pension insurance is implemented through occupational pension funds, incorporated by a licensed retirement insurance company or through the National Social Insurance Institute, and not through inter-occupational institutions. Reductions in occupational old-age pensions in case of employer insolvency are not provided for.

4 Other relevant information

Nothing to report.

Croatia

Summary

(I) The Act on Compensation of Employees of Plobest Company has been adopted

(II) Amendments to the following regulations have been introduced: Regulations on the Delivery Procedure and the Manner of Keeping Records of Collective Agreements; Regulations on the Manner of Election of Mediators and Conducting the Mediation Procedure in Collective Labour Disputes; Regulation on the Registration Procedure and the Contents of the Register of Contracts of Employment of Seafarers and Workers on Seagoing Fishing Vessels

(III) The Plan for Approximation of Croatian Legislation with EU Law for 2020 has been published

(IV) There are no implications of the CJEU judgments in cases C-16/18 and C-168/18 on Croatian law

1 National Legislation

1.1 Act on Compensation of Employees of Plobest Company

The Act on Compensation of Employees of Plobest Company has been adopted (Official Gazette No. 13/2020). The employees of Plobest Company who worked for the company for at least five years in the period 08 October 1999 – 21 October 2002 are entitled to compensation because of a long-term exposure to asbestos. The amount of compensation is prescribed by the Act (Article 3). The Environmental Protection and Energy Efficiency Fund is obliged to ensure the funds are raised and the compensation paid.

1.2 Amendments to regulations

Amendments have been made to the following three regulations: Regulations on the Delivery Procedure and the Manner of Keeping Records of Collective Agreements; Regulations on the Manner of Election of Mediators and Conducting the Mediation Procedure in Collective Labour Disputes; Regulations on the Registration Procedure and Contents of the Register of Contracts of Employment of Seafarers and Workers on Seagoing Fishing Vessels have been published in the Official Gazette No. 13/2020. The amendments more precisely define the competent authority.

1.3 Posting of Workers

The adoption of the Act on Posting of Workers in Croatia, the amendments to the Act on Insurance of Employee Claims and the Aliens Act is planned in the first quarter of 2020. The Plan has been published in the Official Gazette No. 10/2020.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

In the present case, the Hungarian company and its employees (whose residence and social insurance was in Hungary) provided on-board services, cleaning and catering services for passengers on international trains of the Austrian Federal Railways. The Austrian authorities considered them to be posted workers.

The CJEU ruled that Directive 96/71/EC does not apply in such situations because such workers perform a significant part of the work that is inherent in those services in the territory of Hungary and start or end their shifts there.

According to the Aliens Act of 2011 (as amended in 2013, 2017, 2018 and 2019), posted workers are defined as workers who are employed by a foreign employer, provided that the foreign employer within the framework of a temporary or occasional transnational provision of services for a limited time period: 1. posts the worker to the Republic of Croatia under its direction, based on a contract concluded between the foreign employer assigning the employee to perform such work and the service user conducting business in the Republic of Croatia, provided that an employment relationship has been established between the foreign employer and the worker during the period of posting, or 2. posts the worker to the Republic of Croatia to an establishment or company owned by the same group to which the foreign employer belongs, provided an employment relationship exists between the foreign employer and the worker during the period of posting, or 3. posts the worker as a temporary agency worker to a user company established or conducting business in the Republic of Croatia, provided that an employment relationship between the temporary work agency and the worker has been established during the period of posting. The posted worker is a worker posted by a foreign employer to carry out his or her work for a limited period in the Republic of Croatia, which is not, however, the state in which he or she usually works (Article 86(1) and 86(3)).

Although the provisions of the Aliens Act do not provide details such as where the posted worker's work should start or end and where the significant part of the posted worker's work is to be carried out, the Labour Inspectorate reads the provisions of the Aliens Act on the posting of workers in line with the CJEU's judgment in case C-16/18. This judgment may not have any implications on Croatian law.

3.2 Employer insolvency

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 December 2019

In the present case, Mr Bauer had been granted an occupational old-age pension by his former employer.

It consisted of a monthly pension supplement and an annual Christmas bonus granted directly by the former employer and the pension was granted under a pension fund based on contributions made by the former employer to the pension fund. When the pension fund experienced financial difficulties, the amount of the benefits paid were reduced. Mr. Bauer's former employer initially offset the reductions to the benefits paid by the pension fund, but when insolvency proceedings were initiated, the guarantee institution (PSV) informed Mr. Bauer that it was assuming responsibility for the payment of the pension supplement and the annual Christmas bonus, but refused to offset the reductions applied to the old-pension paid by the pension fund. The pension fund continued paying Mr. Bauer a reduced pension. Mr. Bauer brought a claim before the national court, claiming that PSV should offset the reductions applied to the old-pension paid by the pension fund.

The CJEU in this case ruled that:

> *"Article 8 of Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer must be interpreted as applying to a situation in which an employer, which provides occupational old-age pension benefits through an inter-occupational institution, cannot, on account of its insolvency, offset losses resulting from a reduction in the amount of those benefits paid by the inter-occupational institution, a reduction which was authorised by the State supervisory authority for financial services which is the prudential regulator for that institution.*
>
> *Article 8 of Directive 2008/94 must be interpreted as meaning that a reduction in the amount of occupational old-age pension benefits paid to a former employee, on account of the insolvency of his or her former employer, is regarded as being manifestly disproportionate, even though the former employee receives at least half of the amount of the benefits arising from his or her acquired rights, where, as a result of the reduction, the former employee is already living, or would have to live, below the at-risk-of-poverty threshold determined by Eurostat for the Member State concerned.*
>
> *Article 8 of Directive 2008/94, which lays down an obligation to provide a minimum degree of protection, is capable of having direct effect, so that it may be relied upon against an institution governed by private law that is designated by the State as the institution which guarantees occupational pensions against the risk of an employer's insolvency where, in the light of the task with which it is vested and the circumstances in which it performs the task, that institution can be treated as comparable to the State, provided that the task of providing a guarantee with which the institution is vested actually covers the type of old-age benefits in respect of which the minimum degree of protection provided for in Article 8 is sought."*

Croatian law does not allow for occupational pension schemes to be managed directly by the employer (defined benefit schemes). Article 266(2) of the Act on Voluntary Pension Funds (Official Gazette Nos. 19/2014, 29/2018, 115/2018) explicitly states this. Only one type of supplementary (occupational) pension scheme can be set up in Croatia. It is a voluntarily funded contribution scheme involving individual retirement accounts within so-called "closed-end pension funds", i.e. it is limited to the employees/members of the fund sponsors, and not available to other persons (for more information on the Croatian pension system, in particular on the second and third pension pillar, see: Vukorepa, Ivana. Mirovinski sustavi, Kapitalno financiranje kao čimbenik socijalne sigurnosti /Pension Systems, Funded Schemes as a Social Security Factor/, Pravni fakultet u Zagrebu, Zagreb, 2012).

Since occupationally defined benefit schemes cannot be offered in Croatia, i.e. employers are not allowed to manage them, Art. 8 of Directive 2008/94 is not applicable. Therefore, this judgment has no implications on Croatian law.

4 Other relevant information

Nothing to report.

Cyprus

Summary

Review of European Court decisions on EU employer insolvency (C-168/18) and cases of posting of workers (C-16/18 and joined cases C-609/17 and C-610/17) and their impact on Cypriot regulations

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

The court ruled that Article 1(3)(a) of Directive 96/71 must be interpreted as meaning that it does not cover the provision under a contract concluded by an undertaking established in a Member State and an undertaking established in another Member State, which is contractually linked to a railway undertaking established in that same Member State, of on-board services, cleaning or catering services for passengers carried out by salaried employees of the first undertaking, or by workers hired out to it by an undertaking also established in the first Member State, on international trains crossing the second Member State, where those workers carry out a significant part of the work inherent in those services in the territory of the first Member State and where they start or end their shifts.

The case does not have immediate relevance for Cyprus, as there is no railway, nor is it possible to establish such a connection with another EU country.

3.2 Organisation of working time

CJEU, joined Cases C-609/17 and C-610/17, 19 November 2019

In Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v Hyvinvointialan liitto ry, Fimlab Laboratoriot Oy (C-609/17), and Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Satamaoperaattorit ry, the Court (Grand Chamber) ruled:

> *"1. Article 7(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as not precluding national rules or collective agreements which provide for the granting of days of paid annual leave which exceed the minimum period of 4 weeks laid down in that provision, and yet exclude the carrying over of those days of leave on the grounds of illness.*
>
> *2. Article 31(2) of the Charter of Fundamental Rights of the European Union, read in conjunction with Article 51(1) thereof, must be interpreted as meaning that it is not intended to apply where such national rules or collective agreements exist.*

The above case ruling is highly relevant for Cyprus. Cypriot law 25(I)/2001 (Ο Περί της Προστασίας των Δικαιωμάτων των Εργοδοτουμένων σε Περίπτωση Αφερεγγυότητας του Εργοδότη Νόμος του 2001 (25(I)/2001)) on the protection of the rights of employees in the case of employer insolvency (herein referred to as 'the Cypriot Law') contains no provision about any time line within which payments from the Fund are to be made to the employees of the insolvent employer. There is, however, a provision for the write-off of an employee's right to receive the compensation if he does not collect it within 6 months from the date this became payable (Article 5(1) of the Cypriot Law). The aforesaid 6-month period may be extended for another 6 months if the employee can prove a reasonable cause for the delay in collecting the compensation due to him.

Cypriot law limits the amount to be paid to a maximum of 13 weeks' wages. For the purpose of calculating the weekly wages, any amount in excess of the quadruplicate of the basic insured income (i.e. the gross salary before deduction of social insurance contributions), as determined in the Social Insurance Laws 1980-1999, will not be taken into account. The Law on Social Insurance of 1980 (41/80) Article 2.1 defines basic insured amounts as "specified amounts of insured income". In the same article, "insured income" is defined as the amount of the salary of the insured [employee] for which social insurance contributions are payable. "Income" is defined as excluding irregular commissions and ex-gratia payments.

The law expressly prohibits payments for wrongful dismissal or for notice of termination to be made out of the Fund (Article 11.1 of the Cypriot Law). Employees are, however, entitled to receive payment from the Fund for unpaid leave for the 13 weeks of employment included in the period of the last 78 weeks before the date of the employer's insolvency, provided the employer is exempt from the obligation to pay such leave to the Central Leave Fund and is therefore required to pay the amount to the employee directly. The Central Leave Fund is a special fund managed by the social insurance authorities. According to the regulations, all employers must contribute an amount for their employees' leave and the employees can then apply to the social insurance authorities to secure payment of their leave. In many cases, the social insurance authorities will grant exemption for specific employers who apply for it, the result being that the employer pays the leave directly to the employee without interference by the social insurance body. The law does not define the term "leave" nor does it expressly refer to sick leave or maternity leave, it is, however, presumed that such leaves are included under the term "leave". Moreover, the law entitles the employer of the relevant percentage of the 13th or 14th salary as contained in the contract of employment of the 53rd to the 56th week owed to the employee for the last 13 weeks of employment, which are included in the period of the last 78 weeks prior to the insolvency (Art. 4(1)(γ) of the Cypriot Law) other statutory rights are not referred to by the law, but are likely to be allowed. Art. 4(2) of the Cypriot Law provides that in the calculation of the weekly income, any sum exceeding the quadruplicate of the weekly amount of the basic insured salary as provided by the Law on Social Insurance will not be taken into account.

Issues pertaining to social security on the transposition of Articles 6, 7 and 8 of the Directive exist.

There is no provision in Cypriot law that extends the law's scope to any contributions under the national social insurance scheme or under any other scheme, nor is there any provision to the contrary. The law only entitles payment in respect of the wages and entitlements stipulated in Article 4.1(a) of the Cypriot law. Article 4.1.(b) of the Cypriot law provides that any contributions due from an insolvent employer to the statutory Annual Leave Fund in respect of unpaid wages due to employees shall be paid by the Guarantee Institution to the statutory Annual Leave Fund. Although this law makes no provision to the effect that non-payment of contributions by the employer will or will not affect the employees' benefit entitlements, the law on the national social insurance scheme provides that non-payment of any contributions by the employer will not affect the employees' rights.

Article 8 of the Directive has not been transposed into Cypriot Law. This entails the protection of ex-employees: the question arises what happens if a pension scheme becomes insolvent and what is the scope of protection for ex-employees and their pensions. Prior to EU accession in 2004, only few pension schemes were in place in the private sector and therefore, only a limited group of employees who are entitled to the benefits described in Article 8 of the Directive are thus affected by the non-transposition. However, there has been a considerable expansion of private pension schemes, and the numbers of insolvencies have increased significantly since the financial crisis that hit Cyprus in 2012-2015, together with the rise in poverty following the crisis. Austerity measures have intensified the importance of Article 8. Apart from government employees, who are excluded from the scope of this law, employees who are entitled to such pension include:

- A number of employees of the Bank of Cyprus, who were previously employees of the Charter Bank, when the latter bank was bought by the former bank. These employees have retained the benefits they enjoyed when they were still working for the Charter Bank, which includes a private pension scheme.
- Employees of semi-governmental organizations (such as the national electricity board, the national telephone company, etc.);
- The employees of the Central Bank of Cyprus, which is considered to be an independent body. If any such employees leave the Central Bank and enter into employment with one of the commercial banks, the employee retains the benefits he or she was entitled to when s/he was still working for the Central Bank, which includes pension schemes.
- The employees of some large multinational corporations.

There is a rebuttable presumption that the likelihood of the aforesaid employers becoming insolvent is not very high, especially of the employees in the first three categories. However, it is clear that no protection exists for these entitlements in the event of employer insolvency.

The option of Article 10 of the Directive has been taken advantage of (Art. 3.2 of the Law). The guarantee institution has no obligation to compensate employees who:

- in the opinion of the Director of Social Insurance, have special links and common interests with their employers amounting to collusion, are excluded from eligibility for payment from the Fund (Art. 3.1 of the Law) or
- are shareholders and members of the Board of Directors of the employer; or
- own either alone or together with first degree relatives a substantial part of the business or undertaking of the employer and exercise significant influence over the activities.

The Law provides for the setting up of a Fund to which employers must contribute monthly, from which Fund employees may be compensated in the event of their employer's insolvency. Insolvency is defined broadly as "a request… made to the Court for the issue of an order for the acquisition of [the employer's] assets (in the case of a physical person) or for the issue of an order for liquidation (in the case of a company) and the Court has either issued such an order or has found that the employer ceased to carry out activities and there are insufficient assets to justify the issue of the requested order." (Article 2 of the Law). A certain group of employees is considered to not be eligible for payment under the Fund. This group includes employees with a stake in the business as well as crew members of ships and aircraft who do not reside in Cyprus and some other categories. The compensation payable from this Fund is for unpaid wages, annual leave and the 13th or 14th salary entitlement for a maximum of 13 weeks which arose during the last 78 weeks prior to the insolvency.

There is inconsistency with the Directives on two counts, but for the purposes of the relevance of the present CJEU case, the failure to transpose the article is highly relevant (and contradicts what was officially suggested by the Cypriot authorities, who alleged that Article 6.1 of the Law transposes the regulation). Moreover, the provisions of the Provident Fund Law do not seem to bear any relevance to this question. The provisions of the Provident Fund Law 44/1981 of 9 October 1981 (as amended) and the social insurance laws and regulations were thought to be relevant for the protection required by Article 8 of the Directive. However, the Provident Fund laws provide for benefits that are eliminated in their entirety upon the employee's retirement or resignation, whilst the social insurance laws and regulations only cover the national social insurance scheme, which is beyond the scope of Article 8.

Hence, the ruling of the court is relevant in the sense that similar cases could arise in Cyprus, without there being a direct effect.

4 Other relevant information

Nothing to report.

Czech Republic

Summary

An analysis of CJEU cases C-16/18 and C-168/18 is provided

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

The CJEU ruled that:

> *"Article 1(3)(a) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services must be interpreted as meaning that it does not cover the provision, under a contract concluded by an undertaking established in a Member State and an undertaking established in another Member State, which is contractually linked to a railway undertaking established in that same Member State, of on-board services, cleaning or food and drink services for passengers carried out by salaried employees of the first undertaking, or by workers hired out to it by an undertaking also established in the first Member State, on international trains crossing the second Member State, where those workers carry out a significant part of the work inherent in those services in the territory of the first Member State and where they begin or end their shifts there"*.

Directive 96/17/EC has been transposed, among others, in Sec 319 of Act No. 262/2006 Coll. the Labour Code (the "Labour Code"), which provides (very generally) that the posting of workers within the scope of the provision of services occurs *"if the employee of an employer from another Member State of the European Union is posted for the performance of work within the transnational provision of services in the territory of the Czech Republic".*

No further definition of posting of workers within the scope of the transnational provision of services is provided in national law. Therefore, national authorities rely on the text of Directive 96/17/EC and relevant case law of the CJEU when applying the relevant provisions.

The ruling of the CJEU in the present case only has implications on national law to the extent that it provides a tool for national authorities when interpreting the definition of posting and posted workers within the meaning of Directive 96/17/EC.

The CJEU ruling does not seem to have any significant implications for national law. It can, however, guide national authorities when interpreting and applying provisions of national law on the posting of workers within the scope of the transnational provision of services. No amendments of national law seem to be necessary. The national law is in compliance with the CJEU ruling.

3.2 Employer insolvency and company pensions

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 December 2019

The CJEU ruled that:

> *"Article 8 of Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer must be interpreted as applying to a situation in which an employer, which provides occupational old-age pension benefits through an inter-occupational institution, cannot, on account of its insolvency, offset losses resulting from a reduction in the amount of those benefits paid by the inter-occupational institution, a reduction which was authorised by the State supervisory authority for financial services which is the prudential regulator for that institution"*. The provision of Article 8 *"must be interpreted as meaning that a reduction in the amount of occupational old-age pension benefits paid to a former employee, on account of the insolvency of his or her former employer, is regarded as being manifestly disproportionate, even though the former employee receives at least half of the amount of the benefits arising from his or her acquired rights, where, as a result of the reduction, the former employee is already living, or would have to live, below the at-risk-of-poverty threshold determined by Eurostat for the Member State concerned"*. Article 8 further *"lays down an obligation to provide a minimum degree of protection"* and *"is capable of having direct effect, so that it may be relied upon against an institution governed by private law that is designated by the State as the institution which guarantees occupational pensions against the risk of an employer's insolvency where, in the light of the task with which it is vested and the circumstances in which it performs the task, that institution can be treated as comparable to the State, provided that the task of providing a guarantee with which the institution is vested actually covers the type of old-age benefits in respect of which the minimum degree of protection provided for in Article 8 is sought"*.

It needs to be pointed out that old-age pensions in the Czech Republic are publicly funded and provided under a mandatory public old-age pension scheme. Although the public scheme is supported by other supplementary pension schemes to which employers may, under certain conditions, pay contributions in favour of their employee during their employment based on an agreement with the relevant employee, these supplementary schemes are voluntary.

As employers' insolvency has virtually no effect on employees' old-age pension, the present CJEU ruling has no apparent implications in the context of national legislation.

4 Other relevant information

Nothing to report.

Denmark

Summary

(I) A new political agreement has introduced the right to minimum pay in the road transport sector. The rules will apply both to Danish drivers as well as foreign companies engaged in cabotage driving, who will also be required to enrol in a new register. The aim is to prevent social dumping

(II) The CJEU ruling in C-16/18 has no implications for Danish law. On the contrary, the ruling corresponds with the existing practice of the Danish Labour Court on the question of the lawfulness of industrial action against foreign/posting entities, in that it requires the performance of work to have a sufficient connection with the territory

(III) The CJEU ruling C-168/18 has no implications for Danish law. Under Danish law, the insolvency of an employer does not compromise an employee's immediate entitlement to old-age benefits on account thereof, as required by Art. 8 of Directive 2008/94

1 National Legislation

1.1 Minimum pay in the road transport sector

The government and a broad political coalition has reached a political agreement according to which all drivers (of freight or buses in Denmark) are entitled to a salary equivalent to the most representative salary in the road transport sector. The agreement builds on joint recommendations from the DA (Danish Employers' Confederation) and the FH (Danish Trade Union Confederation) on how to prevent social dumping on the roads.

For foreign companies, the new rules will entail a duty to pay a representative salary to drivers who carry out national transports of goods (cabotage driving) following an international transport to Denmark. Furthermore, foreign haulage contractors will be required to enrol in a new register, which will allow Danish authorities to keep track of who is engaged in cabotage driving in Denmark and to control the payment of salaries to the drivers.

