Flash Reports on Labour Law December 2022

Summary and country reports

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

December 2022

EUROPEAN COMMISSION

Directorate DG Employment, Social Affairs and Inclusion

Unit C.1 – Labour Law

Contact: Marie LAGARRIGUE

E-mail: Marie.LAGARRIGUE@ec.europa.eu

European Commission

B-1049 Brussels

Flash Report 12/2022 on Labour Law

Manuscript completed in December 2022

Luxembourg: Publications Office of the European Union, 2022

PDF ISSN 2600-3252 KE-CC-22-012-EN-N

Flash Report 12/2022 on Labour Law

Country	Labour Law Experts
Austria	Martin Gruber-Risak Daniela Kroemer
Belgium	Wilfried Rauws
Bulgaria	Krassimira Sredkova Albena Velikova
Croatia	Ivana Grgurev
Cyprus	Nicos Trimikliniotis
Czech Republic	Nataša Randlová
Denmark	Natalie Videbaek Munkholm Mette Soested
Estonia	Gaabriel Tavits Elina Soomets
Finland	Ulla Liukkunen
France	Francis Kessler
Germany	Bernd Waas
Greece	Costas Papadimitriou
Hungary	Tamás Gyulavári
Iceland	Leifur Gunnarsson
Ireland	Anthony Kerr
Italy	Edoardo Ales
Latvia	Kristīne Dupate
Liechtenstein	Wolfgang Portmann
Lithuania	Tomas Davulis
Luxemburg	Jean-Luc Putz
Malta	Lorna Mifsud Cachia
Netherlands	Miriam Kullmann Suzanne Kali
Norway	Marianne Jenum Hotvedt Alexander Næss Skjønberg
Poland	Leszek Mitrus
Portugal	José João Abrantes Isabel Valente Dias
Romania	Raluca Dimitriu
Slovakia	Robert Schronk
Slovenia	Barbara Kresal
Spain	Joaquín García Murcia Iván Antonio Rodríguez Cardo
Sweden	Andreas Inghammar Erik Sinander
United Kingdom	Catherine Barnard

Table of Contents

Executive Summary

National level developments

In December 2022, 26 countries (all but **Bulgaria**, **Latvia**, **Liechtenstein, Lithuania** and **Malta**) reported some labour law developments. The following were of particular significance from an EU law perspective:

Developments related to the COVID-19 crisis

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

In **Austria**, the COVID-19 Special Care Leave for employees has been extended.

Similarly, in **Luxembourg**, the measure on additional income for people in early retirement who decided to return to work in the health care sector has been extended.

Working time

In **Ireland**, the Labour Court ruled that on-call/standby time is not working time if the attendance requirements do not imply major constraints for the employee. Similarly, in **Spain**, the Supreme Court reiterated that the stand-by time of health staff is to be considered working time when they are required to remain at the employer's premises and/or need to be permanently available.

In **France**, the Court of Cassation overturned its previous case law on the qualification of commuting time, and clarified its previous case law related to day package agreements.

In the **Netherlands**, a court ruled that the remuneration paid to two crane operators for overtime and the surcharges they received for night shifts should be included in the calculation of holiday pay.

In **Estonia**, new amendments to the Employment Contracts Act provide more flexibility in working time.

In **Portugal**, a pilot programme for evaluating the effects of the reduction of the work week to four days was approved.

Work life balance

In **Germany**, the Act on the Further Implementation of the Directive (EU) 2019/1158 on work-life balance passed through the Bundesrat. Similarly, parts of the Work-life Balance Directive were transposed into **Slovenian** law.

In **Luxembourg**, the rules on parental leave were adapted to comply with CJEU case law.

In **Italy**, the newly approved State budget also contains provisions relating to parental leave, while a new Family Benefits Act has been adopted in **Croatia**.

Annual leave

In **Germany**, the Federal Labour Court delivered two important rulings on limitation and forfeiture of holiday entitlements.

In **Slovenia**, the Constitutional Court decided that the upper limit to the right to paid annual leave for public employees was unconstitutional.

Transfer of undertakings

In the **Netherlands**, a court ruled on the role of a dynamic incorporation clause in a transfer of undertakings.

In **Portugal**, a ruling of the Appeal Court of Lisbon dealt with the transfer of an economic unit.

Whistleblowing

In **Belgium** and **Romania**, the Whistleblowing Directive 2019/1937 was transposed into law.

In **Germany**, an Act on the implementation of this Directive was passed by the Bundestag, while in the **Czech Republic**, a new Bill to transpose it into law.

Posting of workers

In **Croatia** and **Luxembourg**, Directive (EU) 2020/1057 on the posting of drivers in the road transport sector has been implemented into legislation.

In **Slovenia**, the Act Regulating the Working Time and Compulsory Rest Periods of Mobile Workers and on Recording Equipment in Road Transport has been amended.

Teleworking

In **Italy**, the newly approved State budget contains provisions relating to teleworking.

In **Spain**, a new law introduced new rules to facilitate the residence of international teleworkers in Spain.

In **Poland**, an amendment to the Labour Code on teleworking has been enacted.

Temporay agency work

In the **Netherlands**, a bill on mandatory certification for employment agencies, aimed at fighting fraudulent temporary work agencies, was approved. Furthermore, a court held that assigning a temporary agency worker for 13 years is not an abuse.

In **Norway**, restrictions to hiring workers from temporary work agencies have been introduced.

In **Belgium**, a new collective agreement contains an updated list of information that the user undertaking of temporary agency workers must provide to its works council.

Other forms of atypical work

In **Austria**, two decisions of the Austrian Supreme Court dealt with consecutive fixed-term employment contracts.

In **Croatia**, an amendment to the Labour Act has been adopted, introducing a presumption of an employment relationship for digital platform workers.

In **Finland**, a draft amendment to the Seasonal Work Decree to clarify and improve berry pickers' status has been proposed.

Other developments

In the **Czech Republic**, a new Decree introduced several changes in the area of occupational health services. Furthermore, a new act introduced modifications in the regulation of working time of employees in inland navigation, as well as in their assessment of health capacity and training.

In **Germany**, the Bundestag approved the Federal Government's draft law implementing the provisions of EU Directive 2019/2121 on employee participation in cross-border transformations, mergers and divisions.

In **Ireland**, Directive 2019/1152/EU on transparent and predictable working conditions has been implemented into national legislation.

Table 1: Major labour law developments

Topic	Countries
Working time	EE ES FR HR IE NL PT SI
Work-life balance	DE HR SI LU IT
Collective bargaining and collective action	AT BE CY RO HU
Whistleblowing	BE CZ DE RO
Temporary agency work	BE NL NO
Telework	IT ES PL
Minimum wage	CZ SK LU
Posting of workers	HR SI LU
COVID-19	AT LU
Fixed-term work	AT HR
Annual leave	DE SI
Transfer of undertakings	NL PT
Employee status	DK ES
Seafarers' work	CZ UK
Platform work	HR CY
Transparent and predictable working conditions	IE RO
Occupational safety and health	CZ
Seasonal work	FI
Cross-border mergers	DE

Implications of CJEU Rulings

Temporary agency work

This Flash Report analyses the implications of a CJEU ruling on temporary agency work.

CJEU case C-311/21, 15 December 2022, TimePartner Personalmanagement

In the present case, the CJEU interpreted the concept of 'overall protection of temporary agency workers', clarifying under which conditions a collective agreement can derogate *in peius* from the principle of equal treatment of temporary agency workers established by Article 5(1) of Directive 2008/104/EC: in this regard, the Court held that workers must be granted advantages in terms of basic working and employment conditions which compensate for the difference in treatment experienced. Furthermore, while Member States are not required to specify which conditions and criteria are to be respected in such derogations, the Court held that such collective agreements must be amenable to effective judicial review to determine whether the social partners have respected the overall protection of temporary agency workers.

A large majority of countries indicated that the legislation does not envisage a possibility to derogate from the principle of equal basic working and employment conditions for temporary agency workers by way of collective agreement. As a result, this judgment is unlikely to have any implications for these national legal systems.

Conversely, as specified in the reports for **Belgium** and **Ireland**, the clarification provided by the CJEU is expected to guide the interpretation of national courts in Member States where collective agreements can derogate form the principle of equal treatment. Similarly, in **Denmark**, the ruling is reported to confirm the Danish *acquis* on this matter, while providing guidance for the Labour Court in future case law.

Furthermore, the **Swedish** report emphasised that the fact that the ruling provides a stricter and more foreseeable legal basis for the claims of individual workers may lead to more disputes, raising questions about Swedish collective agreements.

In **Germany**, the impact of the ruling has been signalled to concern the relationship between state legislation and collective bargaining, as the latter is protected as a fundamental right and collective agreements are generally granted a 'guarantee of correctness', which implies limited judicial control.

Finally, in the **Netherlands**, the ruling may require action to bring regulations in line with the CJEU's ruling, especially for situations in which no comparison is possible with the workers that have been directly recruited by the user undertaking, and thus no assessment can be made regarding both the comparability of the basic working and employment conditions and the countervailing benefits afforded to the temporary agency workers.

Austria

Summary

(I) The COVID-19 Special Care Leave for Employees has been extended.

(II) Two decisions of the Austrian Supreme Court dealt with consecutive fixed-term employment contracts.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Special Care Leave

The Amendment of the Employment Contract Law Amendment Act, *Änderung des Arbeitsvertragsrechts-Anpassungsgesetz* AVRAG, 666/BNR, § 18b para 1 to 1c AVRAG on Special Care Leave during COVID-19 was extended for the 8th time, until the end of the school year 2023.

The Special Care Leave allows employees who have care responsibilities for children or for persons with disabilities to take paid leave from work for up to three weeks in case

- schools/caretaking facilities are closed based on a public ordinance; or
- for children under the age of 14, in case they cannot attend school or care facilities due to a full or partial closure in accordance with an administrative order; or
- for persons with disabilities, who need care, in case they cannot attend their school/care facility in accordance with a public ordinance or full/partial closure in accordance with an administrative order. The same applies to persons with disabilities, who need care but cannot wear an FFP2 mask due to their disabilities.

The employer continues will be refunded by the COVID-19 crisis fund for any remuneration paid to employees who take special care leave.

See here for further information.

2 Court Rulings

2.1 Fixed-term work of theatre actors

Supreme Court, 8 ObA 58/22w, 21 November 2022

The plaintiff was a ballet dancer at the Vienna *Staatsoper* and had been employed under consecutive fixed-term contracts. The contracts were concluded for one year and were automatically extended for another year unless one of the parties informed the other party in advance that no such renewal would occur.

The applicable law is the Theatre Workers Act (*Theaterarbeitsgesetz* – TAG), which in § 27 entitled 'declaration of non-renewal' allows for the conclusion of consecutive fixed-term employment contracts (unofficial translation by the author):

> *"If the theatre employment contract has been concluded for a fixed term and for at least one year, the theatre shall notify the employee in writing by 31 January of the year in which the employment contract ends that the employment contract will not be renewed. If the theatre fails to give such notice or gives such notice late, the employment contract shall be extended for another year unless the employee notifies the theatre in writing at the latest by 15 February of the year*

in which the employment contract ends that he/she does not agree to a renewal of the employment contract."

The employee claimed that such a provision contravenes the Fixed-Term Directive 1999/70/EC and that she therefore was employed under a contract of indefinite duration. The employer, the Vienna Staatsoper, argued that consecutive fixed-term employment relationships are a special system which reflect the distinct features of the theatre sector and that they therefore do not fall under the scope of the Directive. There is no risk of abuse as theatre employment under the TAG are characterised by a higher degree of protection than ordinary employment relationships because they can, in principle, only be terminated once a year.

The Labour Court as well as the Court of Appeals ruled in favour of the employee and considered the provision in the TAG as insufficient to fight the abuse of consecutive fixed-term employment contracts. They applied a general civil law provision (§ 879 of the Civil Code) which considers legal acts that are against *bones mores* nil and therefore void. If a declaration of non-renewal is not based on good cause it is considered a breach of this provision.

The Supreme Court extensively discussed the application of the Fixed-Term Directive 1999/70/EC – it was considered applicable although the declaration of non-renewal under the system of the TAG is functionally very similar to a dismissal by giving notice. Still, the contract is formally a fixed-term contract and therefore falls under the scope of the Fixed-Term Directive 1999/70/EC. It then points out that pursuant to § 5 (1), the Member States may make the admissibility of a consecutive fixed-term employment contract conditional, inter alia, on the existence of objective reasons. In the following, the CJEU decision C-331/17, *Sciotto* is discussed; the Supreme Court summed up the differences between the Italian case before the CJEU and the present Austrian case.

In the Austrian context, the question arises whether it is objectively justified to impose a general time limit on artistic work for the standard performance period, for example because this is intended to allow directors to recast artists with the personalities they deem appropriate for the respective roles. However, the Supreme Court does not deem it necessary to assess whether this concept is also feasible for choirs and ballets. Nor did it consider it necessary to make a conclusive assessment on whether an equivalent protection of the employee against abuse within the meaning of § 5 of the Fixed-Term Directive 1999/70/EC can already be seen in the fact that the employer must issue a declaration of non-renewal, whereby the employment relationship can only be terminated on a certain date once a year and in compliance with a particularly long notice period, which far exceeds the usual notice period.

This is based on the understanding that a request for a preliminary ruling by the CJEU to clarify the resulting questions does not have to be made in this case because even the positive assumption of a transposition contrary to the Directive—contrary to the legal opinion of the lower courts—could not lead to the claim being granted.

The CJEU has already commented on the fact that § 5 (1) of the Fixed-Term Directive is not sufficiently unconditional and precise in terms of its content for an individual to be able to rely on it before a national court, if only because it is not possible to sufficiently determine the minimum protection that would need to be granted in any case under § 5 (1) (CJEU case C-378/07, *Angelidaki and Others*, para. 196).

However, when applying domestic law, national courts must interpret it to the extent possible in the light of the wording and purpose of the Directive in question to achieve the result set out in it. This duty to interpret national regulations in conformity with Community law concerns all national law, whether adopted before or after the Directive at issue (CJEU case C-378/07, *Angelidaki and Others*, para 197). The Supreme Court pointed out that the TAG was passed after the Fixed-Term Directive had been issued and that the wording of the Act is very clear – applying the Austrian methodology of law, it is not possible to go beyond it nor apply general notions of civil law as the lower courts did. The Supreme Court therefore rejected the claim.

This well-argued decision again shows the limits of the direct application of a Directive, on the one hand, as well as of the duty to interpret national legislation in conformity with European Union law, on the other. The Fixed-Term Directive based on a social partner agreement is definitely less precise than many newer directives and therefore the direct application of § 5 (1) is not possible. One question that is still unanswered is whether the vertical application *inter privatos* would have been possible either way. Usually, the CJEU only does so if there is a basis for it in the CFR – and protection against the abuse of fixed-term employment relationships is not mentioned there. One would have to argue that is a circumvention of the right to protection against unjustified dismissal in Article 30 CFR. This could have been another argument against a request for a preliminary ruling.

The decision also shows that the duty to interpret Member State legislation in conformity with Union law is not a panacea, either. National methodology also has its limits when the legislator explicitly opts for a solution that might be in breach of Union law – the distribution of powers in civil law countries prohibits interpretations by the courts that contravene the legislator's will.

2.2 Fixed-term work at universities

Supreme Court, 8 ObA 21/22d, 24 October 2022

The ruling dealt with the facts of a case before the CJEU in C-274/18, *Minoo Schuch-Ghannadan*. The preliminary ruling stated that the Part-time Work Directive 97/81/EC must be interpreted as precluding national legislation (*in casu* the possibility of consecutive fixed-term contracts for scientific personnel of public universities) which lays down a maximum duration of employment relationships for fixed-term workers which is longer for part-time than for comparable full-time workers, unless such a difference in treatment is justified on objective grounds and is proportionate to those grounds, which it is for the referring court to determine.

The Austrian courts had to assess whether the possibility of a part-time worker to work under consecutive fixed-term contracts for a longer duration than a comparable full-time employee was more favourable than the shorter duration that applies to the latter. The two lower courts stated that this was not the case as the claimed advantages for career management were not demonstrable.

The Supreme Court upheld this assessment and stated after an extensive and balanced weighing of all possible arguments that as a result, the plaintiff's renewed, repeated fixed-term contracts could not be justified either by the objective of the plaintiff's "scientific advancement" or by the need for renewed assignment of the plaintiff to a specific (fixed-term) project.

Diverging from the other decision reported above involving the ballet dancer under the Theatre Work Act (TAG), the wording and context of the applicable University Act (Universitätsgesetz – UG 2002) in § 109 enables courts to interpret it in a way that an open-ended employment relationship is presumed.

The decision is in line with the preliminary ruling and not unexpected. The Austrian legislation has already taken action and since an amendment to the University Act was introduced in 2021 (BGBl I 93/2021), the maximum period for fixed-term employment contracts and their renewal are now the same for full- and part-time employees.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-311/21, 15 December 2022, TimePartner Personalmanagement

In Austria, the relevant provision for equal pay is § 10 (1) of the Temporary Agency Work Act (*Arbeitskräfteüberlassungsgesetz* – AÜG) (unofficial translation by the author):

> *"The temporary agency worker shall be entitled to an appropriate remuneration in line with local practice, which shall be paid at least once a month and settled in writing. Standards of collective law to which the hiring party (the temporary work agency) is subject shall remain unaffected. When assessing the appropriateness of the remuneration, the remuneration to be paid to comparable employees who carry out comparable activities in the user undertaking under a collective agreement or by law shall be taken into account for the duration of the assignment. In addition, other binding provisions of a general nature that are applicable to comparable employees who carry out comparable activities in the user undertaking shall be taken into account, unless a collective agreement to which the temporary work agency is subject and a collective agreement, regulation or statutory regulation on remuneration in the user undertaking applies."*

This provision is applicable to all parties (temporary work agency and user undertaking) and may not be deviated from unless in favour of the temporary agency worker. This also applies to collective bargaining agreements. Therefore—unlike in the German case—no provision exists that allows deviation from the equal pay principle by way of collective bargaining. In a first assessment, it seems that the CJEU's decision will not have any practical implications in Austria.

4 Other Relevant Information

4.1 Collective bargaining

Following the nationwide rail strike (see November 2022 Flash Report), a collective bargaining agreement for the Austrian railway sector was concluded. The average raise is 8 per cent (with lower income salaries increased by up to 12 per cent), and by at least EUR 210/month as of 01 December. The increase will continue to rise in two steps throughout the year (to EUR 250 and EUR 290), and once more in February 2024. In 2024, an additional compensation for the inflation in 2023 will be agreed.

See here for further information.

Belgium

Summary

(I) The Whistleblowing Directive 2019/1937 has been transposed into Belgian law.

(II) A new collective agreement contains the updated list of information the user enterprise of temporary agency workers must provide to its works council.

1 National Legislation

1.1 Whistleblowers

The Law of 28 November 2022 on the protection of whistleblowers of breaches of Union or national law established within a legal entity in the private sector of industry, *Moniteur belge*, 15 December 2022 transposes the European Whistleblowing Directive 2019/1937.
This law will enter into force on 16 February 2023, subject to exceptions concerning legal entities in the private sector with 50 to 249 employees and entities engaged in financial services, products and markets. In principle, legal entities with fewer than 50 employees are exempt from the obligations.

Whistleblowers are protected against breaches of the legal or regulatory provisions or directly applicable European provisions and implementing rules concerning public procurement, financial services, products and markets, prevention of money laundering and terrorist financing, product safety and conformity, transport safety, environmental protection, radiation protection and nuclear safety, food and feed safety, health and welfare, public health, consumer protection, privacy, fighting tax fraud, social fraud, harming Union financial interests as well as the internal market.

The personnel scope extends to whistleblowers working in the private sector who have obtained information about breaches in a work-related context, such as—at least—employees, self-employed persons and anyone working under the supervision and direction of (sub)contractors and suppliers. The law also applies to whistleblowers who report or disclose information about breaches that occurred in an employment relationship that has since ended, and for notifiers whose work relationship has yet to begin, if information about breaches was obtained during the recruitment process or other pre-contractual negotiations.

For the protection to apply, reporters must have had reasonable grounds to believe that the reported information about breaches was accurate at the time of reporting and that it fell within the scope of this Law; and they reported information internally or externally, or disclosed information in accordance with the provisions of this Law. The Law therefore distinguishes regulations regarding an internal and external reporting channel from which a reporter can choose. By 16 February 2023, legal entities with at least 50 employees will have to establish such an internal reporting channel. For legal entities with 50 to 249 employees, this should be in place by 17 December 2023. Legal entities with fewer than 50 employees have the option of establishing such an internal reporting procedure, although such entities in the financial sector are always required to do so. In terms of the external reporting channel, some rules have also been put forward. Thereby, the federal Ombudsmen are in charge of coordinating external reporting in the private sector.

Furthermore, the Law contains some non-cumulative conditions regarding disclosures in order for some protection to apply to the whistleblower. For example, the respective person must have made a report, either internal or external, following which no appropriate and timely action was taken. In addition, the protection also applies if the person has good reason to believe that the breach may represent an imminent or real

danger to the public interest; or, in the case of external reporting, there is a risk of reprisal or the breach is unlikely to be remedied effectively.

The protection consists in the prohibition of retaliation, such as suspension, dismissal or unequal treatment, even if it is a mere threat or attempt at retaliation. Support measures are also provided, such as information and advice on available remedies and procedures to protect against retaliation. Any person who believes he or she is a victim may file a reasoned complaint with the federal coordinator, who will initiate an out-of-court protection procedure.

1.2 Temporary agency work

Collective Bargaining Agreement (CBA) No. 108/3, concluded in the National Labour Council on 29 November 2022 amending CBA No. 108 of 16 July 2013 on temporary agency work replaces Article 34, §1, 2° CBA No. 108. Article 34 concerns the information to be provided by the user enterprise of temporary workers to its works council, or in its absence, to the trade union delegation within the user enterprise to provide evidence of the need to use successive daily contracts.

Unlike before, evidence for the need for flexibility which the user undertaking must provide to make use of successive daily contracts for temporary agency work must be statistically substantiated only at the express request of the employee representatives in the works council, or, failing that, at the request of the trade union delegation, and may be supplemented by elements that show that the user undertaking has investigated alternatives to the use of consecutive daily contracts for temporary agency work.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU Case C-311/21, 15 December 2022, TimePartner Personalmanagement

According to the Temporary Agency Workers Directive 2008/104, for the duration of their assignment at a user undertaking, the essential working conditions of temporary agency workers must be at least the same as those that would apply to them if they had been recruited directly by the said undertaking for the same job. Essential working conditions refers to working time, overtime, breaks, rest periods, night work, holidays and public holidays and pay.

This may be derogated from, according to the European Temporary Agency Work Directive, insofar as an adequate level of protection is provided to temporary agency workers. Following a German case, the CJEU has clarified under which conditions a collective agreement can derogate from the principle of equal treatment of temporary agency workers downwards. To ensure the general protection of temporary agency workers, such a collective bargaining agreement must, in return, grant advantages in respect of those essential conditions which compensate for the difference in treatment experienced by the temporary agency workers concerned. These benefits must therefore relate to the essential conditions of the Temporary Agency Work Directive, in particular working time, overtime, breaks, rest periods, night work, holidays and public holidays, or remuneration.