The new rules establish a duty to pay a representative salary. More specifically, national and foreign companies must pay an hourly wage calculated on the basis of the cost level according to the collective bargaining agreements for drivers, which have been entered into by the most representative parties in the freight transport sector, and which apply nationwide. There is no requirement to be a member of an employer association, but the given salary level must be paid. This salary is understood as the accumulated costs (such as hourly pay, supplements, pension, etc.), which may not substantially deviate from the level in the normative collective agreements.

If foreign transport companies do not enrol in the new register, they may be fined up to DKK 10 000 (approx. EUR 1 338). Non-compliance with payment of the required salary level may lead to fines of at least DKK 35 000 DKK (approx. EUR 4 683). The police and an administrative authority will monitor compliance with this provision.

The political agreement represents the foundation of a legislative proposal. No timeline has been set for the legislative proposal to be introduced in Parliament.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

The Austrian Federal Railways awarded a contract for the provision of services consisting of the operation of dining cars or on-board services for some of its trains to an Austrian based company, D. GmbH. That contract was performed by a Hungarian company, Zug Hungary Kft, through a series of subcontracts.

The on-board services, cleaning or catering services for passengers were carried out by salaried employees of H. Kft., or by workers hired out to it by an undertaking also established in Hungary. The workers performed a significant part of their work in Hungary, and started or ended their shifts there.

Administrative penalties were imposed on the director of H. Kft for not complying with Austrian administrative provisions on the posting of workers (declaration of employment of posted workers, retention of documents concerning workers' social security registration as well as the employment contract, documents evidencing payment of wages and documents relating to the wage categories, in German).

First, the CJEU found that the services performed can be covered by Directive 96/71, as they were not covered by the special provisions of the TFEU relating to transport. The reason was that the transport could be performed independently of the incidental services of on-board services, etc.

Second, the CJEU found that a worker cannot, with reference to Directive 96/71, be considered posted to the territory of a Member State if the performance of his or her work does not have a sufficient connection with that territory. The Court found that that was the case in the present case, and that Article 1(3)(a) of Directive 96/71 must be interpreted as meaning that it does not cover services such as those described in the present case.

The ruling will presumably not have any implications for Danish law.

In Denmark, posting entities are obligated to enrol in the Register of Foreign Service Providers (RUT) and provide adequate information upon registration. The information must include the relevant time period of the work, the working place and the identity of the posted workers. Documentation on pay is not required.

There are no cases involving failure to register in the RUT with reference to the international transport of passengers.

However, the ruling corresponds with the existing practice of the Danish Labour Court on the issue of the lawfulness of industrial action against foreign/posting entities, in that it requires the performance of work to have a sufficient connection with the territory:

In the Mitropa case (AR2000.455), German employees travelled on trains in Denmark as part of the general international transport of passengers. The Labour Court stated that when only a small part of such international transport takes place in Denmark, and constitutes a natural and insignificant part of general transport, special circumstances would be required to establish a sufficiently strong and current interest of the trade union in this limited work being performed in Denmark. The ruling set a standard for the assessment of the amount and nature of the work being temporarily performed in Denmark with a view to fulfilling the requirement under Danish collective labour law of a sufficiently strong and current interest of trade unions in concluding and conflicting to conclude a collective agreement for the work being performed. Also, the minor amount of work did not suffice to constitute a situation of posting under EU law.

In the Kim Johanson OÜ case (AR2014.0028), which concerned the international transport of goods by road, the truck drivers also carried out work in Denmark, but this amounted to less than 3 per cent of their total work performed. This was the first case to test the lawfulness of conflicts against posting entities with a view to obtaining a collective agreement for the salaries of posted workers after the amendment of the Danish Posting of Workers Act following the CJEU 's Laval ruling. The ruling reiterated the findings of the Mitropa ruling on a minimum level of work being performed in Denmark. The conflicts were found to be unlawful on the basis that this minor amount of work did not suffice to constitute 1) a posting under EU law, or 2) an interest of sufficient weight to justify an industrial conflict under Danish collective labour law.

3.2 Employer insolvency and company pensions

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 December 2019

Mr. Bauer, a German citizen, was granted an occupational old-age pension by his former employer. The pension comprised e.g. a pension granted under a pension fund on the basis of contributions made by his former employer, which was paid by the Pensionskasse für die Deutsche Wirtschaft, an inter-occupational institution that gives employees a legal claim to their benefits.

When the Pensionskasse experienced financial difficulties in 2003, it reduced the amount of benefits paid. Mr. Bauer's former employer initially offset the reduction in the benefits paid by the Pensionskasse.

However, in 2012, insolvency proceedings were initiated against Mr. Bauer's former employer, and PSV (which guarantees the payment of occupational old-age pensions in the event of employer insolvency in Germany and Luxembourg) informed Mr. Bauer that it would only pay him a reduced pension (without the offset).

The CJEU found that Article 8 of Directive 2008/94/EC, requiring Member States to ensure protective measures of employee rights to certain pensions, was applicable in this case, as Mr. Bauer was a former employee and his former employer was facing insolvency and on the date of the onset of his employer's insolvency, Mr. Bauer's immediate entitlement to old-age benefits was compromised.

The CJEU also found that a reduction should be regarded as being manifestly disproportionate, where the former employee is already living, or would have to live, below the at-risk-of-poverty threshold determined by Eurostat for the Member State concerned.

As an EU-conform interpretation of the relevant German national law was not possible, the referring court also asked whether Article 8 of the Directive could be given direct effect in a dispute between private parties.

The CJEU found that Art 8 was unconditional and sufficiently precise. Furthermore, Art. 8 could, in principle, be relied upon against PSV in light of the task with which the entity had been vested and the operational circumstances. The entity was distinct from individuals and was comparable to the State. However, this interpretation was only applicable, if Germany has delegated the obligation imposed by Article 8 to PSV. The CJEU left this decision to the referring court, but noted that the facts of the case indicated that this had not been the case.

The ruling does not have any implications for Danish law.

In Denmark, three occupational pension schemes exist:

- Collective agreement-based pensions (trade unions and employers decide on pension contributions, the pension companies are typically member-owned pension funds)

- Company-based pension (a pension scheme agreed to between a single employer and a commercial/independent pension company)
- Civil servant pension (regulated by the Act on Civil Servant Pensions and funded by the State Budget).

In Denmark, it depends on the individual pension plan whether it operates with a market interest rate or a guaranteed interest rate. In 2015, 53 per cent of collected pension assets had no guarantee or had a zero-guarantee.

If a pension plan has a guaranteed interest rate, the pension fund—and not the employer—is liable towards the employee.

If a pension plan does not have a guaranteed interest rate, in principle, pension assets in pension funds are not covered by any guarantee in case of the fund's insolvency (as opposed to pension assets in banks, which are covered by a deposit insurance, *Indskydergaranti*).

Thus, in case of employer insolvency, an employee's immediate entitlement to old-age benefits will not be compromised on account thereof, as required by Article 8 of Directive 2008/94/EC.

This also corresponds with a reading of the Act on Lønmodtagernes Garantifond/LG (Salary Guarantee Foundation for Employees), which is the Danish equivalent of PSV. According to the LG Act, section 2(1), "the guarantee covers claims for salaries and other elements of remuneration". Other benefits include an employer's contributions to a pension fund. This is established in case law, e.g. the Eastern High Court ruling of 19 December 2013 (UfR 2014.1062 Ø), where LG was required to cover both the employer and the employee's part of the pension contributions and transfer the payment to a pension company.

As the (out)payment of pension benefits when the employee retires is of no relevance to the employer (or LG), the situation addressed in the present case cannot arise in a Danish context.

It appears, that Germany has now legalised the defined contribution schemes, referred to as "pay and forget", which on the face of it look similar to the Danish schemes, with a legislative amendment in 2017.

4 Other relevant information

Nothing to report.

Estonia

Summary

(I) Two CJEU rulings, one on the posting of workers and the other on employer insolvency, are addressed.

(II) The new monthly minimum wage has been applied since 01 January 2020.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

The case concerned the posting of workers and the applicable employment conditions in the railway industry. The dispute primarily focussed on the question in which country the majority of work was performed. Offering services in a train during a journey through different Member States does not constitute a posting if the majority of the work is carried out in the sending country.

The decision has minor implications for the Estonian legal system. It clarifies in which situation the PWD applies and also clarifies what is understood as transport services. As Estonia does not offer train services in other EU Member States, the impact of the ruling is modest.

3.2 Employer insolvency and company pensions

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 December 2019

The case concerned employer insolvency and employees' protection vis-à-vis the employer's pension scheme.

The case and its reasoning is of little relevance for the Estonian legal system. In Estonia, there is no possibility to create a separate employer's pension scheme that will be paid in addition to the state guaranteed pension. Therefore, it is difficult to assess the implications of the decision for the Estonian legal system. At the same time, the decision helps interpret the Directive and the nature of the guarantee institution in case of employer insolvency.

4 Other relevant information

4.1 New monthly minimum wage

Since January 2020, the new monthly minimum wage in Estonia is EUR 584 and EUR 3.48 per hour.

According to the agreement reached by the Estonian Employers' Association and the Estonian Trade Unions Confederation, the monthly minimum wage should reach at least 40 per cent of the average monthly wage by 2021.

The average monthly wage in Estonia in the third quarter of 2019 was EUR 1 397.

Finland

Summary

(I) The Supreme Court has given three important rulings on equal treatment, cooperation negotiations, the obligation to inform personnel representatives and transfer of business.

(II) Many strikes are underway, related to negotiations on collective agreements.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Equal pay

Supreme Court, No. KKO 2020:4, S2018/393, 15 January 2020

The claimant had worked as a firefighter for a municipality, and part of his working time entailed basic level first aid tasks. He had been paid a lower pay than other basic level first aid paramedics.

The claimant claimed that he had been treated unequally compared with those working as full-time paramedics. The Supreme Court, however, held that the claimant's tasks were not comparable with those of other basic level paramedics, and the municipality had thus not violated the duty of equal treatment.

2.2 Cooperation negotiations

Supreme Court, No. KKP 2020:7, S2018/675, 24 January 2020,

A state agency had conducted cooperation negotiations on redundancies. In the negotiation proposal, the agency informed the staff representatives that the negotiations covered all staff and the maximum number of persons affected would be 60. The employer also asserted that certain regulations applied, that the order of the workforce reduction was to be observed, and that no discriminatory or unequal measures of termination were to be applied.

The Supreme Court held that the criteria provided were too general, and the employer had thus not provided the necessary information as specified in the law. The state was ordered to pay compensation for an officer who had been made redundant.

2.3 Transfer of business

Supreme Court, No. KKO 2020:8, S2018/592, 29 January 2020

The claimant had worked as the only salaried employee in a transport company. The employer missed several salary payments. Later, the company sold the truck the claimant had used to work for another company, which eventually hired the claimant.

The Supreme Court held that a transfer of business had taken place. The new employer company was responsible to pay the unpaid salaries jointly with the transferor.

3 Implications of CJEU Rulings and ECHR

3.1 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

The significance of this ruling is not of considerable importance for Finland, as the only international railway transport to or from Finland is connected to Russia, but no European Union countries.

3.2 Employer insolvency and company pensions

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 December 2019

It can be assumed that this ruling might have a significant impact on interpretations of the Finnish regulation on protection of payments of employees in case of employer insolvency.

4 Other relevant information

4.1 Strikes

Many strikes are currently underway related to collective agreement negotiations.

France

Summary

(I) Law No. 2019-1446 of 24 December 2019 on the financing of social security for 2020, Finance Act for 2020 No. 2019-1479 of 28 December 2018 and Decree No. 2019-1548 of 30 December 2019 will be analysed in the first part of the report.

(II) The Court of Cassation has issued a ruling on staff representatives, part-time work and harassment.

(III) Comments on the CJEU's decision, 19 December 2019, aff. C-16/18 and CJUE, 19 December 2019, aff. C-168/18.

1 National Legislation

1.1 Financing of social security for 2020

The exceptional bonus for purchasing power put in place by Law No. 2018-1213 of 24 December 2018 and known as the 'Macron bonus', has been renewed in 2020, with some adjustments.

To benefit from the planned exemptions from social security contributions and income tax, the bonus may not exceed EUR 1 000. In addition, the exemptions only apply to employees whose remuneration is less than three times the gross minimum wage ('SMIC') in the last 12 months.

From now on, to benefit from the exemptions, only employers who have set up a profit-sharing agreement (accord d'intéressement) can benefit from such exemptions. Companies have until 30 June 2020 to organise the implementation of such a scheme.

1.2 Finance Act for 2020

A flat-rate tax was introduced in Article 145 of the Finance Act for 2020 for specific fixed-term contracts ('CDD d'usage'), with the exception of those concluded:

- with workers in the entertainment industry mentioned in Article L.5424-20 of the Labour Code;
- with intermediary associations mentioned in Article L.5132-7 of the Labour Code;
- with occasional dockworkers mentioned in Article L.5343-6 of the Transport Code.

For each specific fixed-term contract concluded from 1 January 2020 pursuant to Article L.1242-2 of the Labour Code, the employer will have to pay a tax (EUR 10 per contract), which is paid to the URSSAF. The list of sectors concerned by this specific fixed-term contract is determined in Article D.1242-1 of the Labour Code.

This tax is due as soon as the contract is concluded and must be paid no later than the normal due date for payment of social security charges and contributions following the date of conclusion of the contract.

1.3 Duties of employee representatives

Decree No. 2019-1548 published on 31 December 2019 introduces several changes to the duties of employee representatives.

- Displaying the names of members of the Social and Economic Council (CSE)

The decree states that the list of names of the members of each CSE must be displayed at the premises where they are assigned to work. This list must indicate each committee member's regular workplace and specify the committees in which he or she participates, if any.

- Number of representatives in the Central CSE

Unless a collective agreement is concluded between the employer and all the representative trade union organisations, the number of members of the Central CSE may not exceed 25 titulars and 25 alternates.

In the absence of such an agreement, each establishment of the company may be represented in the Central CSE either by a single delegate, whether titular or alternate, or by one or two titular delegates and one or two alternate delegates, always within the total limit of 25 titular delegates and 25 alternate delegates.

- Time-off hours for staff representatives to fulfil their duties and fixed annual working time in days

As a reminder, half-day corresponds to four hours of the mandate.

The Decree now specifies that when the remaining delegation credit is less than four hours, the employees concerned have a full half-day of delegation at their disposal, which is deducted from the annual number of days worked set out in their individual fixed annual working time in days agreement.

2 Court Rulings

2.1 Staff representatives

Labour Division (Chambre sociale) of the Court of Cassation, No. 18-20.5918 January 2020

In the present case, an employee retired and took legal action against his former employer, claiming damages because of the employer's failure to organise elections for staff representatives.

The Court of Appeal rejected the employee's claim on the ground that he had not questioned the employer's approach to the organisation of elections of staff representatives until the end of an 18-year relationship and during the period of notice prior to his retirement. In addition, he did not invoke or provide evidence of any prejudice.

The Court of Cassation did not agree with the Court of Appeal and ruled that an employer who has not taken the necessary steps to establish staff representative institutions, even though he is legally required to do so, without having drawn up a report on his failure to act (procès-verbal de carence) is culpable of causing prejudice to employees, thus depriving them of the possibility of having their interests represented.

Therefore, if no professional elections are organised, the employer is liable to pay damages to employees who do not have staff representation, and this without having to prove prejudice. Only the report of failure to act (procès-verbal de carence) can justify the absence of representative institutions within the company.

In the present case, the Court of Cassation confirmed a well-established case law (for example, Cass. soc., 20 January 2015, No. 13-23.431 or Cass. soc., 15 May 2019, No. 17-22.224).

"Et sur le second moyen:

Vu l'article L.2313-1 du Code du travail, dans sa rédaction alors applicable, ensemble l'alinéa 8 du préambule de la Constitution du 27 octobre 1946, l'article 27 de la Charte des droits fondamentaux de l'Union européenne, l'article 1382, devenu 1240, du code civil et l'article 8, § 1, de la directive 2002/14/CE du 11 mars 2002 établissant un cadre général relatif à l'information et la consultation des travailleurs dans la Communauté européenne;

Attendu qu'il résulte de l'application combinée de ces textes que l'employeur qui n'a pas accompli, bien qu'il y soit légalement tenu, les diligences nécessaires à la mise en place d'institutions représentatives du personnel, sans qu'un procès-verbal de carence ait été établi, commet une faute qui cause un préjudice aux salariés, privés ainsi d'une possibilité de représentation et de défense de leurs intérêts;

Attendu que pour débouter le salarié de sa demande de dommages-intérêts en raison de l'absence d'organisation des élections des délégués du personnel au sein de l'unité économique et sociale dont faisait partie la société qui l'employait, la cour d'appel énonce que le salarié n'a interpellé l'employeur sur l'organisation des élections des délégués du personnel qu'au terme d'une collaboration de dix-huit ans et pendant son délai de préavis préalable à son départ à la retraite, et qu'il n'invoque ni ne rapporte la preuve d'aucun préjudice;

Qu'en statuant ainsi, la cour d'appel a violé les textes susvisés;"

2.2 Employee classification

Labour Division (Chambre sociale) of the Court of Cassation, No. 18-24.328, 15 January 2020

A driver was declared unfit for duty on 03 September 2014 following two medical examinations. He was dismissed on 12 February 2014 for incapacity and impossibility of reclassification. Three reclassification proposals were made on 30 September without the consultation of the staff representatives. These reclassification proposals were reiterated on 4 November after consultation of the staff representatives on 22 October.

The employee argued that the employer failed to fulfil its consultation obligations, which require him to consult the staff representatives (the Social and Economic Committee) before any reclassification proposal is made.

The Court of Appeal accepted this argument, considering that the consultation that had taken place after the first reclassification proposal could not replace a consultation that should have taken place before the first reclassification proposal.

In accordance with Articles L. 1226-10 and L. 1226-15 of the Labour Code, in the version applicable to the dispute, the Court of Cassation overruled the decision and considered that by reiterating its proposals, the employer had standardised the legal consultation procedure.

In the present case, the Court of Cassation confirmed its established case law. Indeed, if the consultation of the staff representative must take place after the incapacity decision and before the proposal to the employee of a reclassification (Cass. soc., 28 October 2009, No. 08-42.804; Cass. soc, 25 March 2015, No. 13-28.229), the procedure may be standardised by the communication of new reclassification proposals after the formulation of the said notice, provided that it is issued "prior to an actual proposal to the employee of a reclassification position" (Cass. soc., 16 March 2016, No. 14-13.986).

The Court of Cassation now admits that the procedure can be standardised when the employer reiterates its reclassification proposals to the employee after consultation with the staff representatives.

"Vu les articles L. 1226-10 et L. 1226-15 du code du travail dans leur version applicable au litige.

6. Il résulte de la combinaison de ces textes que l'avis des délégués du personnel sur le reclassement du salarié, prévu par le premier d'entre eux, doit être recueilli après que l'inaptitude du salarié a été constatée dans les conditions prévues par l'article R. 4624-31du code du travail et avant une proposition à l'intéressé d'un poste de reclassement approprié a ses capacités.

7. Pour dire que l'employeur n'avait pas respecté son obligation de consultation des délégués du personnel, l'arrêt retient que l'avis de ces derniers n'a pas été recueilli avant les propositions de reclassement puisqu'ils ont été convoqués à une réunion s'étant tenue le 22 octobre 2014 alors que la société a proposé des postes de reclassement au salarié dans un courrier du 30 septembre 2014.

8. En statuant ainsi, alors qu'il résultait de ses constatations que l'employeur avait, le 4 novembre 2014, de nouveau proposé au salarié un poste de reclassement, postérieurement à la consultation des délégués du personnel intervenue le 22 octobre 2014, la cour d'appel a violé les textes susvisés."

2.3 Part-time work

Labour Division (Chambre sociale) of the Court of Cassation, No. 18-20.104, 15 January 2020

An employee claimed requalification of her part-time contract into a full-time one on the ground that the contract did not meet the requirements of Article L. 3123-14 of the Labour Code. According to this article, the written contract of the part-time employee must establish the planned weekly or, monthly duration and the distribution of the working time between the days of the week or the weeks of the month.

It follows that the absence of working hours and their distribution are associated with full-time employment. It is for the employer who disputes this presumption to prove, on the one hand, the exact weekly or monthly duration of working hours agreed upon and, on the other hand, that the employee was not placed in a position of being unable to foresee the hours she would have to work and that she did not have to be at the employer's disposal at all times.

To dismiss the employee's claim, the Court of Appeal—after holding that the contract was presumed to have been concluded for full-time because of the absence of any mention of the distribution of working hours in the contract—held that the employer had provided written proof that the employee was simultaneously working for another company.

Thus, the Court of Appeal decided, notwithstanding the absence of any mention of the distribution of working hours in the contract, that the employee was not unable to foresee her work volume, nor was she under any obligation to be available to her employer at all times.

The Court of Cassation considered that the Court of Appeal's decision was based on grounds that were inapt to argue why the employee was not placed in the position of being unable to foresee the amount of working hours she would have to work for the employer and that she did not have to be at the employer's disposal at all times. Therefore, the Court of Appeal deprived its ruling of a legal foundation.

"En se déterminant ainsi, par des motifs impropres à caractériser que la salariée n'était pas placée dans l'impossibilité de prévoir à quel rythme elle devait travailler et n'avait pas à se tenir constamment à la disposition de l'employeur, la cour d'appel a privé sa décision de base légale"

2.4 Harassment

Labour Division (Chambre sociale) of the Court of Cassation, No. 18-23.417, 15 January 2020

For 20 years, the employee had been subject to acts of intimidation, humiliation, threats, overwork and a deterioration of his working conditions, which likely affected his health, leading to exhaustion and the request to retire.

The employee requested his application for retirement to be classified as a "prise d'acte" based on his employer's wrongdoing, producing the effects of a null and void dismissal.

The Court of Cassation ruled in accordance with the decision of the Court of Appeal that the duration of the facts, their persistence and consequences on the employee's career constitute aggravating circumstances, which led to the conclusion that the employer's failure was sufficiently serious to prevent continuation of the employment contract.

As a reminder, an employee who takes note of the termination of the employment contract (prise d'acte du contrat de travail) produces the effects of dismissal without real and serious cause only if the employer's failures are sufficiently serious to prevent the continuation of the employment relationship, which cannot be the case, in principle, with reference to past failures (Cass. soc. 26 March 2014 No. 12-23.634).

The time that had elapsed between the date of the breaches imputed to the employer and the response of the employee represented an essential element for the assessment of the seriousness of the facts preventing the continuation of the employment contract.

For instance, the court found the claim to be unfounded; an employee who waited five years to claim overtime pay (Cass. soc. 14 November 2018 No. 17-18.890) or when the acts of harassment were old, had lasted a few weeks only and the employer had quickly put an end to these acts by punishing the harasser after conducting an investigation (Soc. Cass. soc. 19-June 2019 No. 17-31.182).

However, the judge cannot set aside breaches solely on the basis of seniority. It is up to the employer to assess their validity and seriousness and to determine whether they were such as to prevent the continuation of the employment contract (Cass. soc. 19 December 2018 No. 16-20.522).

It was held that despite their seniority, acts of harassment against an employee, who had been absent from work for 18 months at the time the act was committed, justified a breach of the employer's obligations (Cass. soc. 11 December 2015 No. 14-15.670).

The Court of Cassation confirmed this principle in its ruling of 2020.

> *"La cour d'appel, qui a constaté que le salarié avait été l'objet depuis 1992 d'actes d'intimidation, d'humiliations, de menaces, d'une surcharge de travail et d'une dégradation de ses conditions de travail, de nature à affecter sa santé, constitutifs de harcèlement moral l'ayant conduit à l'épuisement et à l'obligation de demander sa mise à la retraite, ainsi que d'une discrimination syndicale dans l'évolution de sa carrière et de sa rémunération, a pu décider que la persistance de ces manquements rendait impossible la poursuite du contrat de travail.*
>
> *6. Le moyen n'est donc pas fondé."*

3 Implications of CJEU Rulings and ECHR

3.1 Posting of workers

CJEU, Case C-16/18 – Dobersberger, 19 December 2019

The Court of Justice has rendered an important judgment on the provision of services on board international trains and the status of such workers.

In the present case, Hungarian employees employed by a Hungarian company provided services on the Austrian railway company's trains from Budapest to Salzburg and Munich. The Austrian authorities held that they qualified as posted workers and that their employer should have made a prior declaration and respect national rules imposing administrative obligations in relation to the posting of workers.

According to Article 2 § 1 of Directive 96/71/EC, a "'posted worker' means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works".

The Court had to assess the applicability of the Directive to this dispute. As a reminder, in the transport sector, the free movement of services is not regulated by Article 56 TFEU, which concerns the freedom to provide services in general, but by Article 58(1) TFEU, which provides that the free movement of services in the transport sector is regulated by the provisions of the title relating to transport, i.e. Articles 90 to 100 TFEU (CJEU, 22 December 2010, Case C-338/09, Yellow Cab). A service in the transport sector means any physical act of moving persons or goods by means of transport, but not only: the concept also includes any service that, even if only incidental to such an act, is intrinsically linked to it (CJEU, 15 October 2015, aff. C-168/14, Grupo Itevelesa, see our article). That is precisely what is at issue in this case: for the Court, the services provided in the present case—on-board services, cleaning etc.—although indeed an accessory to the service of transporting passengers by train, are not intrinsically linked to that transport service.

In other words: such a transport service could perfectly well be carried out without such accessory services, which, de facto, are not covered by the provisions of the TFEU relating to transport, but by Articles 56 to 62 relating to services—with the exception of Article 58(1) of the TFEU—and are therefore likely to be covered by Directive 96/71/EC.

However, the fact that those services may be covered by the Directive does not necessarily mean that the workers actually fall within the scope of the Directive defined in Article 1.

Thus, it applies to situations where a company in a Member State posts workers for the purposes of the provision of services, on its behalf and under its direction, to the territory of another Member State, under a contract concluded between the sending company and the recipient of the provision of services operating in the latter Member State, provided that an employment relationship exists between that undertaking and the worker during the period of posting (CJEU, 3 April 2008, Case C-346/06 Rüffert).

Everything therefore rests on the notion of 'posted worker', i.e. any worker who, for a limited period, carries out his or her work in the territory of a Member State other than the Member State in whose territory he or she habitually works (Directive Article 2, § 1). In other words, a worker could not be considered as being posted to the territory of a Member State within the scope of Directive 96/71/EC, if the performance of his or her work does not have a sufficient link with that territory. The aim here is to exclude cases of very limited benefits in the territory of a Member State from the application of the provisions of the Directive relating to minimum rates of pay and minimum length of paid annual leave. In the present case, the workers carried out a significant part of their work in the Member State in which the undertaking that assigned them to provide services on international trains is established: under these conditions, they could not maintain a sufficient link with the territory of the Member States through which the trains pass to be considered "posted workers" within the meaning of Directive 96/71/EC.

Indeed, the Court considered that

> *"workers who carried out a significant part of their work in the Member State of establishment of the undertaking which assigned them to provide services on international trains, that is to say all activities falling within the scope of that work with the exception of the on-board service provided during the train's journey, and who begin or end their shifts in that Member State, do not have a sufficient connection with the territory of the Member State or Member States crossed by those trains to be regarded as 'posted', within the meaning of Directive 96/71."*

The French Labour Code provides a definition of posted worker. Article L.1261-3 states that

> *"a posted worker is any employee of a regularly established employer and who carries out his activity outside of France and who, usually working on behalf of that employer outside the national territory, performs his work at the request of that employer for a limited period on the national territory under the conditions defined in Articles L. 1262-1 and L. 1262-2."*

The worker must carry out a specific job on behalf of his or her employer. Thus, an employee who usually works in France for eight months and three months in Belgium could not be employed on French territory as a posted worker (Cass. soc., 16 May 1990, No. 86-43.356, Bull. civ. V, p. 135).

The concept of work is to be understood in the broad sense of the term to mean any performance of work, whether salaried or self-employed. However, it must be a 'fixed task whose content and duration is predefined and the reality of which must be capable of being proven by the production of the corresponding contracts'. Similarly, the person concerned "must continue to maintain, in his State of origin, the means necessary for the exercise of his activity in order to be able to continue it upon his return" (use of offices, payment of social security contributions, taxes, professional card, registration with professional organisations, etc.).

3.2 Employer insolvency and company pensions

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 December 2019

This case concerned the interpretation of Article 8 of Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer. The CJEU clarifies the scope of Article 8 of Directive 2008/94/EC and the level of the minimum protection obligation that a Member State must guarantee in the event of a reduction in a former worker's old-age benefits.

In the present case, the former employer in Germany of an individual granted him an occupational pension. The pension fund, the Pensionskasse, ran into economic difficulties and reduced the amount of benefits provided, following authorisation by the public financial services supervisory authority. Between 2003 and 2013, the amount of the monthly retirement pension paid to the individual was reduced by 13.8 per cent. In accordance with the guarantee obligation based on the national regulations, the former employer first compensated the Pensionskasse for the reductions in the benefits provided, as these regulations do not provide for any further guarantee obligation for the benefits provided by the pension funds. In January 2012, insolvency proceedings were opened against this former employer. The body that ensures the payment of occupational pensions in the event of insolvency of an employer in Germany then informed the individual that it would take over the monthly payment of the pension supplement.

However, since the institution refused to compensate for the reductions applied to the retirement pension paid by the Pensionskasse, the latter paid the individual a reduced retirement pension.

The individual brought an action before the German courts arguing that because of the insolvency proceedings against his former employer, the institution had to guarantee the reductions in the benefits paid by the Pensionskasse.

In the context of this dispute, the German Federal Court referred to the CJEU for a preliminary ruling on the interpretation of Article 8 of Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer (Directive 2008/94/EC of the European Parliament and of the Council, 22 October 2018).

Directive 2008/94/EC does not, in principle, cover social security contributions. However, pursuant to Article 8 of this Directive, "Member States shall ensure that the necessary measures are taken to protect the interests of employees and of persons having already left the employer's undertaking or business at the date of the onset of the employer's insolvency in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary occupational or inter-occupational pension schemes outside the national statutory social security schemes."

The Court's examination first concerned the applicability of Directive 2008/94/EC. This applies to employees' claims arising from employment relationships and exists against employers who are in a state of insolvency (Prec. Dir., Art. 1, § 1). The CJEU confirmed the broad scope of application of Directive 2008/94/EC by finding that the individual was a former employee, that his former employer was in a state of insolvency and that on the date of the occurrence of insolvency and because of it, the acquired rights to old-age benefits had been infringed, since that former employer was no longer able to compensate for reductions in the monthly occupational retirement pension paid by an inter-professional institution in accordance with the obligation to guarantee the payment of occupational retirement benefits incumbent on the employer under national law (CJEU, 25 April 2013, aff. C-398/11, Hogan et al.).

The second question concerns the proportion that the reduction in the amount of occupational pension benefits must reach to activate the Member State's obligation to provide "minimum protection". The Court of Justice pointed out that, having regard to the margin of discretion left to the Member States, Article 8 of the Directive does not impose a full guarantee of the rights at issue. A reduction in those rights is authorised, provided that the principle of proportionality is complied with. The CJEU takes over the main elements of its case law on the minimum protection to be granted by the Member States (CJEU, 06 September 2018, case C-17/17, Hampshire):

- a former employee must, in the event of employer insolvency, receive at least half of the old-age benefits deriving from pension rights accumulated under a supplementary occupational pension scheme.
- even if a minimum guarantee amounting to half of the old-age benefits is required under Article 8 of Directive 2008/94/EC, that does not have the effect of precluding the possibility that under certain circumstances, the losses suffered by a worker or former worker may also be regarded as being manifestly disproportionate in the light of the obligation to protect the interests of employed persons.

In the view of the CJEU, a reduction in the old-age benefits of a former employee must be regarded as manifestly disproportionate where it follows from that reduction, and, where appropriate, from the anticipated trend in that reduction, that the ability of the person concerned to provide for him- or herself is seriously affected. This would be the case of a reduction in old-age benefits suffered by a former employed person who is already living or is expected to live below the risk-of-poverty threshold as a result of

that reduction. The German national court will thus have to ascertain whether that former employed person is already living or should live below the risk-of-poverty threshold determined for the Member State concerned by Eurostat as a result of that reduction.

Finally, the Court confirmed the direct effect of Article 8 of Directive 2008/94/EC. The interesting aspect of the present judgment is the application of the direct effect to the requirement that Member States must provide minimum protection to former workers exposed to a manifestly disproportionate reduction in old-age benefits. In the present case, the institution, having regard to its tasks, must be assimilated to the State. However, according to the Court, that interpretation may only be adopted if the Member State has entrusted the institution with the obligation to provide minimum protection in respect of old-age benefits pursuant to Article 8 of the Directive.

In France, Article 50 of Act No. 2014-40 of 20 January 2014 (OJ 21 Jan.) guaranteeing the future and justice of the pension system authorised the government to issue by ordinance "any measure falling within the scope of the law to protect the interests of employees and persons who had already left the employer's undertaking or establishment on the date of the occurrence of the employer's insolvency with regard to their acquired rights, or rights in the process of being acquired, to supplementary company pension benefits".

Order No. 2015-839 of 9 July 2015 (OJ 10 July), relating to the securing of pensions paid under the pension schemes referred to in Article L.137-11 of the Social Security Code, is intended to bring French law into line with Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer.

This issue had already been addressed by the legislature in Article L. 913-2 of the Social Security Code, which states that "*no provision entailing the loss of rights acquired or in the process of being acquired to retirement benefits, including the reversion of employees or former employees in the event of the insolvency of the employer or the transfer of an undertaking, establishment or part of an establishment to another employer, resulting from a contractual assignment or merger, may be inserted, under pain of nullity, in the agreements or decisions referred to in Article L. 911-1*"

Article 1 of the Ordinance provides that pension rights liquidated under the pension schemes referred to in Article L. 137-11 of the Social Security Code will be gradually secured at a level of at least 50 per cent under the conditions set out in Article 2. However, the guarantee may be limited for each beneficiary and per year, to one and a half times the social security ceiling.

With internal management, the company has the option of self-insuring itself and paying the promised annuities when the time comes. This method has a major disadvantage: the sustainability of the system depends on the company's ability to bear the burden of the annuities. If the company's economic development is not favourable or if the wealth produced by the assets does not allow for the payment of pensions, the very existence of a company may be threatened and, in any case, the employees are not guaranteed their expected benefits.

Ordinance No. 2015-839 of 9 July 2015 (OJ 10 July) transposes Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer to guarantee these rights. Pursuant to this Ordinance, pension rights liquidated under the pension schemes mentioned in Article L. 137-11 of the Social Security Code will be gradually secured to the extent of at least 50 per cent.

4 Other relevant information

Nothing to report.

Germany

Summary

(I) The Federal Constitutional Court has issued two landmark decisions on the Court's jurisdiction and the standard of review within the scope of application of the Union's fundamental rights.

(II) The ruling of the CJEU in case C 168/18 might have some implications for Germany.

(III) The German Parliament has discussed better protection from bullying. Demands have been raised for better protection for platform workers. A considerable number of German workers have side jobs.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 "Right to be forgotten"

Federal Constitutional Court, 1 BvR 16/13 and 1 BVR 276/17, 06 November 2019

In November 2019, the Federal Constitutional Court issued two landmark decisions on the Court's jurisdiction and the standard of review within the scope of application of the Union's fundamental rights. In terms of substantive law, the decisions dealt with the "right to be forgotten" with reference to the internet.

In dogmatic terms, both decisions concern the relationship between the fundamental rights guaranteed by the German Constitution, on the one hand, and the fundamental rights protected by the Charter of Fundamental Rights of the European Union, on the other. According to its Article 51(1), the Charter applies to the Member States "only when they are implementing Union law". This applies both to those areas of regulation that are completely unified and thus determined by Union law, and to those areas in which the Member States retain their own scope of action.

The first decision of the Federal Constitutional Court ("Right to be forgotten I") dealt with a situation within the scope of application of Union law within which German law is not fully determined by Union law. According to the established case law of the Federal Constitutional Court, the fundamental rights of the Basic Law remain applicable in these cases and serve as a standard of review by the Court in constitutional complaints. This case law is further substantiated by the first decision. With regard to cases concerning matters of ordinary legislation that are not fully harmonised under EU law and thus allows for different legislative designs at Member State level, the Court held that it will primarily rely on the fundamental rights of the Basic Law as the standard for reviewing the interpretation of the relevant legislation, even though EU fundamental rights may also be applicable to the matter in question. This follows from the finding that where EU law affords leeway to design, it seeks to accommodate the diversity of fundamental rights regimes; and it rests on the presumption that the application of German fundamental rights simultaneously ensures the level of protection required by EU fundamental rights, which in this scenario set but outer limits. An additional review on the basis of EU fundamental rights is only necessary if specific and sufficient indications

indicate that the Basic Law does not afford adequate fundamental rights protection (see Press Release No. 83/2019 of 27 November 2019).

The second ruling of the Federal Constitutional Court ("Right to be forgotten II") concerned a legal dispute governed by legislation that is fully harmonised under EU law. As the starting point for its review, the Federal Constitutional Court held that the ordinary legislation relevant in this case is fully harmonised under EU law and that the fundamental rights of the Basic Law were thus not to be applied. To the extent that the application of EU legislation takes precedence over German fundamental rights, the Federal Constitutional Court reviews the application of such legislation by German authorities on the basis of EU fundamental rights; this ensures that there are no gaps in fundamental rights protection. By applying this standard of review, the Federal Constitutional Court discharges its responsibility with regard to European integration under Art. 23 of the Basic Law (see Press Release No. 84/2019 of 27 November 2019). At the same time, the Court announced that it will exercise control over the Union's fundamental rights in close cooperation with the CJEU The Federal Constitutional Court would only consider applying the fundamental rights of the Union if the European Court of Justice had already clarified its interpretation or if the principles of interpretation to be applied were obvious in themselves. Otherwise, the Federal Constitutional Court has an obligation to refer the matter to the CJEU under Article 267(3) TFEU.

3 Implications of CJEU Rulings and ECHR

3.1 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

The CJEU held that Directive 96/71/EC does not cover the provision under a contract concluded by an undertaking established in a Member State and an undertaking established in another Member State, which is contractually linked to a railway undertaking established in that same Member State, of on-board services, cleaning or catering services for passengers carried out by salaried employees of the first undertaking, or by workers hired out to it by an undertaking also established in the first Member State, on international trains crossing the second Member State, where those workers carry out a significant part of the work inherent in those services in the territory of the first Member State and where they start or end their shifts there.

That assessment by the Court seems to be in line with the prevailing view in Germany that the Directive does not cover workers who normally work in the territory of two or more Member States and are part of the travelling or flying staff of an undertaking which, in its own name, operates international passenger transport services by rail, road, air or water (see *Heuschmid/Schierle*, in: Preis/Sagan (eds.), Europäisches Arbeitsrecht, 2nd. ed 2019, § 16 16.108).

3.2 Employer insolvency and company pensions

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 December 2019

With its decision, the CJEU confirmed its previous interpretation of the scope of Art. 8 of Directive 94/2008/EC with regard to the direct applicability of the Directive in the matter of occupational pensions, the individual right of action of affected employees and the minimum protection to be guaranteed by the state in the amount of 50 per cent of the guaranteed pension benefits. It also extends the requirements for minimum protection to include the aspect of proportionality.

With regard to the practical effects of the decision, it should be noted that regard must be taken as to whether the beneficiaries affected by the restructuring have to accept

such severe losses that the minimum protection of Art. 8 of Directive 94/2008/EC is affected in the first place. In a second step, the proportionality of the reduction has to be examined. If it is established that the pension beneficiaries have suffered disproportionate losses as a result of the reduction of their pension benefits by the pension fund, they are entitled to a claim for compensation which, under the current legal situation, they could only assert as a state liability claim against the Federal Republic of Germany.

In view of the fact that the overall concept of statutory insolvency protection has thus far not been designed to provide insolvency protection that also encompasses pension funds, insolvency protection on the basis of a corresponding statutory regulation seems conceivable. The Federal Ministry of Labour and Social Affairs has provided an initial starting point for discussion in this regard with its draft bill to amend the Occupational Pensions Act, which was published at the end of 2019. According to this draft, at least those pension fund obligations that are granted through so-called "regulated" pension funds are to be integrated into the statutory insolvency protection of the Occupational Pensions Act (see jurisPR-ArbR 3/2020 note by *u. Langohr-Plato*).

4 Other relevant information

4.1 Better protection against bullying

The parliamentary group of the party "The Left" (Die Linke) has called for better protection of workers against bullying. It has therefore tabled a parliamentary motion (19/16480) stating that more than one million workers in Germany are currently exposed to bullying. Among other things, they demand that the Federal Government supplement the Occupational Safety and Health Act with regard to the prevention of bullying and "bossing around" (systematic bullying by superiors). In addition, the government is to present a draft law on protection against bullying, which defines bullying as a separate legal concept and, analogous to the General Equal Treatment Act, offers those affected a legal claim to compensation and damages for pain and suffering. Finally, the parliamentary group is calling for an amendment of the Works Constitution Act and an anti-stress ordinance.

In a public hearing before Parliament's competent committee held on 27.01.2020, the invited experts were divided on the need to better protect employees against bullying by colleagues or superiors.