In Belgium, Articles 10 and 19 of the Temporary Agency Employment Law of 24 July 1987 guarantee equal treatment of temporary workers in relation to permanent employees of the user company.

Unlike the broader derogation possibilities in Directive 2008/104, Article 10(2) of the Belgian Temporary Agency Employment law allows for derogations from the principle of equal treatment only as regards pay, but not as regards other essential working conditions.

It seems that this derogation possibility concerning pay is only very limited in Belgium, especially with regard to end-of-year bonuses (CBA of 19 April 2016 of the Joint Committee on Temporary Agency Work concerning the end-of-year bonuses for temporary agency workers). Under the CBA, temporary agency workers receive a bonus from a sectoral fund for temporary employment that fully compensates any absence of an end-of-year bonus for the permanent employees of the user company.

According to the CJEU's ruling C-311/21, if a different (lower) pay for temporary workers were contained in a Belgian CBA, the CBA would have to compensate the reduced pay of temporary agency workers compared to workers recruited directly by the user undertaking by providing benefits that offset this difference in relation to the duration of working time, overtime, breaks, rest periods, night work, holidays, public holidays of other forms of financial compensation. The ruling therefore has implications for the Belgian legal order.

4 Other Relevant Information

Nothing to report.

Bulgaria

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU Case C-311/21, 15 December 2022, TimePartner Personalmanagement

Case C-311/21, 15 December 2022 does not have any implications for Bulgaria. Temporary agency workers are entitled to the same protection as regular workers in accordance with the general provisions on basic working and employment conditions under national and EU law.

Article 107u LC stipulates that a worker employed to perform work at a user undertaking shall have the right to remuneration; leave of absence as provided for in this Code; membership in a trade union association; participation in the general meeting of employees in the undertaking; information on all issues related to the performance of the assignment; participation in a collective agreement; settlement of collective labour disputes; social, welfare and cultural services; health and safety at work; initial and continued training in accordance with the position and nature of work at the user undertaking; compensation under the terms and in accordance with the procedure provided for in the Social Insurance Code; other rights directly related to the performance of the work assigned.

Collective labour agreements may not contain clauses that are less favourable to the employees than the provisions of the law or of a collective agreement, which is binding on the employer (Article 50q (2) LC).

Temporary agency workers have the same rights and obligations as employees recruited directly by the user undertaking. Under Article 107u (2 LC), such employees may not be put in a less advantageous position only on account of the temporary nature of their work compared with the other employees performing the same or similar work at the user undertaking, unless a law makes entitlement to certain rights that are conditional upon the qualifications acquired or skills obtained. Where no other employees are employed to perform the same or similar work, the workers employed to perform temporary work at the user undertaking may not be put in a less advantageous position than other employees working at the user undertaking.

Pursuant to Bulgarian legislation, employment contracts with temporary agency work are only concluded for a fixed termed. They may only last until the completion of a particular assignment or for the replacement of an employee who is absent from work (Article 107p (2) LC). They have the same rights as other employees, presented above under 1. and 2.

The overall protection of temporary agency workers within the meaning of Article 5(3) of Directive 2008/104 in Bulgaria is regulated by law (see above – p. 1—3). Social

partners cannot maintain or conclude collective agreements that authorise differences in treatment with regard to basic working and employment conditions to the detriment of those workers. As already mentioned above, a collective agreement may not regulate labour and social insurance issues of employees, which are regulated in mandatory provisions of the law (Article 50 (1) LC).

Collective agreements providing differences in treatment with regard to basic working and employment conditions to the detriment of temporary agency workers are therefore not possible in Bulgaria. In case such provisions are issued, they will be null and void due to contradicting with the provision of Article 107p (2) LC, according to which the user undertaking has the obligation to provide workers who perform temporary assignments with basic working and employment conditions and equal treatment, as provided to the other employees employed by the undertaking who perform the same or similar work in the same or in a similar position, including healthy and safe working conditions. In such cases, any party to the collective agreement as well as any employee who is subject to the application of the agreement, has a right to bring a legal action before the court for a declaration of nullity of the collective agreement or of individual clauses thereof, provided such clauses are in conflict with or circumvent the law (Article 60 LC). There is no case law on this issue.

For temporary agency workers performing a temporary assignment, the user undertaking has the obligation to inform the temporary work agency of the conditions of the employees who perform the same or similar work in the same or similar position, and of any changes in such conditions (Article 107r (1), issue 7 LC). This obligation covers the provision of information not only about the basic working conditions, but about all conditions under which the relevant work is performed. The information must also cover the conditions stipulated in the collective labour agreement to which the user undertaking is bound.

4 Other Relevant Information

Nothing to report.

Croatia

Summary

(I) An amendment to the Labour Act has been adopted, also introducing a presumption of employment relationship for digital platform workers.

(II) Directive (EU) 2020/1057 on the posting of drivers in the road transport sector has been transposed into Croatian legislation.

(III) A new Family Benefits Act has been adopted.

1 National Legislation

1.1 Undeclared work

The Act on Suppression of Undeclared Work has been adopted (see Official Gazette No. 151/2022). It defines the notion of undeclared work, regulates measures to suppress undeclared work, activities to encourage the registration of work, the keeping of records of inactive persons and liability for violations of the provisions of this Act. It introduces a presumption of a six-month duration of employment relationship. When the labour inspector determines the existence of undeclared work, the worker who performed such work will be considered to have continuously worked under a full-time employment relationship with the employer for the duration of the preceding six months on the day on which the inspection was carried out and the fact of undeclared work was established, unless the information available to the inspector during the inspection clearly demonstrates that the employment relationship's previous duration was shorter or longer (Article 6).

Employers who do not register workers or use the services of workers who are allegedly self-employed will be black-listed on the Ministry of Labour's website. Employers will be fined for unregistered domestic and alien workers. The undeclared worker will be immediately registered, and the employer will be required, in addition to a fine, to pay all other obligations (social security contributions) for the undeclared worker for the past 6 months.

1.2 Amendment to the Labour Act

An amendment to the Labour Act has been adopted (see Official Gazette No. 151/2022).

The novelties worth mentioning are as follows:

- The conclusion of a fixed-term employment contract is limited to a maximum of three times over three years, and an objective reason for concluding a fixed-term contract is necessary;
- what is not considered an interruption of the successive fixed-term contracts is regulated more strictly, i.e. the duration of the break between the termination of a fixed-term employment contract and the conclusion of a new one which is not considered an interruption of successive fixed-term contracts is extended from two to six months;
- a right of part-time worker to request full-time employment is regulated in more detail;
- it is possible to establish the right of the worker in the employment contract to freely determine his/her place of work;
- the Act differentiates between working from home from teleworking (work using IT technology);

- the employer no longer needs to include an annex to the employment contract when, in the case of force majeure (such as epidemics), the worker needs to work from home; this is limited to a period of 30 days; if the force majeure lasts longer than 30 days, there is an obligation on the part of the employer to attach an annex to the employment contract and regulate the specific rights of the worker who has to work from home;
- the right of the worker to request working from home is prescribed in certain situations (in case of sickness/disability of the worker; to provide care for small children and other dependent family members);
- child labour i.e. work performed by pupils/ work-based learning is regulated in more detail, as is the protection of other vulnerable categories of workers (pregnant workers, working parents, etc.);
- there is no longer a possibility to derogate from the principle of equal basic working and employment conditions for temporary agency workers in collective agreements;
- the time of availability of workers after working hours to take calls and respond to e-mails from their employer is defined;
- it is possible to conclude employment contracts for permanent seasonal jobs for a fixed and indefinite period;
- the worker will be able to work 8, and exceptionally 16 hours of overtime a week;
- the employer may extend the duration of the probation period in case of temporary absence of the employee during the probation period;
- periods of training for work is considered working time and where possible, should be organised during established working hours;
- the rights to paid and unpaid leave are regulated in more detail; among others, the right of workers-carers of dependent family members to unpaid leave of 5 working days has been transposed from the Work-Life Balance Directive;
- the content of the notion of salary is regulated in more detail;
- in case of interruption of work due to extraordinary circumstances (such as epidemics), the worker will have the right to compensation of wages in the amount of 70 per cent of his/her average salary over the previous three months;
- a worker who, at the time of termination of the employment contract, has reached the age of 65 and has 15 years of insurance periods cannot exercise the right to a notice period nor is he/she entitled to severance pay;
- the procedure in case of harassment and sexual harassment has been improved, i.e. an employer who employs at least 20 workers is required, with prior written consent of the person the employer proposes to appoint, to appoint one person, while an employer who employs more than 75 workers is required to appoint two persons of different genders who, in addition to the employer, are authorised to receive and resolve complaints related to the protection of dignity of workers. Furthermore, the confidential counsellor is appointed with prior consultation with the works council;
- so far, unionised and non-unionised workers were entitled to same level of rights concluded by the collective agreements; according to the new provision, the members of trade unions are entitled to a higher level of rights compared to non-unionised workers; more precisely, the pecuniary rights (jubilee award, holiday pay, Christmas bonus, etc.), can be agreed upon in a collective agreement to a greater extent for the members of the trade union that negotiated the collective agreement; the total amount of such rights may not be agreed on an annual basis for more than twice the average annual union membership fee of the unions

that negotiated the collective agreement; such rights are exercised by those members of the trade union which the trade union has informed the employer about. Such provisions are problematic from the point of view of the right to not be a member of a union because they encourage membership in representative trade unions (members of smaller unions that are not representative for collective bargaining do not have a higher level of pecuniary rights), and at the same time, they give too much power to representative unions to determine which union members have the right to a higher level of pecuniary rights;

- provisions on the regulation of work through digital platforms (16 new Articles of the Labour Act) will enter into force in 2024. Among others, the presumption of the employment relationship of the digital platform worker and the exception to it are defined. In this context, the shifting of the burden of proof from the worker to the digital platform and the aggregator is prescribed. The notions of a digital platform and an aggregator are defined and their joint liability for the obligations towards the worker is provided. As regards the exception to the assumption of the existence of an employment relationship, it should be mentioned that it does not apply to a natural person who, by working through digital work platforms in a particular quarter of the calendar year, did not receive more than 60 per cent of the gross amount of three monthly minimum wages as determined by a separate regulation. If meanwhile the Proposal Directive on Platform Workers is adopted, it will be necessary to amend these provisions in line with the Directive;
- the obligation to pay an increase in the hourly rate for work on Sundays and holidays by 50 per cent of the regular hourly rate is also new (such regulation was previously part of collective agreements).

1.3 Third-country nationals

An amendment to the Aliens Act has been adopted (see Official Gazette No. 151/2022) due to Croatia's accession to the Schengen area.

1.4 Work-life balance

The new Family Benefits Act has been adopted (see Official Gazette No. 152/2022). Despite the fact that the last amendment to the Family Benefits Act was only recently adopted, i.e. in July 2022, the Work-life Balance Directive has been transposed into Croatian law, the legislator decided to adopt a new Act.

Its purpose is to raise the salary compensation for family leave-takers, to allow certain types of work of family leave-takers, to allow family leave-takers who have concluded an employment contract when using the leave to postpone the use of unused period of leaves and to introduce a new right of adoption leave to the partner of the adoptive parent analogous to the duration of paternity leave.

1.5 Posting of workers

The amendment to the Act on Working Time, Mandatory Rest Periods for Mobile Workers, and Recording Devices in Road Traffic (see Official Gazette No. 152/2022) has been adopted to transpose Directive (EU) 2020/1057 of the European Parliament and of the Council of 15 July 2020 laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) No. 1024/2012 into Croatian law.

The amendment defines the notions of the place of work, mobile worker, night work, etc., regulates the posting of drivers, defines the bilateral exchange of information via the IMI system and the misdemeanour provisions are prescribed in more detail.

1.6 Civil servants

The amendment to the Civil Servants Act (see Official Gazette No. 141/2022) has been adopted. It provides that retired civil servants can work as fixed-term and part-time civil servants until they reach the age of 67 years. Furthermore, civil servants who fulfil the requirements for old-age pensions can continue to work as civil servants until they reach the age of 67 years.

1.7 Occupational health and safety

The amendment to the Regulations on the Performance of Occupational Health and Safety Duties has been adopted (see Official Gazette No. 154/2022). It defines, among others, the qualifications of an expert for occupational health and safety and prescribes the enlisting of experts for occupational health and safety in the register of training in occupational health and safety and the performance of occupational health and safety tasks.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-311/21, 15 December 2022, TimePartner Personalmanagement

Since 01 January 2023, when the amendment to the Labour Act entered into force, there no longer is a possibility to derogate from the principle of equal basic working and employment conditions for temporary agency workers by a collective agreement. Therefore, the CJEU's judgment will not have any implications for Croatian law.

4 Other Relevant Information

Nothing to report.

Cyprus

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU Case C-311/21, 15 December 2022, TimePartner Personalmanagement

In its decision, the Court dealt with the equality principle for temporary agency workers. Between January and April 2017, TimePartner Personalmanagement GmbH, a temporary work agency, employed CM as a temporary worker on the basis of a fixed-term contract. During her assignment, CM was an order picker with a user company in the retail sector. For this work, she received a gross hourly wage of EUR 9.23, in accordance with the collective agreement applicable to temporary workers concluded between two unions which TimePartner Personalmanagement GmbH and CM were members of, respectively. This collective agreement derogated from the principle of equal treatment recognised in German law, by providing for a lower remuneration for temporary agency workers than that paid to workers of the user company under the terms of a collective agreement for workers in the retail sector in the Land of Bavaria (Germany), namely a gross hourly wage of EUR 13.64. CM lodged an appeal with the *Arbeitsgericht Würzburg* (Labour Court of Würzburg, Germany) seeking to obtain an additional remuneration totalling EUR 1 296.72, equivalent to the difference in salary between temporary workers and comparable workers recruited directly by the user undertaking. The claimant invoked a breach of the principle of equal treatment of temporary workers enshrined in Article 5 of Directive 2008/104. After the dismissal of this claim in first instance and on appeal, CM brought an action for revision before the *Bundesarbeitsgericht* (Federal Labour Court, Germany), which referred five questions to the CJEU for a preliminary ruling on the interpretation of this provision.

In Cyprus, the law purporting to transpose the Temporary Work Agency Directive is (*Ο περί της Εργασίας μέσω Επιχείρησης Προσωρινής Απασχόλησης Νόμος του 2012, 174(I)/2012. Ερμηνεί*), herein referred to as TWA Law. The Cypriot law does not allow for any derogation of the principle of equal treatment while respecting the overall protection of temporary agency workers. The TAW law stipulates that the principle of equal treatment applies. The basic working and employment conditions of temporary agency workers shall, for the duration of their assignment at a user undertaking, be at least those that would apply if they had been recruited directly by that undertaking to occupy the same job in accordance with Article 5 of Directive 2008/104/EC (Article 18 of the TWA Law). Temporary agency workers also enjoy the same level of protection with reference to occupational health and safety conditions (Article 18(2) of the TWA Law). Temporary agency workers are entitled to equal treatment as workers hired directly by the user undertaking, as per Article 18(1) of the TWA Law. The relevant section of the law reads as follows:

> *"18 (1) Οι βασικοί όροι εργασίας και απασχόλησης των προσωρινά απασχολούμενων, κατά την περίοδο της παραχώρησής τους σε έμμεσο εργοδότη, είναι τουλάχιστον αυτοί που θα εφαρμόζονταν αν οι εργοδοτούμενοι είχαν προσληφθεί απευθείας από τον εργοδότη αυτόν για να καταλάβουν την ίδια θέση".*

This includes health and safety standards (in accordance with Article 18(2) of the TWA Law), the rights derived from statutes, subsidiary legislation and administrative provisions, collective agreements and practices. The relevant section of the law (Article 18(3) of the TWA Law) reads as follows:

"(3) Οι κανόνες που ισχύουν στην επιχείρηση του έμμεσου εργοδότη, όπως προνοούνται από τη νομοθεσία, τις κανονιστικές και διοικητικές διατάξεις, τις τυχόν εφαρμοστέες συλλογικές συμβάσεις και πρακτική πρέπει να τηρούνται με τους ίδιους όρους και ως προς τους προσωρινά απασχολούμενους και κυρίως σε σχέση με: (α) την προστασία των εγκύων και γαλουχουσών γυναικών και την προστασία των παιδιών και των νέων· και β) την ίση μεταχείριση ανδρών και γυναικών και κάθε δράση για την καταπολέμηση κάθε διάκρισης λόγω φύλου, φυλής ή εθνοτικής καταγωγής, θρησκείας ή πεποιθήσεων, ειδικών αναγκών ή αναπηρίας, ηλικίας ή γενετήσιου προσανατολισμού."

4 Other Relevant Information

4.1 Platform work

Delivery workers working for the Wolt digital platform went on a week-long strike in all major cities in the Republic of Cyprus, protesting against deteriorating working conditions and deductions in pay by agents who work for the platform. The working conditions are grave and are all workers are migrants. Third-country nationals (students and asylum seekers in Cyprus) are not allowed to sign up directly with the platform, whilst Europeans are. They are legally required to sign up via one of the delivery agencies.

The delivery workers went on strike after their employer reduced their wages further to EUR 2.26 from EUR 3.26 per ride. Drivers demanded the compensation for each route to be restored to EUR 2.60 as was previously the case, and EUR 4.00 for Fridays and EUR 3.50 for Saturdays. They also demanded compensation of EUR 0.50 per kilometre for all routes and EUR 1.10 for deliveries in inclement weather. They also demanded the percentage kept by the fleet managers to be reduced to 30 per cent, instead of the currently 41 per cent.

Their contract provided that apart from the EUR 2.60 per journey, the drivers would receive compensation of EUR 0.25 – EUR 0.50 for deliveries at a distance of over 1 kilometre, while for deliveries within one kilometre, they would receive no compensation at all. They demanded compensation of EUR 0.50 per kilometre for all journeys, and compensation of EUR 1.10 for deliveries during rainy weather. The agencies function as employers and assign the delivery workers to the digital platform, deduct 41 per cent of their wages, while Wolt, which is the company for which they actually work for, claims it has no responsibility for these workers.

These workers' average income is EUR 400 - EUR 500 per month (interview with one of the strikers). The have to buy the equipment they use (jacket, delivery box, helmet) from Wolt which imposes a dress code and Wolt-designed delivery box. The strikers demanded the company to cover the cost of the equipment, pay for their fuel, protective equipment, and distribution bags and should be required to cover any damages to the equipment.

Trade unions supported the delivery workers' strike (see SYXKA - PEO, Solidarity with striking workers working for digital platform Wolt).

In response, Wolt asserted that the strikers' demands are related to their compensation, an issue managed by the agencies - distributor companies rather than Wolt. The

platform Wolt claimed that it has no direct business relationships with any distributor companies in Cyprus; however, 80 per cent of its delivery drivers are affiliated with distribution firms or companies that the platform works with.

The strike ended through the mediation of the Department of Labour Relations of the Ministry of Labour which invited all parties (striking workers, the trade union PEO and SEK, the agencies and various digital platforms) to a structured dialogue. A meeting attended by representatives of the workers and of the employers took place on 21 December 2022. In view of the start of a dialogue, the strikers unanimously decided in a General Assembly to end the strike.

The job is difficult, not well paid and has many hazards. Given that it is difficult for third-country nationals to find any other work, many of them take a delivery job. It is a very dangerous job, with frequent accidents and racist attacks.

The regulation of platform work is an issue that has been tabled for discussion since March 2022 by the parliamentary Labour Committee. Trade unions and the opposition parties have stated that there is a need to regulate the working environment for employees in this sector, the terms of employment and the protection of their labour rights, the issue was discussed in March 2022 in the Labour Committee of the Parliament. The matter was postponed following the delay of the EU draft directive.

Czech Republic

Summary

(I) A new act has introduced certain changes in the regulation of working time of employees in inland navigation, as well as in their assessment of health capacity and in their training.

(II) A new Decree has introduced several changes in the area of occupational health services.

(III) A new Bill aims to transpose the Whistleblowing Directive 2019/1937 into law.

1 National Legislation

1.1 Average salary in the national economy

The Communication of the Ministry of Labour and Social Affairs No. 426/2022, on the announcement of the amount of average salary in the national economy for the 1st and 3rd quarters of 2022 for the purposes of the Labour Code, has been adopted and published. This Communication is issued periodically and is used in various labour-law calculations, and is available here.

1.2 Annual valorisation of compensation payments

Governmental Regulation No. 413/2022 on adjustment of compensation provided for the loss of earnings after the end of a period of temporary incapacity for work caused by a work accident and/or occupational disease and on the adjustment of compensation of survivors pursuant to labour law regulations, has been published and will enter into effect on 01 January 2023. The annual valorisation of the above compensation takes place on regular basis.

The Regulation is available here.

The Regulation governs the calculation of the following types of compensation:

- compensation for loss of earnings after the end of a period of temporary incapacity for work caused by a work accident and/or by an occupational disease;
- compensation of survivors (provided to the eligible survivors of employees).

The amount of compensation is calculated based on the amount of average earnings. For the purposes of the calculation, the rate of valorisation of the average earnings is adjusted regularly – the amount of average earnings will now be increased by 5.1 per cent.

1.3 Amendments to the Act on Civil Service

Act No. 384/2022 amending Act No. 234/2014 Coll., on Civil Service, has been adopted and published. The Act will enter into effect on 01 January 2023. The Act introduces certain changes in the public service sphere.

The text of the Act is available here.

We informed about this Act already in the November 2022 Flash Report.

1.4 Foreign subsistence expenses

Decree No. 401/2022 Coll., on the setting of minimum rates of foreign subsistence expenses for 2022, has been adopted and published. The Decree will enter into effect on 01 January 2023.

The Decree is available here.

The minimum rates of foreign subsistence expenses (payments to employees in case of trips abroad) have been reviewed and amended.

Due to changes in the exchange rates of foreign currencies and/or prices abroad, the minimum rates of foreign subsistence expenses (in case of business trips abroad) have been amended accordingly. This adjustment takes place regularly.

1.5 Act on Inland Navigation

Act No. 372/2022 amending Act No. 114/1995 Coll., on Inland Navigation, has been adopted and published. The Act will enter into effect on 01 March 2023.

The text of the Act is available here.

The Act introduces new rules on the regulation of inland navigation, including certain changes in the regulation of working time of employees in inland navigation, as well as in the assessment of health capacity and in the training of these employees.

The Act also introduces certain changes to the regulation of working hours of employees in inland navigation. Notably, the Act sets forth new rules on work breaks for meals and rest periods.

As already described in many previous Flash Reports, the Czech Labour Code differentiates between work breaks for meals and rest periods which are provided by the employer after a period of continuous work of maximum six hours, and a reasonable time for meals and rest periods when the work cannot be interrupted. The former break shall last at least 30 minutes and is considered a rest period, and is thus unpaid; the latter, on the other hand, is considered part of the employee's working hours since the employee cannot take a real rest period due to the nature of the work (e.g. an employee supervising boilers who cannot leave the boilers' proximity for more than 5 minutes due to the technical requirements of the boilers), and is therefore financially compensated.