4.2 Better protection for platform workers

On 29.01.2020, the parliamentary group "The Left" (Die Linke) tabled a motion (19/16886) emphasising the need to remove the possibility for platform operators to evade their obligations as employers. The parliamentary group is calling for the Federal Government to submit a bill that establishes that employees of the gig economy are basically employees of platform operators. A reversal of the burden of proof is to be introduced as well, so that platform operators will have to refute that dependent employment exists.

4.3 Number of side jobs

In 2018, out of 41.8 million workers, some 2.2 million had more than one job. This is the result of the finding (19/16658) to a question posed by the Federal Government (19/16288) by the parliamentary group "The Left" (Die Linke).

Greece

Summary

An assessment of the rulings of the CJEU cases C-16/18 and C-168/18 is provided.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

A worker according to Directive 96/71 is considered to be posted to the territory of a Member State if his or her work has sufficient connection with that territory. The judgment emphasises the right that it is not the country of the company's establishment, nor the country where the contract for services is concluded that is crucial for the application of the posting provisions, but the country where the services are provided, as well as the country where the work starts and ends. This raises the question, however, whether not only the country where the work starts and ends, but also the country where the majority of work and working hours are provided should be taken into account. This could be a way to avoid social dumping where an employer determines the place where the work begins and ends in one country while the majority of the work is performed in another country.

The judgment in the above cases contributes to the clarification of the issue. The ruling does not seem to have any implications for Greece, because due to the geographic location of the country, there are currently no such services, that is to say, international trains only cross the country.

3.2 Employer insolvency and company pensions

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 December 2019

The judgment clarifies some important issues related to employer insolvency. First, it clarifies questions about a former employer who is in a state of insolvency and is no longer in the position to offset reductions in the monthly occupational pension paid by an inter-occupational institution, provided that there is such an obligation to guarantee the payment of occupational old-age pension benefits. Secondly, it clarifies that a reduction in the amount of occupational old-age pension benefits paid to a former employee, on account of the insolvency of his or her former employer, is deemed manifestly disproportionate, even if the former employee receives at least half of the amount of the benefits arising from his or her acquired rights, where, as a result of the reduction, the former employee is already living, or would have to live, below the at-risk-of-poverty threshold. Thirdly, it clarifies the conditions under which Article 8 of Directive 2008/94/EC has direct effect.

This judgment does not seem to have any implications for Greece, as Greek law does not provide for an employer's obligation to guarantee provisions for pension payments.

4 Other relevant information

4.1 Trade union law

The Greek government is planning a wide-ranging amendment of trade union law and of conciliation procedures for individual and collective labour disputes.

Hungary

Summary

(I) Amendments to the Labour Code are presented.

(II) The parties must co-operate and inform each other in case of warning strikes.

(III) The two rulings in the CJEU cases C 16/18 and C-168/18 are assessed.

1 National Legislation

1.1 Amendments of the Labour Code

Amendment of Article 34(3) of the Labour Code

Act 110 of 2019 amends Article 34(3) of the Labour Code (Act 1 of 2012), which came into force on 01 January 2020.

The authorisation of the Welfare Department was necessary for the employment of persons under 16 years of age in cultural, art, sport or modelling activities. The amendment stipulates that the Welfare Department must only be informed 15 days prior to employment.

Amendment of Article 34(3) of the Labour Code

Act 126 of 2019 amends Article 34(3) of the Labour Code (Act 1 of 2012), which came into force on 01 January 2020. The former text read:

"*34(3) Employers shall modify the employment contract based on the employee's request to work part time, covering half of the daily working time until the child reaches the age of three, and up to the age of five for parents with three or more children.*"

The amended text reads:

"*34(3) Employers shall modify the employment contract based on the employee's request to work part time, covering half of the daily working time until the child reaches the age of four, and up to the age of six for parents with three or more children.*"

Amendment of Article 99(3) of the Labour Code

Act 126 of 2019 has amended Article 99(3) of the Labour Code (Act 1 of 2012), which came into force on 01 January 2020.

According to Article 92(2) (not amended):

"(2) Based on an agreement between the parties, the daily working time for full-time jobs may be increased to not more than twelve hours daily for employees:

a) working in stand-by jobs;

b) who are relatives of the employer or the owner (extended daily working time)."

According to Article 99(3):

"*According to the work schedule:*

a) the daily working time of employees shall not exceed twelve hours, or twenty-four hours in case of stand-by jobs;

b) the weekly working time of employees shall not exceed forty-eight hours, or seventy-two hours in case of stand-by jobs, if so agreed by the parties."

According to the amendment of Article 99(3), the employee may not suffer an unlawful disadvantage as a consequence of terminating this agreement.

New Article 229/A of the Labour Code

Act 126 of 2019 inserts the new Article 229/A in the Labour Code (Act 1 of 2012), which came into force on 01 January 2020.

The new Article 229/A enlists the cogent and relative dispositive rules in relation to employment contracts and collective agreements regarding non-competition clauses (Article 228) and study contracts (Article 229).

New Article 36(3) of the Labour Code

Act 126 of 2019 inserts the new Article 36(3) in the Labour Code (Act 1 of 2012), which came into force on 01 January 2020.

Article 36(2) lists the provisions of the Labour Code on transfers of undertakings, which shall not be applied in liquidation proceedings.

According to the new Article 36(3), the rules (excluded provisions) in Article 36(2) shall also be applied to proceedings regulated by the Act on promoting security of credit institutions and investment firms in accordance with Article 34(4) of Directive 2014/59/EU.

2 Court Rulings

2.1 The right to strike

Supreme Court, No. 1/2020, Mpk.II.10.059/2019/7, 4 September 2019

The case concerned the information obligation on the right to strike, and in particular, warning strikes. In a car factory (in 2016), a warning strike took place between 00.30 and 02.30 a.m. on 24 November. However, the trade union had only informed the employer about the strike in an email at 22.31 p.m. on 23 November.

According to the Supreme Court, the rules on strikes shall apply to warning strikes as well, which can only last up to 2 hours in accordance with Act 7 of 1989 on the right to strike. That is, there is an obligation to cooperate with the other party. Such a short notice (less than an hour) violates the information and co-operation obligation of the trade union, since enough time must be given to the employer to prepare for the strike and its consequences. Therefore, the warning strike was unlawful for having breached this information obligation.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

The case concerned the posting of workers. Article 1(3)(a) of Directive 96/71 must be interpreted as meaning that it does not cover the provision under a contract concluded by an undertaking established in a Member State and an undertaking established in another Member State, which is contractually linked to a railway undertaking established in that same Member State, of on-board services, cleaning or catering services for

passengers carried out by salaried employees of the first undertaking, or by workers hired out to it by an undertaking also established in the first Member State, on international trains crossing the second Member State, where those workers perform a significant part of the work inherent in those services in the territory of the first Member State and where they start or end their shifts there.

Article 295(1) of the Labour Code contains the following definition of posting:

> *"a foreign employer – based on an agreement with a third party – employs an employee in an employment relationship in the territory of Hungary"*

Consequently, the statutory definition is in line with the above described judgment. However, this decision must be taken into account by the Hungarian labour courts when interpreting this statutory definition. Such services provided on a train that crosses into another country are not considered a posting of workers.

3.2 Employer insolvency and company pensions

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 December 2019

The case concerned the insolvency of an employer and the related occupational pension rights. Article 8 of Directive 2008/94/EC must be interpreted as applying to a situation in which an employer that provides occupational old-age pension benefits through an inter-occupational institution, cannot, on account of its insolvency, offset losses resulting from a reduction in the amount of those benefits paid by the inter-occupational institution, a reduction which was authorised by the State supervisory authority for financial services which is the prudential regulator for that institution. A reduction in the amount of occupational old-age pension benefits paid to a former employee on account of the insolvency of his or her former employer, is regarded as being manifestly disproportionate, even though the former employee receives at least half of the amount of the benefits arising from his or her acquired rights, where, as a result of the reduction, the former employee is already living, or would have to live, below the at-risk-of-poverty threshold determined by Eurostat for the Member State concerned. Article 8 of Directive 2008/94 may have direct effect.

Act 117 of 2007 regulates occupational pensions and pension funds. According to Article 26 of this Act, the employee's pension rights must be regulated by the employment contract or collective agreement. If the employer does not perform his or her obligations, the pension fund or the employee may initiate a court procedure. The obligation of payment by the employer ends at the time of termination/cessation of the employment relationship.

Act 66 of 1994 on the Wage Guarantee Fund does not contain any specific provision on the responsibility for occupational pension payments and related guarantees. However, this payment may be included in the broad interpretation of the definition of 'wage claim' in Article 1.2.d. Furthermore, it may be disputed in a court procedure whether the employer is responsible for such a reduced payment of the Occupational Pension Fund. Hungarian law does not regulate this specific situation.

4 Other relevant information

Nothing to report.

Iceland

Summary

(I) An assessment of the CJEU cases C-16/18 and C-168/18 is provided.

(II) A collective agreement of municipal employees has been concluded.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

This case on the relevance of Article 1(3)(a) of Directive 96/71/EC concerning the posting of workers to certain groups of railway employees who perform tasks on international trains crossing boundaries of different Member States is not relevant for Icelandic law as the country does not have a railway and Iceland's geographic location prevents such issues from arising.

3.2 Employer insolvency and company pensions

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 December 2019

The case concerned a reduction in the pension contributions paid by a former employer that was in a state of insolvency and the subsequent application of Art. 8 of Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer.

The Icelandic pension system has three pillars: firstly, a tax-financed public pension, secondly a compulsory payment to a pension fund and thirdly, voluntary private pensions. Act No. 129/1997, on Compulsory Pension Insurance and Pension Fund Operations, makes membership to a pension fund compulsory, as stated in Article 1(3). According to Article 2(1), at least 12 per cent of an employee's salary must be paid into the pension fund (in general collective agreements, this contribution has been raised to 15.5 per cent) and guarantees at least 56 per cent of the employee's salary over a period of 40 years, given that the individual has reached the age of 70, as stated in Article 4(1). Article 23(1) of Act No. 100/2007, on Social Security, guarantees a full basic pension of ISK 2 553 312 to those who have reached the age of 67 and have lived in the country for 40 years between the ages of 16 and 67 as provided for in Article 17(1) of the Act. Certain rules of the Act touch upon the interplay of the publicly funded pension, on the one hand, and other payments, such as from an occupational pension fund, on the other.

It must also be mentioned that Act No. 88/2003, on the Wage Guarantee Fund, transposes Directive 2008/94/EC into Icelandic law, with Article 5(1)(d) protecting

pension fund contributions, covering a period of three months leading up to insolvency and three months after insolvency as stipulated in Article 5(1)(a) and (b) of the Act

In accordance with this system, a scheme such as the one covered by the present case is not commonplace in Iceland as the relationship between an employee and an employer typically ends when the employee retires and starts receiving his/her pension. In light of these systematic differences, it is unlikely that this case will have any implications for Iceland.

4 Other relevant information

4.1 Collective agreement of municipal employees signed

On 16 January, 17 of the 19 unions in the Federation of General and Special Workers in Iceland (SGS) and the Icelandic Association of Local Authorities (SÍS) signed a collective agreement which runs to 30 September 2023. The agreement is currently being presented to members of the individual trade unions' members and will be voted on in the first week of February. Another member union of SGS also signed a comparable agreement with SÍS in January, which was confirmed by its members. The last union of SGS, Efling, which is also the largest, is still negotiating with the City of Reykjavík and strikes have been planned and agreed upon by members, commencing on 4 February.

The agreement entails pay raises in line with the collective agreements in the private sector, the reduction of the work week by 65 minutes starting on 01 January 2021, paid educational leave for those who have been employed for at least three consecutive years, extending annual paid leave from 24 to 30 days and finally, further investigation of the working conditions of shift workers.

Ireland

Summary

The national minimum hourly rate of pay will increase to EUR 10.10.

1 National Legislation

1.1 Minimum Wage Order

The Minister for Employment Affairs and Social Protection has issued the National Minimum Wage Order 2020 (S.I. No. 8 of 2020) increasing the national minimum hourly rate of pay from EUR 9.80 to EUR 10.10 with effect from 01 February 2020.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

This decision has no relevance for Ireland as no international trains crossing the territory of another Member State operate in Ireland.

3.2 Employer insolvency and company pensions

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 December 2019

This decision has implications for Ireland. When the Protection of Employees (Employers' Insolvency) Act 1984 was enacted, considerable dissatisfaction was expressed concerning the limited nature of the protection proposed for employee pension rights in an insolvency situation. An amendment was put forward whereby an employee could claim entitlements arising in the event of losing his or her ongoing pension payments owing to the employer's insolvency. This was rejected on the grounds that the costs would be substantial and could not be imposed upon employers only.

Notwithstanding the CJEU decision in case C-278/05, *Robins* EU:C:2007:56, no amendments were made to the 1984 Act so as to ensure that employees received at least 50 per cent of the value of their accrued occupational pension entitlements in the event of their employer's insolvency. This failure led to the CJEU decision in case C-398/11, *Hogan* EU:C:2013:272.

The plaintiffs were former employees of Waterford Crystal. One of their conditions of employment was that they join a defined benefit supplementary pension scheme. In 2009, a receiver was appointed and the supplementary pension scheme was wound up with a deficit of around EUR 110 million. The actuary retained by the plaintiffs considered that they would only receive between 18 per cent and 28 per cent of the amounts to which they would have been entitled if they had received the then present value of their accrued pension rights. The plaintiffs instituted High Court proceedings, claiming that Ireland had not properly transposed Article 8 of the Directive and various questions were referred to the CJEU for a preliminary ruling. The Court decided that the measures

adopted by Ireland, following its judgment in *Robins* did not fulfil the obligations imposed by the Directive.

When the case was returned to the High Court, the proceedings were settled and the deficiencies identified by the CJEU in *Hogan* were addressed, albeit without retrospective effect, by sections 9 and 10 of the Social Welfare and Pensions (No. 2) Act 2013. Section 9 amends section 48 of the Pensions Act 1990 so as to change the order of priority in a "double insolvency" situation by providing that, as before, first priority is given to defined contribution assets; the second and third priorities are now given to 50 per cent of pensioner and members' benefits; and then priority is given to protecting pension benefits up to EUR 12 000. Section 10 then provides that in case of a "double insolvency", where a scheme has insufficient resources to provide the 50 per cent benefits and protect EUR 12 000 of pensioner benefits, the Minister for Finance shall provide for the shortfall in scheme assets.

The CJEU in *Bauer* has now ruled that Article 8 requires Member States to guarantee to a former employee, exposed to a reduction in his or her old-age occupational pension benefits, compensation in an amount which, without necessarily covering all of the losses suffered, is such as to prevent them from being "manifestly disproportionate". Consequently, a reduction in the amount of such benefits, on account of the insolvency of a former employer, will be "manifestly disproportionate", even though the former employee receives at least 50 per cent of the amount of the benefits where, as a result of the reduction, the former employee is already living, or would have to live, below the at-risk-of-poverty threshold determined by EUROSTAT for the Member State concerned which, in the case of Ireland, is currently EUR 20 597.

4 Other relevant information

Nothing to report.

Italy

Summary

(I) On 1 January, the Budget Law No 160 of 27 December 2019, containing the State budget for the financial year 2020 and the multi-year budget for the period 2020-2022, entered into force. The Act supplements and modifies the provisions of the previous Budget Law (Act No 205 of 30 December 2018), which had introduced, confirmed or modified various measures in favour of workers and companies, such as incentives for youth employment, subsidies to encourage hiring by companies and incentives for entrepreneurship, which, with the new regulations, have been confirmed and / or modified.

(II) Highlights on case law of the Cassazione on dismissal and riders as well as comments on CJEU rulings *Dobersberger* and *Pensions-Sicherungs-Verein VVaG*.

1 National Legislation

1.1 State budget for the financial year 2020

On 1 January, Budget Law No. 160 of 27 December 2019, on the State budget for the financial year 2020 and the multi-year budget for the period 2020-2022, entered into force. It is a preventive accounting document, presenting public inputs and outputs for the following three years, *ex* Article 81 of the Italian Constitution. The Act supplements and modifies the provisions of the previous Budget Law (Act No 205 of 30 December 2018), which had introduced, confirmed or modified various measures in favour of workers and companies, such as incentives for youth employment, subsidies to encourage hiring by companies and incentives for entrepreneurship, which, with the new regulations, have been confirmed and / or modified.

Incentives for micro enterprises that hire apprentices

Companies with a maximum of nine employees who hire apprentices are entitled to 100 per cent social security contribution relief for the first three years of the contract.

Incentives for the recruitment of young graduates and PhDs

An incentive for companies hiring young graduates and PhDs was already provided in the previous Budget Law, but it had never been applied. The new Budget Law provides a social security contribution relief of EUR 8 000 for the first 12 months for private sector employers who hire graduates *cum laude* or PhDs.

Young graduates must have obtained a master degree *cum laude* within the legal duration of the course of study, with a weighted average of not less than 108/110, before their 30th birthday (34th if PhDs).

Under 35 recruitment bonus

To encourage the hiring of employees under the age of 35, the Act provides a social security contribution relief of 50 per cent for 3 years and for an amount not exceeding EUR 3 000 per year. The relief measure also applies when transforming a fixed-term contract into a permanent one.

Extension bonus employment in southern Italy

The Act introduces a bonus to encourage employment in southern Italy. Companies hiring employees under the age of 35 under a permanent contract or employees over the age of 35 without a regularly paid job for at least six months receive 100 per cent social security contribution relief.

The bonus is not yet operational and a special decree by the National Agency for Active Work Policies (ANPAL) is necessary for it to enter into force.

Extension of some incentives

The new Budget Law also introduces the following provisions:

- incentives for employers who hire workers entitled to unemployment benefits (NASpI);
- 50 per cent social security contribution relief for employers who hire workers registered in the Extraordinary Earnings Integration Fund (CIGS), who are entitled to a relocation allowance. The incentive is available for a period of 18 months;
- 10 per cent social security contribution relief when hiring workers who have been registered in the CIGS for at least three months for a total period of 12 months;
- 50 per cent social security contribution relief for employers who hire women who have been unemployed for at least six months and reside in southern Italy, or any person who has been unemployed for at least one year. The relief measure applies for 18 months for permanent contracts, and 12 months for fixed-term contracts;
- 50 per cent social security contribution relief for companies with less than 20 employees who hire fixed-term workers to replace employees on maternity leave until the child of the replaced worker reaches the age of one year.

Paternity leave

Compulsory paternity leave has been extended from 5 to 7 days. The father must take the leave within five months of the child's birth (or from the time the child has entered Italy in the event of a national / international adoption).

2 Court Rulings

2.1 Dismissal

Cassazione, No. 808, 23 January 2020

An individual dismissal immediately following a collective dismissal justified by the same company crisis is unlawful.

2.2 Work protection

Cassazione, No. 1663, 24 January 2020

Article 2 Legislative Decree 81/15 is applicable to Foodora riders.

Article 2 Legislative Decree 81/15 provides that subordinate work protection must be applied to any work relationships that are performed personally and continuously and organised by the client.

The Court of Cassation does not specify whether the work of riders should be considered independent or subordinate, but establishes the need to apply all protective measures to the subordinate employment of these workers.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

The judgment concerns the application of Article 8 of Directive 2008/94.

The case concerned a German pensioner, who had an occupational old-age pension within the meaning of the Law on Occupational Pensions. That occupational old-age pension comprised a pension that was granted under a pension fund based on contributions made by the pensioner's former employer, paid by the *Pensionskasse für die Deutsche Wirtschaft*, an inter-occupational institution that gives employees a legal claim to their benefits.

This Pension Fund faced financial difficulties and with the authorisation of the Federal Agency for the Supervision of Financial Services, reduced the amount of the benefits to be paid. The former employer offsets the reductions in the benefits paid by the Pensionskasse, until declared insolvent in 2012.

After the declaration of insolvency, the German insolvency insurance institution (PSV) refused to offset the reductions applied to the old-age pension paid by the Pension Fund.

According to the Court, Article 8 of Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 must be applied when an employer that provides occupational old-age pension benefits through an inter-occupational institution cannot, on account of insolvency, offset losses resulting from a reduction in the amount of those benefits paid by the inter-occupational institution. Article 8 can have direct effect if the institution that guarantees occupational pensions against the risk of an employer's insolvency is comparable to the State and if the task of providing a guarantee with which the institution is vested actually covers the type of old-age benefits in respect of which the minimum degree of protection provided for in Article 8 is sought.

The Italian Guarantee Fund does not apply to supplementary social security benefits, which have not been paid by the insolvent employer. According to Article 5(2) Legislative Decree No. 80/1992, in the event that, for the omission or partial payment of the contributions by the employer, the benefit to which the employee would have been entitled cannot be paid, the worker may request the Guarantee Fund to integrate the resulting omitted contributions into the complementary pension management concerned.

3.2 Employer insolvency and company pensions

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 December 2019

Article 1(3)(a) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996, concerning the posting of workers within the scope of the provision of services, must be interpreted as meaning that the worker is not posted, if he or she carries out a significant part of the work in the territory of the first Member State, where he or she starts or ends the shifts.

According to Italian law, if an employee habitually carries out work in a Member State and neither a significant part of his or her work nor a permanent place of work in a second Member State, he or she is not considered to be a posted worker.

4 Other relevant information

Nothing to report.

Latvia

Summary

(I) Draft amendments to the Labour Law relating to the implementation of Directive 2018/957/EU were presented in the State Secretary meeting

(II) CJEU decision C-177/18 *Baldonedo Martín* is analysed

1 National Legislation

1.1 Posting of workers

On 16 January 2020, the draft amendments to the Labour Law implementing amendments to the posting of workers Directive 2018/957/EU entered the legislative process (submitted to Parliament) – the amendments were presented at the State Secretary meeting. The amendments have not yet been adopted for submission to the Cabinet of Ministers (and subsequently to Parliament). The State Secretary meeting decided to coordinate and consult with all ministries as well as the social partners – the Confederation of Trade Unions and the Employers' Confederation. Since the draft can still be amended by the institutions and social partners involved, a detailed analysis on the implementing measures of Directive 2018/957/EU will be presented in the following flash reports.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Compensation

CJEU, case C-177/18 - Baldonedo Martín, 22 January 2020

The CJEU's decision addresses issues related to two different types of compensation – severance pay (in case of legal termination of the employment relationship) and compensation for unfair dismissal (termination of the employment contract in situations of misuse of fixed-term contracts).

The Latvian situation in this regard is as follows:

Article 112 of the Labour Law provides for the right to severance pay in case the employment relationship is terminated by the employer on economic or organisational grounds. The provision as such does not distinguish between indefinite and fixed-term contracts. No relevant interpretation has been given by the Senate of the Supreme Court as to whether fixed-term employees are also entitled to the severance pay provided in Article 112 of the Labour Law. The only relevant interpretation provided by the Senate is that the aim of the severance pay is to stabilise the situation of a worker under the new circumstances that have arisen on account of the loss of employment (decision of the Senate of the Supreme Court (extended panel) (27 March 2014) in case No.SKC-1683/2014 (points 16, 19 and 20), not published). In light of this, it can be concluded that the expiration of a fixed-term contract does not create the unexpected situation as is the case when an indefinite contract is terminated, as emphasised by the CJEU in the present case (see paras.45 and 46).

There is also no right to compensation in case of unfair dismissal (due to misuse of fixed-term contracts) under Latvian law as the Senate has held that compensation for moral damage is to be awarded in discrimination cases only.

It follows that the decision in case C-177/18 has no implications for Latvian law.

4 Other relevant information

Nothing to report.

Liechtenstein

Summary

This Flash Report deals with two judgments of the Court of Justice of the European Union, namely CJEU case C-16/18 concerning the provision of services on board international trains and CJEU case C-168/18 concerning supplementary pension schemes in the event of employer insolvency.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

In case C-16/18, the CJEU (Grand Chamber) ruled as follows:

> *"Article 1(3)(a) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services must be interpreted as meaning that it does not cover the provision, under a contract concluded by an undertaking established in a Member State and an undertaking established in another Member State, which is contractually linked to a railway undertaking established in that same Member State, of on-board services, cleaning or food and drink services for passengers carried out by salaried employees of the first undertaking, or by workers hired out to it by an undertaking also established in the first Member State, on international trains crossing the second Member State, where those workers carry out a significant part of the work inherent in those services in the territory of the first Member State and where they begin or end their shifts there."*

With reference to the present case, Liechtenstein law contains provisions similar to those of Austrian law, which was the subject of the main proceedings before the CJEU. The Liechtenstein Act on Posting of Workers (*Gesetz über die Entsendung von Arbeitnehmern im Rahmen der grenzüberschreitenden Erbringung von Dienstleistungen, Entsendegesetz, EntsG*, LR 823.21), which serves, inter alia, to transpose Directive 96/71/EC, provides as follows:

The Act on Posting of Workers applies to undertakings established abroad that post employees to the Principality of Liechtenstein within the scope of cross-border services, provided that an employment relationship exists between the posting undertaking and the employee for the duration of the posting (Article 3(1) of the Act on Posting of Workers).

Cases in which the work is performed within the scope of a temporary employment relationship where the place of employment is the Principality of Liechtenstein are also covered (Article 3(1)(c) of the Act on Posting of Workers).

The posting employer must grant the employees posted to Liechtenstein at least those terms and conditions of employment laid down in the relevant acts, ordinances, collective agreements and standard employment contracts, and which concern specific areas, inter alia, remuneration, including overtime rates and reimbursement of expenses (Article 4(1) of the Act on Posting of Workers).

The posting employer must provide certain information to the Office of National Economy, for example, information on the place where the activity is carried out, on the planned start and end of the posting, and information on the type of activity to be carried out in Liechtenstein. The activity may start as soon as the notification is made, if the posting occurs from a Member State of the European Economic Area (Articles 6a(1) and (2) of the Act on Posting of Workers).

For the duration of the posting, the posting employer shall make the following documents available to the supervisory bodies or to keep them available at the place of work: documents to establish the identity of the posted employees; the employment contract or other forms of information in German; any agreements on the posting and expense allowances in German; and a certificate issued by the competent social security institution stating that the posted worker is covered by social security (Article 6b(1) of the Act on Posting of Workers).

Article 9 of the Act on Posting of Workers contains penal provisions for cases in which the provisions of the Act on the Posting of Workers have been violated. The highest possible penalty is a fine of CHF 50 000 per affected employee. In addition, the employer may be charged inspection costs of up to 50 per cent of the fine imposed.

It is not appropriate in the present context to comment on the abovementioned provisions of Liechtenstein law from the perspective of European law, since the CJEU has ruled in the present case that the services in question (on-board services, cleaning or catering services for rail passengers) is not covered by Directive 96/71/EC.

It should also be noted that the decision is not relevant for Liechtenstein in so far as Liechtenstein, as a relatively small country, does not operate its own railway undertaking. The only railway line running through Liechtenstein is the line between Feldkirch (Austria) and Buchs (Switzerland), which is owned and operated by the Austrian Federal Railways (Österreichische Bundesbahnen, ÖBB).

3.2 Employer insolvency and company pensions

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 December 2019

In case C-168/18, the CJEU (Fifth Chamber) ruled as follows:

> *1. Article 8 of Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer must be interpreted as applying to a situation in which an employer, which provides occupational old-age pension benefits through an inter-occupational institution, cannot, on account of its insolvency, offset losses resulting from a reduction in the amount of those benefits paid by the inter-occupational institution, a reduction which was authorised by the State supervisory authority for financial services which is the prudential regulator for that institution.*
>
> *2. Article 8 of Directive 2008/94 must be interpreted as meaning that a reduction in the amount of occupational old-age pension benefits paid to a former employee, on account of the insolvency of his or her former employer, is regarded as being manifestly disproportionate, even though the former employee receives at least half of the amount of the benefits arising from his or her acquired rights, where, as a result of the reduction, the former employee is*

already living, or would have to live, below the at-risk-of-poverty threshold determined by Eurostat for the Member State concerned.

3. Article 8 of Directive 2008/94, which lays down an obligation to provide a minimum degree of protection, is capable of having direct effect, so that it may be relied upon against an institution governed by private law that is designated by the State as the institution which guarantees occupational pensions against the risk of an employer's insolvency where, in the light of the task with which it is vested and the circumstances in which it performs the task, that institution can be treated as comparable to the State, provided that the task of providing a guarantee with which the institution is vested actually covers the type of old-age benefits in respect of which the minimum degree of protection provided for in Article 8 is sought.

Liechtenstein law on occupational pension schemes is essentially based on the following legal sources:

- Act on Occupational Pension Schemes (Gesetz über die betriebliche Personalvorsorge, BPVG, LR 831.40);
- Ordinance on Occupational Pension Schemes (Verordnung zum Gesetz über die betriebliche Personalvorsorge, BPVV, LR 831.401);
- Ordinance on the Obligations of the Staff Welfare Institution (Verordnung betreffend die Pflichten der Personalfürsorgeeinrichtung, LR 831.401.11);
- Act on the Supervision of Institutions for Occupational Retirement Provision (Gesetz betreffend die Aufsicht über Einrichtungen der betrieblichen Altersversorgung, Pensionsfondsgesetz, PFG, LR 831.42);
- Ordinance on the Supervision of Institutions for Occupational Retirement Provision (Verordnung betreffend die Aufsicht über Einrichtungen der betrieblichen Altersversorgung, Pensionsfondsverordnung, PFV, LR 831.421);
- Art. 37–39 of the Civil Code (Allgemeines Bürgerliches Gesetzbuch, ABGB, LR 210).

The request for a preliminary ruling by the CJEU was made in the proceedings between Pensions-Sicherungs-Verein VVaG (an institution responsible for guaranteeing occupational pensions, "PSV") and a former employee, concerning the offset of reductions in the amount of benefits paid by a pension fund. In an action brought before the court with jurisdiction in first instance, the (former) employee submitted that, on account of the insolvency proceedings involving his former employer, PSV was required to make good the shortfall arising from the reductions in the benefits paid by the "Pensionskasse". PSV asserted that it was not under an obligation to assume responsibility for meeting the benefits paid by a pension fund if the employer was unable, owing to its insolvency, to discharge its statutory obligation to guarantee payment of the pension benefits (C-168/18 No. 21).

According to Art. 22e of the Liechtenstein Act on Occupational Pension Schemes, the government shall establish or designate a foundation to be administered on a parity basis, which shall maintain a Guarantee Fund ("Sicherheitsfonds", an institution responsible for guaranteeing occupational pensions). The Guarantee Fund ensures, in particular, the statutory and regulatory benefits of insolvent pension funds (Article 22f(1a) of the Liechtenstein Act on Occupational Pension Schemes). The guarantee is subject to a certain limitation (Article 22f(3) of the Liechtenstein Act on Occupational Pension Schemes). The office of the Guarantee Fund examines whether the legal requirements for payments have been met and, at the request of the pension fund, records its decision in a ruling (Article 22f(5) of the Liechtenstein Act on Occupational Pension Schemes). Appeals against rulings of the Guarantee Fund may be lodged with the FMA Appeals Commission, and appeals against rulings of the FMA Appeals

Commission may be lodged with the Administrative Court (Article 23b of the Liechtenstein Act on Occupational Pension Schemes).

Payments from the Guarantee Fund must be applied for by the insolvent pension fund (Article 57(1) of the Ordinance on Occupational Pension Schemes). In this respect, Liechtenstein law differs fundamentally from German law in the main proceedings before the CJEU (cf C-168/18 No. 9 according to which pensioners and their survivors whose entitlements arising from a direct pension guarantee from the employer are not fulfilled because insolvency proceedings have been opened regarding the assets or estate of the employer have a claim against the insolvency insurance institution).

For this reason, a case such as that reviewed in C-168/18 cannot arise in Liechtenstein. However, the judgment may be of indirect significance if the Guarantee Fund has to assess what benefits it has to provide. In one specific individual case, the principles laid down in the judgment could have implications for the above-mentioned limitation of the benefits to be granted by the Guarantee Fund.

4 Other relevant information

Nothing to report.

Lithuania

Summary

The entry into force of legal amendments eliminates the information and consultation rights of works councils in case insolvency proceedings are initiated.

1 National Legislation

1.1 Collective redundancies in case of insolvency proceedings

On 01 January 2020, the amendments of 13 June 2019 of the Labour Code (Law No. XIII-2224, Registry of Legal Acts, 2019-10338) came into force, which eliminate the information and consultation rights of employee representatives and the notification duty of the employer in case of initiation of insolvency procedures. In accordance with those amendments, the duty to inform and consult the works council with a view to reaching an agreement on mitigation of the consequences of dismissal and the duty to notify the State Employment Office (*Uzimtumo tarnyba)* cease to exist with the commencement of insolvency proceedings (entry into force of the court's ruling at the beginning of the insolvency procedure or the decision of the meeting of the creditors on an out-of-court insolvency procedure). It seems that this novelty, which came into force together with the new Law on Insolvency of Legal Persons (Law No. XIII-2221, Registry of Legal Acts, 2020-10324) means that the legislation of Lithuania (Article 63 (6) of the Labour Code) violates Directive 98/59/EC, as interpreted by the CJEU in joint cases *Claes*, C-235/10, C-239-10.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

The ruling sets the principle of non-application of the rules on the posting of workers to situations of transnational provision of services on international train connections if the workers on board carry out a significant part of that work in the territory of the home Member State and where they start or end their shifts.

The CJEU's ruling provides an interpretation of the rules on the scope of application with regard to the provision of transnational services. There were no similar situations or cases or indices to consider that the situation would be interpreted differently in Lithuania. Although the transportation of passengers by rail could be considered an important issue (in particular, with regard to trains from Moscow to Kaliningrad which cross the territory of Lithuania), the practical importance of the ruling is rather low because of the low remuneration and minimum labour standards in Lithuania.

3.2 Employer insolvency and company pensions

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 December 2019

The ruling sets the principle of responsibility of the inter-occupational pension fund to guarantee a certain level of income from the old-age pension scheme for the former

employee of the insolvent employer in case of the reduction of the benefit due to the insolvency of the employer.

The legal problem the ruling dealt with has no implications for Lithuanian legislation or jurisprudence. Private occupational pensions exist in Lithuania (Law on Occupational Pensions, 04 June 2006, No. X-745), but age-related (supplementary) payments from the previous employer do not exist in Lithuania. The ruling is of low practical importance for Lithuania, also because of the very low coverage of occupational old-age pension schemes.

4 Other relevant information

Nothing to report.

Luxembourg

Summary

(I) A bill implementing Directive (EU) 2018/957 on the posting of workers has been brought before Parliament.

(II) Four bills ratifying ILO Conventions have been deposited.

1 National Legislation

1.1 Implementation of Directive (EU) 2018/957

A bill has been deposited to implement Directive 2018/957 amending the Directive on Posting of Workers.

Remuneration and expenditures

As regards the definition of remuneration, the law simply refers to the general definition of remuneration in Article L. 221-1 of the Labour Code. It covers global reimbursement, including all advantages and supplements such as bonuses, attendance fees, reductions, premiums, free accommodation and other charges.

The rules on expenditures will be implemented literally.

Agency work

Concerning agency work, the requirements of Directive (Article I 1) c) ii) will be implemented in Articles L. 141-1 (2) al. 3, 4 and L. 142-2 (4) of the Labour Code; the wording is close to the Directive's text.

The user undertaking must inform the temporary work agency about the posting of the temporary agency worker, as well as the applicable employment conditions, especially with regard to remuneration.

More specifically, the bill states that the user undertaking's collective agreements will apply to posted temporary agency workers, whether they are generally applicable or not (L. 141-1 (1) al. 2). To justify this specific exception, the parliamentary documents refer to the Commission's Practical Guide on Posting of Workers (question 2.9.) and to the Directive on Temporary Agency Work.

Fundamental rights

The new text on safeguarding fundamental rights such as the freedom to strike and to conclude collective agreements (Art. I 1 (b) pt. 1a of the Directive) has for the most part been literally implemented (Art. L. 141-1 (1) al. 4). This type of general and unclear statement is rather uncommon in Luxembourg. In the reporter's view, it is not entirely clear under which legislation a posted worker has the right to strike.

Duration of posting

In line with the Directive, it will be provided that if the posting exceeds 12 months, all applicable terms and conditions of employment must be applied, with the exception of the rules on the conclusion and termination of the employment contract and the supplementary retirement pension schemes (L. 141-2). The rules in case an undertaking replaces a posted worker with another posted worker, and the definition of the terms "the same task at the same place" have been literally implemented.

The labour inspectorate will be responsible for granting extensions up to 18 months; the application form must be submitted at least two months before the initial 12-month period expires.

Website

When the enforcement Directive was implemented, the legislator considered that it was not necessary to explicitly establish a single official national website in formal law. This has changed, as the bill states that the labour inspectorate will be responsible for publishing all required information on its website (Article L. 141-3bis; Art. I 2. A) al. 4 of the Directive).

The bill also states that the circumstance that the website is incomplete or erroneous must be taken into account when determining penalties in order to ensure proportionality (L. 143-2 (1) al. 4).

Workers away from home; conditions of accommodation

As required by the Directive, the condition of workers' accommodation and the allowances or reimbursement of expenditure to cover travel, board and lodging expenses will be guaranteed to all posted workers.

However, due to its small size, Luxembourg has no legal provisions on accommodations of workers away from their homes, which will thus be implemented by the new law; although they are applicable to all employees, they will, in practice, probably only concern posted workers.

The Labour Code will be supplemented by a new title on the conditions of workers' accommodation (Article L. 291-1ff). Any flat or room rented or provided to the employee must meet a set of rules on salubrity, hygiene, security and habitability to be defined by a new law and a decree, which are in the course of being adopted. The costs must be fully covered by the employer. It is prohibited to accommodate employees in industrial, artisanal or commercial premises.

The employer must keep a special register indicating the worker's name, the location of the accommodation, the costs, as well as the start and end date of workers who are away from their regular place of work (L. 291-2). This register must be countersigned by the employee and can be accessed at all times by the labour inspectorate.

In addition to an administrative fine, a criminal sanction is incurred in case the employer does not comply with the rules mentioned above. The sanction includes a fine between EUR 251 to EUR 25 000 and /or an imprisonment of up to 6 months.

Subcontracting liability

The responsibilities of clients (*donneur d'ordre/maître d'ouvrage*) for their subcontractors will be extended on two points:

• The client is not only required to check whether the subcontractor has registered the posted workers, but if the subcontractor failed to do so, the client will be required to submit the necessary information to the electronic platform three days before the posting commences (L. 142-2 (3)).

• Inspired by an existing procedure that was introduced when the Enforcement Directive was implemented (Article L. 281-1), a specific liability in subcontracting situations was introduced for accommodation-related issues. Clients can be contacted by the labour inspectorate if the workers are not appropriately housed, and must enjoin the sub-contractor to comply with the legislation. In the reporter's opinion, this procedure may lack effectiveness, as the client has a purely formal obligation to channel the inspectorate's injunction to the subcontractor.

In both cases, physical persons contracting for private purposes are exempt.

Declaration formalities

As regards the various amendments mentioned above, the information on the posted worker that must be submitted to the electronic platform (*e-detachement*) has been

expanded to enable the labour inspectorate to monitor the application of the law. This additional information must be provided:

- The type of services provided;
- The identification of the client (*donneur d'ordre, maître d'ouvrage)* or the subcontractor;
- The place of accommodation;
- The way expenditures (travel, housing and/or board) are covered.

Penalties

The penalties remain the same (administrative sanction between EUR 1 000 to EUR 5 000 per posted worker). However, the scope is extended to the conditions of accommodation, the obligation to keep a register and when a user undertaking does not meet its obligation to communicate the required information to the temporary work agency.

Reference: Projet de loi n° 7516 portant 1. transposition de la directive (UE) 2018/957 du Parlement européen et du Conseil du 28 juin 2018 modifiant la directive 96/71/CE concernant le détachement de travailleurs effectué dans le cadre d'une prestation de services; 2. 2. modification du Code du travail.

1.2 Ratification of ILO Instruments

Four bills have been deposited to ratify three ILO Conventions and one ILO Protocol.

1.2.1 ILO Convention No. C122

Bill No. 7517 has been deposited for ratification of ILO Convention No. 122 on Employment Policy, dating back to 1964. To explain this late ratification, the parliamentary documents only refer to the ILO Centenary Celebration. There will be no legislative changes, as the existing employment law is considered to be sufficient; the parliamentary documents also refer to the active role of the Job Administration (*ADEM – Administration pour le Développement de l'Emploi)* and to the Standing Committee on Labour and Employment (*Comité Permanent du Travail et de l'Emploi*).

Reference: Projet de loi n° 7517 portant approbation de la Convention n° 122 de l'Organisation internationale du Travail sur la politique de l'emploi, signée à Genève, le 9 juin 1964.

1.2.2 ILO Convention No. C144

Bill No. 7518 deals with ILO Convention No. 144 on Tripartite Consultation dating back to 1976. Again, the ILO Centenary Celebration is mentioned to explain the delayed ratification in 2020. No legislative change is projected, as the Tripartite Consultations are already in place in Luxembourg. The representative trade unions and employers' organisations are involved in matters concerning the activities of the International Labour Organisation.

Reference: Projet de loi portant approbation de la Convention n° 144 de l'Organisation internationale du Travail sur les consultations tripartites relatives aux normes internationales du travail, signée à Genève, le 21 juin 1976.