According to the Act, employees in inland navigation are no longer entitled to a reasonable time for meals and rest – they are now only entitled to work breaks for a meal and rest.

In this connection, the Act also specifies another rule, i.e. if the work break for meals and rest periods is to be divided in parts, each such part shall be at least 15 minutes.

The Act further sets certain specific rules with respect to the health capacity of certain employees in inland navigation and the assessment thereof, and introduces certain provisions relating to the training of crew members in inland navigation.

1.6 Living and subsistence minimum

Regulation No. 436/2022 Coll., on increasing the living and subsistence minimum has been adopted, published, and will enter into effect on 01 July 2022.

The text of the Regulation is available here.

The Regulation governs the amount of the following:

- amount of living minimum;
- amount of subsistence minimum.

The amount of living minimum has been increased to CZK 4 860 (i.e. approx. EUR 200). The amount of subsistence minimum has been increased to CZK 3 130 (i.e. approx. EUR 129.2).

Apart from their original purpose (setting the minimum amount necessary for an individual to survive), both these amounts are used for the calculations of other institutes and amounts throughout the entire legal system. The one related to employment and insolvency is the 'unseizable amount' – the amount that cannot be deducted from an employee's salary.

The regulation increases the amount of living minimum, as well as the amount of subsistence minimum. This automatically leads to an increase in the so-called unseizable amount, which serves as a limit to the deductions that can be made to an employee's salary.

1.7 Minimum wage

Government Regulation No. 465/2022 Coll., on the amendment of Government Regulation No. 567/2006, on minimum salary, on the minimum amount of guaranteed salary, on delineation of difficult working conditions and on the amount of payment for work under difficult conditions, as amended, has been adopted and published. The Government Regulation will enter into effect on 01 January 2023. The increase in the minimum salary is an adjustment that is regularly implemented – with certain differences compared to past years.

The minimum hourly salary is set to CZK 103.80 (i.e. approx. EUR 4.29) and the minimum monthly salary is set to CZK 17,300 (i.e. approx. EUR 714.20).

The Decree is available here.

Normally, the government also sets the amount of the so-called guaranteed salary, i.e. the minimum salary amounts for certain categories of jobs, depending on their responsibility, complexity and difficulty. There are 8 such categories. Category 1 workers are entitled to the lowest amount of minimum salary above, Category 8 workers are entitled to twice the amount of the minimum salary. The guaranteed salary for Category 8 workers is therefore now set to CZK 207.60 (i.e. approx. EUR 8.58) per hour and CZK 32 400 (i.e. approx. EUR 1 428.40) per month.

In the past, the guaranteed salary for Categories 2-7 workers increased proportionally as well; however, the government has refrained from increasing the amount in these categories.

1.8 Occupational safety and health

Decree No. 452/2022 Coll., amending Decree No. 79/2013, on Occupational Health Services and certain types of assessment care, has been adopted and published. The Decree will enter into effect on 01 January 2023.

The Decree is available here.

The Czech Ministry of Health has prepared an amendment to the Decree on Occupational Health Services. Even though it was expected that the amendment would introduce substantial changes to occupational health services, after significant feedback from other authorities as well as private entities, the number of amendments was reduced. Nonetheless, further amendments are planned by the Ministry.

While initial medical examinations remain unaffected by the amendment, periodic medical examinations will be changed quite substantially. Unless there are relevant risks to employees' health (either consisting in hazardous nature of work or in occupational risks), periodic medical examinations will only be performed upon the employee's or employer's request. The change will most significantly affect office employees.

Furthermore, extraordinary medical examinations will no longer be required in cases when an employee was absent from work for more than 6 months due to maternal or parental leave.

The amendment also changes the surveillance of occupational health service providers of employers' workplaces. In case there are no relevant risks to employees' health, health surveillance will not be compulsory. Health surveillance shall only be performed in case the occupational health service providers have a mandate or the employer voluntarily opts in. In other cases, the frequency in which the providers of occupational health services shall survey employers' workplaces will be extended.

Also, the minimum time required for consultancy and surveillance of employers' workplaces will be repealed.

1.9 Whistleblowing

The Government Bill on the Protection of Whistleblowers has been submitted to the Chamber of Deputies of the Parliament of the Czech Republic. The Bill shall enter into effect on the first day of the second calendar month following the publication of the Bill in the Collection of Laws. The Bill aims to transpose Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

The Bill is available here.

On 30 November 2022, the government introduced the Bill to the Chamber of Deputies.

The legislation (and the protection) applies to reports of possible wrongdoing that has the elements of a criminal offence, which breaches the Bill or EU law/regulations in specified areas. To be a whistleblower within the meaning of the Bill, a person must have a specific (work) relationship with the person (company) to whom the report relates.

Such persons are protected from retaliation when they submit a report in the manner set out by the Bill. Other persons are also protected from retaliation.

The Bill contains exceptions to the breach of confidentiality when making a report.

The Bill also requires certain entities to establish an internal reporting system. This obligation is regulated differently for different sectors. For the private sector, the obligation generally applies to employers who have at least 50 employees as of 01 January in the relevant year.

The internal reporting system must allow the notifier to submit the notification both orally and in writing and, on request, in person. The entities do not have to accept anonymous reports. They must designate a specific person(s) to receive and review the reports.

An internal system may only be shared with another body (person) that employs up to 249 employees. The Bill contains time limits for notification or receipt of the report (7 days); assessment of the report (30 days, which may be extended twice).

The Bill requires the State to establish an external reporting system that allows for oral, written, and, upon request, in-person reports. This reporting system is administered by the Ministry of Justice and has already been established. So-called designated staff have been appointed to review the reports. In the event of suspicion of a violation, the designated employee shall inform the competent authorities that deal with the specific violation.

The Bill also provides for the possibility of publishing information on wrongdoing. It also regulates the obligations to register the reports, regulates control compliance with the Bill and sanctions for non-compliance.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU Case C-311/21, 15 December 2022, TimePartner Personalmanagement

The CJEU ruled that:

> *"Article 5(3) of Directive 2008/104 of the European Parliament and of the Council of 19 November 2008 on temporary agency work must be interpreted as meaning that that provision, by its reference to the concept of 'overall protection of temporary agency workers', does not require any account to be taken of a level of protection specific to temporary agency workers that is greater than that laid down for workers in general by provisions on basic working and employment conditions under national and EU law. However, where the social partners, by means of a collective agreement, authorise differences in treatment with regard to basic working and employment conditions to the detriment of temporary agency workers, that collective agreement must, in order to respect the overall protection of the temporary agency workers concerned, afford them advantages in terms of basic working and employment conditions which are such as to compensate for the difference in treatment they suffer."*

The CJEU further ruled that:

> *"Article 5(3) of Directive 2008/104 must be interpreted as meaning that compliance with the obligation to respect the overall protection of temporary agency workers must be assessed, in concrete terms, by comparing, for a given job, the basic working and employment conditions applicable to workers recruited directly by the user undertaking with those applicable to temporary agency workers, in order to be able to determine whether the countervailing benefits afforded in respect of those basic conditions can counterbalance the effects of the difference in treatment suffered."*

As to the working conditions of temporary agency employees compared with other employees:

According to Section 309 (5) of the Labour Code, the employment agency and user undertaking are required to ensure that the working and wage conditions of a temporarily assigned employee are not less favourable than those of a comparable permanent employee. If the working or wage conditions of a temporary worker are less favourable during the period of performance of work for the user undertaking, the temporary work agency is required to ensure equal treatment at the request of the temporary agency worker or, if the agency learns of this otherwise, even without a request; a temporarily assigned employee shall have the right to seek redress from the temporary work agency.

The Labour Code does not contain any further specifications of the term 'working and wage conditions' and uncertainty over the exact content of this term persists.

To unify the control procedures for comparable working and wage conditions of temporary agency workers, the General Inspector of the State Labour Inspection Office issued a 'Methodical Instruction No. 2/2016' (hereinafter referred to as the 'Methodical Instruction' or 'Instruction'). This Methodical Instruction sets out the principles for the assessment of the comparable working and salary conditions. The Instruction is not binding on courts, however, it is binding on Labour inspection offices when performing checks. The Methodical Instruction contains a more detailed definition of working and

wage conditions. According to the Instruction, working conditions refers to the conditions set out in labour law regulations in case such working conditions are tax deductible expense. According to the Methodical Instruction, wage conditions refers to remuneration directly related to the performance of work. The relationship between remuneration and the performance of work is decisive. Employers (more or less) respect this Methodical Instruction as it only provides guidelines on comparable working and wage conditions.

Despite the Methodical Instruction, the Supreme Administrative Court ruled (on 29 May 2020 in File No. 2 Ads 335/2018) that the unequal treatment of temporary agency workers compared to the user undertaking's permanent employees is permissible—even if they perform work in the same position—if economically justifiable and generally acceptable reasons for such unequal treatment exist for differentiated wages for different categories of workers for their employer (user undertaking). Such reasons may include experience, performance, reliability, degree of connection with and loyalty to the user undertaking, as well as capacity to deal with non-standard situations. The Supreme Administrative Court also expressed opinion that temporary agency workers who frequently rotate (every few months) may generally be paid lower wages compared to the user undertaking's permanent employees, even though they perform work in the same position, because permanent employees provide the user undertaking with more benefits and pose a lower risk.

It seems that the Supreme Administrative Court ruling is not in line with the above CJEU ruling and Article 5 (3) of Directive 2008/104, as it does not mention the necessity to afford temporary agency employees any advantages in terms of basic work and employment conditions as compensation for the difference in treatment and the less favourable working and wage conditions to ensure the overall protection of working and employment conditions of temporary workers.

It seems that the Czech Republic has not integrated the definition of comparable working and wage conditions into law and the Methodological Instruction is not sufficient. A new amendment on temporary agency work is currently being discussed by the Ministry of Labour. One of the reasons is case C-232-20, *Daimler AG, Mercedes-Benz Werk Berlin* because Czech legislation is not in line with this ruling. Comparable working and wage conditions are not part of the amendment.

4 Other Relevant Information

Nothing to report.

Denmark

Summary

A decision of the Danish Employees' Guarantee Institution deals with the classification of (false) independent contractors and employees.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Employee status

Decision by the Danish Employees' Guarantee Institution

In Denmark, employees are covered by the Employees' Guarantee Institution (*Lønmodtagernes Garantifond*), which guarantees claims for unpaid remuneration in case of employer insolvency. A decision by the Institution deals with the classification of (false) independent contractors and employees.

A private care company had a contract for the delivery of care services on behalf of a Danish municipality. The private care company contracted social and health care assistants as independent consultants. The assistants were registered with their own company registration number and were only paid for the 'active' working hours spent with the patient. This sometimes resulted in workdays of a total of more than 12 hours. Their remuneration did not include pension or holiday pay. In the planning of work, the assistants were assigned to shifts the same way ordinary employees of the care company were.

The private care company went bankrupt, and FH (the Danish Trade Union Confederation) brought a claim before the Danish Employees' Guarantee Institution (LG) for compensation for the loss of wages on behalf of the assistants, claiming that they had in fact been employees, and not independent contractors. LG agreed that the assistants had indeed been employees and the two employees were thus awarded DKK 323 000 (EUR 43 428) in total for outstanding pay, pension and holiday pay.

Directive 2008/94/EC on the protection of employees in the event of insolvency of their employer applies to employees' claims arising from contracts of employment or from employment relationships. Member States are required to ensure that employees' claims for unpaid remuneration are covered by the national guarantee institution. The definition of who is considered an employee is left for the national law, cf. Article 2(2).

The CJEU has consistently held that the Directive shall apply to 'all categories of employees' defined as such by the national law of the Member State, e.g. in CJEU C-334/92, *Wagner Miret*.

The LG's ruling is in line with the EU law acquis. It demonstrates that the personal scope does not depend on the parties' own formal definition of the relationship, such as registering a company registration number. The classification is subject to an intensive review by the Guarantee Institution, which may include the composition of pay, instruction, responsibility for the quality of work performed, etc.

The decision of the Employees' Guarantee Institution is in line with other recent national rulings on the classification of employees in other legal areas. A recent ruling in the context of tax law, namely a decision by the National Tax Board (*Skatterådet*) of 25 January 2022, found that a WOLT food delivery driver was to be considered an employee for tax purposes, and that the food delivery company WOLT was required to withhold

taxes on behalf of that employee. A Supreme Court ruling of 8 December 2022 reconfirmed that professional drivers were to be considered employees for taxation purposes.

These rulings/ decisions demonstrate that courts and administrative boards will set aside the parties' own formal description of their relationship in the face of labour and employment law and carry out an in-depth evaluation of the characteristics of the relationship between the contractor/employee and the company. The assessment of these recent rulings in taxation law and the protection of employee claims in case of employer insolvency specifically focus on assessing the facts of the relationship between the contracting parties, and less on the formalities of how remuneration is paid, the individual components of the contract and whether or not the contractor has a registered company number.

See here for information provided by FH (the Danish Trade Union Confederation) concerning the decision of the Employees' Guarantee Institution, 14 September 2022.

See here for the decision (binding assessment) of the National Tax Board, 25 January 2022.

See here for the Supreme Court ruling, BS-37342/2021-HJR, 08 December 2022.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-311/21, 15 December 2022, TimePartner Personalmanagement

The ruling clarifies the interpretation of Directive 2008/104, Article 5(3) with reference to collective agreements that can derogate from the principle of equal treatment (Article 5(1)), while respecting 'the overall protection of temporary agency workers'. The case concerned a German collective agreement that provided for lower pay for temporary agency workers than for staff members directly recruited by the user undertaking.

In light of the Directive's (dual) purposes, the CJEU clarified that the overall protection of temporary agency workers in collective agreements based on Article 5(3) are only respected if those workers are at the same time given advantages that aim to compensate the effects of the difference in treatment.

Those advantages must cover the working and employment conditions defined in Article 3(1)(f), i.e. working time, overtime, breaks, pay, etc. A concrete assessment hereof must be carried out, and the CJEU sets down the three steps in such an assessment.

First, it is necessary to determine the basic working and employment conditions that would apply if the temporary agency worker had been directly recruited by the user undertaking (for the same job).

Second, it is necessary to compare those conditions with those resulting from the applicable collective agreement.

Third, it must be assessed whether other potential benefits can offset any difference in treatment.

The CJEU rejected that Member States (national legislators) were required to specify which conditions and criteria were to be respected in derogations allowed under Article 5(3).

Finally, the CJEU clarified that collective agreements under Article 5 (3) must be amenable to effective judicial review to determine whether the social partners have complied with their obligation to respect the overall protection of temporary agency workers. Whereas labour market parties are afforded a discretionary margin in the negotiation of agreements, the national courts are required to ensure that collective agreements are consistent with the obligations of Article 5(3) of Directive 2008/104.

The ruling provides an important clarification of Directive 2008/104 on several aspects. In a Danish context, the ruling contributes with a clarification, namely:

1) that derogations can be made subject to a legal review to ascertain whether they respect the overall protection of temporary agency workers (para 79);
2) how such a legal review must be carried out, namely by comparing the provisions to the rights of the user undertaking's permanent employees (para 50);
3) that the comparison must be of the basic working and employment conditions as defined in Article 3(1)(f) of the Directive, as these ensure 'general protection' (paras 38 and 39);
4) that the requirement for respecting overall protection is that any detrimental working conditions in one area are offset by advantages in other basic working conditions (para 44).

In Denmark, the derogation provided for in Article 5(3) of the Directive has been implemented in the Danish Temporary Agency Worker Act (TAW Act), section 3(5). Section 3(5) reads as follows (the provisions in section 3(1)-(4) of the Danish TAW Act implement the equal treatment principle as required in Article 3(1-2) of the TAW Directive):

"Subsections (1)-(4) do not apply in the event that the temporary work agency is included in or has joined a collective agreement that has been concluded by the most representative social partners in Denmark, and which is valid within the entire Danish territory, by which the general protection of temporary agency workers is respected."

The derogation is widely used in Denmark.

Ad 1) – Judicial review

The provision sets out the formal requirements for a collective agreement to derogate from the principle of equal treatment: 1) The TWA must have acceded to a collective agreement or be covered by a collective agreement through membership of an employer association; 2) the collective agreement in question must have been concluded by the most representative social partners in Denmark; and 3) the agreement must apply to all of Denmark (geographically).

These three formal criteria ensure a certain 'quality' of the collective agreements that may derogate from the principle of equal treatment of TAW. The role of the final sentence in provision 3(5) 'by which the general protection of temporary agency workers is respected' were very vaguely described in the preparatory works for the TAW Act. The preparatory works could easily be understood as suggesting that the fulfilment of the formal requirements would be sufficient to establish an assumption that overall protection was being respected, as a collective agreement (of this nature) always respects the workers and is always balanced.

This approach of the perceived balance and overall protection was modified by the Supreme Court. The parties to the case disagreed on whether this last part of section 3(5) should be considered as being a separate condition for the lawfulness of derogating agreements, or whether it was to be considered an automatic consequence of the high formal thresholds of derogating agreements – as indicated in the preparatory works. In the Supreme Court ruling of 17 December 2019 (U 2020.845 H), the Court found that the content of the agreement shall also be subject to judicial review. It should be possible to provide a judicial review of whether a derogating agreement actually observes the general protection of temporary agency workers provided for in the Directive.

The Supreme Court in its ruling first established that the overall protection of the TAW is an individual requirement for the lawfulness of derogating agreements, in particular

relying on the wording of the TAW Act section 3(5). Thus, it can be subject to judicial review whether a derogating agreement fulfils this requirement.

The judicial review of whether the conditions in the TAW Act section 3(5) are met are by law delegated to the Labour Court, cf. TAW Act section 3(7). The Danish Labour Court has competence to determine whether the conditions in section 3(5) for derogation from the principle of equal treatment are fulfilled. Similarly, this follows from section 9(1) No. 9) in the Labour Court Act.

The Supreme Court, secondly, found that these legal bases establish an exclusive competence for the Labour Court. The Labour Court has competence to assess whether a derogating collective agreement fulfils not only the formal requirements in section 3(5) but also whether it respects the overall protection of temporary workers in Directive 2008/104/EC.

In terms of the first outcome of the CJEU ruling, the Supreme Court ruling clarifies—in full conformity with the standard procedures for assessment of the contents of collective agreements—that derogating agreements can be subject to judicial review, both with regard to the agreement's formal requirements, as well as to the material condition of respecting the overall protection of TAWs.

As for the comparator and the method for comparisons, ad 2)-4):

The Supreme Court ruling did not, however, give any guidance on how the Labour Court should carry out such a review. This is left to the Labour Court to decide.

The Labour Court has not yet assessed any claims involving an assessment of whether derogating agreements live up to 'the overall protection of temporary agency workers'. As a consequence, the Labour Court has not provided guidance on what 'general protection' means or how it should be assessed.

On these points, the CJEU ruling provides some guidance for the Danish courts.

Ad 2) –principle of equal treatment and the level of protection

The preparatory works to the TAW Act suggest that the concept refers to 'the EU law minimum requirements with regard to the protection of TAW's salary and employment conditions'. In response to Parliamentary Question No. 24, the Minister stated that "*it is the level of protection of the most representative nationwide collective agreements in Denmark that must be compared with the minimum level in the EU.*"

The CJEU ruling clarifies that the elements to be compared are not the minimum rights under EU law, but instead the level of the same (EU-based) rights provided for in a collective agreement or legislation for permanently employed persons with the same employer, aside from the condition of permanent employment.

Ad 3) –concept of 'general protection'

The CJEU ruling clarifies that the elements to be compared are the categories of rights provided under EU law as referred to in Article 3(1)(f). These are considered the basic working and employment conditions that must be respected for TAW, and these are balanced against the need for flexibility, etc., which is the Directive's opposing purpose.

That is, the comparison need not be on each specific element of the collective agreement, but on the elements that are considered basic working and employment conditions within the framework of the Directive itself.

Detrimental working conditions should be offset by advantages in other basic working and employment conditions. Not simply any advantage is thus considered to offset less favourable treatment.

On this point, the CJEU provides a specific clarification for the Danish context, which slightly aligns with the preparatory works for the provisions. The working conditions to

be reviewed when assessing the level of protection of the TAW are the working conditions mentioned at EU level in the TAW Directive.

Ad 4) – Offsetting detrimental conditions with advantages elsewhere

The CJEU clarifies that the assessment shall be an overall assessment of the basic working conditions. Detrimental working conditions in one area can be offset by advantages in another area. The assessment includes a step-by-step comparison of the working conditions and a final overall evaluation whether the reduced rights and the stronger rights are overall balanced.

The CJEU thus provides a formula for conducting a judicial review of how to respect the general protection of TAWs.

The Danish Labour Court is familiar with this formula. The Labour Court usually carries out intense and in-depth reviews of collective agreements, and the approach adopted by CJEU as such does not conflict, but corresponds to the judicial review procedure in Denmark. The formula does not in itself deviate substantially from assessments carried out by the Labour Court in other areas of Danish labour law, where the Court compares the level of protection of two competing collective agreements.

In this regard, the CJEU's ruling confirms that this approach of the Labour Court can be—and must be—applied when ruling on claims as well, where an assessment must be made whether a derogating agreement fulfils the requirement of respecting the overall protection of TAWs.

The CJEU ruling thus clarifies, guides and confirms the Danish acquis in this matter. The ruling provides useful guidance for the Labour Court in future case law.

See here for the Temporary Agency Work Act, L 595 of 12 June 2013.

See here for preparatory works to the TAW Act, L 209 of 2013.

See here for the Act on a Labour Court, no.1003 of 24 August 2017.

See here for the Supreme Court ruling of 17 December 2019.

4 Other Relevant Information

4.1 Annulment of the Directive on Adequate Minimum Wages

In December 2022, a new coalition government was formed in Denmark. The new government is made up of three political parties across the centre of Danish politics: the Social Democrats (the former governing party, which the (old) new Prime Minister is a member of), Venstre (the second largest party, a liberal party called 'The Left', which was in government until 2019), and the moderates (a new centre party formed by the Prime Minister until 2019 from the Left) – a very centre-oriented government.

In the new government's political foundation (*regeringsgrundlag*), one of the agreements is, that the government will seek an annulment by the CJEU of the Directive on Adequate Minimum Wages. Denmark voted against the Directive, and the social partners from both sides have consistently voiced concerns about the new directive. It remains to be seen whether an action for annulment is filed before the deadline expires in late January 2023.

See here for the new government's political foundation.

Estonia

Summary

New amendments to the Employment Contracts Act provide more flexibility in working time.

1 National Legislation

1.1 Working time

The Estonian Parliament has adopted amendments to the Employment Contracts Act, which provide more flexibility in labour relationships.

In the first amendment, the concept of an employee with independent decision-making competence was established. To date, an employee with independent decision-making competence was only defined in the Sports Act in 2020, but a general definition of an employee with independent decision-making competence was lacking.