1.2.3 ILO Convention No. C187

Bill No. 7519 intends to ratify ILO Convention No. C187 on a Promotional Framework for Occupational Safety and Health Convention (2006). No legal changes are projected. According to the parliamentary documents, the legislator considers that the national legislation fulfils all requirements, especially Articles L. 311-1ff of the Labour Code (which are mostly a textual implementation of the European Framework Directive). Furthermore, the labour inspectorate (*Inspection du Travail et des Mines*) is considered a sufficient authority to monitor this legislation, and the Standing Committee on Labour

and Employment (*Comité Permanent du Travail et de l'Emploi)* is a suitable body for the periodical tripartite discussions required by Article 2 (3) of the Convention.

Reference: Projet de loi n° 7519 portant approbation de la Convention n° 187 de l'Organisation internationale du Travail sur le cadre promotionnel pour la sécurité et la santé au travail, signée à Genève, le 15 Juin 2006.

1.2.4 ILO Protocol No. 29

Bill No. 7521 concerns ILO Protocol of 2014 to the Forced Labour Convention (29). No changes will be made to the national legislation. The legislator considers that current legislation and practice complies with the Protocol's requirements. Specifically, an amendment of the Criminal Code (Law of 31 May 1999) already reinforced the implications of trafficking of human beings. A more recent amendment of the Code of Criminal Procedure (Law of 08 May 2009) reinforced victims' rights in general and qualified victims of trafficking as particularly vulnerable. Concerning national policy as well as information and awareness campaigns, the legislator considers that the National Plan of Action against Trafficking in Human Beings adopted in 2016 is sufficient (*plan d'action national contre la traite des êtres humains*).

Reference: Projet de loi n° 7521portant approbation du Protocole P029 de l'Organisation internationale du Travail relatif à la Convention sur le travail forcé, signé à Genève, le 11 Juin 2014.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workera

CJEU, case C-16/18 – Dobersberger, 19 December 2019

The definition of posting in Luxembourg does not differ from that in the European Directive, and there is nearly no case law on posting.

As regards the innovative part of this decision, i.e. the existence of a "sufficient connection" with the Member State (paragraph 13), there does not seem to be any administrative practice to which the CJEU's position could be applied. Nevertheless, this decision will likely raise some discussion in Luxembourg, because the posting of workers is a major issue in a country with high salaries, where no point of the territory is more than 30 kilometres away from a border with another Member State. As this decision is not limited to the transport sector, the question will be whether other types of work performed in Luxembourg can also be considered as being insufficiently connected to Luxembourg because other parts of the task are carried out in France, Germany or Belgium. It is to be expected that the labour inspectorate, in charge of monitoring the posting of workers and of imposing penalties, will adopt a restrictive approach.

3.2 Employer insolvency and company pensions

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 December 2019

As mentioned in paragraph 11 of the decision, on the basis of a bilateral agreement (*] Convention entre la République fédérale d'Allemagne et le Grand-Duché de Luxembourg relative à la coopération dans le cadre de l'assurance insolvabilité des régimes complémentaires d'assurance pension*), the German *Pensions-Sicherungs-Verein* is also

in charge of covering occupational pensions (*régimes de pension complémentaires*) in Luxembourg. The case is thus of interest for Luxembourg. Concerning answer 3 (to questions 3 and 4), the decision is fully transposable to Luxembourg, as it is the same insurance institution.

It seems that the first two points are of limited interest for Luxembourg, and there does not seem to be any similar case law that the courts have dealt with.

According to national legislation, the employer can opt for an internal scheme (*régime interne*) and an external scheme (*régime externe*). Only internal schemes are subject to insolvency insurance. The case of financial problems encountered by an inter-occupational institution could thus not arise. Furthermore, there is no possibility of reducing the amount of occupational old-age pension benefits.

4 Other relevant information

Nothing to report.

Malta

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

This ruling has no real implications for Malta, given that Malta has no international railway system (or indeed a local railway system).

3.2 Employer insolvency and company pensions

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 December 2019

The applicable law in Malta transposing Directive 2008/94/EC is the Insolvency Guarantee Fund Regulations, 2002, which define "occupational pension schemes" as follows:

> "*any scheme or arrangement which, forming part of a contract of employment, provides or is capable of providing, in relation to employees in any description of employment, benefits, in the form of pensions or otherwise, payable to or in respect of any such employees on the termination of their employment or on their death or retirement (Regulation 2)*".

In these cases, the Regulations state that the Guarantee Fund shall be utilised, at the Administration Board's discretion, to guarantee payment of valid claims for employees' outstanding wages and for contributions to be paid by the employer in respect of occupational pension schemes resulting from contracts of service, when the Administration Board is satisfied that the employer of an employee to whom these Regulations apply, has become insolvent (Regulation 6(1)).

The maximum amount paid out of the Fund to an employee shall not exceed a sum which is equivalent to 13 weeks' national minimum wage payable at the time of the termination of employment of such employee.

From the above provisions, it becomes clear that:

1. Regarding the first paragraph of the judgment, there seems to be no such provision under Maltese law. Consequently, arguably, there are no implications and this pronouncement could be transposed into Maltese law. One would have to see how it would work in practice in the Maltese financial and pension services concept.

2. Regarding the second paragraph, Maltese law has no guarantee against poverty in relation to the minimum payable to the employee. Consequently, given that the

employee can only be paid up to 13 weeks national minimum wage, it is clear that Maltese law has no consideration of whether there is a risk of poverty for the relative employee (in terms of the second paragraph of the CJEU in the above-mentioned judgment).

3. There is no question about the direct effect of the applicable provisions as stipulated above.

4 Other relevant information

Nothing to report.

Netherlands

Summary

Long awaited recommendations to the government on the future of the labour market and labour regulation have been issued.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Employer insolvency and company pensions

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 December 2019

The CJEU has ruled that Article 8 of Directive 2008/94 EC (Protection of employees in the event of insolvency) has direct effect and applies if the employer provides old-age pension through an inter-occupational institution and cannot offset losses of the reduction in the amount of benefits paid by the said institution due to the employer's insolvency. A reduction in the amount of occupational old-age benefits is regarded as manifestly disproportionate if, as a result of the reduction, the former employee is already living, or would have to live below the Eurostat at-risk-of-poverty threshold, even if the former employee receives at least half of the amount of the benefits arising from the acquired rights.

The CJEU ruling has no implications for national law. In the Netherlands, the protection of acquired old-age pension rights is laid down in the Pensions Act. Protection is mainly realised through the obligation to place a pension scheme with a pension provider and the obligation to pay premiums. Furthermore, the Unemployment Insurance Act contains a provision in case an employer cannot pay premiums due to insolvency. The assessment of the government, supported by academic literature, is that the system in place secures the essence of pension obligations in case of insolvency of the employer (see analysis of the State Secretary for Social Affairs and Employment on the Hogan case, CJEU 25 April 2013, C-398/11). The Bauer ruling is not likely to change that assessment. The Dutch state pension that all residents of the Netherlands are entitled to amounts to approximately EUR 15 000 per year and exceeds the Eurostat at-risk-of-poverty threshold. Any reduction in supplementary occupational pension benefits will not likely have the effect that the pensioner would have to live below that threshold.

No attention has been given to this ruling in academic literature, nor any public attention in media.

3.2 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

The CJEU has ruled that the Posting of Workers Directive does not apply to on-board services, cleaning catering services for passengers carried out on an international train running from Member State 1 (Hungary) to or through Member State 2 (Austria) by

workers hired by an establishment in Member State 1 (Hungary) and via subcontracts assigned to an undertaking Member State 2 (Austria) that is contractually linked to a railway undertaking in that same Member State 2.

No specific rules on the implementation of the Posted Workers Directive covering this situation and no case law about a similar situation regarding international trains and this type of services exists.

However, the Dutch Supreme Court lodged questions for a preliminary ruling on 21 December 2018 to the CJEU in case FNV / Van den Bosch (C-815/18). The case concerned drivers working in international road transport and the question what criteria or considerations should be used to determine what posted 'to the territory of a Member State' in Articles (1) and (3) of the Posting of Workers Directive means. The Court of Second Instance ruled that the Posting of Workers Directive does not apply to drivers posted from German and Hungarian subsidiaries of the Dutch transport company Van den Bosch to drive on international routes outside the Netherlands.

If the CJEU reasoned along the same lines as in the Dobersberger case, it seems that the decision of the Dutch Court of Second Instance will be upheld.

The ruling is not crucial, but unions and employers in international transport are keen to know what this ruling means for the aforementioned Van den Bosch case.

So far, only one case note has been published. The author states that the reasoning of the Advocate-General who analyses the logic of the Directive is more satisfying than the main argument of the CJEU that the performance of the work does not have a sufficient connection with the territory of the second Member State.

4 Other relevant information

4.1 Advisory report on regulation of work

On 23 January 2020, the *Committee Regulation of Work* presented its final report to the Minister of Social Affairs and Employment. The Minister established the Committee in November 2018 to advise the government on the future of the regulation of the labour market. The Committee was composed of economists and lawyers (labour law, social security law and tax law), mostly academics and included the author of this Flash Report. An English summary of the advice will be available shortly here.

The Committee presented 47 concrete proposals to thoroughly reform the current regulation on work, grouped around four themes:

1) External flexibility should be discouraged since the Dutch labour market has a very high rate of flex workers (fixed-term contracts, on-call contracts, temporary agency work, bogus self-employment) working in structural jobs. One of the proposals is to make flexible work more expensive (this has already been partly realised) and ensure that flexible contracts are only used for temporary positions. As a counterbalance, there should be more flexibility within employment contracts concluded for an indefinite period. It should be less complicated to amend the contract by both the employer and the employee. Furthermore, dismissal protection should be loosened and the obligations for employers who have concluded contracts of indefinite duration eased, mainly by reducing the period of continued payment of wages during illness, which currently amounts to up to two years.

2) The existing system of labour contracts should be simplified. The current regulation is complex and fragmented: there are many types of employment contracts, all governed by different rules. The Committee advocates the introduction of a system comprising three types of contracts: (i) an employment

contract (fixed-term or permanent), (ii) a temporary agency contract, and (iii) a contract for the provision of services in case of genuine self-employment/entrepreneurship. The classification of employees and self-employed persons should be clear and needs to be enforced. To establish a clear classification, the Committee advises aligning the definition of the employment agreement with the definition of employee as established by the CJEU in its case law on Art. 45 TFEU. The most far-reaching consequence is that in the assessment of the employment relationship, the parties' intention will no longer play the significant role it currently does. Furthermore, the misuse of triangular employment relations should be encountered and the enforceability of rights must be simplified.

3) Life-long learning and education should be safeguarded for every worker, self-employed or not. This should be done via an individual budget for every worker that increases if the worker has a lower initial education. Current public employment services should be reformed and be more proactive.

4) Labour should be taxed more equally than is currently the case. Taxation should not be dependent on the type of contract. All workers should have basic income insurance in case of incapacity for work (including self-employed persons). Together with the individual training budgets and the state old-age pension that is already in place creates a broad foundation (or basis) for all workers, regardless of their contract.

5) The Dutch employment policy of the Netherlands should entail higher benefits, but for a shorter period. More investments are necessary for those marginalised from the labour market.

The government has not yet issued an official response to the report yet, although the Prime Minister and the Minister of Social Affairs and Employment publicly support the analysis of the report and have followed the Committee's recommendation to further develop the proposals through a broad alliance including the social partners as well as other stakeholders.

The proposed reform touches upon employment policies, life-long learning and several specific directives such as Directives 1997/81/EG, 1999/70/EC and 2008/104/EG (non-exhaustive).

These recommendations have been long awaited. The social partners seemed divided over the concrete measures proposed, but are united on the analysis. It is now up to the government to proceed and the steps will become clearer once an official response has been issued.

4.2 Notification of posting of workers

As of 01 March 2020, employers abroad and relevant self-employed persons from the EEA and Switzerland who are temporarily posted in the Netherlands have a duty to notify the authorities. As of 01 February 2020, the notification website will be online and available in Dutch, German and English. Notifications can be made as of 01 February 2020.

Norway

Summary

New rules on whistleblowing have entered into force.

1 National Legislation

1.1 Whistleblowing

Effective 01 January 2020, new provisions on whistleblowing in Chapter 2A of the Working Environment Act came into force. One of the changes in force since 01 January 2020 is an expansion of the statutory objective to include the facilitation of a good free speech climate in the undertaking.

Another important change to the rules on whistleblowing is an expansion of the personal sphere to include persons who are not employees pursuant to sections 1-6 of the Working Environment Act.

As of 01 January 2020, the law defines the term "censurable conditions" and includes a list of examples of "censurable conditions".

The requirement of "warrantable" no longer applies as of 01 January 2020. The law now determines that an employee can always notify the supervisory authorities and other public authorities, with the presumption that the employee is acting in good faith in terms of content.

The changes also included an obligation on the employer to act and "within reasonable time" ensure an adequate examination of the notification. However, the law does not lay down any requirements as to what the employer specifically must do. This is within the employer's discretion in each situation.

The employer must also ensure that the whistleblower has a fully safe and secure working environment. If deemed necessary, the employer shall also provide measures that are suitable to prevent retaliation. A worker who has been subject to retaliation may claim compensation for financial damage on objective grounds, i.e. without regard to culpability on the part of the employer.

More information is available here.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

Article 1(3)(a) of Directive 96/71/EC has been transposed in section 1-7 of the Working Environment Act. The first paragraph of section 1-7 states that "a posted employee is an employee who for a limited period works in a country other than that with which the employment is normally associated".

C-16/18 will not necessitate any changes in Norwegian law, and Norwegian courts will in future cases interpret section 1-7 in line with the CJEU ruling.

3.2 Employer insolvency and company pensions

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 December 2019

Article 8 of Directive 2008/94/EC has been implemented through section 1 of the Act on State Guarantee for salary claims in bankruptcies. No amendments to Norwegian law will be necessary as a consequence of C-168/18.

4 Other relevant information

Nothing to report.

Poland

Summary

On 1 January 2020, the amount of the statutory minimum wage for work was increased. The draft aiming to repeal the ban to perform trade activities on Sundays was submitted. It seems that—taking into account the CJEU rulings in cases C-16/18 and C-168/18—there is no need to amend national regulations on the posting of workers and the protection of employee claims in case of employer insolvency

1 National Legislation

1.1 Minimum wage

On 01 January 2020, the Regulation of 10 September 2019 of the Council of Ministers on the amount of minimum wage for work and the amount of the minimum hourly rate in 2020 (Journal of Laws 2019, item 1778) took effect. The minimum wage amounts to PLN 2 600 for employees with an employment contract (around EUR 610), and PLN 17 per hour for employees with a civil law contract. This change implies a raise of the minimum wage by 15.6 per cent in comparison to 2019.

In recent years, the statutory minimum wage for work has been continuously increasing. The regulation that took effect on 01 January 2020 follow this trend.

The Ministry for Family, Labour and Social Policy has issued information on the changes to the minimum wage for work in 2020, which can be found here.

1.2 Ban to work on Sundays in commercial establishments

The Law of 10 January 2018 on limiting trade on Sundays, public holidays and some other days (consolidated text, Journal of Laws 2019, item 466) has gradually introduced limitations to carry out trade activities on Sundays. From 01 January 2020, the general ban on the prohibition to perform such activities on Sundays is in force (with some minor exceptions) (for in-depth analysis of this law, see Flash Report Poland, 1/2018, point 1.B, with further references).

The ban to carry out trade activities on Sundays continues to be a topic of public debate and the legislative process. On 8 January, the draft of the law on the amendment to the Labour Code and the repeal of the law on limiting trade on Sundays, public holidays and some other days, was submitted to the legislative process in the Sejm (the lower chamber of Parliament). It was submitted by the group of deputies from the Civic Platform (Platforma Obywatelska) political party on 12 December 2019.

The main idea behind the draft is twofold. Firstly, to repeal the law on limiting trade activities on Sundays, public holidays and some other days. Secondly, to modify the Labour Code provisions on work on Sundays. The aim is to make work in commercial establishments on Sundays admissible, and to ensure weekly rest periods for employees who work in shops and supermarkets.

Under the current regulations, the Labour Code only allows work on Sundays in specific situations (Article 151^{10} LC). Working in shops, supermarkets, etc. is not indicated. As far as work in commercial establishments is concerned, the Labour Code directly refers to the law on limiting trade on Sundays, public holidays and some other days (Article 151^{9a} LC).

According to the draft, the latter provision would be substantially amended. The proposed wording states that work in commercial establishments would remain

inadmissible on public holidays (§ 1). The abovementioned provision would also apply if a public holiday falls on a Sunday (§ 2). Work on Sundays would be admissible in commercial establishments to perform work that is necessary because of its usefulness for society and people's daily needs. In fact, this amendment would restore the legal situation that existed prior to 01 March 2018, i.e. the day the law on limiting trade activities in commercial establishments took effect.

Another modification would be the change in the employer's duty to ensure one Sunday off. Under the current regulations (Article 151^{12} LC), an employee who performs work on Sundays must have a Sunday off at least once every four weeks. According to the draft, such an employee would have a Sunday off at least once every two weeks.

The main idea behind the draft is to repeal the ban on work on Sundays in commercial establishments. The previous situation, i.e. the nearly unlimited possibility of work on Sundays in commercial establishments, would be restored. Employees who perform work on Sundays would be entitled to a Sunday off every two weeks instead of every four weeks.

In the reporter's view, the draft will not pass. The Civic Platform is in opposition, and does not have sufficient support to enforce any changes. At the same time, the current government (formed by the Law and Justice political party, Prawo I Sprawiedliwość) considers the ban to work in shops on Sundays to be its major success. It seems highly improbable that changes in this regard will be supported by trade unions and be accepted by the ruling political party.

Sources:

Information on the legislative process is available here.

The draft and its substantiation is available here.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

In Poland, Directives 96/71 and 2014/67 have been transposed by the Law of 10 June 2016 on the posting of workers within the scope of the provision of services (consolidated text Journal of Laws 2018, item 2206).

Article 24 of the Law imposes on entrepreneurs who post workers to Poland the duty to indicate a contact person, as well as to inform the State Labour Inspectorate about the details of the activities to be performed. Article 25 imposes the duty to keep records and documentation that are connected to the posting.

The problem analysed in case C-16/18 has not been reported in Poland.

The ruling does not seem to have any implications for Polish regulations on the concept of "posted worker". It seems that there is no reason to modify the national provisions on the posting of workers.

3.2 Employer insolvency and company pensions

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 December 2019

The judgment refers to a situation in which an employer, who provided occupational old-age pension benefits through an inter-occupational institution, could not, on account of insolvency, offset losses resulting from a reduction in the benefits paid by the inter-occupational institution, a reduction that was authorised by the State supervisory authority for financial services, which is the prudential regulator for that institution.

Under Polish regulations, it seems that such a situation is very unlikely to occur. Supplementary old-age pension schemes are not widespread, although a legal basis to establish them does exist.

In this context, the Law of 20 April 2004 on employee old-age schemes (consolidated text: Journal of Laws 2019, item 850) should be mentioned. It introduced the possibility to establish an additional occupational old-age scheme on the basis of the agreement between the employer and employee representative. The parties can choose the relevant organisational form. Subsequently, the supplementary old-age scheme would be managed by a specialised financial institution.

Under Art. 40 item 2 of the Law, an employer's bankruptcy constitutes one of the situations where the occupational old-age scheme can be liquidated. In such a situation, according to Art. 41 item 5 of the Law, an employee should indicate another old-age scheme to which the financial assets would be transferred by the institution that operates the scheme, or the assets will be paid back directly to the employee.

Directive 2008/94/EC on the protection of employees in the event of insolvency of their employer has been transposed by the Law of 13 July 2006 on the protection of employee claims in case of employer insolvency (consolidated text, Journal of Laws 2020, item 7). This legal act does not refer to occupational old-age schemes at all.

Article 8 of the Directive has not been directly transposed into Polish law. It seems, however, that the protection introduced by the law on employee old-age schemes, as provided by other regulations, is sufficient.

It should be emphasised, however, that additional old-age schemes organised by the employer are not popular in Poland. The problem analysed by the CJEU in the present ruling has not been reported in Poland.

4 Other relevant information

Nothing to report.

Portugal

Summary

(I) Ordinance No. 27/2020, of 31 January 2020, approves the annual update of the Social Support Index

(II) Ordinance No. 28/2020, of 31 January 2020, approves the annual update of pensions and other social benefits

(III) Ordinance No. 30/2020, of 31 January 2020, establishes the standard age of access to old-age pension in 2021

(IV) An analysis of the recent CJEU's rulings issued in case C-16/18 on the posting of workers and in case C-168/18 on employer insolvency is provided

1 National Legislation

1.1 Annual update of the Social Support Index

Ordinance No. 27/2020, of 31 January 2020, defines the annual update of the Social Support Index ("IAS"), which is a reference value used for the determination and calculation of contributions, pensions and other social benefits provided by the social security system.

According to this Ordinance, the IAS amount for 2020 corresponds to EUR 438.81.

1.2 Annual update of pensions and other social benefits

Ordinance No. 28/2020, of 31 January 2020, approves the annual update for 2020 concerning *(i)* pensions and other social benefits provided by the social security system, *(ii)* the convergent social protection pensions paid by *Caixa Geral de Aposentações,* and *(iii)* pensions for workers with a permanent incapacity for work and death due to occupational disease.

1.3 Normal age of access to old-age pension in 2021

Ordinance No. 30/2020, of 31 January 2020, establishes that the standard age for access to the regular retirement pension of the Portuguese social security system for 2021 is 66 years and 6 months.

This update was published in compliance with Decree Law No. 187/2007 of 10 October, which stipulates that the regular age for access to retirement pensions from the social security system varies in accordance with the average life expectancy of 65 years old, between the second and third year prior to the start of pension.

This Ordinance updates the factor to be applied to the amount of old-age pension to 0.8480.

These rules are considered effective as of 01 January 2020.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

Case C-16/18 concerns the interpretation of Articles 56 and 57 of the Treaty on the Functioning of the European Union (TFEU) and of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996, on the posting of workers in the framework of the provision of services.

The CJEU analysed whether Article 1 (3) of Directive 96/71/EC must be interpreted as meaning that it covers the provision under a contract concluded between an undertaking established in a Member State and an undertaking established in another Member State, which is contractually linked to a railway undertaking established in that same Member State, of on-board services, cleaning or catering services for passengers carried out by salaried employees of the first undertaking, or by workers hired out to it by an undertaking also established in the first Member State, on international trains crossing the second Member State, where those workers perform a significant part of the work inherent in those services in the territory of the first Member State, and where they start or end their shifts there.

According to the CJEU, services such as on-board services, cleaning services or catering services on trains fall within the scope of Articles 56 to 62 of TFEU, with the exception of Article 58 (1) TFEU, and may be covered by Directive 96/71/EC.

Pursuant to Article 1 (3) of Directive 96/71/EC, this Directive applies to a situation in which an undertaking established in a Member State posts, within the scope of the transnational provision of services, workers on its account and under its direction to the territory of another Member State, under a contract concluded between the undertaking posting the workers and the party for whom the services are intended, operating in the latter Member State, provided that an employment relationship exists between that undertaking and the employee during the posting period.

According to the CJEU, a worker cannot, in the light of Directive 96/71/EC, be considered as having been posted to the territory of a Member State if the performance of his/her work does not have a sufficient connection with that territory. According to Article 3 (2) of Directive 96/71/EC, read in light of recital 15, in case of a very limited provision of services in the territory to which the workers concerned are posted, the provisions of the Directive on minimum rates of pay and minimum paid annual leave are not applicable.

In case C-16/18, the CJEU ruled that the workers—who carried out a significant part of their work in the Member State of establishment of the undertaking assigning them to provide services on international trains and who start or end their shifts in that Member State—do not have a sufficient connection with the territory of the Member State crossed by those trains are to be considered "posted workers" for the purposes of Directive 96/71/EC. Therefore, Article 1 (3) of this Directive does not apply to the situation described above.

Directive 96/71/EC has been transposed into the Portuguese legal framework through the regulations in Articles 6 to 8 of the Portuguese Labour Code, approved by Law No. 7/2009 of 12 February 2009, as subsequently amended.

The interpretation resulting from this CJEU judgment may be relevant for the interpretation of cases in which a worker is considered to have been posted to or from Portugal under the terms and for the purposes of the above-mentioned provisions of Portuguese law.

3.2 Employer insolvency and company pensions

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 December 2019

Case C-168/18 concerned the interpretation of Article 8 of Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer, which states that *"Member States shall ensure that the necessary measures are taken to protect the interests of employees and of persons having already left the employer's undertaking or business at the date of the onset of the employer's insolvency in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary occupational or inter-occupational pension schemes outside the national statutory social security schemes".*

According to the CJEU ruling, this provision of Directive 2008/94/EC must be interpreted in the following terms:

(i) It applies to a situation in which an employer that provides occupational old-age pension benefits through an inter-occupational institution, cannot, on account of its insolvency, offset losses resulting from a reduction in the amount of those benefits paid by the inter-occupational institution, a reduction which was authorised by the State supervisory authority for financial services, which is the prudential regulator for that institution;

(ii) This means that the reduction in the amount of occupational old-age pension benefits paid to a former employee, on account of the insolvency of his or her former employer, is regarded as being manifestly disproportionate, even though the former employee receives at least half of the amount of the benefits arising from his or her acquired rights, where, as a result of the reduction, the former employee is already living, or would have to live, below the at-risk-of-poverty threshold determined by Eurostat for the Member State concerned;

(iii) The referred Article 8 of Directive 2008/94/EC, which lays down an obligation to provide a minimum degree of protection, may have direct effect, so that it may be relied upon against an institution governed by private law that is designated by the State as the institution that guarantees occupational pensions against the risk of an employer's insolvency where, in the light of the task with which it is vested and the circumstances in which it performs the task, that institution can be treated as comparable to the State, provided that the task of providing a guarantee with which the institution is vested actually covers the type of old-age benefits in respect of which the minimum degree of protection provided for in Article 8 is sought.

This ruling of the CJEU should be taken into account to determine the scope of protection granted to the employee in case of insolvency of the employer, namely in the case that such employer provided complementary pension schemes (outside the Portuguese social security system) to its employees.

4 Other relevant information

4.1 Portugal State Budget Proposal for 2020

The State Budget Proposal for 2020 (Draft Law no. 5/XIV) is still under discussion in the Portuguese Parliament.

Romania

Summary

(I) Female teaching staff may opt to continue the employment contract until the age of 65 (retirement age for men)

(II) Recent CJEU rulings C-16/18 and C-168/18 on the posting of workers and employer insolvency will presumably have implications for future Romanian jurisprudence

1 National Legislation

1.1 Termination of employment contracts

The Labour Code was recently amended by Government Emergency Ordinance No. 96/2018 on the extension of certain terms, as well as on the modification and completion of certain normative acts, published in the Official Gazette No. 963 of 14 November 2018, approved by Law No. 93/2019, published in the Official Gazette No. 354 of 8 May 2019 (see also FR No. 11/2018 and 5/2019). On that occasion, women were given the option to continue the employment contract, even after reaching the standard age for retirement and the minimum contribution period, until the age of 65 (retirement age for men).

To extend these rules to the teaching staff as well, Government Emergency Ordinance No. 3/2020, published in the Official Gazette No. 36 of 20 January 2020, amended National Education Law No. 1/2011. The aim of this new piece of legislation is to implement the Constitutional Court's Decision No. 387/2018 on the right of women to continue working after reaching retirement age under the same conditions as male teaching staff.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

In case C-16/18, the Court of Justice of the European Union ruled that Article 1(3)(a) of Directive 96/71/EC is not applicable in the case of workers providing on-board services on international trains crossing another Member State, where those workers carry out a significant part of the work inherent in those services in the territory of the initial Member State and where they start or end their shifts there.

The specificity of the case is that there is no country of destination of the service, in the sense that the country of origin and destination of the service is the same.

In Romania, the national law transposing Directive 96/71/EC and Directive No. 2014/67/EU is Law No. 16/2017 on the posting of workers within the framework of the provision of transnational services (published in the Official Gazette of Romania No. 196 of 21 March 2017). The only provision in this law regarding workers in international transport operations is contained in Art. 9. It stipulates that for the staff of employers established in the territory of Romania, who carry out international transport operations,

being posted to another Member State or to the territory of the Swiss Confederation to work for a limited period of time, and who do not fall under the posting of workers conditions, the provisions on allowances are provided in the Labour Code, including payment of transport and accommodation expenses, as well as subsistence allowance.

Romanian case law has not yet dealt with a case similar to that analysed in C 16-18. However, it can be assumed that the Romanian courts will follow the same reasoning as the Court of Justice of the European Union when interpreting the scope of Article 1(3) of Directive 96/71/EC.

3.2 Employer insolvency and company pensions

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 December 2019

Case C 168/18 concerned the rights of workers who benefited from an occupational pension scheme in case of employer insolvency and the interpretation of Article 8 of Directive 2008/94/EC on the protection of workers with regard to their entitlement to old-age benefits under supplementary occupational or inter-occupational pension schemes outside the national statutory social security scheme.

Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer has been transposed into national law by Law No. 200/2006 on the establishment and use of the Guarantee Fund for the payment of salary claims, with subsequent amendments and supplements (published in the Official Gazette of Romania No. 532 of 20 June 2006).

In Romania, to date, no occupational pension system has been offered that is organised directly by an employer for employees on the basis of their employment relationship. An optional pension system, regulated by Law No. 204/2006 on optional pensions, as subsequently amended (published in the Official Gazette of Romania No. 470 of 31 May 2006) does, however, exist. Supplementary social security schemes at enterprise level are rare, hence no relevant case law on the effects of employer insolvency or the extent to which the employees' pension entitlements are affected exists in the context of Article 8 of the Directive.

In January 2020, Law No. 1/2020 on occupational pensions (published in the Official Gazette of Romania No. 10 of 08 January 2020) transposed the provisions of Directive (EU) 2016/2341 into law. The law will be followed by regulations of the Financial Supervisory Authority. The entry into force of this new law may give relevance to the decision of the Court of Justice of the European Union in case C-168/18 (which reaffirmed the line of interpretation previously conferred in case C-17/17 Hampshire).

4 Other relevant information

Nothing to report.

Slovakia

Summary

(I) No new legal acts have been adopted

(II) CJEU cases C-16/18 and C-168/18 are analysed

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

The issue of posting of workers within the framework of the provision of services is regulated in the Slovak Republic by the Labour Code, as amended (Act No. 311/2001 Coll. - Collection of Laws) and Act No. 351/2015 Coll. on cross-border cooperation in the posting of employees to perform work in the provision of services and on amendments to certain acts, as amended. Act No. 351/2015 Coll. transposed Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and the regulation (EU) No. 1024/2012 on Administrative Cooperation through the Internal Market Information System ('the IMI Regulation') into the legal order of the Slovak Republic.

The Labour Code regulates the posting of employees in Article 5 (paragraphs 1-15). According to Article 5 paragraph 6 letter b/ of the Labour Code, a posted employee is a domestic employee, who over a certain period performs work in another Member State of the European Union (provision of services), while normally working in the Slovak Republic.

According to Article 5 paragraph 12 of the Labour Code, a domestic employer may post a domestic employee to perform work, i.e. provide services from the territory of the Slovak Republic to the territory of another Member State of the European Union on the basis of a written agreement. The agreement referred to in the first sentence shall in particular include:

a) the date of the start and end of the posting period,

b) the type of work during posting,

c) place of work during posting,

d) wage conditions during posting.

The Labour Code does not define type of work in more detail.

According to Article 3 paragraph 1 of Act No. 351/2015 Coll. on cross-border cooperation in the posting of employees to perform work (i.e. provide services) an overall assessment of the facts must be carried out to determine compliance with the posting

rules, in particular, the facts referred to in paragraphs 2 and 3. These facts cannot be assessed separately, but in the given context, having regard to the specificities of the situation under consideration.

However, even the facts set out in Section 3 of Act No. 351/2015 Coll. do not define type of work in more detail.

To avoid the problems that arose in Austria, it would probably be helpful to amend the regulation in the Labour Code within the meaning of the judgment.

This problem is also not addressed in Act No. 307/2019 Coll. Which transposes Directive (EU) 2018/957 of the European Parliament and the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services into the legal order of the Slovak Republic. This Act, which has been in force since 30 July 2020, and amends the Labour Code and Act No. 351/2015 Coll.

3.2 Employer insolvency and company pensions

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 December 2019

In the Slovak Republic, this is the case in two branches of law - labour law and social security law.

The Labour Code initially regulated employer insolvency and payment of employees' claims in the event of employer insolvency.

In 2003, the provisions of the Labour Code on employer insolvency and payment of employees' entitlements associated with employment in the event of the employer's insolvency were incorporated into Act No. 461/2003 Coll. on social insurance.

As regards the practical requirements and keeping employees and employers aware of their rights and obligations in the event of the employer's insolvency, two provisions on insolvency were added to the Labour Code by Act No. 348/2007 Coll. (Articles 21 and 22).

According to Article 21 of the Labour Code, if the employer becomes insolvent and cannot meet employees' claims resulting from the in labour law relationship, these claims shall be paid from the guarantee insurance under a special regulation.

The new provision of Article 22 of the Labour Code defines the obligation of information of both the employer and the employee.

According to Article 22 paragraph 1, the employer, the preliminary bankruptcy trustee or the bankruptcy trustee are required to inform the employee representatives in writing, and if there are no employee representatives, to inform the employees directly about the insolvency within ten days of its occurrence.

The employee is required to provide the employer, the preliminary bankruptcy trustee or the bankruptcy trustee with all the necessary information associated with the verification of the claims arising from the labour law relationship pursuant to a special regulation (Article 22 paragraph 2 of the LC).

This special regulation is Act No. 461/2003 Coll. on social insurance, which regulates the "guarantee insurance".

This insurance insures employees in case of employer insolvency. Employees whose employer has become insolvent and as a result cannot meet employees' entitlements. The applicant may claim guarantee insurance to the fullest extent for a period of three months for the last 18 months of his/her employment preceding the commencement of insolvency, or from the date of termination of his/her employment relationship following the employer's insolvency.

The guarantee insurance is a benefit paid from the basic guarantee insurance fund if the statutory conditions have been met. It serves to pay claims that result from the employment relationship following the employer's insolvency. According to Article 102 paragraph 1 of Act No. 461/2003 Coll. on social insurance, an employee (of an employer under Article 18) shall be entitled to a guarantee insurance if his or her employer becomes insolvent and cannot cover the employee's claims, which are:

a) entitlement to wages and reimbursement for standby duty,

b) entitlement to income for a member of a cooperative resulting from his/her employment relationship with the cooperative,

c) entitlement to remuneration agreed in the agreement on work performed outside the employment relationship,

d) entitlement to wage replacement for public holidays on which the employee had to work,

e) entitlement to wage replacement for leave that was accrued during the calendar year, in which the employer's insolvency commenced, as well as for the preceding calendar year,

f) entitlement to severance payment, which is due to an employee at the time of termination of his/her employment relationship,

g) entitlement to wage compensation for immediate termination of the employment relationship,

h) entitlement to wage compensation for invalid termination of the employment relationship,

i) entitlements to travel, moving and other expenses incurred in the pursuit of the employee's work duties,

j) entitlement to compensation of material damage related to accidents at work or occupational disease,

k) entitlement to wage compensation during an employee's temporary incapacity for work,

l) court costs associated with claims raised resulting from the employee's employment relationship, including the costs of legal representation.

These provisions do not address pension insurance at all.

The system of social security in the Slovak Republic on old-age pension insurance is based on three pillars representing an important mandatory public pillar (1st pay-as-you-go pillar), the old-age pension savings system (2nd pillar). The system of social security is enhanced through tax deductible voluntary saving/insurance schemes, supported by the state (3rd pillar).

Old-age pension saving together with old-age insurance (first pension pillar), the old-age pension saving (second pension pillar) constitute the basic pension insurance system (Act No. 461/2003 Coll. on social insurance, as amended, Act No. 43/2004 Coll. on retirement pension savings, as amended). Participation in the second pension pillar is voluntary, part of the compulsory contributions of the employee (participant of the second pension pillar) are forwarded to his or her personal pension account that is managed by a pension management company. Once the employee reaches retirement age, he or she has the option of receiving a pension from the second pension pillar (that is, paid by the pension management company or a life insurance agency), in addition to the old-age pension from the first pension pillar (which is paid by the Social Insurance Agency). Supplementary pension insurance is voluntary and represents the third pillar

of the pension scheme in which the participants' funds are administered by supplementary pension companies (third pension pillar).

A supplementary pension company is a joint stock company established in the territory of the Slovak Republic (Article 22 paragraph 1 of Act No. 650/2004 Coll. on supplementary pension savings and on amendments to certain acts). The supplementary pension company shall be subject to the Commercial Code (Act No. 513/1991 Coll., as amended), unless otherwise provided by this Act (Article 22 paragraph 6 of the Act).

Article 115 of Act No 461/2003 Coll. on social insurance also defines the clearing of benefits with material needs benefits and contributions to the material needs benefits. In case of old-age pensions, early retirement pensions, disability pensions, accident annuity, guarantee insurance benefits or unemployment benefits, they are awarded retroactively for the period during which the insured person was paid a material needs benefit and contributions to a material needs benefit.

This provision would probably require a more detailed analysis. All explanatory memorandums to the above-mentioned acts stated that they were in full compliance with EU law at the time of their adoption.

4 Other relevant information

Nothing to report.

Slovenia

Summary

CJEU cases C-16/18 and C-168/18 are analysed

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

It is impossible to anticipate with any certainty whether the judgment will have a direct impact on case law in Slovenia. Nevertheless, the case provides some useful clarifications that can be taken into consideration by the case law of Member States.

The Commission already stated in 2010 that Directive 96/71/EC does not cover workers normally employed in the territory of two or more Member States, and who form part of the mobile staff of an undertaking engaged in the provision of services to international passenger or goods transport services by rail, road, air or water. The CJEU's judgment(additionally) interpreted that in the light of Directive 96/71/EC, a worker cannot be considered to be posted to the territory of a Member State if the performance of his or her work does not have a sufficient connection with that territory. The CJEU asserts that the length (time limitation) of the provision of services can be decisive when assessing the existence of that connection.

1.1 Employer insolvency and company pensions

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 December 2019

An introductory observation must be made: the protection of workers' claims in the case of employer insolvency is not the object of labour law but of insolvency legislation. The Financial Operations, Insolvency Proceedings and Compulsory Dissolution Act (Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju (Official Gazette of the RS No. 13/14-official consolidated text- ZFPPIPP, 10/15-popr., 27/16, 31/16-odl. US, 63/16-ZD_C, 54/18-odl.US, 69/19- odl. US)) can be mentioned in this regard.
Directive 80/987/EEC has been transposed into the Slovenian legal order by the Public Guarantee, Alimony and Disability Fund of the RS Act (Zakon o javnem jamstvenem, preživninskem in invalidskem skladu Republike Slovenije (Official Gazette of the RS, No. 78/06-official consolidated text-ZJSRS-UPB2, 106/12-ZJSRS-F, 39/16-ZJSRS-G); the Act does not make any reference to Directive 2008/94/EC).

The case in the preliminary proceedings is also related to the issue of supplementary pension schemes. The Pension and Invalidity Insurance Act (Zakon o pokojninskem in invalidskem zavarovanju (Official Gazette of the RS, No. 96/2012- ZPIZ-2, 39/13, 55/13)) dedicates Part 12 (163 articles) to supplementary pension insurance, and

represents the basic position – to ensure the right to a supplementary pension and other rights laid down by the Act.

Cases similar to the one dealt with in the preliminary proceedings can be found in Slovenian case law. National regulations differ, regardless whether they have similar or the same objectives.

As regards the judgment in the preliminary proceedings, the following issues, applicable to different cases/situations and related to Article 8 of Directive 2008/94/EC, are of special importance and interest for Member States:

- The interpretation that Article 8 of Directive 2008/94/EC is capable of having direct effect,
- The interpretation when/ under which condition the reduction in the amount of the occupational old-age pension benefits paid to a former employee, on the account of the insolvency of his or her former employer, is regarded as being manifestly disproportionate (the amount as the result of reduction, leading to life below the at-risk-of-poverty threshold)
- The interpretation of the scope of application of Article 8 is useful, but related to concrete national regulations.

4 Other relevant information

Nothing to report.

Spain

Summary

(I) General elections were held on 10 November, and a new government has been formed. In January 2020, the government approved a wage increase for public employees. Many reforms are expected in the near future following a very quiet legislative period

(II) A Supreme Court ruling on fixed-term employment contracts is analysed

(III) CJEU cases C-16/18 and C-168/18 are analysed

(IV) An agreement to increase the minimum salary has been reached

1 National Legislation

1.1 Wages in the public sector

Royal Decree Law 2/2020 raises the salaries of public employees of all public Administrations (at the state, regional and local levels) and business entities invested or controlled by said Administrations. This Royal Decree- Law complies with the commitments assumed by the Government of Spain with the unions in an Agreement of 9 March 2018 (II Agreement for the improvement of public sector employment and working conditions by the Government of Spain and the most representative trade union organisations in the public sector, CC.OO., UGT and CSIF)

The main features are:

- The salary of public employees will increase by 2 per cent.
- A possible additional increase of up to 1 per cent is being considered depending on GDP growth.
- Additional growth could be conditional on several circumstances, such as the implementation of plans or projects to improve productivity or efficiency.
- Public administrations are authorised to make contributions to pension plans for public employees, provided that the limits of the general increase in wages are not exceeded.
- Collective bargaining cannot exceed the salary limits set in this Royal Decree Law, unless the Ministry of Finance authorises it.