According to § 43 of the Employment Contracts Act, an employee who has independent decision-making power is free to organise his/her working time according to the nature of the work, and the employer and employee must agree to it. Thus, autonomous decision-making does not simply arise on its own, but requires an agreement between the employee and the employer. Independent decision-making in this regard means that various restrictions to working time remain inapplicable. Thereby, the rest period within the working day and between working days is not defined; nor does the employee get overtime. Special rules do not apply when working at night. Since the employee can decide for him-/herself when to work, it also means that it is not possible for the employee to be subject to these restrictions.

Since autonomous decision-making requires an agreement between the employee and the employer, formal requirements that must be followed have also been set out in the agreement.

- the agreement must be made in writing;
- the agreement may be concluded with an employee with independent decision-making power whose salary in any one month is at least equal to the average gross monthly wage in Estonia in the quarter preceding the agreement in accordance with data published by Statistics Estonia;
- the agreement must not adversely affect the employee's health and safety;
- an accounting period of one month shall apply to the calculation of the working time of an employee with independent decision-making powers;
- the employee and employer may terminate the agreement at any time by giving 14 calendar days' notice.
- the agreement may only be concluded with an adult employee (see Employment Contracts Act (*töölepingu seadus*).

The second amendment concerns flexible on-call working time for employees who are employed in the ICT sector.

The general rule for on–call working time according to § 48 of the ECA is that if an employee and employer have agreed that the employee is available to the employer for the performance of duties outside of working hours (on-call time), remuneration which is not less than one-tenth of the agreed wages must be paid to the employee. In case of an agreement on the application of on-call time which does not guarantee the employee the possibility of using daily and weekly rest periods is void.

The following amendments apply to ICT workers:

By agreement of the parties, the restriction of the division between working time and rest periods is not applied to a full-time employee whose duties are to ensure the continuous functioning of ICT services and infrastructure as well as information security where:

1) The agreement is made in a form reproducible in writing;
2) the employee can perform duties that require a response during on-call time by using means of ICT without having to travel to their place of work;
3) the parties have agreed on a reasonable response time during which the employee is required to start the performance of duties;
4) the duration of on-call time per calendar month does not exceed 130 hours;
5) the employee is guaranteed two weekends with no work or on-call time per calendar month;
6) the agreement does not harm the employee's health or safety. The employee and the employer may cancel the specific agreement on on-call work at any given time by giving 30 calendar days' advance notice.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-311/21, 15 December 2022, TimePartner Personalmanagement

The Court's ruling only has modest implications on the current labour law and labour legislation in Estonia.

In Estonia, there are no collective agreements in Estonia that provide for special measures to expand the rights of temporary workers.

The working conditions of temporary employees are regulated in the following provisions of the Employment Contracts Act:

§ 6 (5) of the ECA provides for a general clause according to which an agreement on temporary work is concluded in writing. According to ECA, if an employer and employee agree that the employee shall perform work on a temporary basis for a third party (user undertaking) on the instructions and supervision (of the temporary work agency), the employer must, in addition, notify the employee that the duties are performed by way of temporary agency work in the user undertaking.

According to the Labour Market Services and Benefits Act, an employer cannot prohibit a temporary employee from concluding an employment contract with the user undertaking.

Separate provisions in the ECA cover the conclusion of fixed-term employment contracts with temporary agency workers. According to ECA § 9 (1), if duties are performed by way of temporary agency work, an employment contract may be entered into for a specified term, also if it is justified by the temporary characteristics of the work in the user undertaking.

If, in general, there are restrictions on fixed-term contracts, which do not allow a fixed-term employment contract to be concluded more than twice consecutively or to extend a fixed-term employment contract no more than once within five years. In the case of

temporary workers, it is related to the activities of the user undertaking. According to ECA § 10 (2), if the duties are performed by way of temporary agency work, the restriction to consecutive conclusion or extension of an employment contract for a specified term is applied to every user undertaking separately.

The Equal Treatment Act provides for equal treatment for temporary agency workers. According to § 11 of Equal Treatment Act, the following applies:

> *"(2) Employees who perform duties by way of temporary agency work shall not be subjected to less favourable conditions of occupational health and safety, working and rest time and remuneration for work than those applied to comparable employees of the user undertaking. Employees who perform duties by way of temporary agency work are entitled to use, during the period of performing duties, the benefits of the user undertaking, the first meal, transportation and childcare services, on the same conditions as comparable employees of the user undertaking".*

There is also a notion of a comparable employee. According to the Equal Treatment Act § 11:

> *(3) "'Comparable employee' means an employee working for the same employer, who is engaged in the same or a similar work, due regard being given to qualification and skills of the employee. Where there is no comparable employee employed by the same employer, the comparison shall be made by reference to the applicable collective agreement. Where there is no collective agreement, an employee engaged in the same or similar work in the same region shall be deemed a comparable employee".*

There are no specific rules on collective agreements and limitations for collective agreements concluded for temporary agency workers.

As neither specific collective agreements exist nor is a general principle of equal treatment of temporary agency workers guaranteed, the implications of the CJEU's decision are modest.

4 Other Relevant Information

Nothing to report.

Finland

Summary

A draft amendment to the Seasonal Work Decree to clarify and improve berry pickers' status has been proposed by the Ministry of Economic Affairs and Employment.

1 National Legislation

1.1 Seasonal work

The Act on the Conditions of Entry and Residence of Third-Country Nationals for Seasonal Work *(Laki kolmansien maiden kansalaisten maahantulon ja oleskelun edellytyksistä kausityöntekijöinä työskentelyä varten*, 907/2017) does not regulate foreign nationals engaged in agricultural work. The Act on the Legal Status of Foreigners Picking Agricultural Products (*Laki luonnontuotteita keräävien ulkomaalaisten oikeudellisesta asemasta*, 487/2021) applies to foreign nationals who pick agricultural products. The purpose of the Act, which entered into force on 14 June 2021, was to improve the position of pickers and to lay down statutory obligations for berry companies. The Act does not, however, apply if agricultural products are picked under an employment relationship.

The Ministry of Economic Affairs and Employment has been preparing an amendment to the Seasonal Work Decree (*Valtioneuvoston asetus maatalouden ja matkailun alaan kuuluvista kausiluonteista toimintaa sisältävistä toimialoista*, 966/2017) that aims to clarify and improve berry pickers' status. The purpose would be that in the future, entry into the country would require an employment relationship between the picker and the company. The amendment under preparation aims to bring berry pickers under the aegis of the Act on the Conditions of Entry and Residence of Third-Country Nationals for Seasonal Work and under the aegis of labour legislation. The draft amendment to the Decree has been submitted for comments. Comments can be made until 02 February 2023.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-311/21, 15 December 2022, TimePartner Personalmanagement

The labour legislation applicable to employment relationships generally also governs temporary agency work in a similar way as work performed in other types of employment relationships. However, Section 9, subsection 1 of Chapter 2 in the Employment Contracts Act (*Työsopimuslaki*, 55/2001) contains a particular provision on determining the applicable collective agreement. This subsection provides that the employer who has hired out an employee to work for another employer is neither bound by a collective agreement as referred to in Section 7, subsection 3, nor required to observe a generally applicable collective agreement in its employment relationships; the provisions of the collective agreement referred to in Section 7, subsection 3 to which the user undertaking is bound, or a generally applicable collective agreement shall be applied to the employment relationship of the temporary agency worker. The collective agreement referred to in Section 7, subsection 2, is the agreement which an employer

is required to conclude under the Collective Agreements Act (*Työehtosopimuslaki*, 436/1946).

Thus, according to the Employment Contracts Act, the minimum terms of employment for a temporary agency worker are determined according to the collective agreement of the temporary work agency or, if such a collective agreement does not exist, the collective agreement binding the user undertaking. Accordingly, if different collective agreements are applied to temporary agency workers and the user undertaking's employees, the terms of employment of these groups of workers may differ. It should be noted that according to Section 2, subsection 1 of Chapter 2 in the Employment Contracts Act, an employer must treat all employees equally, unless deviating from this is justified in view of the duties and position of the employees.

4 Other Relevant Information

4.1 Transition security scheme

The transition security scheme is a scheme that applies in cases of redundancy and refers to measures that aim to support employees who lose their job for financial and production-related reasons. Both employers and labour authorities are involved in the implementation of the Finnish transition security scheme. The scheme seeks to accelerate and facilitate re-employment. An evaluation of the transition security scheme has been carried out. According to the report (Publications of the Ministry of Economic Affairs and Employment 2022:62), the model generally works well.

The evaluation focussed on the effects of the employer's extended obligations introduced in 2017. Based on qualitative observations, the employer's obligations have an impact on re-employment, but the impact could not be verified based on register data. Redundant workers covered by the extended obligation had been offered more services than others, but not all had received them. Those who used the services felt that they had been useful for their re-employment or job search.

According to the report, the Employment and Economic Development Office's models and processes for the transition security scheme are poorly integrated into the employers' transition management processes. The report suggests that the authorities implementing the model should be provided with a statutory opportunity to discuss the use of employer training obligation and to exchange information with employers on available service providers. Information on good practices and implementation models should be systematically provided. A coordination structure, such as the transition security development project, provides an important means of disseminating good practice.

France

Summary

The Court of Cassation has overturned its previous case law on the qualification of commuting time, and has clarified its previous case law on day package agreements.

1 National Legislation

1.1 Unemployment insurance

A Law of 21 December 2022 (Law No. 2022-1598 on emergency measures relating to the functioning of the labour market aiming for full employment) significantly modifies French unemployment insurance. Most importantly, it allows for variation of the duration of compensation depending on the situation in the labour market (see Article L. 5422-2-2 of the French Labour Code). If the unemployment rate exceeds 9 per cent, rules on compensation remain unchanged. By contrast, if the rate of unemployment is under 9 per cent or has not increased by more than 0.8 per cent over a trimester, the duration of compensation will be decreased by 25 per cent for each job seeker entitled to compensation (an implementing decree shall set the date of entry into force of the provisions of the Law).

The Law also stipulates that between 01 November 2022 and 31 December 2023, unemployment insurance rules can be determined by decree without the need for prior negotiation with the social partners. This principle derogates from the provisions of the French Labour Code (see Article L. 5111-2 of the French Labour Code).

Moreover, it provides for the exclusion of the job seeker's right to unemployment benefit in case of two rejections of permanent job offers following a fixed-term contract or temporary contract over the last 12 months for the same or similar job.

The Law creates a presumption of resignation for employees who voluntarily abandon their job and do not return to work after having been given notice to justify their absence and to return within a time limit set by the employer (see Article L. 1237-1-1 of the French Labour Code). Yet, employees will be able to contest the termination of their employment contract before the Employment Tribunal, which shall rule on the nature of the termination and its consequences, i.e. the validity of the resignation or dismissal without real and serious cause.

Furthermore, the Law aims to exclude workers from unemployment benefits who have refused two permanent employment offers at the end of a fixed-term contract over the last 12 months for an identical or similar job (same remuneration, working hours, place of work, classification) and in accordance with their job search (see Article L. 5422-1-I of the French Labour Code). In such a case, the employer will be required to inform the job centre (*Pôle Emploi*) of the employee's rejection (see Article L. 1243-11-1 of the French Labour Code).

1.2 Disabled workers

A Decree of 13 December 2022 (Decree No. 2022-1561 on the career path and rights of disabled workers admitted to establishments and services providing assistance through work) sets out the conditions under which disabled workers can be directed to an *Etablissement et service d'aide par le travail (ESAT)*, a French organisation that helps disabled persons return to the labour market.

It also specifies the conditions for implementing a dual activity in ordinary and sheltered environments, the rights such workers are entitled to in the context of the reinforced employment pathway for workers entering the ordinary labour market, the new

individual and collective social rights such workers are entitled to in the sheltered labour market and the methods of the regional health agencies in charge of monitor the plan's measures.

Finally, the Decree reinforces and specifies the various individual and collective social rights of disabled workers in ESATs, with reference to the public social order applicable to all workers, regardless of their status.

2 Court Rulings

2.1 Working time

Social Division of the Court of Cassation, No. 20-21.924, 23 November 2022

In the present case, a sales representative was in charge of a large business area, covering seven departments. He travelled to the company's various customers in a company car. The car was equipped with a hands-free kit, and the employee made appointments, and talked to customers and colleagues while driving.

On 15 January 2015, the employee brought an action before the Employment Tribunal claiming judicial termination of his employment contract. On 19 October 2015, he was dismissed.

Article L. 3121-1 of the French Labour Code defines actual working time as

> *"the time during which the employee is at the disposal of the employer and complies with his or her instructions without being able to freely go about his or her personal business*".

According to Article L. 3121-4 of the French Labour Code, the commute to the place of performance of the employment contract is not actual working time. However, if the commute exceeds the usual travel time between home and the usual workplace, it must be compensated either in the form of rest or monetary terms. Such compensation is determined by a company or establishment agreement or, failing that, by a branch agreement. In the absence of an agreement, the employer shall define the amount of compensation unilaterally, after consulting the Social and Economic Committee (CSE) (see Articles L. 3121-7 and L. 3121-8 of the French Labour Code).

This issue of exceeding the usual time for commuting is of particular relevance for commuting workers who work at customers' premises.

The Court of Cassation (see Social Division of the Court of Cassation, No. 16-20.634, 30 May 2018) has applied the following principles laid down in a 2018 judgment for commuting workers:

- The time spent by commuting workers between several work sites on the same working day is paid as actual working time.
- However, the daily travel time between home and the first and last client sites is not paid as actual working time but must only be compensated when it exceeds the employee's usual travel time.

The Court of Appeal ordered the employer to pay the claimant overtime. Indeed, as the employee had made appointments and had called various work-related persons (customers, sales managers, assistants and technicians), it was no longer possible to speak strictly of commuting time within the meaning of Article L. 3121-4 of the French Labour Code. It was actual working time, which had to be paid as such.

Relying on the case law of the CJEU in its decision of 23 November, the Court of Cassation confirmed the decision of the Court of Appeal.

Published in a press release, the Court of Cassation overturned its past case law and put an end to the contradiction between French and European case law.

Until this decision, the Court of Cassation considered the time required for a commuting employee to travel to his/her first client and to return home at the end of the day from a client did not constitute actual working time.

Broadly speaking, the Court of Cassation justified its position on two points:

- On the one hand, the Directive leaves the legislator of the Member States a certain margin of interpretation;
- On the other hand, the debate was not really about the notion of actual working time, but rather about the method of remuneration of travel time in the case of commuting workers.

Whereas in a 2015 ruling, the CJEU qualified the commuting time employees without a fixed or usual workplace spend on their daily commutes between their home and the sites of their first and last client (see CJEU, case C-266/14, 10 September 2015) as 'working time' in the light of Directive 2003/88/EC of 04 November 2003 on the organisation of working time.

However, this was the case before the CJEU ruling case C-344/19 on 09 March 2021, which held that the concepts of 'actual working time' and 'rest period' could not be compromised. In this regard, Member States have no choice but to apply the definitions set out in the 2003 Working Time Directive.

The Court of Cassation therefore considered that the French exception resulting from its 2018 ruling could no longer be justified.

Consequently, it now considers that this time can be considered actual working time if the employee is at the employer's disposal during the commute and required to comply with his/her instructions without being able to go about his/her personal business.

Hereby, the Court of Cassation has taken an important step towards compliance with European law and case law. Yet the French legislator, despite several attempts of the Court of Cassation to push forward a change in the legislation, has still not amended the provisions of the French Labour Code to comply with European law.

2.2 Day package agreement

Social Division of the Court of Cassation, No. 20-20.572, 14 December 2022

In the present case, a salesperson was promoted to shop manager on 06 October 2003. By an amendment of 18 December 2006 to his employment contract, the employee signed a day package agreement. The employment relationship was covered by the collective bargaining agreement of non-food retail businesses of 05 September 2003.

On 15 December 2017, the employee brought an action before the Employment Tribunal demanding, in particular, the unenforceability of the day package agreement, the judicial termination of the employment contract and the payment of various sums. On 28 May 2019, the employee was dismissed for unfitness and impossibility of redeployment.

According to Article L. 212-15-3 of the French Labour Code which was in force at the time, and interpreted in the light of Articles 17(1) and 19 of Directive 2003/88/EC of the European Parliament and of the Council of 04 November 2003, and Article 31 of the Charter of Fundamental Rights of the European Union, that Member States may only derogate from the provisions on working time in compliance with the general principles of the protection of workers' safety and health. Any agreement on a fixed number of days must be provided for by a collective agreement, the stipulations of which ensure that reasonable working hours and daily and weekly rest periods are respected.

The Court of Appeal dismissed the employee's arguments and did not consider the day package agreement as null and void. In fact, the Court of Appeal noted that the agreement of 05 September 2003, in its Article 3.2.1., provided for a number of days

worked per calendar year or period of 12 consecutive months, the right to rest from the first following quarter in the event that the ceiling was exceeded, as well as the right to full annual leave, weekly rest and daily rest, and that contrary to the employee's assertions, it included limits and guarantees, i.e. control over the number of days or half-days worked, or of rest/leave time.

In its decision of 14 December 2022, the Court of Cassation overruled the decision of the Court of Appeal. The Court of Cassation deemed that Article 3.2.1. of the agreement of 05 September 2003, attached to the national collective agreement for non-food retail businesses of 09 May 2012, did not establish an effective and regular follow-up enabling the employer to remedy in good time a workload that may be incompatible with a reasonable duration. Even if the amplitude and workload remain reasonable and a good distribution is ensured in terms of the respective person's working time, it could be deduced that the fixed-term work agreement was null and void.

In fact, Article 3.2.1. of the agreement of 05 September 2003 merely provided that:

- the number of days worked or rest days taken had to be drawn up monthly by the person concerned,
- that professional and managerial staff had to submit a document summarising the number of days already worked, the number of days or half-days of rest taken and those still to be taken to the employer once a month, who validated it, i.e. the organisation of working time was monitored,
- the application of this agreement and the impact of the workload on their activity for each day had to be reviewed,
- the working days had be monitored either by means of an automated system or a self-declared document; the document signed by the employee and the employer had to be kept by the latter for three years and made available to the labour administration upon request.

Hereby, the Court of Cassation reinforced its case law on day package agreements in line with the CJEU's case law (see CJEU, case C-55-18, 14 May 2019). Thus, the Court of Cassation affirmed the right to rest and to health as a constitutional requirement which cannot be set aside for workers under day package agreements.

Yet, the European Committee of Social Rights (see ECSR, 19 May 2021, No. 149/2017) has recently been even stricter about the validity of day package agreements.

It will be necessary to closely follow in the future how both the CJEU and Court of Cassation position themselves in terms of day package agreements, and whether they will go even further for respect of the right to rest and the right to health. After all, the present case was ruled on provisions of the French Labour Code that are no longer in force today.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-311/21, 15 December 2022, TimePartner Personalmanagement

In its case C-311/21, the CJEU interpreted the concept of "*overall protection of temporary agency workers*" regarding collective agreements which authorise differences in treatment with regard to basic working and employment conditions.

Temporary agency work in France is simultaneously characterised by a highly structured legal framework and a large number of contracts being concluded and dialogue taking place. This makes for relatively strong protection for workers and legitimises the work of temporary work agencies. Temporary agency contracts cannot be used on a long-term basis to fill jobs linked to the company's regular business. There is a restriction on

the use of temporary workers (these are judicially supervised and there is a list of circumstances under which such contracts can be concluded, such as six months after a redundancy), how many times an employer can renew an employee on the same fixed-term contract (it used to be once until the Macron Law was issued, and now two fixed-term contracts can be successively concluded), and the maximum duration (a fixed-term contract may not exceed 18 months).

The general principle is that the employer is in fact the temporary work agency. It is fully responsible for paying and training the temporary employee and for exercising all disciplinary powers related to the temporary worker.

Insofar as the duration of fixed-term contracts is often short, the worker does not, in practice, acquire any rights based on duration of service, for example. To compensate for the precarity of this status, there is a 'precarity bonus' which is a minimum of 10 per cent of the temporary worker's wage, and which must be paid monthly to all FTC and TAWs as well as compensation for annual leave, which make for a higher wage than that of other workers.

Also, responsibility during the performance of work (in particular for working conditions: working hours, night work, weekly breaks, hygiene and safety) lies with the user undertaking. Article L.4154-2 of the Labour Code, which came into force on 01 May 2008, establishes the obligation to provide employees including temporary workers with enhanced safety training and appropriate induction and information whenever they are assigned to work stations presenting particular risks to their health or safety. It is up to the employer to draw up a list of workplaces that present particular risks to the health and safety of said employees.

Article L. 1251-21 of the French Labour Code states:

> "*Throughout the duration of the assignment, the user undertaking is responsible for the conditions related to the performance of the worker's employment […] and for the application of provisions concerning: working hours; night work; weekly rest; health and safety at work; the work of women, children and young workers*".

The user undertaking has the duty to guarantee the same conditions (only the provisions mentioned above) for temporary workers as those enjoyed by its employees.

In France, temporary workers have access to all collective facilities, in particular, canteens, transport services, restaurant vouchers, etc. on the same terms as workers employed directly by the user undertaking. It follows from Articles L. 124-3 6° and L. 124-4-2, paragraph 1, of the Labour Code that a temporary employee's remuneration is provided for in Article L. 140-2 of the same Code. Since remuneration is to be understood in accordance with the meaning of the latter text as the ordinary basic or minimum wage or salary and all other benefits and bonuses paid, directly or indirectly, in cash or in kind, by the employer to the worker by reason of the latter's employment, the luncheon voucher, which constitutes a benefit in kind paid by the employer, is included as part of the employee's remuneration. Therefore, a labour court has ordered the temporary employer to pay damages to a temporary employee for non-payment of meal vouchers and declared that the ruling applied to the user undertaking, asserting that meal vouchers constitute an element of the remuneration which is legally justified in its decision (see Social Chamber Cour de Cassation, No. 05-42.853, 29 November 2006).

Article L. 3221-2 of the French Labour Code establishes the principle of 'equal pay for equal work' (employees performing the same work should receive the same pay).

In accordance with Article L. 1251-18 of the Labour Code, equal treatment of temporary agency workers and permanent workers at a user undertaking holding the same posts is a general principle that is formally confirmed by the law and covers all of the employee's individual and collective rights. Failure to adhere to the regulations may result in sanctions that vary depending on the offence. Specifically, the law stipulates that the assignment contract can be 'switched' to a permanent contract with the user

enterprise in the event of any non-authorised use. The law also makes provision for criminal sanctions (in the form of fines or imprisonment) for breaches of the legislation.