1.2 Keeping records of working time

This agreement in the metal industry requires employers to implement a recording system of working time following negotiations with employee representatives. Each worker's daily working time must be reliably recorded, indicating the specific start and end time. The privacy of the worker must be respected.

Royal Decree Law 8/2019 requires employers to record working time. Companies now have the obligation to record daily working time, indicating the start and end times of each worker's working hours. The main purpose is to monitor compliance with the rules on overtime and to prevent abuse. The terms of compliance with this obligation can be specified in collective bargaining agreements.

2 Court Rulings

2.1 Freedom of expression

Constitutional Court, 146/2019, 06 January 2020

The Constitutional Court has declared the dismissal of a worker null and void, who complained to the city council about the functioning of a municipal centre dedicated to the care of dependent elderly people and managed, by administrative concession, by the company that had hired him. The Court held that the worker's right to freedom of expression had been violated.

The Constitutional Court distinguishes between the right to freedom of expression, which protects the expression of thoughts, ideas and opinions, and the right to communicate information, which protects the expression of those facts that are newsworthy. This second right requires the facts to be truthful, while the first one does not. In this case, the dismissal of the worker is connected to the freedom of expression, since he or she expressed opinions about what happened in the company.

The freedom of expression includes criticism of the behaviour of others, although it may bother or displease is the individual addressed, but excludes insults or outrageous or offensive comments. The worker has the right to freedom of expression because the employment contract may not deprive him or her of a fundamental right. Workers' fundamental rights and the employer's interests must be fairly balanced (test of proportionality).

The Constitutional Court ruled in favour of the worker, who had complained about the working conditions, including lack of medical supplies, without being offensive. The worker did not raise his complaints to his employer, but submitted them directly to the city council, conduct that the Constitutional Court considers acceptable from the perspective of freedom of expression and not a breach of good faith.

2.2 Fixed-term employment contracts

Supreme Court, No. 1986/2018, 05 December 2019

The Spanish Labour Code allows for fixed-term employment contracts to be concluded in the event of substitution of workers who are entitled to retain their post, provided that the employment contract specifies the name of the replaced worker and the reason for the replacement (Article 15 of the Labour Code). Such contracts (interim contract) are also allowed for temporary coverage of a vacant post. The contract is valid as long as the reason justifying its existence continues, without limitation (except for temporary coverage of a vacant post in private undertakings, where such a contract may not exceed three months).

The Basic Statute of the Public Employee provides that vacancies must be filled within three years. This is an indirect limitation for interim contracts; if the vacancy must be filled within three years, the interim contract cannot, in theory, last more than three years.

However, the Supreme Court considers that this rule does not automatically mean that an interim contract should be redefined as a 'contract of indefinite duration' when it exceeds those three years. The judgment requires a case-by-case assessment. On this occasion, the excessive duration did not take place due to a legal breach, but precisely because of the need to comply with the law. During the economic crisis, the law did not allow launching competitions to appoint permanent civil servants, with the aim of limiting public spending. The three-year rule of the Basic Statute of the Public Employee could therefore not be respected.

As has been reported numerous times in the last three years, the first CJEU De Diego Porras ruling (14 September 2016, C 596/14) had a huge impact on the Spanish legal system. Workers had the right to a severance pay of 12 days of salary per year at the end of their fixed-term contracts, except in case of fixed-term replacement contracts (interim contracts), which did not entail the right to severance pay unless otherwise agreed. On the other hand, the termination of an employment contract (permanent or fixed-term) for objective reasons was considered a form of dismissal, and the worker had the right to a severance pay of 20 days of salary per year. The De Diego Porras ruling deemed that such differentiation violated Article 4 of the Framework Agreement on Fixed-term Work.

The CJEU's Montero Mateos and Grupo Norte Facility rulings remedied the De Diego Porras ruling, and stated (paragraph 62) that "Spanish law does not treat fixed-term workers and comparable permanent workers differently, since Article 53(1)(b) of the Workers' Statute provides for statutory compensation equivalent to twenty days' remuneration per year of service with the employer to be paid to a worker, irrespective of whether his employment contract is for a fixed-term or for an indefinite duration".

However, the CJEU's Montero Mateos ruling (5 June 2018, case C-677/16), in paragraph 64 states that "in the present case, Ms Montero Mateos could not have known, at the time she entered into her temporary replacement contract, the exact date on which the post she occupied under that contract would be permanently filled, nor that the duration of that contract would be unusually long. However, the fact remains that the contract expired because the reason justifying its conclusion no longer existed. That being so, it is for the referring court to consider whether, in the light of the fact that the point at which the contract would end was unforeseeable and its unusually long duration, the contract should be redefined as a 'contract of indefinite duration'".

Therefore, the problem is no longer the compensation at the end of the contract, but whether the contract is no longer a fixed-term, but a permanent one. The Supreme Court referred to the Montero Mateos ruling and indicated willingness to comply with it. It did, however, state that the redefinition of the contract should not take place simply because the duration has been 'unusually' long. This ruling asserts that the duration must be 'unreasonably' long. The different meaning of 'unusually' and 'unreasonably' lead the Court to the aforementioned conclusion. In the present case, the contract had lasted for a long time, and it may have been unusually long, but it had not been unreasonably long, because there was a justified reason for its long duration.

It is worth mentioning that the fixed-term contract in this case had lasted six years. This case-by-case approach will undoubtedly lead to new preliminary rulings before the CJEU, so this could be the beginning of a long-term issue.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

According to the CJEU's ruling Dobersberger (19 December 2019, case C-16/18), Article 1(3)(a) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services must be interpreted as meaning that it does not cover the provision, under a contract concluded by an undertaking established in a Member State and an undertaking established in another Member State, which is contractually linked to a railway undertaking established in that same Member State, of on-board services, cleaning or catering services for passengers carried out by salaried employees of the first undertaking, or by workers hired out to it by an undertaking also established in the first

Member State, on international trains crossing the second Member State, where those workers carry out a significant part of the work inherent in those services in the territory of the first Member State and where they begin or end their shifts there.

This ruling should not have any implications for Spain. Directive 96/71/EC has been transposed in Spain by Act 45/1999. According to Article 1 of Act 45/1999, these rules apply to undertakings established in a Member State of the European Union or in a State signatory to the Agreement on the European Economic Area that temporarily post their workers to Spain within the framework of a transnational provision of services, excluding merchant navy undertakings as regards seagoing personnel. On the other hand, the Act does not apply to posting situations related to training activities that are not associated with the provision of services of a transnational nature.

Act 45/1999 sought to be true to the letter of the Directive. Therefore, it does not mention travelling or flying staff (mobile staff) of an undertaking involved in international transport. These workers are not considered posted workers. The concept of posting of workers does not correspond to those types of workers in accordance with Article 11.5 of Regulation 883/2004. This issue has not yet arisen in Spain, but it seems that the posting of workers provisions would not have been applied to a similar case in Spain.

3.2 Employer insolvency and company pensions

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 December 2019

According to the CJEU's ruling Pensions-Sicherungs-Verein VVaG v Günther Bauer (19 December 2019, case C-168/18):

> *"1.Article 8 of Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer must be interpreted as applying to a situation in which an employer, which provides occupational old-age pension benefits through an inter-occupational institution, cannot, on account of its insolvency, offset losses resulting from a reduction in the amount of those benefits paid by the inter-occupational institution, a reduction which was authorised by the State supervisory authority for financial services which is the prudential regulator for that institution.*
>
> *2.Article 8 of Directive 2008/94 must be interpreted as meaning that a reduction in the amount of occupational old-age pension benefits paid to a former employee, on account of the insolvency of his or her former employer, is regarded as being manifestly disproportionate, even though the former employee receives at least half of the amount of the benefits arising from his or her acquired rights, where, as a result of the reduction, the former employee is already living, or would have to live, below the at-risk-of-poverty threshold determined by Eurostat for the Member State concerned.*
>
> *3. Article 8 of Directive 2008/94, which lays down an obligation to provide a minimum degree of protection, is capable of having direct effect, so that it may be relied upon against an institution governed by private law that is designated by the State as the institution which guarantees occupational pensions against the risk of an employer's insolvency where, in the light of the task with which it is vested and the circumstances in which it performs the task, that institution can be treated as comparable to the State, provided that the task of providing a guarantee with which the institution is vested actually covers the type of old-age benefits in respect of which the minimum degree of protection provided for in Article 8 is sought."*

This ruling is heavily influenced by the configuration of the social security scheme in Germany. A similar problem could not arise in Spain. Retirement benefits are covered by public social insurance schemes. Therefore, an employee's entire pension amount is paid by the social security system. No three-pillar system exists, there is only one pillar, the public one.

Article 41 of the Spanish Constitution allows for private pension schemes outside the public social security scheme, but such private pension schemes have no bearing on the public system. They are not related, i.e. people can freely decide whether to invest in an additional pension, but that decision does not interfere with the right to retirement benefits under the public scheme.

Employers, unilaterally or through collective bargaining, can add supplements to their worker's social security benefits (for example, for their time after retirement). These supplements are of a fully private nature and the social security system is not involved. To prevent the worker from losing such supplements in case of employer insolvency, the First Additional Provision of the Royal Legislative Decree 1/2002, of 29 November, requires 'externalisation', that is, the employer is required to take out private insurance. This private insurance does not fall under the social security scheme and there are no mechanisms to reduce the benefits in case the insurance company faces financial difficulties. Once the employer has taken out such insurance, the employer is no longer responsible (if the contributions have been paid, obviously, but this applies for any type of insurance), i.e. the guarantee institution has no liability in such cases.

4 Other relevant information

4.1 Minimum wage

Government, unions and business organisation have reached an agreement to increase the minimum wage to EUR 950. Approval of this increase seems imminent.

Sweden

Summary

(I) The Swedish Labour Court ruled in a disability discrimination case that the job-requirement to manage a range of phone lines as a phone receptionist did not discriminate a job applicant who, due to deafness, was unable to use the commonly used speaker-phone at the call centre where he applied to work.

(II) The CJEU has made a decision in case C-16/18 on the posting of workers and came to the conclusion that the circumstances of the case did not fall under Art. 1.3 a. of the Posting of Workers Directive.

(III) The CJEU came to the conclusion that the minimum protection in Directive 2008/94/EC could be applied in a situation where an occupational pension scheme had been reduced due to lack of financial resources in a Pensionskasse in the German private sector and the (former) employer, due to insolvency, was unable to compensate for this reduction.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Disability discrimination

Labour Court, No AD 2020 3, 22 January 2020

In Labour Court case AD 2020 No. 3, the Court addressed disability discrimination in the light of Directive 2000/78/EC and the UN Convention of the Rights of Persons with Disabilities (UNCRPD). The applicant had applied for a job with a coordinating "call-centre" with the aim of providing services to deaf persons and people with hearing impairments and to connect them to interpreters. The applicant was deaf and unable to operate hearing or speaker-phones, which according to the Labour Court, made up the most significant part of the job.

The Labour Court came to the conclusion that the employer could not possibly have carried out any reasonable accommodations or arrangements to improve the applicant's accessibility and that the requirement to also operate speaker-phones was not indirectly discriminatory against the applicant.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

The CJEU decision in case C-16/18 on workers engaged in services on trains, who crossed borders between Member States, concluded that the circumstances of this particular situation, in which the on-board staff performed a significant part of their workload in the state in which they were registered for social security (Hungary), but also engaged in on-board activities while the train passed through Austria or Germany, was not a situation of posting. The CJEU found that the workers, while passing through these other Member States, did not have such a connection with these states as to constitute a posting of workers situation.

The wording of the Swedish definition of posting reads (unofficial translation by the Swedish Government):

> *"Section 3*
>
> *Posting means any of the following transnational measures:*
>
> *1. when an employer on its own account and under its own direction sends workers to Sweden in accordance with a contract that the employer has entered into with the recipient of the services that is active in Sweden;*
>
> *2. when an employer sends workers to Sweden to an establishment or to an undertaking owned by the group; or*
>
> *3. when an employer that hires out workers or is a placement agency sends workers to a user undertaking established in Sweden or operating in Sweden. An employment relationship must exist between the employer and the worker during the period of posting."*

The definition in the Swedish Posting of Workers Act, while using slightly different words than Article 1.3.a of the PWD, would most likely be interpreted in line with the case before the CJEU. The understanding would, in line herewith, be that not any passing through or performance of any part of the workload in another Member State would fall under the posting of workers legislation. To require the workers to have some sort of stronger connection to the other Member State appears to be relevant. A Swedish lorry driver could easily start his or her working day in Sweden, drive to Norway and drop off some goods, drive through Sweden and Denmark and end up in northern Germany in one shift, without leaving the truck. For posting of workers regulations to apply in all of these countries would not be proportionate.

3.2 Employer insolvency and company pensions

CJEU, case C-168/18 - Pensions-Sicherungs-Verein, 19 December 2019

The CJEU discussed a complicated question in case C-168/18 on employer insolvency and (horizontal?) direct effects in relation to private occupational pension schemes, organised under specific legislation in a Member State. The case had been referred to the CJEU by the German Bundesarbeitsgericht.

An employee had, since 2000, been entitled to a retirement scheme which covered an occupational old-age pension managed by a private organisation, a Pensionskasse, and which was based on the contributions the (former) employer had paid to the Pensionskasse. Over a number of years, the pension amount paid to the retiree decreased due to financial problems of the Pensionskasse. The former employer was in that case required to compensate the pensioner for the reduced pension, but this compensation came to an end due to the insolvency of the former employer.

The CJEU arrived at the conclusion that the minimum standards provided for in Art 8 of Directive 2008/94/EC should apply in situations like this and provide for an obligation for the Pensionskasse, as has been pointed out by national law, to guarantee the minimum standards regulated in the Directive.

Case C-168/18 relates to the importance of the implementation of sustainable occupational pension schemes and the disconnection between employer solvency and retirement schemes. Historically, the Swedish occupational pension schemes might have had similar features as they were mainly defined as benefits-based, which still applies to the collective agreement for public (state employees). The modern, private sector occupational pension schemes, provided for under collective agreements, are defined as contribution-based and separated from the former employer. The occupational pension paid to the pensioner is related to the contributions and the financial

development of the funds generated in the name of the pensioner. The insolvency of the employer would not affect the payment of the pension, since this is all carried out by a separate entity. If the employer, however, due to insolvency, has not fulfilled his or her obligation to pay the pension contributions (during the employee's employment, which of course is an entirely different situation from the one in the case before the CJEU), a re-insurance organised by the Pensionskassen would guarantee the contributions for the individual workers.

4 Other relevant information

Nothing to report.

United Kingdom

Summary

(I) The CJEU case C-16/168 on Posted workers is analysed

(II) The Withdrawal agreement (Brexit) was signed

(III) A new visa rule for global talent introduces new rules on immigration

(IV) Employers on Greater Manchester have agreed to ban zero-hours contracts

(IV) The draft regulation on bereavement rules for those who have lost a child is before the Parliament

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU, case C-16/18 – Dobersberger, 19 December 2019

In case C-16/18 *Dobersberger* the Grand Chamber ruled:

> *"Article 1(3)(a) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services must be interpreted as meaning that it does not cover the provision, under a contract concluded by an undertaking established in a Member State and an undertaking established in another Member State, which is contractually linked to a railway undertaking established in that same Member State, of on-board services, cleaning or food and drink services for passengers carried out by salaried employees of the first undertaking, or by workers hired out to it by an undertaking also established in the first Member State, on international trains crossing the second Member State, where those workers carry out a significant part of the work inherent in those services in the territory of the first Member State and where they begin or end their shifts there."*

In the UK, the Posted Workers Directive has had limited impact generally: the UK applies a territorial approach to its law. This means anyone who is in the territory of the UK irrespective of nationality and time spent in the UK, is covered by UK labour law. It did not pass specific legislation implementing the PWD, although it did repeal some pieces of legislation. For example, Article 3(1)(f) requires the host state to provide posted workers 'Protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth'. In the UK, the protection for those women who are pregnant or who have recently given birth is found in the Employment Rights Act (ERA) 1996 and the Equality Act 2010. The right to time off-for ante-natal care is found in ss.55-57 ERA. In addition, s.99 ERA gives protection against dismissal. S.196 ERA 1996 removes these rights from those 'engaged in work wholly or mainly outside Great Britain'. In order to implement the Directive, s.196 was repealed by s.32 of the Employment Relations Act 1999 ('(3) Section 196 of the Employment

Rights Act 1996 (employment outside Great Britain) shall cease to have effect;' Section 9, Schedule 9 SI 1999/2790 The Employment Relations (Northern Ireland) Order 1999), with the result that the territorial limitation no longer applies to any of the rights in the ERA. However, the repeal of s.196 created some uncertainty as to the scope of ERA 1996. These difficulties were addressed by the House of Lords in *Lawson v Serco* ([2006] ICR 250*)* in which it was held that section 94(1) ERA 1996 (on unfair dismissal) applies only to employees working or based abroad in exceptional circumstances. Lord Hoffman identified three broad categories of such employees: (1) those working in Great Britain when they were dismissed, (2) peripatetic employees (whose base, being the place where they ordinarily work, should be treated as their place of employment), and (3) expatriate employees, posted abroad 'for the purposes of a business carried on in Great Britain' (Para. 38).

So what does this mean for those engaged in cross-border transport services? It seems that Eurostar drivers have UK drivers' licences and so are subject to UK law. This will continue post-*Dobersberger.*

4 Other relevant information

4.1 Brexit

The Withdrawal Agreement was signed at the end of January, the UK implementing legislation passed unamended through the UK Parliament (the EU (Withdrawal Agreement) Act 2020)) and the European Parliament voted in favour. On 31 January, the UK ceased to be a Member State and became a third country.

4.2 Exceptional Talent/Global Talent visas

There has been a statement of changes to the immigration rules. The new rules introduce a 'Global Talent' route replacing the Tier 1 (Exceptional Talent) route. 'For the first time UK Research and Innovation (UKRI) will endorse applicants from the scientific and research community. The route will:

- provide for a brand new fast-track scheme, managed by UKRI which will enable UK-based research projects that have received recognised prestigious grants and awards, including from the European Space Agency and the Japan Science and Technology Agency, to recruit top global talent, benefiting higher education institutions, research institutes and eligible public sector research establishments - this will enable an individual to be fast-tracked to the visa application stage
- double the number of eligible fellowships, such as Marie Skłodowska-Curie Actions, the European Research Council and Human Frontier Science, which also enable individuals to be fast-tracked
- continue to ensure dependents have full access to the labour market
- preserve the route's flexibility by not requiring an individual to hold an offer of employment before arriving or tying them to one specific job
- provide an accelerated path to settlement for all scientists and researchers who are endorsed on the route
- provide for an exemption from our absences rules for researchers, and their dependants, where they are required overseas for work-related purposes, ensuring they are not penalised when they apply for settlement

The changes are part of the initial-phase wider reforms to enable those with world class skills in science and research to come to the UK as soon as possible.'

4.3 Ban on zero-hours contracts

The FT is reporting that 'Employers in Greater Manchester have agreed to ban zero-hours contracts and pay above the minimum wage' (see also here).

In addition, a new 'Zero Hours' justice campaign has been launched whose aim is to help those affected and to fight for an end to such oppressive practice.

4.4 Bereavement leave

The draft Parental Bereavement Leave and Pay Regulations is before Parliament. BEIS says:

> *"The Parental Bereavement Leave and Pay Regulations, which will be known as Jack's Law in memory of Jack Herd whose mother Lucy campaigned tirelessly on the issue, will implement a statutory right to a minimum of 2 weeks' leave for all employed parents if they lose a child under the age of 18, or suffer a stillbirth from 24 weeks of pregnancy, irrespective of how long they have worked for their employer.*
>
> *This is the most generous offer on parental bereavement pay and leave in the world, set to take effect from April.*
>
> *Parents will be able to take the leave as either a single block of 2 weeks, or as 2 separate blocks of one week each taken at different times across the first year after their child's death. This means they can match their leave to the times they need it most, which could be in the early days or over the first anniversary."*

Employees with at least 26 weeks' service, who meet minimum earnings criteria, will also qualify for Statutory Parental Bereavement Pay (at the same rate as Statutory Paternity Pay).

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