In other words, sanctions will apply unless the basic work and employment conditions that the temporary worker is entitled to are guaranteed (i.e. the same conditions that employees hired directly by the user company for the same position enjoy)

Collective bargaining is very strong in France, and the regulatory role of the social partners is underpinned by the responsibility that sector-level institutions have in the management of social security and welfare. For TAW, these include the Temporary Work Training Insurance Fund (Fonds d'Action Sociale du Travail Temporaire, FAF-TT), the Professional Fund for Employment of Temporary Work (Fonds Professionnel pour l'Emploi du Travail Temporaire, FPE-TT), the Temporary Work Social Action Fund (Fonds d'Action Sociale du Travail Temporaire, FAS-TT), plus other welfare and pension arrangements. The first collective agreement in the sector dates back to 1972 and was based on a company agreement at Manpower. Subsequent agreements have made an important contribution to the regulation of the sector by developing and supplementing the law.

The most recent collective agreements were the September 2022 Framework Agreement for the employment and qualification of young people This Framework Agreement was concluded between the Ministry of Labour, Employment and Integration and the UNML, Prism'emploi, AKTO, the FASTT and the FPE.TT. In France, the TAW sector agreement is often extended to the 90 per cent of companies that are not members of the employers' association (PRISME). However, PRISME members are the largest group (accounting for 90 per cent of the sector's turnover), so collective bargaining coverage is high in terms of number of employees.

The 2021 Agreement *Prism'emploi - Pôle* employment agreement was signed between *Pôle emploi* and *Prism'emploi*. *Pôle emploi* is the public employment service in France. Its role is to compensate jobseekers and professionally support them in their return to the labour market.

The 2019 Framework Agreement for the recruitment of people with disabilities was concluded between Prism'emploi, the Ministry of Labour, the State Secretariat in charge of disabled people, UNEA, *Pôle Emploi*, FAF.TT, CHEOPS, FASTT, UNML, OIR, APEC and AGEFIPH.

The most recent national collective agreement on the prevention of discrimination and the promotion of equality and diversity in the temporary work sector of 18 November 2022 (currently being extended) states that:

> *"Following from the branch agreements of 16 March 2007 for permanent employees and 6 July 2007 for temporary employees, the signatory parties reaffirm, in the present agreement, their strong commitment to respecting the principles of non-discrimination and equal treatment, whether in terms of recruitment, vocational training, assignment, career development or professional development.*
>
> *Indeed, the temporary work sector, which is at the heart of the recruitment process, faces situations of discrimination and requests.*
>
> *The temporary work sector cannot accept to be associated with such practices, as they are contrary to its ethical commitment and to the actions it carries out on real equal opportunities for all, through the fair promotion of the skills of each permanent employee and each temporary employee in the professional world.*
>
> *The fight against all forms of discrimination and the active promotion of diversity therefore pose, more than ever, major challenges for the temporary work sector.*
>
> *Moreover, this approach is part of a policy of social responsibility pursued by the temporary work sector, which has always worked to provide access to sustainable employment for those who are furthest away from employment, over and above compliance with legal and regulatory obligations alone.*

> *Through an agreement of 19 July 2019, the temporary work sector has strengthened its commitment specifically to the integration of and securing the professional careers of people with disabilities. It has always developed special relationships with the players involved in the employment and support of people with disabilities.*
>
> *More generally, the social responsibility policy pursued by the sector is applied on a national scale, since more than 2.4 million temporary employees have been assigned to over 16 million assignments in 2020, owing to the commitment of 29 000 permanent employees.*
>
> *Thus, the signatory parties of this agreement will ensure that it is brought to the attention of every player in the sector.*
>
> *Within the framework of this goal for active involvement by the sector, the objectives of this agreement are, in particular, to*
>
> *Prevent and act against discrimination for all;*
>
> *Inform client companies;*
>
> *Train to apply equal treatment;*
>
> *Ensure non-discrimination in recruitment;*
>
> *Ensure non-discrimination of employees who have been assigned.*
>
> This commitment seems to be in line with the interpretation given by the ECJ stating *that collective agreement must, in order to respect the overall protection of the temporary agency workers concerned, afford them advantages in terms of basic working and employment conditions, which are such as to compensate for the difference in treatment they suffer"*

The Luxemburg-based Court also provided a strong method for comparing working conditions by ruling

> *"that compliance with the obligation to respect the overall protection of temporary agency workers must be assessed, in concrete terms, by comparing, for a given job, the basic working and employment conditions applicable to workers recruited directly by the user undertaking with those applicable to temporary agency workers, in order to be able to determine whether the countervailing benefits afforded in respect of those basic conditions can counterbalance the effects of the difference in treatment suffered*."

It should be noted that the French case explicitly referring to Directive 2008/104/EC is rare. In 2019, the Cour de Cassation (*Civil Chamber 2, No. 19-40.002, 11 April 2019)* rejected a request to appeal to the Conseil constitutionnel:

> *"by providing, for the accomplishment of each assignment, for the conclusion, on the one hand, of a contract of provision between the temporary employment undertaking and the user client, known as the "user undertaking", and on the other hand, of a contract of employment, known as the "assignment contract", between the temporary employee and his employer, the temporary work undertaking, the provisions under criticism, which transcribe into national law the objectives of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary work, confer exclusively on the temporary work undertaking the capacity of employer of the temporary worker; that if the user undertaking may be called upon, pursuant to Articles L. 241-5-1 and L. 412-6 of the Social Security Code, either to bear part of the cost of the accident at work or the occupational disease under the risk rating system, or to cover, in whole or in part, the temporary employment agency for the amount of the increases and indemnities payable by it in the event of inexcusable fault, it may bring an action before the general social security courts or the court responsible for the rating of insurance against accidents at work, or defend the*

action brought against it before these courts; that it cannot therefore be argued that the provisions criticised, as interpreted by the Court of Cassation, deprive the user undertaking of an effective legal remedy and thus seriously disregard the requirements of Article 16 of the Declaration of the Rights of Man and of the Citizen of 26 August 1789; that, as the user company is not placed in the same legal situation as the temporary employment company for the performance of the worker's mission, it cannot be argued either that the contested provisions seriously disregard the requirements of the principle of equality before the law and justice that derive from Articles 1, 6 and 16 of the Declaration of 26 August 1789".

4 Other Relevant Information

Nothing to report.

Germany

Summary

(I) The Bundestag has passed the Act on the implementation of the Whistleblowing Directive 2019/1937.

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

(III) The Act on the Further Implementation of the Directive (EU) 2019/1158 on work-life balance has been approved in the Bundesrat.

(IV) The Federal Labour Court has delivered two important rulings on limitations and forfeiture of holiday entitlements.

1 National Legislation

1.1 Whistleblowers

On 16 December 2022, the *Bundestag* passed the Act to improve protection of whistleblowers and on the implementation of the Directive on the protection of persons reporting infringements of Union law. In the next step, the law must now be approved by the Bundesrat. It could enter into force in May 2023.

See here for the draft law and here for the Parliament's plenary protocol.

1.2 Cross-border mergers

On 01 December 2022, the Bundestag approved the Federal Government's draft law on the implementation of the provisions of the Transformation Directive on employee participation in cross-border transformations, mergers and divisions. The Act aims to implement Directive 2019/2121/EU of the European Parliament and of the Council of 27 November 2019 amending Directive 2017/1132/EU as regards cross-border transformations, mergers and divisions.

See here for the Parliament's plenary protocol.

1.3 Work-life balance

On 16 December 2022, the Act on the Further Implementation of Directive (EU) 2019/1158 of the European Parliament and of the Council of 20.06.019 on reconciliation of work and private life for parents and family carers and repealing Council Directive 2010/18/EU was approved by the *Bundesrat*.

2 Court Rulings

2.1 Limitation of holiday entitlements

Federal Labour Court, 9 AZR 266/20, 20 December 2022

The Federal Labour Court has ruled that an employee's statutory entitlement to paid annual leave is subject to the statutory limitation period (sections 214(1), 194(1) of the Civil Code), but that the three-year limitation period only starts at the end of the calendar year in which the employer informed the employee of his/her specific leave entitlement as well as the expiry periods and the employee nevertheless did not take the leave out of his/her own free will.

In the underlying case, the employer had not given the employee the opportunity to exercise her holiday entitlement by fulfilling the obligations to request and notify. Therefore, the claims did not expire at the end of the calendar year (section 7(3) sentence 1 of the Federal Holidays Act) or of a permissible carry-over period (section 7(3) sentence 3 of the Federal Holidays Act), nor could the employer successfully argue that the leave not granted had already become time-barred during the current employment relationship after the expiry of three years.

2.2 Forfeiture of holiday entitlements for health reasons

Federal Labour Court, 9 AZR 245/19, 20 December 2022

The Federal Labour Court has ruled that entitlement to statutory minimum leave from a year in which the employee actually worked before he was prevented from taking his leave for health reasons only expires after the expiry of a carry-over period of 15 months if the employer gave him the opportunity to take leave in due time. This result follows from an interpretation of German law in conformity with the Working Time Directive.

According to the previous case law, the statutory holiday entitlement expired at the end of 31 March of the second year of continued incapacity for work. The Court has now further developed this case law by implementing the CJEU's requirements established in the preliminary ruling in cases C-518/20 and C-727/20, 22 September 2022, which the Federal Labour Court had requested in its decision of 07 July 2020 (9 AZR 401/19 (A)).

According to the Federal Labour Court, holiday entitlement continues to expire at the end of the 15-month period if the employee was prevented from taking his/her holiday for health reasons from the beginning of the holiday year until 31 March of the second calendar year following the holiday year. In this case, it does not matter in the view of the Court whether the employer fulfilled its obligations to cooperate, because this could not have contributed to the taking of the leave. However, the situation is different if the employee actually worked in the holiday year before becoming fully incapacitated for work due to illness. In this case, the limitation of the holiday entitlement presupposes that the employer has put the employee in a position to actually take his/her holiday in due time before the incapacity for work arose.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-311/21, 15 December 2022, TimePartner Personalmanagement

The decision is likely to have considerable implications for German law and collective bargaining practice in the temporary agency work sector. Already with regard to the Advocate General's Opinion, the view was expressed in the literature that the deviation from the principle of equal treatment in temporary agency work under collective agreements, which is common in Germany, is probably ineffective (Seiwerth, *Zur tariflichen Abweichung vom Grundsatz der Gleichbehandlung von Leiharbeitnehmern, in: Entscheidungen zum Wirtschaftsrecht (EWiR)* 2022, p. 597). Irrespective of this, from a legal point of view, the relationship between state legislation and collective bargaining must be readjusted, whereby it should be noted that the latter is protected as a fundamental right and that collective agreements are generally granted a 'guarantee of correctness' (*Richtigkeitsgewähr*) which goes hand in hand with limited judicial control.

4 Other Relevant Information

Nothing to report.

Greece

Summary

Nothing to report.

1 National Legislation

1.1 Codification of labour legislation

Greek individual labour legislation was codified in a single text (Presidential Decree 80/2022). The codification of collective labour law will also follow.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-311/21, 15 December 2022, TimePartner Personalmanagement

Greek legislation does not give social partners the option of upholding or concluding collective agreements which authorise differences in treatment with regard to basic working and employment conditions to the detriment of temporary agency workers. The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.

No exemption is provided even where temporary agency workers who have a permanent contract of employment with a temporary work agency continue to be paid in between assignments.

Therefore, the above judgment has no impliations for Greece.

4 Other Relevant Information

Nothing to report.

Hungary

Summary

(I) The Amendment of the Labour Code will come into force on 1 January 2023.

(II) The Constitutional Court has ruled on the constitutionality of restrictions on strikes of teachers.

1 National Legislation

1.1 Amendment of the Labour Code

The government has submitted a Bill to Parliament on the Amendment of the Labour Code on 2 November 2022, as part of the text on the amendment of employment-related laws (Bill No. T/1845). The Bill is available in Hungarian here. The amendment, which is available here, was passed on 7 December 2022, and will enter into force on 1 January 2023.

2 Court Rulings

2.1 Collective action

Parliament has passed Act 5 of 2022 on regulatory issues relating to the end of the COVID state of emergency. This includes Article 14, which enacts the provisions of Government Decree No. 36/2022. It requires teachers to provide care for children in their original groups (merging groups is prohibited) between 7 am and 4-6 pm (depending on school level). This makes a strike practically impossible. In addition, disciplinary measures may be enforced in case of refusal to work (civil disobedience).

The Constitutional Court passed a decision on 29 November 2022 reiterating the constitutionality of the above-mentioned norms (limitations) on strike law for teachers. The decision is available here. According to the Court's reasoning, children's right to education is a legitimate aim for imposing restrictions on strikes. Since the restriction has a legitimate aim, it was considered automatically necessary and proportionate. The Constitutional Court therefore did not investigate the necessity and proportionality of the measure.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-311/21, 15 December 2022, TimePartner Personalmanagement

Article 219 of the Labour Code, which is available here, regulates the equal treatment of temporary agency workers:

- The basic working and employment conditions of temporary agency workers shall, for the duration of their assignment, be the same as those available to the employees employed by the user undertaking under a permanent employment relationship (Article 219.1).
- The basic working and employment conditions shall, in particular, cover the amount and protection of wages, including other benefits (Article 219.1).
- Collective agreements may deviate from the relevant provisions of Article 219 to the benefit as well as detriment of employees (in peius and in melius derogations are also allowed).

The Labour Code does not contain any reference to 'respect for the overall protection of the temporary agency workers concerned'. However, the judgment does not clearly require such a reference. Therefore, it is up to the social partners to respect the overall protection of the temporary agency workers concerned, without any direct legal provision requiring it.

4 Other Relevant Information

Nothing to report.

Iceland

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Dismissal

Reykjavík District Court, No. 803/2022, 806/2022 and 809/2022, 07 December 2022

Three rulings were issued in the Reykjavík District Court on 07 December 2022 relating to the dismissal of three employees of a trade union in cases No. 803/2022, 806/2022 and 809/2022. Whilst the dismissals themselves were not deemed illegal, the manner of the dismissals and the circumstances surrounding them was considered to have been especially detrimental to the employees and they were therefore awarded damages.

These judgments follow an interesting recent trend of courts scrutinising dismissals more closely than before in private sector employment relationships. Whereas the dismissals themselves may be considered legal as dismissal protection is relatively low in the Icelandic private sector, the circumstances surrounding dismissals have been subject to more thorough judicial reviews. It is not yet clear whether the relevant parties will appeal to the Court of Appeals.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-311/21, 15 December 2022, TimePartner Personalmanagement

It is unlikely that Icelandic legislation on temporary work will be affected by this ruling. The major collective agreements in the field in which temporary agency work is used do not differentiate between temporary agency workers and other workers. In addition, temporary agency workers are guaranteed the same minimum wage and other basic working conditions as other workers in the Icelandic labour market, see Article 1 of Act No. 55/1980 on working conditions for employees and mandatory insurance of pension rights and Article 1 a of Act No. 139/2005 on temporary work agencies.

4 Other Relevant Information

4.1 Collective bargaining

In December, most trade unions of unskilled workers, office workers and tradesmen concluded collective agreements. The agreements are to apply from 01 November 2022, when the term of the previous agreements ended, which is a rare occurrence on the Icelandic labour market. The collective agreements are to last for 14 months, an especially short term compared to recent collective agreements, and mainly focus on wage increases. The major factor at play was the inflation rate, which, as in most other European countries, has been considerably higher than in recent years at over 9 per cent in December.

Ireland

Summary

(I) Directive 2019/1152/EU on transparent and predictable working conditions has been implemented into national legislation.

(II) The Labour Court has ruled that on-call/standby time is not working time.

1 National Legislation

1.1 Transparent and predictable working conditions

Regulations were introduced by the Minister for Enterprise, Trade and Employment, on 16 December 2022, for the purpose of giving full effect to Parliament and Council Directive 2019/1152/EU: European Union (Transparent and Predictable Working Conditions) Regulations 2022 (S.I. No. 686 of 2022).

These Regulations amend the Terms of Employment (Information) Act 1994 (the 1994 Act), which implemented the provisions of Council Directive 91/533/EEC. The 1994 Act had been amended by the Employment (Miscellaneous Provisions) Act 2018 so as, *inter alia*, to require employers to provide their employees with a written statement of five core pieces of information within five days of commencing employment. This 'five day' statement has now been expanded to include:

1. The place of work or, where there is no fixed or main place of work, a statement specifying that the employee is employed at various places or is free to determine his or her place of work or to work at various places.
2. The title, grade, nature or category of work for which the employee is employed or a brief specification or description of the work.
3. The date of commencement of the employee's contract of employment.
4. Any terms or conditions relating to hours of work (including overtime).
5. Where a probationary period applies, its duration and conditions.

All other terms of employment required to be given under the 1994 Act must now be given to the employee within one month of commencing employment. This written statement must now also include:

1. The training entitlement, if any, to be provided by the employer.
2. In the case of temporary agency work, the identity of the user undertaking.
3. Where the work pattern is entirely or mostly unpredictable,
   (i) the principle that the work schedule is variable,
   (ii) the number of guaranteed paid hours and the remuneration for work performed in addition to those guaranteed hours,
   (iii) the reference hours and days within which the employee may be required to work, and
   (iv) the minimum notice period to which the employee is entitled before the start of a work assignment.
4. The identity of the social security institutions receiving the social insurance contributions attached to the contract of employment and any protection relating to social security provided by the employer.

Additional information is also required where employees have to work outside of Ireland and in respect of 'posted workers'.

Probation periods should not exceed six months, save in exceptional cases; in the public sector, however, the period shall not exceed twelve months.

Parallel employment is addressed by stipulating that an employer shall not prohibit an employee from taking up employment with another employer outside of the employee's work schedule, unless there are 'objective grounds' for doing so such as health and safety, the protection of business confidentiality, avoidance of conflicts of interest, and a range of other examples.

Where an employer is required by law or by a collective agreement to provide training, such training shall be provided to the employee free of cost, shall count as 'working time' and, where possible, shall take place during working hours.

Miscellaneous amendments are also made to the Organisation of Working Time Act 1997, the Protection of Employees (Fixed-Term Work) Act 2003 and the Workplace Relations Act 2015.

Reflecting the fact that the Directive applies to workers, as defined by the Court of Justice, who have an employment contract or employment relationship, the scope of the 1994 Act is extended to include not just apprentices and agency workers but also individuals who agree with another person "*personally to execute any work or service for that person*". This will bring many workers in the gig-economy within the scope of that Act without them having to establish that they are employed under a 'contract of service'.

1.2 Sick leave

The provisions of the Sick Leave Act 2022 came fully into operation on 01 January 2023: Sick Leave Act 2022 (Commencement) Order 2022 (S.I. No. 606 of 2022).

This Act establishes a scheme of statutory sick leave for employees in the private sector who have completed 13 weeks continuous service with their employer. The Act provides that such an employee is entitled up to and including three statutory sick leave days in a year.

Employers are to pay a prescribed daily rate of payment set at 70 per cent of wages subject to a daily cap of EUR 110: Sick Leave Act 2022 (Prescribed Daily Rate of Payment) Regulations 2022 (S.I. No. 607 of 2022).

2 Court Rulings

2.1 Working time

Labour Court, DWT2252, 08 November 2022, Kerry County Council v Walsh.

The Labour Court has dismissed a claim by a retained firefighter that the entirety of the time spent on-call/standby was 'working time' for the purposes of the Organisation of Working Time Act 1997: *Kerry County Council v Walsh* DWT2252. Relying on the *CJEU decision in Case C-214/20, 11 November 2021, MG v Dublin City Council*, the Labour Court ruled that the attendance requirements did not place the claimant under major constraints and did not have a significant impact on the management of his time in that he was able to pursue other activities for a significant period of his standby periods, including running his own business. Nor was he required to attend all of the callouts. *CJEU Case C-518/15, 21 Feburary 2018, Matzak* was distinguished on the basis that the claimant in that case had been required to remain at a place determined by his employer during standby periods, namely his home.

During the hearing, the claimant's lawyer submitted a letter from Mr Matzak's legal team purporting to confirm that there was no requirement on their client, when on standby, to remain at his home. The Labour Court was satisfied, however, that the CJEU's decision

was premised on a requirement that Mr Matzak be in a place determined by his employer.

In light of its finding that the claimant's standby time was not working time, the Labour Court did not feel the need to consider the claimant's preliminary point that Directive 2003/88/EC had been incorrectly transposed into Irish law.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-311/21, 15 December 2022, TimePartner Personalmanagement

Directive 2008/104/EC is implemented in Ireland by the Protection of Employees (Temporary Agency Work) Act 2012 (the 2012 Act). Section 6(1) of the 2012 Act provides that *subject to any collective agreement for the time being standing approved under section 8*, an agency worker shall, for the duration of his or her assignment with a hirer, be entitled to the same 'basic working and employment conditions' as to which he or she would be entitled if he or she were directly employed by the hirer to do that work.

Section 8 of the 2012 Act empowers the Labour Court to approve collective agreements providing for working and employment conditions that differ from the basic employment and working conditions applicable by virtue of section 6 as respects agency workers. Among the matters of which the Labour Court must be satisfied before approving the collective agreement is the appropriateness of approval "*having regard to paragraph 3 of Article 5 of the Directive*".

No such agreement has to date been submitted to the Labour Court pursuant to section 8, but the decision of the CJEU in this case makes it clear that before any collective agreement providing for a lower rate of pay for agency workers could be approved, the Labour Court must assess whether the agreement affords agency workers

> *"advantages in terms of basic working and employment conditions which are such as to compensate for the difference in treatment they suffer".*

If the countervailing benefits afforded do not 'counterbalance' the effects of the lower rate of pay, the Labour Court would be precluded from approving the collective agreement.

Section 6(2) of the 2012 Act provides that subsection (1) shall not, insofar only as it relates to pay, apply to an agency worker employed by an employment agency under a permanent contract of employment, provided certain conditions as to pay in respect of periods between assignments apply: see the Labour Court decision in *Staffline Recruitment Ltd v Fitzgerald* AWD184.

4 Other Relevant Information

Nothing to report.

Italy

Summary

The Italian Parliament has approved the State budget, which contains provisions relating to parental leave, teleworking and voucher-based work.

1 National Legislation

1.1 Budget Law

On 29 December 2022, the Italian Parliament approved the State budget for the financial year 2023 and the multi-year budget for the period 2023–2025 (Act No. 197).

The law contains some provisions on employment relationships:

- Parental leave: the allowance for parental leave of working mothers or fathers has been increased to 80 per cent of the worker's salary (previously it was 30 per cent for one month within the sixth year of the child, also in cases of adoption and custody). For the remaining months of parental leave, the allowance remains 30 per cent.
- Smart working: until 31 March 2023, frail workers are entitled to smart working. The employer must support remote working, e.g. by assigning different tasks to such workers without a change in pay.
- Voucher-based work: the Budget Law widens the scope of voucher-based work. The maximum remuneration an employer can pay for voucher-based work within a year, which can be used in the tourism and the agricultural sectors, ranges from EUR 5 000 to EUR 10 000. Employers can use voucher-based work if they have a maximum of 10 employees (the previous limit was 5 employees). Each worker continues to receive no more than EUR 5 000 for voucher-based work annually. Agricultural enterprises can use voucher-based work for no more than 45 working days per year for each worker.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-311/21, 15 December 2022, TimePartner Personalmanagement

In Italy, temporary agency work is regulated in Article 30 and following in the Legislative Decree of 15 June 2015 No. 81, amended by the Law Decree of 12 July 2018 No. 87.

According to Article 35 para 1 Legislative Decree 81/2015, TAWs are 'generally' entitled to the same monetary and normative conditions that are not less favourable than those provided to the employees of the user undertaking who perform the same tasks. The term 'generally' should be interpreted in the sense that if several levels of collective bargaining agreements apply to the workers (i.e. national, local and company collective agreements), the worker has right to all of the conditions provided for in all collective bargaining agreements, and a TAW cannot be paid a lower remuneration than an employee working in the same company and performing the same tasks.

Each national collective agreement includes a section on TAW and staff leasing, because Italian legislation allows for some deviation in collective bargaining agreements, but

Article 1 (para2) Legislative Decree 02 March 2012 No. .24 establishes that national collective agreements, agreed between the comparatively more representative trade unions of workers and of employers, may only apply or introduce provisions that are more favourable for workers than those provided by law.

For instance, collective agreements provide for methods and criteria for the determination and payment of remuneration related to the results achieved in implementing programmes agreed between the parties or related to the economic performance of the company. Temporary agency workers also have the right to benefit from social and welfare services provided to the user undertaking's employees, excluding those services that are conditional on participation in an association or cooperative society or to the achievement of a specific seniority of service. Collective agreements may not include a derogation from the principle of equal treatment, however.

A review of respect for overall protection is based both on the collectively agreed working conditions and the working conditions that exist in the user undertaking.

The notion of 'adequate level of protection' under Article 5(4) of the Directive is not expressly transposed or interpreted, because according to Italian law, an 'overall protection' of workers exists, and there is no possibility to derogate from the principle established in Article 35 para 1 of Legislative Decree 81/2015.

In short, Italian legislation is in line with the CJEU's judgment.

4 Other Relevant Information

4.1 Work-life balance

On 06 December 2022, the National Labour Inspectorate issued a statement (National Labour Inspectorate No. 2414) regarding the appropriate application of sanctions provided for in Legislative Decree 105/2022, transposing Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (*see* FR 8/2022).

The note contains instructions for inspectors on how to detect and penalise possible violations of the law.

Latvia

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-311/21, 15 December 2022, TimePartner Personalmanagement

The decision of the CJEU in case C-311/21 has no implications on Latvian law because it does not allow derogations from the mandatory minimum legal regulations by collective agreements with regard to temporary agency workers.

First, Article 6(1) of the Labour Law (see *Darba likums,* OG No.105, 6 July 2001) stipulates that all clauses included in employment contracts or collective agreements which provide for less favourable rights than required by the legal regulation are void.

Second, Article 7(4) and (5) provide for minimum mandatory employment conditions for temporary agency workers which must be equal to those of the workers of a user undertaking. Labour law does not contain any provision allowing a derogation from such an obligation by a collective agreement.

It follows that the decision in case C-311/21 has no implications for Latvian law.

4 Other Relevant Information

Nothing to report.

Liechtenstein

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU Case C-311/21, 15 December 2022*, TimePartner Personalmanagement GmbH*

All leading sentences of the judgment deal with Article 5(3) of Directive 2008/104/EC. The relevant wording of this Article is as follows: Member States may, after consulting the social partners, give them, at the appropriate level and subject to the conditions laid down by the Member States, the option of upholding or concluding collective agreements which, while respecting the overall protection of temporary agency workers, may establish arrangements concerning the working and employment conditions of temporary agency workers, which may differ from those referred to in para 1. At the centre of the present judgment is the requirement that the 'overall protection of temporary agency workers' – who, by means of a collective agreement, have some less favourable terms and conditions of employment than employees directly employed by the user undertaking – must be preserved.

Temporary agency work in Liechtenstein is regulated by the Act on the Placement of Workers and Temporary Agency Work (Gesetz über die Arbeitsvermittlung und den Personalverleih, Arbeitsvermittlungsgesetz, AVG, LR 823.10). Article 1(1a)(a) states that this Act serves, among other things, to implement Directive 2008/104/EC on temporary agency work. Article 19a(1) establishes the principle of equal treatment between temporary agency workers and employees directly employed by the user undertaking with regard to basic working and employment conditions. According to Article 19a(2)(b), this principle may be derogated from by collective agreement, provided the *overall protection of the temporary agency workers* is respected.

By explicitly and literally adopting this important element from the EU Directive in Liechtenstein law, it is thus entirely possible to interpret the concept of overall protection in conformity with European law and the case law of the CJEU.

Effective judicial control is guaranteed in accordance with Liechtenstein's judicial system. Legal protection functions at both the individual and collective level.

There is a collective agreement on temporary agency work. The collective agreement is available here.

This collective agreement does not contain any specific provisions on the problems addressed in the CJEU ruling.

4 Other Relevant Information

4.1 Posting of workers

The government has issued Decision No. 19/2022 of the EEA Joint Committee amending Annex XVIII to the EEA Agreement, which is available here. According to this Decision, the following Directive shall be incorporated into the EEA Agreement: Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (text with EEA relevance).

Lithuania

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-311/21, 15 December 2022, TimePartner Personalmanagement

The ruling of the CJEU has no direct implications for Lithuanian labour law, because Lithuania has not made use of the possibility provided in Article 5 (3) of Directive 2008/104 to allow the social partners to deviate from the principle of equal treatment by way of collective agreement

However, the ruling raises some important general questions with regard to the position of the Court to require Member States to ensure the necessity of effective judicial reviews in cases of (possible) deviations from the standard of protection. On the other hand, the notion of 'overall protection' which shall be safeguarded in case of deviation, is totally unclear in Lithuanian law, as no one has ever tried to provide for alternative means of 'overall protection' (not only for temporary agency workers but for other categories of workers as well) and no one has ever challenged the legality of those alternatives.

4 Other Relevant Information

Nothing to report.

Luxembourg

Summary

(I) A new bill implements Directive 2020/1057 on the posting of drivers in the road transport sector.

(II) The rules on parental leave have been adapted to comply with CJEU case law.

1 National Legislation

1.1 Posting of workers

A bill implementing Directive 2020/1057 on the posting of drivers in the road transport sector has been adopted.

The law also introduces certain changes to the general posting regime (Directive 2014/67), on the one hand, to clarify and adapt the terminology and to take account of the observations made by the European Commission, on the other.

For example, it will no longer be necessary to share the identity of the 'effective representative' at the time of posting since the Commission considers such an obligation to neither be justified nor proportionate. Similarly, it will no longer be necessary to communicate the posted employee's 'profession'. The obligation to verify the declaration will only apply in cases of chains of subcontractors. Until now, any client (*maître d'ouvrage ou donneur d'ordre)* who entered into a contract with a service provider posting employees was subject to this obligation. The law also takes account of the Commission's criticism that certain documents may need to be retained or provided upon request, but not that these documents have to be submitted along with the initial declaration.

A number of documents will no longer be necessary at all, because they are already subject to control by the posted worker's Member State of origin.

The law furthermore takes account of the Commission's criticism that no specific 'recognition' is required for cross-border enforcement of financial administrative penalties and/or fines. Requests for enforcement of an administrative penalty or fine or for notification of a decision imposing such a penalty or fine must be made without the requirement for any additional formality. Moreover, translations into French or German will no longer be required.

To transpose Directive 2020/1057, a new chapter entitled 'Posting of employees performing mobile road transport activities' has been introduced into the Labour Code (Articles L. 145-1 et seq). The text is similar to that of the Directive and does not call for any particular observations. The final version of the text was subject of a large number of amendments following the recommendations of the Council of State, which deemed that the initial draft was not in conformity with the Directive.

The bill also adapts the penalty procedure in the event of labour law breaches in subcontracting chains, as well as in the event of violations of health and safety standards in the accommodation (*salubrité des logements*) provided to employees. As regards accommodation, the Director of ITM will not only be able to intervene against the employer, but also against the owner or manager (*exploitant*) of the premises. Instead of ordering an evacuation and closure of inacceptable premises, the labour inspectorate will also be authorised—in case of less serious breaches—to impose a deadline for compliance. Administrative sanctions have been replaced with criminal sanctions, namely a fine of up to EUR 125 000 and imprisonment of up to 5 years.

The law also introduces a general regime of protection against retaliation for legal action, which had not explicitly existed until now. It was thus decided to take advantage of the

Directive's transposition to introduce such explicit protection as required in Article 1(5) of Directive 2014/67. No employee may be subject to retaliation in response to a legal action taken to enforce his or her rights under the Labour Code. Any dismissal resulting from such action is null and void, and the employee has 15 days to submit a claim for nullity.

See here for *Loi du 23 décembre 2022 portant modification : 1° du Code du travail en vue de la transposition de la directive (UE) 2020/1057 du Parlement européen et du Conseil du 15 juillet 2020 établissant des règles spécifiques en ce qui concerne la directive 96/71/CE et la directive 2014/67/UE pour le détachement de conducteurs dans le secteur du transport routier et modifiant la directive 2006/22/CE quant aux exigences en matière de contrôle et le règlement (UE) n° 1024/2012 ; 2° de certaines autres dispositions du Code du travail*.

1.2 Parental leave

A law has been adopted to bring Luxembourg law in line with EU law, as interpreted in CJEU cases C-802/18, 2 April 2020 and C-129/20, 25 February 2021, *Caisse pour l'avenir des enfants*. The first case dealt with social security aspects of child allowances. The second case concerned parental leave (Luxembourg legislation did not comply with Directive 2010/18/EU).

Luxembourg's legislation imposes two conditions for entitlement to parental leave, namely the worker must be employed and insured not only for a continuous period of at least 12 months immediately preceding the commencement of parental leave, but he or she must also be employed at the time of the child's/ children's birth or the arrival of an adopted child.

The CJEU stated that the revised Framework Agreement on parental leave must be interpreted as not precluding national legislation, which makes entitlement to parental leave conditional on a period of uninterrupted employment of at least 12 months immediately preceding the commencement of parental leave. By contrast, it precludes national legislation that makes entitlement to parental leave conditional on the parent having the status of 'worker' at the time of the birth or adoption of the child.

The CJEU emphasised in particular the individual right of every worker to parental leave (§ 46).

To comply with the requirements of the Court of Justice of the European Union, Article 306 of the Social Security Code and the related provisions in the Labour Code, the State Civil Servants' Statute and the Municipal Civil Servants' Statute were amended. Entitlement to parental leave is now only subject to the condition of uninterrupted employment for a period of 12 months immediately preceding the commencement of parental leave.

See here for *Loi du 23 décembre 2022 portant modification : 1° du Code de la sécurité sociale ; 2° du Code du travail ; 3° de la loi modifiée du 16 avril 1979 fixant le statut général des fonctionnaires de l'État ; 4° de la loi modifiée du 24 décembre 1985 fixant le statut général des fonctionnaires communaux.*

1.3 Measures to respond to the COVID-19 crisis

The temporary derogations introduced in response to the pandemic have gradually expired, and very few special rules are still in force.

One of the rules discussed in several previous Flash Reports concerned the level of additional income people in early retirement who return to work in the health care

sector, medical analysis laboratories and care assistance could earn. The aim was to encourage such persons to return to work.

Since there is still a need for labour and the development of the pandemic is not predictable, this temporary measure has been extended until 31 March 2023.

See here for *Loi du 23 décembre 2022 portant modification de la loi modifiée du 20 juin 2020 portant 1° dérogation temporaire à certaines dispositions en matière de droit du travail en relation avec l'état de crise lié au Covid-19 ; 2° modification du Code du travail.*

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

Case C-311/21, 15 December 2022, TimePartner Personalmanagement

Case C 311/21 should have no implications for Luxemburg.

Temporary agency workers are subject to the same legal provisions as regular workers. They fully benefit from the principle of equal treatment, including in terms of remuneration.

Collective agreements for temporary agency workers are admissible. In practice, there is one single collective agreement applicable to all temporary agency workers, as it has been declared generally applicable for all temporary work agencies.

Luxembourg did not implement Article 5 (3) of the Directive, which allows social partners to establish arrangements, i.e. the question of 'overall protection' cannot arise.

In accordance with the general principle applicable to all collective agreements, collective agreements can only derogate from the law if the provisions are more favourable for the employees.

A collective agreement for temporary agency workers cannot derogate from the principle of equal treatment.

4 Other Relevant Information

4.1 Minimum wage

As stated in previous Flash Reports, the social minimum wage was increased by 3.2 per cent as of 01 January 2023. The gross minimum wage is now set at EUR 2 387.40 per month (EUR 2 864.88 for qualified workers).

See here for *Loi du 23 décembre 2022 portant modification de l'article L. 222-9 du Code du travail.*

The minimum inclusion revenue (REVIS) has also been increased by 3.2 per cent. Pensions have been raised by 2.2 per cent.

Malta

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU Case C-311/21, 15 December 2022, TimePartner Personalmanagement

The implications of this ruling are subdivided into five separate areas.

Article 5(3) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work must be interpreted as meaning that that provision, by its reference to the concept of 'overall protection of temporary agency workers', does not require account to be taken of a level of protection specific to temporary agency workers that is greater than that laid down for workers in general by provisions on basic working and employment conditions under national and EU law. However, where the social partners, by means of a collective agreement, authorise differences in treatment with regard to basic working and employment conditions to the detriment of temporary agency workers, that collective agreement must, in order to respect the overall protection of the temporary agency workers concerned, afford them advantages in terms of basic working and employment conditions, which are such as to compensate for the difference in treatment they suffer.

The Temporary Agency Workers Regulations 2010, which is available here, makes it very clear that, 4(1), without prejudice to the provisions of Regulation 5, the basic working and employment conditions of temporary agency workers shall, for the duration of their assignment at a user undertaking, be at least those that would apply if they had been directly recruited by that undertaking to occupy the same job, by virtue of the Act, or any regulations issued thereunder or under any other legislation or by virtue of any applicable collective agreement. This Regulation makes it very clear that the basic working conditions of temporary agency workers shall be at least those that would apply for other workers directly employed by the user undertaking, whose working conditions should be those applicable in terms of national and EU law. In other words, Maltese law is fully aligned with this first part of the ruling. Furthermore, whilst collective agreements are generally not widely available in Malta, it is very difficult—if not outright impossible—for any collective agreement to agree to working conditions that are lower in overall protection for any category of workers (including temporary agency workers) than that afforded to them by EU law and Maltese law. Hence, it is highly unlikely that temporary agency workers would be subjected to such a difference in treatment.

Article 5(3) of Directive 2008/104 must be interpreted as meaning that compliance with the obligation to respect the overall protection of temporary agency workers must be assessed, in concrete terms, by comparing, for a given job, the basic working and employment conditions applicable to workers recruited directly by the user undertaking with those applicable to temporary agency workers, in order to be able to determine

whether the countervailing benefits afforded in respect of those basic conditions can counterbalance the effects of the difference in treatment suffered. The Regulation seems to be silent on this "assessment" but not about the actual equality of treatment, as submitted above. Indeed, the starting point is in no way tolerant of any difference in treatment between direct employees of the user undertaking and temporary agency workers employed there. It is quite natural for the Regulations to assume that no such difference in terms of basic employment conditions exists. Under Regulation 8 of the Regulations of Maltese Law, which transposes Article 6(4) of the Directive 2008/104, a difference in treatment may be acceptable only with respect to training and facilities accessible to the employees in the user undertaking – only, however, if objective reasons exist therefor. What these "objective reasons" may amount to, of course, is quite another matter altogether. A question here arises. If, say, in a workplace with a fluctuating workforce due to seasonality, would subsidies for (say) childcare amount to an "objective reason" to close off access to such facilities?

Article 5(3) of Directive 2008/104 must be interpreted as meaning that the obligation to respect the overall protection of temporary agency workers does not require the temporary agency worker concerned to have concluded a permanent contract of employment with a temporary work agency.

Article 5(3) of Directive 2008/104 must be interpreted as meaning that the national legislature is not required to lay down the conditions and criteria designed to respect the overall protection of temporary agency workers, within the meaning of that provision, where the Member State concerned gives the social partners the option of upholding or concluding collective agreements which authorise differences in treatment with regard to basic working and employment conditions to the detriment of those workers.

As for the fourth area, there are no implications for Maltese law because the Regulations—or indeed Maltese law—do not give social partners the option of upholding or concluding collective agreements that authorise differences in treatment with regard to basic working and employment conditions to the detriment of temporary agency workers. On the contrary, Article 3 (4) of the Regulations makes it clear that any collective agreement containing provisions that are more favourable shall not be prejudiced by the Regulations. It is clear that no collective agreement may be less favourable than the protection afforded by the Regulations and the Regulations do not allow for a difference in treatment (save what is stated above). Hence, it is safe to assume that it is not possible for any collective agreement in Malta to allow for any difference in treatment.

As for the fifth area, it is clear that under Maltese law, collective agreements cannot authorise a difference in treatment. If there are differences in treatment, such difference are null and void. Hence, there does not seem to be any implications for Maltese law in this regard.

The Regulations wanted to make it very clear that equal treatment between temporary agency workers and permanent workers in the user undertaking is obligatory. Consequently, it is difficult to conceptualise how, under Maltese law, differences in treatment could be authorised by means of a collective agreement.

4 Other Relevant Information

Nothing to report.

Netherlands

Summary

(I) The government has approved a bill on mandatory certification for employment agencies, aimed at fighting fraudulent temporary work agencies. A court has held that assigning a temporary agency worker for a total period of 13 years is not abuse.

(II) A court has ruled on the role of a dynamic incorporation clause in a transfer of undertakings.

(III) A court has ruled that the remuneration paid to two crane operators for overtime and the surcharges received for night shifts should be included in the calculation of holiday pay.

1 National Legislation

1.1 Temporary agency work

On 09 December 2022, the Council of Ministers approved the bill on mandatory certification for employment agencies aimed at fighting fraudulent temporary work agencies. Certification has two aims: (1) ensuring that temporary work agencies guarantee that all their employees work under good working and living conditions, and (2) improving the vulnerable position of migrant workers and ensuring a level playing field for all user undertakings.

The bill has been submitted to the Council of State (*Raad van State*) for comment, after which it will be submitted to the Lower House (*Tweede Kamer*) sometime in spring 2023.

Certification will become mandatory as of 2024. For the issuing of certificates, a new organisation will be established that will start operating in the summer of 2024. Moreover, the Labour Inspectorate's capacity will be expanded from 2023 onwards to enforce the certification requirement, starting from the date temporary work agencies are able to obtain a certificate, most likely from 01 January 2025 onwards. That means that as of that date, temporary work agencies that have no such certificate and user undertakings that hire from non-certified agencies can be fined.

1.2 Self-employment

On 16 December 2022, the Ministry of Social Affairs and Employment published the Progress Letter working with and as self-employed (*Voortgangsbrief werken met en als zelfstandige(n)*), informing about measures to be taken in the context of working with self-employed and as self-employed.

Three types of measures are proposed: (1) improving the level playing field; (2) clarifying the rules on assessing the employment relationship and legal presumption; and (3) improving the enforcement of bogus self-employment.

Ad (1) Improving the level playing field:

- Phasing out (i) the self-employed tax deduction (*zelfstandigenaftrek*) in several steps from EUR 6 310 in 2022 to EUR 900 in 2027, starting in 2023, expected to result in higher tariffs to be paid by self-employed persons, and (ii) the fiscal old-age reserve (*fiscale oudedagsreserve*), a scheme that allows entrepreneurs to set aside tax-facilitated investments for old age combined with taking steps towards an employment-neutral pension framework;
- Introducing a mandatory sickness insurance for self-employed persons;

- Updating the Guidelines on Collective Bargaining for Self-employed Workers in line with the European Commission's guidelines (approximately early 2023) to allow self-employed workers to use the full scope for collective bargaining that the Commission's guidelines provide for this purpose;
- Expanding the number of seats of the Social-Economic Council (*Sociaal Economische Raad*) to strengthen the voice of self-employed persons in the Council, the main advisory council for government and Parliament on socio-economic issues.

Ad (2) Clarifying the rules on assessing the employment relationship and legal presumption:

- Increasing clarity by fleshing out the open standard 'working in the service of' ('*werken in dienst van*') from Article 7:610 Dutch Civil Code with the involvement of social partners, experts and stakeholders;
- Introducing a rebuttable legal presumption based on a gross hourly rate (*rechtsvermoeden gebaseerd op een uurtarief*);
- Continuing the use of the web module to assess employment relationships (*webmodule beoordeling arbeidsrelaties*) which aims at giving an *ex ante* indication, based on the applicable laws and case law, on the classification of an employment relationship.

Ad (3) Improving the enforcement of eliminating bogus self-employment:

- Increasing the enforcement capacity of the Tax and Customs Administration (*Belastingdienst*) by raising the staff capacity from 55 fte to 80 fte;
- Gaining insight into the size of the actual enforcement gap as to the correct classification of the employment relationship;
- Specifying the collaboration between the Tax and Customs Administration with the Employee Insurance Agency (*Uitvoeringsinstituut Werknemersverzekeringen*) and the Labour Inspectorate (*Arbeidsinspectie*);
- Abolishing the enforcement moratorium as of 1 January 2024.

1.3 STAP budget for training and development

With a view to reducing abuse and improper use of the STAP budget (a financial incentive to improve an individual's labour market position, see January 2022 Flash Report), the Dutch government has decided to not open the January 2023 application period. Time is needed to conduct investigations that will offer insights into abuse and misuse. The next application period starts on Tuesday 28 February 2023. In case training courses are part of the investigation undertaken by the Assessment Chamber (*Toetsingskamer*), the mere fact that a course is under investigation is insufficient reason to not pay a trainer (yet). To limit the number of payments for courses that do not meet the conditions for the STAP budget, applications in January 2023 will be closed.

2 Court Rulings

2.1 Transfer of undertaking

Court of Appeal Den Bosch, ECLI:NL:GHSHE:2022:4106, 29 November 2022

This case examined whether after a transfer of undertaking within the meaning of Article 7:662 Dutch Civil Code and Article 1 Directive 2001/23/EC, the employees could derive rights from wage increases laid down in a new version of a collective agreement to which the employees were bound before the transfer due to a dynamic incorporation clause. The court derived from the CJEU's *Asklepios* case that a dynamic incorporation clause transfers to the transferee, provided that the transferee has the possibility, under national law, to change the working conditions consensually or unilaterally after the transfer.

The court considered that this is possible under Dutch law. Under Dutch law, the transferee has the possibility to conclude a new employment contract with the employee, or to unilaterally change the terms of an existing employment contract by relying on either Article 7:613 Dutch Civil Code, Article 7:611 Dutch Civil Code and/or Article 6:248 paragraph 2 Dutch Civil Code (and with reference to the standard formulated by the Supreme Court in the *Stoof/Mammoet* case). This means that under Dutch law, a dynamic incorporation clause transfers to the transferee.

In the present case, the transferee made use of the possibility to modify the working conditions by offering the employees a new employment contract. The new employment contract to which the employees agreed knowingly and informedly, did not refer to the collective agreement. As a result, the new collective agreement did not form part of the employment contract. The employees were therefore not entitled to the wage increases agreed in the new collective agreement.

2.2 Overtime and holiday pay

Court of Appeal The Hague, ECLI:NL:GHDHA:2022:2369 and ECLI:NL:GHDHA:2022:2370, 06 December 2022,

These cases examined whether the remuneration paid to two crane operators for overtime and the surcharges they received for night shifts should be included in the calculation of holiday pay within the meaning of Article 7:639 Dutch Civil Code, which corresponds with Article 9 Directive 2003/88/EC. Regarding the remuneration paid for overtime, the court derived three criteria to establish whether that remuneration should be included in the calculation from the CJEU's judgment in the case *Hein v Albert Holzkamm GmbH & Co. KG*: (1) the overtime results from obligations arising from the employment contract, (2) overtime occurs on a regular basis, and (3) the remuneration for overtime constitutes a significant part of the employee's total remuneration. Since there was a long-standing practice of working overtime, the crane operators were continuously scheduled for more than 40 hours per week and the parties did not dispute that the remuneration for overtime was an important part of their total remuneration, the court determined that these criteria were indeed met.

Based on the CJEU's ruling in case *Williams and Others v British Airways plc*, the court also answered the question whether the surcharges for night shifts should be included in the calculation in the affirmative, since working the crane at night is an inconvenient aspect which is linked intrinsically to the performance of the task assigned to a crane operator under the employment contract.

Furthermore, the court found that since Article 7:639 Dutch Civil Code does not leave room for differentiation between statutory and non-statutory periods of annual leave, the inclusion of remuneration for overtime and surcharges for night shifts in the calculation of holiday pay goes for both the statutory period of annual leave, which

corresponds with the minimum of four weeks of Directive 2003/88/EC, and the non-statutory period of annual leave not regulated by Directive 2003/88/EC.

2.3 Temporary agency work

Court of Rotterdam, ECLI:NL:RBROT:2022:11010, 12 December 2022

This case is the first case in which a Dutch court interpreted the prohibition to permanently assign a temporary agency worker to the same user undertaking in accordance with Article 5(5) Directive 2008/104/EC. In the present case, the worker had worked for (legal predecessors of) the same user undertaking for a continuous period of 13 years based on various assignments by two different temporary work agencies. The key question was whether the worker had an employment contract with the user undertaking. The court considered that a limitation of the duration of the number of consecutive assignments of a temporary agency worker to the same user undertaking is not regulated by Dutch law. The court added that Directive 2008/104/EU does not require Member States to do so: it only requires Member States to take 'appropriate measures' to prevent abuse. In the opinion of the court, it is up to the Dutch legislator to regulate by law (or not) a maximum period of assignments as well as the sanctions when this period is exceeded. It is not for the court to anticipate this and 'sit in the legislator's chair'.

The court considered that the issue might be different, however, in case of abuse. In that case, support for accepting the existence of an employment contract with the user undertaking could be found in the case law of the Supreme Court on abusive practices (this case law concerns the circumvention of the rules of successive fixed-term contracts (Article 7:668a Dutch Civil Code) by alternating fixed-term employment contracts with temporary agency work contracts). However, even though a continuous period of 13 years constitutes an extensive period, it is insufficient to prove abuse within the meaning of Directive 2008/104/EC. In this regard, the court discussed, first, that the contract between the worker and the temporary work agency was a genuine temporary agency work contract. The worker was assigned to different user undertakings before being assigned to the user undertaking in question and the temporary work agency, besides paying wages, played a substantial role in the performance of the employment contract. Second, the court found that there was an objective explanation for successive assignments. Given the nature of its business (manufacturing), the user undertaking had a legitimate interest in a 'flexible shell'. As part of that flexible shell, the temporary agency worker was deployed in various branches of the undertaking, without much responsibility. Third, the court found that in the past, the user undertaking had offered the employee a (fixed-term) employment contract, which shows it was not a policy of the user undertaking to not directly employ temporary agency workers under any circumstances.

Based on these fact, the court ruled that this case involved the *use* and not *abuse* of temporary agency work contracts. By extension, the comparison to the abovementioned case of the Supreme Court on abusive practices does not apply. As a result, the court determined that no employment contract had existed between the worker and the user undertaking.

3 Implications of CJEU Rulings

3.1 Temporary agency work

Case C-311/21, 15 December 2022, TimePartner Personalmanagement

This case concerned the equal treatment of temporary agency workers. Following Article 8(1) Law allocation to labour force by intermediaries (*Wet allocatie arbeidskrachten door intermediairs*), in The Netherlands, temporary agency workers shall be entitled to at

least the same terms and conditions of employment as those applicable to regular employees working in equal or equivalent positions in the user undertaking. Derogation from the main rule is possible (Article 8(4)), yet does not specify that an overall level of protection must be guaranteed. The only 'guarantee' given in Article 8(4) is that the collective agreement must provide for a rule preventing abuse against successive assignments.

Where a temporary work agency assigns a worker to a user undertaking, it is likely that the agency is subject to the generally binding Collective Labour Agreement for Temporary Agency Workers 2021-2023 (*ABU Cao voor Uitzendkrachten 2021-2023*). Under Article 16 of the collective agreement, the temporary agency worker is entitled to the user undertaking's remuneration scheme. As of 01 January 2023, remuneration covers 10 elements, which are each at least the same as those earned by employees in the same or similar jobs at the user undertaking. The 10 elements are:

(1) periodic wage that applies to the pay scale;

(2) the application reduction of working hours;

(3) all supplements for working during irregular hours and/or under (physically) stressful conditions related to the nature of the work (e.g. overtime, working at night/at weekends/on public holidays, shifted hours and shift work, working in low/high temperatures, exposure to hazardous substances, dirty work);

(4) initial wage increase (amount and timing in accordance with the user undertaking's policy);

(5) expense allowances (for as long as the agency is not liable to pay income tax and national insurance contributions and premiums over these allowances);

(6) increments (amount and timing in accordance with the user undertaking's policy);

(7) reimbursement of travel hours and/or travel time related to the work (unless they are considered hours worked);

(8) one-off payments (not including periodically repeated payments); and

(9) home working allowances;

(10) fixed end-of-year payments (amount and timing as per the user undertaking's policy).

A similar provision applies to temporary work agencies admitted as members to the Netherlands Association of Intermediary Organisations and Private Employment Agencies (*Nederlandse Bond van Bemiddelings- en Uitzendondernemingen*) (see Article 16 Collective Labour Agreement for Temporary Agency Workers, NBBU Cao; this collective agreement is not generally binding).

As for other basic and working employment conditions (Article 3(1)(f) Directive 2008/104/EC), the collective agreements do not refer to the conditions applicable at the user undertaking.

A difference in treatment to the detriment of the temporary agency worker is permissible in the following situations, namely where:

(a) the collective agreement applicable to the user undertaking contains pay elements that go beyond those exhaustively mentioned in Article 16 of both collective agreements and thus is more favourable to temporary agency workers. In such a situation, the collective agreement that governs the terms and conditions of employment of similarly bound workers, most likely the user undertaking's collective agreement, should apply to the temporary agency worker.

(b) the user undertaking's collective agreement is a minimum collective agreement (i.e. allowing for more favourable employment conditions than determined in the collective agreement) and the agency's collective agreement is a standard collective agreement (i.e. allowing no derogation from the level of protection provided in the collective agreement). If the agency collective agreement contains a provision referring to the applicability of the user undertaking's basic working and employment conditions and if both collective agreements contain the same pay elements, there is no need for any comparison. Yet, where the agency's collective agreement contains less pay elements than the user undertaking's collective agreement, the agency may not derogate at all from the collective agreement it is bound by, even if the user undertaking's agreement would allow temporary agency workers a higher pay.

(c) the collective agreement applicable to the user undertaking is generally binding and contains provisions applicable to temporary agency workers, while the collective agreement applicable to the temporary work agency is not generally binding. Here, the user undertaking's collective agreement would prevail because a declaration of general bindingness is an act of substantive law.

(d) the collective agreement applicable to the temporary work agency is generally binding, while the collective agreement applicable to the user undertaking is not. Here, the agency's collective agreement would prevail because a declaration of general bindingness is an act of substantive law.

(e) Both user and agency collective agreements are (not) generally binding and both are minimum collective agreements based on the favourability principle a choice must be made.

(f) both user and agency agreements are (not) generally binding and both are standard collective agreements based on the favourability principle a choice must be made.

(g) the user undertaking's collective agreement is a standard collective agreement and the agency's collective agreement is a minimum collective agreement. Here, the user undertaking may not derogate at all from the collective agreement it is bound by, even if the agency's agreement would allow temporary agency workers more favourable basic working and employment conditions, except where the user undertaking's collective agreement would allow for such derogation.

In situations (a), (e) and (f), the temporary work agency would need to, in line with point 49 of the CJEU's ruling, (1) determine which basic working and employment conditions would apply to the temporary agency worker if he or she had been recruited directly by the user undertaking to occupy the same job, (2) compare those basic working and employment conditions with those resulting from the collective agreement to which the temporary agency worker is actually subject, and (3) assess whether the countervailing benefits afforded can offset the difference in treatment suffered.

Such an assessment is not possible for situations © (generally binding user collective agreement applies per definition, so no comparison of collective agreements), (b) (no comparison possible unless provided for in the agency's standard collective agreement), (d) (generally binding agency collective agreement applies, so no comparison of collective agreements), and (g) (no comparison possible unless provided for in the user's standard collective agreement).

This may require the social partners and/or the legislator to consider taking action to bring regulations in line with the CJEU's ruling in *TimePartner*, especially for situations in which no comparison is possible and thus no assessment can be made about the comparability of the basic working and employment conditions as well as whether the countervailing benefits afforded can offset the difference in treatment suffered.

4 Other Relevant Information

4.1 Collective agreement for temporary agency workers

On 20 December 2022, the social partners reached a negotiation result for a new collective agreement for temporary agency workers. The most important changes concern:

- From 01 July 2023, relevant work experience will be taken into account when determining the applicable pay scale for temporary agency workers. To determine the relevant work experience, the temporary work agency shall consider the individual's education, work experience and competences provided by the temporary agency worker. Upon request by the temporary agency worker, the temporary work agency must explain how the pay scale was established.
- The social partners will take further steps in 2023 to achieve equal working and employment conditions by expanding the notion of pay as per 01 July 2023 so as to include the following elements: all allowances (*toeslagen*) as applicable in the user undertaking and the user undertaking's pay extended to include all reimbursements of expenses, regardless whether they can be paid free of wage tax and social security contributions in accordance with the applicable tax legislation, whereby the part of the reimbursement that is not specifically exempt by law is paid gross.
- Periodic increments shall be awarded to temporary agency workers in the same manner as to employees directly employed with the user undertaking. If the awarding of a periodic increase depends on the assessment of the temporary agency worker, the following applies: the temporary agency worker will always be awarded a periodic increase, except if the temporary work agency can demonstrate that the temporary employee has been given a negative assessment in accordance with the rules and procedures at the user undertaking, and if no or no timely assessment has been made, the temporary agency worker will be awarded a periodic increase corresponding to the median of the assessments at the user company.
- As of 01 July 2023, all successive temporary employment contracts with the same user undertaking must be concluded for at least four weeks.

Apart from that, as of 01 January 2023, fixed end-of-year bonuses, defined as all income components that are paid annually or otherwise periodically on a recurring basis (i.e. fixed end-of-year payments), such as a 13th month, end-of-year bonus and Christmas bonus, will become part of the pay applicable at the user undertaking (*inlenersbeloning*) (Article 16 the Collective Labour Agreement for Temporary Agency Workers 2021-2023 (*ABU Cao voor Uitzendkrachten 2021-2023*)). Allocation takes place in accordance with the regulations applicable at the user undertaking, such as when the payment is made and the conditions applicable to the allocation.

Norway

Summary

Restrictions on hiring workers from temporary work agencies have been introduced.

1 National Legislation

1.1 Right to full-time employment

The Working Environment Act (LOV-2005-06-17-62) has been amended with a 'right' to full-time employment (LOV-2022-12-09-88). Amendments have also been made to the Working Environment Act section 14-3 on preferential rights for part-time employees. These changes were described in the November 2022 Flash Report.

The amendments entered into force 01 January 2023.

1.2 Temporary agency work

Hiring workers from temporary work agencies has, according to the main regulation in the Working Environment Act (LOV-2005-06-17-62), been equalised with the right to conclude temporary employment contracts. This implies that it is possible to hire employees from temporary work agencies to perform work of a temporary nature or to temporarily replace a worker or workers, cf. Sections 14-9 and 14-12 of the Working Environment Act. Changes have now been introduced to restrict the possibility of hiring employees from temporary work agencies (LOV-2022-12-20-99). The most important changes can be summarised as follows:

Firstly, the possibility of hiring employees from temporary work agencies to perform work of a temporary nature has been abolished, cf. the Working Environment Act Section 14-12 (1) and the Act on State Employees Section 12 (LOV-2017-06-16-67).

However, two exceptions have been stipulated in separate regulations for (1) hiring of health care personnel to ensure the proper operation of health care and care services, and (2) hiring of employees with special skills who will perform advisory and consulting services in a clearly defined project.

Secondly, no workers from temporary work agencies can be hired for construction work on construction sites in Oslo, Viken and formerly Vestfold. This prohibition is set out in separate regulations.

The right to permanent employment has been expanded, i.e. temporary agency workers have the right to permanent employment after three consecutive years, regardless of the reason for which they were hired.

A statutory definition of hiring has been introduced in the Working Environment Act, clarifying the boundary between hiring and contracting.

The new restrictions will enter into force on 01 April 2023 (FOR-2022-12-20-2300), however, with specific transitional rules (FOR-2022-12-20-2301).

1.3 Collective bargaining

Norway has a system of general application of collective agreements (*allmenn-gjøringsordning*), cf. The General Application of Collective Agreements Act (LOV-1993-06-04-58). An autonomous government entity, the Tariff Board (*Tariffnemnda*), has authority—if certain conditions are met—to decide that a nationwide collective agreement shall apply in full or in part to all employees who perform work of the type specified in the agreement within an industry or part of an industry. Collective

agreements have general applicability in several industries, and the Tariff Board has decided that these regulations continue to have general applicability. Collective agreements have general applicability in the following sectors:

- Freight transport on road, cf. FOR-2022-12-09-2171.
- Passenger transport by touring car, cf. FOR-2022-12-09-2172.
- Fishing companies, cf. FOR-2022-12-09-2154.
- Accommodation, restaurants and catering, cf. FOR-2022-12-09-2156.
- Agriculture, cf. FOR-2022-12-09-2154.
- Shipbuilding industry, cf. FOR-2022-12-09-2170.
- Cleaning companies, cf. FOR-2022-12-09-2169.
- Electrophage, cf. FOR-2022-12-05-2152.

Construction sites, cf. FOR-2022-12-09-2155.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-311/21, 15 December 2022, TimePartner Personalmanagement

Directive 2008/104/EC is implemented in the Working Environment Act (LOV-2005-06-17-62), and the principle of equal treatment can be found in Section 14-12 a of the Act. Para 3 of this provision gives the Ministry authority to decide in regulations whether and to what extent the provisions on equal treatment may be derogated from in collective agreements. Such regulations are laid down by the Ministry (FOR-2015-07-06-874). Derogation requires the temporary work agency to be bound by a collective agreement entered into with a trade union that is entitled to submit so-called recommendations (*innstillingsrett*) pursuant to the Labour Dispute Act 2012 Section 39 (LOV-2012-01-27-9). A trade union must have at least 10 000 members to be entitled to submit recommendations. Both the Working Environment Act Section 14-12 a (3) and Section 1 of the regulations state that the "*general worker protection provisions must be respected in all cases*". These provisions implement Article 5 (3) of the Directive.

The CJEU's judgment does not raise any specific concerns. There are no decisions by Norwegian courts on the abovementioned provisions, and there is no reason to believe that the CJEU's interpretation of Article 5 (3) of the Directive will pose any problems in Norway. According to the general principles of Norwegian law, the provisions in the Working Environment Act Section 14-12 a (3) and Section 1 of the regulations must be interpreted in line with the CJEU's judgment.

Neither the Working Environment Act nor the regulations set down further conditions or criteria designed to respect the overall protection of temporary agency workers when the principle of equal treatment is deviated in a collective agreement in accordance with the abovementioned provisions. This, however, is not required, as concluded by the CJEU in case C-311/21.

According to current law, collective agreements that authorise differences in treatment for basic working and employment conditions to the detriment of temporary agency workers, are amenable to effective judicial review to determine whether the social partners have complied with their obligation to respect the overall protection of such workers. In general, courts will be able to review whether a provision in a collective

agreement is lawful. A party to the collective agreement can bring a claim on the lawfulness of the agreement before the Labour Court, while a temporary work agency, which is not a party to the collective agreement, or a temporary agency worker, can bring a claim before the ordinary courts.

4 Other Relevant Information

Nothing to report.

Poland

Summary

The amendment to the Labour Code on teleworking has been enacted.

1 National Legislation

1.1 Teleworking

On 01 December 2022, the amendment to the Labour Code on remote work was enacted by the Sejm (lower chamber of Parliament), and was approved by the Senate (higher chamber of Parliament) on 16 December 2022, with some minor modifications.

Remote work is currently regulated in the anti-COVID shield and refers to remote working during the pandemic. The purpose of the amendment is to introduce a permanent legal framework for remote working (with substantial amendments compared to the anti-COVID regulations), and to replace the current regulations on teleworking with the regulations on remote working.

The draft and information on the legislative process can be found here. The draft was extensively introduced and analysed in the November 2022 Flash Report, section 1.1.

The following aspects on the legislative process should be highlighted:

- the employer will be required to accept requests for remote working by employees taking care of a child up to the age of 10 years (instead of up to the age of 4 years, as had been previously proposed), unless such approval is not possible due to the establishment's organisational requirements or the type of work being performed. A rejection must be justified (Article 67^{19} § 6 LC);
- the employer will be required to accept requests by employees with disabilities for remote working, and not only requests by employees who are taking care of a family member with disabilities (as had been previously proposed). Approval of the request depends on the establishment's organisational requirements and the type of work being performed; any rejection must be justified. It should also be mentioned that the employer will in principle be required to approve requests for remote working submitted by a pregnant employee (Article 67^{19} § 6 LC);
- remote work can be performed on an *ad hoc* basis (i.e. without 'regular' statutory requirements), upon the employee's request, not more than 30 days in a calendar year.

Previously, it had been proposed that ad hoc teleworking could not be performed for more than 24 days per calendar year.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-311/21, 15 December 2022, TimePartner Personalmanagement

In Poland, Directive 2004/108 has been implemented by the Law of 09 July 2003 on the Employment of Temporary Workers (*ustawa o zatrudnianiu pracowników*

tymczasowych), the consolidated text is available here: Journal of Laws 2019, item 1563.

Article 15 item 1 of the Law provides that while performing work for the benefit of the user undertaking, a temporary agency worker may not be treated less favourably with regard to working conditions and other employment conditions than the user undertaking's employees employed in the same or a similar position. According to Article 15 item 2 of the Law, with regard to access to training organised by the user undertaking to improve the qualifications of employees, the provision of section 1 does not apply to temporary agency workers who perform work for the user undertaking for a period shorter than six weeks. Thus, the statute in principle requires the same protection to be afforded both to the user undertaking's permanent employees and to temporary workers.

Polish labour law is mainly statutory law, and collective labour agreements play a secondary role. There are no collective labour agreements that would transpose Directive 2008/104 or that would deviate from statutory provisions on temporary work. There are no restrictions or prohibitions to temporary agency work based on collective labour agreements. Therefore, the dispute at stake would not arise in Poland, since there are no collective labour agreements that would introduce collective arrangements on the employment conditions of temporary workers, while respecting the overall protection of temporary workers. The protection of temporary workers is in practice subject to statutory regulations only.

Article 7 item 1 of the Law provides that a temporary work agency employs temporary agency workers on the basis of an employment contract for a fixed period. In other words, according to the statute, the fixed-term employment contract is the basis of the relationship between the temporary work agency and the temporary worker (and civil law contracts for the provision of services). There is no option to conclude an open-ended employment contract with a temporary worker. There is no room to evaluate the overall protection of temporary workers from the perspective of concluding a permanent employment contract.

The CJEU's ruling does not have any implications for the compatibility of Polish law with Directive 2004/108, and there is no need to modify national regulations.

4 Other Relevant Information

Nothing to report.

Portugal

Summary

(I) A pilot programme for evaluating and testing the effects of the reduction of the work week to four days has been approved.

(II) A ruling of the Appeal Court of Lisbon dealt with the transfer of an economic unit.

1 National Legislation

1.1 Retirement pension

Ordinance No. 292/2022, of 9 December 2022, establishes that the normal age for access to an old-age retirement pension of the Portuguese general social security system will increase to 66 years and 4 months in 2024.

1.2 Four-day week

Ordinance No. 301/2022, of 20 December 2022, approves the development of a pilot programme, the 'Four-day Week', which aims to experimentally adopt, by employers and the respective employees, a reduction of the work week to four days.

The responsibility for implementing and managing the pilot programme lies with the Employment and Professional Training Institute (*Instituto de Emprego e Formação Profissional*).

This pilot programme aims to analyse and test a new working organisation model based on the following specific objectives: (i) assess new forms of organisation and balance of working times, which allows for the protection of the employees' interests, reduces operational costs of companies and environmental costs; (ii) assess the impact the reduction in working time, without a loss of salary, has on the quality of life of employees and their families; (iii) assess the effects on productivity, quality of services provided and absenteeism.

This pilot programme will begin during 2023 and consists of evaluating the implementation of the work week of four days, with the corresponding reduction in the number of working hours and without reducing the employee's remuneration. Employers and employees may voluntarily join this pilot programme.

An evaluation will be carried out before, during and after the implementation of the pilot programme based on indicators (i) related to the company, such as productivity and intermediate costs, and (ii) related to employees, including health and well-being.

1.3 Minimum wage

On 22 December 2022, Decree-law No. 85-A/2022 was published, which approves the national minimum wage for the year 2023. According to the Decree, the national minimum wage applicable in the Portuguese mainland territory will be EUR 760 as of 01 January 2023.

2 Court Rulings

2.1 Transfer of undertakings

Ruling of the Appeal Court of Lisbon, No. 9810/20.1T8SNT.L1-4, 15 December 2022.

In this judgment, the Appeal Court of Lisbon ruled that the succession of companies in the provision of surveillance services in a shopping centre, accompanied by the maintenance of essential equipment for the execution of the contracted service and the integration of some employees of the previous provider, should be deemed as a transfer of an economic unit for the purposes of Article 285 of Portuguese Labour Code and Article 1 (1) of Directive 2001/23/EC of 12 March 2001. In the given situation, the following facts were considered relevant:

(i) Surveillance services continued to be provided in the same location and for the same customer, without any relevant time gap;

(ii) The specific surveillance and human security services contracted by the shopping centre were maintained;

(iii) For the provision of services, the new provider used the same goods and equipment belonging to the customer which the previous provider had used (e.g. a chair, a desk, key ring, a landline telephone, a complete CCTV system, consisting of a computer, monitors and cameras for capturing images, and a fire control centre);

(iv) Some of the previous provider company's employees entered into fixed-term employment contracts with the new provider, continuing to render the referred surveillance services in the same premises.

Pursuant to Article 286-A of Portuguese Labour Code, employees have the right to oppose the transfer of the position of employer in their employment contracts when it may cause them harmful damages, namely due to the acquirer's lack of solvency or difficult financial situation, or even if the work organisation policy of the acquirer does not seem trustworthy. In this judgment, the Appeal Court considered that the opposition to the transfer was valid and founded as the new surveillance service provider had refused to recognise the employees' rights arising from their employment contract with the transferor, imposing on them the conclusion of a new fixed-term contract. According to the court, in that case, the employees may face the real possibility of losing job stability and the rights and guarantees that until then had been provided to them, which implies 'serious damage' and justifies that the employees do not have confidence in the work organisation policies of the transferee. Based on this argument, the Appeal Court ruled that in the present situation, the exercise of the opposition right by the plaintiff was valid and, therefore, his employment contract was not transferred to the transferee, remaining at the transferor's service.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-311/21, 15 December 2022, TimePartner Personalmanagement

This case concerned the interpretation of Article 5 of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work. This provision foresees, in para 1, that

> *"the basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they have been recruited directly by that undertaking to occupy the same job"*.

However, para 3 of said Article 5 establishes that

> *"after consulting the social partners, Member States may give them, at the appropriate level and subject to the conditions laid down by the Member States, the option of upholding or concluding collective agreements which, while respecting the overall protection of temporary agency workers, may establish arrangements concerning the working and employment conditions of temporary agency workers which may differ from those referred to in paragraph 1".*

In the present case, a temporary agency worker employed by a temporary work agency (*TimePartner Personalmanagement GmbH*) brought a claim before a German labour court requesting additional pay equivalent to the difference between the remuneration set forth in the collective agreements applicable to temporary agency workers and the remuneration due to comparable workers of the user undertaking, in accordance with the collective agreement for retail workers in the Land of Bavaria which applies to them.

The CJEU ruled that Article 5 (3) of Directive 2008/104/EC must be interpreted as meaning that such provision, by its reference to the concept of "*overall protection of temporary agency workers*", does not require account to be taken of a level of protection specific to temporary agency workers that is greater than that laid down for workers in general by provisions on basic working and employment conditions under national and EU law. However, the CJEU also stated that where the social partners, by means of a collective agreement, authorise differences in treatment with regard to basic working and employment conditions to the detriment of temporary agency workers, that collective agreement must, in order to respect the overall protection of the temporary agency workers concerned, afford them advantages in terms of basic working and employment conditions which are such as to compensate for the difference in treatment they suffer.

Under Portuguese law, during an assignment, the temporary agency worker is subject to rules applicable to the user undertaking in relation to the way, place, duration of the work and suspension of the employment contract, safety and health at work and access to social equipment (Article 185 (2) of Labour Code). In addition, the temporary agency worker is entitled to the minimum remuneration set forth in the collective agreement applicable to the temporary work agency or to the user undertaking that corresponds to the respective functions, or to the remuneration practiced by the latter for equal work or of equal value, whichever is more favourable (Article 185 (5) of Labour Code). Portuguese law does not give the social partners the possibility provided for in para 3 of Article 5 of Directive 2008/104/EC and therefore, this recent CJEU ruling does not seem to have any significative implications for Portugal.

4 Other Relevant Information

4.1 Future amendments to labour law

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

Romania

Summary

(I) The new Social Dialogue Law has been adopted, expanding the possibility of collective bargaining and the generation of collective conflicts.

(II) Romania has transposed Directive 2019/1937, ensuring the protection of whistleblowers in labour relations.

1 National Legislation

1.1 Law on Social Dialogue

The new Law on Social Dialogue, Law 367/2022 (see Official Gazette of Romania No. 1238 of 22 December 2022), essentially changed collective bargaining procedures, the representativeness of social partners, and the regulation of collective labour disputes. As an expression of Romania's National Recovery and Resilience Plan, the new law repeals Social Dialogue Law No. 62/2011, which, to a large extent, has obstructed social dialogue in Romania over the last 10 years. The new law mainly provides:

a) Extension of the right to information/consultation. Henceforth, the employer not only has the possibility but the obligation to invite employee representatives to the meetings of the board of directors, when issues of a professional and social interest with an impact on the workers are discussed. The procedure for informing and consulting employees about the development of the company's economic situation has been regulated, as well as the obligation to organise a public information session on workers' rights at least once a year in undertakings where trade unions are not established.

b) Unions will be able to organise self-employed and unemployed workers. The latter will not be taken into account when determining the number of union members based on which a union's representativeness is established. To form a union, a number of at least 10 workers from the same undertaking or at least 20 workers from different undertakings from the same sector is required (until now, at least 15 employees from the same undertaking were required to form a union). The thresholds for representativeness have been reduced; notably, at the unit level, a trade union that has 35 per cent of the total number of employees as members (compared to 50 per cent+1, as provided until now) has representativeness.

c) Collective bargaining can also take place at the national level, which was not possible until now. Collective bargaining is mandatory in any undertaking with more than 10 employees (compared to 21, as provided until now). Besides, the new law aims to strengthen collective bargaining at the sectoral level and defines new sectors called 'collective bargaining sectors'.

Collective labour disputes may arise not only during the negotiation of the collective labour agreement but also—under certain conditions—in case of rejection, collectively, of individual rights provided by the applicable collective labour agreements. Employees can also initiate a collective conflict if employers refuse to adhere to the sectoral collective labour agreement. Several procedural aspects relating to strikes have been modified, including the establishment of a Strike Committee. In addition, a *"strike against the social and economic policy of the Government"* may be initiated as a result of the social or economic policies that have led to the reduction of some rights provided by the applicable collective labour agreements. The strike shall take place on the premises of the company. Along with grounds that make a strike illegal, 'grounds of non-compliance' have also been introduced, if legal procedural aspects have been omitted.

1.2 Whistleblowers

Law No. 361/2022 on the protection of whistleblowers in the public interest (see Official Gazette of Romania No. 1218 of 19 December 2022) transposed Directive 2019/1937 on the protection of persons who report breaches of Union law into Romanian law. The new law replaces the previous regulations, mainly provided for in Law No. 571/2004 on the protection of staff working for public authorities, public institutions and other units, who report violations of the law. The repealed law included certain protective measures, but it was applicable exclusively in the public sector.

1.3 Minimum wage

Government Decision No. 1447/2022 for establishing the national guaranteed minimum gross basic salary (see Official Gazette of Romania No. 1186 of 09 December 2022) provides for a minimum salary of RON 3 000 per month for the year 2023. This is a 17.6 per cent increase over the 2022 minimum salary.

According to the Ministry of Labour, the establishment of the minimum wage for 2023 was agreed based on negotiations and the joint agreement between the government and representatives of employers and unions during the meeting of the Tripartite National Council for Social Dialogue. Over 2 million employees will benefit from the increase in the minimum basic salary in 2023.

Emergency Government Ordinance No. 168/2022 (see Official Gazette of Romania No. 1186 of 09 December 2022), provides that in the case of full-time employees who earn minimum wage, part of their salary (i.e. RON 200) will be non-taxable and exempt from social security contributions. The Ordinance also provides that the minimum salary in the construction sector will be RON 4 000 per month in 2023 (compared to RON 3 000 in 2022).

1.4 Employment contract model

By Order of the Ministry of Labour No. 2171/2022 (see Official Gazette of Romania No. 1180 of 09 December 2022), a new framework model of the individual employment contract was approved. The model adopts the new elements introduced in the Labour Code by Law No. 283/2022 (see also October 2022 Flash Report), transposing Directive (EU) 2019/1152 on the transparency and predictability of working conditions in the European Union.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-311/21, 15 December 2022, TimePartner Personalmanagement

Directive 2008/104/EC on Temporary Agency Work has been transposed into Romanian legislation mainly through the Labour Code (Articles 88-102, Law No. 53/2003, republished in the Official Gazette of Romania No. 345 of 18 May 2011) and Government Decision No. 1256/2011 on the operating conditions and the procedure for authorising temporary agency work (see Official Gazette of Romania No. 5 of 04 January 2012).

Romanian legislation does not expressly address derogations allowed in Article 5 (3). There is no provision for the option of upholding or concluding collective agreements

which, while respecting the overall protection of temporary agency workers, derogate from the principle of equal treatment. The only express provision is that contained in Article 11 (3) of Government Decision No. 1256/2011, which provides that the working conditions established by the collective labour agreement applicable at the user level are directly applicable to temporary agency workers during their temporary work assignment.

Even if there were a collective labour agreement at the level of the temporary work agency (which is rare in practice), the provisions of the collective labour agreement applicable at the user undertaking would, if more favourable apply to the temporary agency worker during his/her assignment.

In the absence of any derogations from the principle of equal treatment, there is no question of compensatory advantages and their evaluation.

The regulation of work through a temporary work agency has not advanced, remaining at an embryonic stage since 2011; as a result, in the current context, it cannot be expected that the CJEU's decision in case C-311/21 will produce any immediate effect.

4 Other Relevant Information

Nothing to report.

Slovakia

Summary

A new amendment to the Labour Code has modified several articles concerning the determination of the amount of certain wage supplements.

1 National Legislation

1.1 Minimum wage

On 07 December 2022, the National Council of the Slovak Republic adopted a proposal of two opposition MPs to amend the Labour Code, as amended (Act No. 311/2001 Collection of Laws – 'Coll.').

According to the explanatory report to the draft Act in Article I, a change to the current wording of Article 120 on the determination of the minimum wage and several Articles on the determination of the amount of certain wage supplements is proposed. In 2020, the government enforced the wording of the provisions that were now to be changed, leading to a deterioration in the remuneration of workers earning minimum wage, as well as all workers receiving supplements to their wages, especially with regard to supplements for working non-standard working hours, or for emergency work outside the workplace. Deterioration of remuneration does not only affect permanent employees, but also those who work under an agreement to perform work outside the employment relationship.

The deterioration of remuneration is linked to changes in the determination of the amount of additional payments: instead of tying remuneration to the development of the minimum wage, the legislator has established fixed amounts that have not been modified since 2020, while the minimum wage has been rising. Currently, however, the government's solution from 2020 is unacceptable and substantially harms working people and reduces their incomes.

Ultimately, the adjustment of the degree of work difficulty was dropped from the MPs' proposal. Such adjustments are currently being increased by the same amount as the basic minimum wage. According to the original draft of the amendment, they should again be counted as a multiple. In practice, for example, the second level would be calculated as 1.2 times the minimum wage, and the last wage earned up to twice it's amount. Yet this is missing in the approved proposal.

In the original proposal, which was not approved, the new proposed wording of Article 120 paragraph 4 of the Labour Code should have been:

> *"The rate of minimum wage entitlement for the relevant degree is a multiple of the hourly minimum wage for the established weekly working time of 40 hours or the minimum wage in euros per month, for an employee who earns a monthly wage, established by a special regulation, and the coefficient of the minimum wage."*

In other words, the original text of Article 120 para 4 still applies:

> *"The amount of the minimum wage entitlement of an employee who earns a monthly wage for the relevant grade for the relevant calendar year is the sum of the difference between the amount of the monthly minimum wage determined for the relevant calendar year and the amount of the monthly minimum wage determined for the year 2020 and the product of the amount of the monthly minimum wage determined for the year 2020 and the coefficient of the minimum wage. The amount of the minimum wage entitlement for the respective grade for the respective calendar year for each hour worked by the employee at the*

prescribed weekly working time of 40 hours is 1/174 of the amount of the minimum wage entitlement according to the first sentence."

The degree and minimum wage coefficient are the same as in the proposed new text.

These are the adopted changes (new wording):

Wage surcharge for work on Saturday (Article 122a paras 1-4)

"An employee shall be entitled to a wage surcharge, in addition to the wage earned, for each hour worked on Saturday in the amount of at least 50 per cent of minimum wage in EUR per hour pursuant to a special regulation (paragraph 1)."

Wage surcharge for work on Sunday (Article 122b paras 1-4)

"An employee shall be entitled to a wage surcharge, in addition to the wage earned, for each hour worked on Sunday at least in the amount of 100 per cent of minimum wage in EUR per hour pursuant to a special regulation (para 1)."

Wage surcharge for night work (Article 123 paras 1-3)

"For the performance of night work, in addition to the wage earned, an employee shall, for each hour of night work, be entitled to a wage surcharge in the amount of at least 40 per cent of the minimum wage in euros per hour according to a special regulation, and if it is an employee performing hazardous work, he/she is entitled to a wage surcharge in the amount of at least 50 per cent of the minimum wage in euros per hour according to a special regulation (para 1)."

Wage compensation for the performance of arduous work (Article 124 paragraphs 1-5)

According to Article 124 para 1 of the LC, the employee is entitled to wage compensation for the performance of arduous work when performing the work activities listed in para 2, if those activities have been classified by the relevant public health authority as belonging to category 3 or 4 as specified in a special regulation, and during their performance of work, the intensity of the effects of the work environment despite the technical, organisational and specific protective and preventive measures implemented in accordance with special regulations require the employee to use personal protective work equipment to reduce the health risk.

Article 124 para 3:

"For each hour of work performed according to para 1, in addition to the earned wage, the employee is entitled to wage compensation for the performance of arduous work of at least 20 per cent of the minimum wage in euros per hour according to a special regulation."

Agreements on work performed outside the employment relationship (Article 223 para 2, 4th Sentence)

"Employees who perform work based on agreements to perform work outside the employment relationship are entitled to the agreed remuneration increased by at least the amount of minimum wage per hour for each hour worked on a holiday pursuant to a special regulation." (Former text: "*Employees who perform work based on agreements 'on work performed outside the employment relationship' are entitled to the agreed remuneration for each hour of work on a holiday, with an increase in the agreed remuneration of at least EUR 3.58").*

The Act will enter into force on 01 June 2023.

This Act has not yet been promulgated in the Collection of Laws ('Coll.').

The approval of this amendment to the Labour Code has resulted in intense protests by employers. Employers have criticised Parliament for bypassing the standard legislative process, which includes a comment procedure and expert discussion.

On Monday, 12 December 2022, the employers' representatives left the tripartite meeting of the Economic and Social Council of the Slovak Republic. The Association of Employers' Unions and Associations, the Republican Union of Employers, the Association of Industrial Unions and Transport and the Association of Cities and Towns of Slovakia explained in a joint statement why they left the negotiations of the Social and Economic Council.

This amendment was approved despite the strong disagreement of all employers' tripartite organisations without a relevant assessment of the effects and impacts on the business environment.

2 Court Rulings

2.1 Dependent work

Supreme Court, No. 2 Cdo 323/2020, 28 July 2022

Dependent work (Article 1 paragraph 2 of the Labour Code) can only be performed in an employment relationship according to the Labour Code. Negotiating another legal relationship for the performance of dependent work is invalid (Article 39 of the Civil Code).

According to Article 39 of the Civil Code, a legal act is invalid if its content or purpose contradicts the law, circumvents it or infringe good morals.

2.2 Organisational change

Supreme Court, No. 4 Cdo 139/2021, 24 March 2022

The Commercial Code is not in relation to the Labour Code in a relationship of subsidiarity, which would allow the use of Article 134 of the Commercial Code (commercial management) to assess the substantive legal conditions for the validity of termination of employment pursuant to Article 63 paragraph 1 letter b) of the Labour Code (termination due to organizational changes). The person(s) who is entitled to the legal act of termination on behalf of the employer (Article 9 paragraph 1 of the Labour Code) is authorized to decide on such a question with relevance for employment relations.

See here for a collection of opinions of the Supreme Court and decisions of the courts of the Slovak Republic No. 4/2022.

3 Implications of CJEU Rulings

3.1 Temporary agency work

Case C-311/21, 15 December 2022, TimePartner Personalmanagement

Temporary assignments and agency employment are primarily regulated in legislation. Act No. 311/2001 Coll. as amended regulates temporary assignments, the relationship between the employer and the user undertaking, between the employee, his/her employer and the user undertaking, and specifies the duties of employees during temporary assignments (Articles 58, 58a, 58b).

The Slovak Republic does not provide for an exception to the principle of equal treatment, although Article 5 (3) of the Directive offers some flexibility. Collective agreements must comply with the relevant legislation.

The Slovak legislation also does not provide for exceptions to the overall protection of temporary agency workers. Compliance with the principle of equal treatment can be assessed by comparing the working conditions of temporary agency workers with those of a comparable employee at the user undertaking.

If the working conditions of temporary workers are covered by the user undertaking's collective agreement, they may not be less favourable than those of the user undertaking's regular employees, including salary conditions. The Labour Code explicitly provides for this duty (Article 58, para 9, 11 Labour Code). A collective agreement cannot provide for less favourable working conditions for temporary agency workers. Such a provision would be in breach of the law and would be invalid.

According to Article 58 para 9 of the Labour Code, the basic working conditions of temporary agency workers must be at least equal to those of a comparable employee. This also applies to the collectively agreed working conditions of the temporary workers.

For the purposes of this Act, a comparable employee shall be an employee who has concluded an employment relationship for an indefinite period and a fixed weekly working time with the same employer or an employer pursuant to Sec. 58, who performs or would perform the same type of work or similar type of work, taking into consideration qualifications and professional experience (Article 40 para 9 of the LC).

According to Article 231 para 1 of the Labour Code, a trade union body shall conclude a collective agreement with an employer, which shall regulate the working conditions including wage conditions and conditions of employment, the relationship between the employer and employees, the relationship between employers or their organisations and one or more employees' organisations on more favourable terms than those stipulated in this Act or other labour-law regulations, unless this Act or other labour law regulations explicitly prohibit this or if from their provisions it does not follow that they cannot derogate from them.

There is no special legal regulation on temporary agency workers and the collective bargaining or collective agreements. In each particular case, it will be necessary to proceed according to the cited provision of Article 231 para 1 of the Labour Code.

According to Article 58a para 1 of the Labour Code, the employer or temporary work agency may agree with the user undertaking on the temporary assignment of an employee in an employment relationship for the performance of work. According to paragraph 2 letter f/, the temporary assignment agreement concluded between the employer or temporary work agency and the user undertaking shall include the working conditions (including wage conditions and employment conditions for temporarily assigned employees), which shall be at least as favourable as those for a comparable employee employed directly by the user undertaking.

According to Article 4 para 2 of Act No. 2/1991 Coll. on Collective Bargaining, as amended, the collective agreement shall be invalid if it:

- contravenes generally binding legal regulations;
- regulates provisions for temporary employees that are less favourable than those of the collective agreement of a higher degree.

4 Other Relevant Information

Nothing to report.

Slovenia

Summary

(I) Parts of the Work-life Balance Directive have been transposed into Slovenian law.

(II) The Act Regulating the Working Time and Compulsory Rest Periods of Mobile Workers and on Recording Equipment in Road Transport has been amended.

(III) The Constitutional Court has decided that the upper limit to the right to paid annual leave for public employees was unconstitutional.

1 National Legislation

1.1 Work-life balance

The Act amending the Parental Protection and Family Benefits Act (adopted by the National Assembly in November 2022, see FR 11/2022 under 1.1) was published in the Official Journal (‘*Zakon o spremembah in dopolnitvah Zakona o starševskem varstvu in družinskih prejemkih (ZSDP-1F)*’, Official Journal (OJ RS) No 153/22, 6. 12. 2022, p.12470-12472).

It transposes an important part of the EU Directive 2019/1158, i.e. the Work-life Balance Directive into Slovenian law. According to Article 1 of the ZSDP-1F, this Act transposes the WLB Directive as regards:

- paternity leave,
- parental leave,
- payment/wage compensation during such leaves, and
- flexible working arrangements.

The ZSDP-1F entered into force on 21 December 2022 (15 days after its publication), however, it will only start to apply as of 1 April 2023 (Art 30 of the ZSDP-1F).

The most important changes concerning the transposition of the WLB Directive are presented below (with reference to the Articles of the consolidated version of the Parental Protection and Family Benefits Act after the last amendments by the ZSDP-1F, ‘*Zakon o starševskem varstvu in družinskih prejemkih (ZSDP-1)’*, OJ RS No. 26/14 et subseq.).

Paternity leave

According to Article 25 of the ZSDP-1, as amended by ZSDP-1F, fathers or equivalent second parents have the right to paternity leave of 15 (calendar) days; in case of twins or more, paternity leave is extended for the second and subsequent child by an additional 10 days. This right is conferred irrespective of the worker’s marital or family status and not just to fathers but also to the equivalent second parent.

The paternity leave is a non-transferrable right. It can be used as a full- or part-time absence from work, in a continuous block of 15 days, within the first three months after the child’s birth.

Parental leave

Each parent is (will be – after 1 April 2023) entitled to parental leave of 160 (calendar) days (before the ZSDP-1F’s amendments: 130 days each).

The rules on (non-)transferability are as follows: each parent may transfer 100 days of parental leave to the other parent, while 60 days are non-transferable.

Parental leave may be extended in certain cases (in case of the birth of twins or more, a child with special needs, etc.). Parental leave can be used in various flexible ways, as a full- or part-time absence from work, immediately following the expiry of maternity leave (just one parent, both parents successively, both parents at the same time – if taken in the form of part-time absence from work or in special cases, such as the birth twins and similar, etc.), whereby 60 days of non-transferable leave can be used at a later stage, but must be used before the child reaches the age of 8 years. A non-transferable part of the parental leave can also be used during the maternity leave.

Payment/ wage compensation benefit

Some minor changes have been introduced in terms of the calculation of the payment/ wage compensation/ benefit during maternity, paternity and parental leave, but it is not particularly relevant from the perspective of the WLB Directive.

From the perspective of the WLB Directive and other relevant directives in this area, it is important to emphasise that Slovenian law entitles all working parents to *paid* maternity/ paternity/ parental leave, they are entitled (if the relatively complex calculation rules are simplified and generalised) to compensation, as a general rule, to an amount of 100 per cent of their previous salary.

During such leaves, parents have the right to a payment, the so-called maternity compensation benefit (‘*materinsko nadomestilo*’), paternity compensation benefit (‘*očetovsko nadomestilo*’), parental compensation benefit (‘*starševsko nadomestilo*’) in the amount of 100 per cent of the base salary (Article 47 of the ZSDP-1), whereby the base salary is calculated as the average of the worker’s previous wages/ salaries over the last 12 months; the law prescribes the minimum amount of the compensation benefit (with reference to the amount of basic minimum income regulated by the social assistance legislation) and the maximum ceiling (in the amount of 2.5 average salaries in the previous year), this maximum ceiling does not apply to the maternity compensation benefit.

Flexible working arrangements

Some minor changes to the right of parents to work part time due to child care responsibilities have been introduced, which were regulated before the last changes to ZSDP-1F. In short, one of the parents is entitled to start working part-time if he/she has care responsibilities for a child younger than the age of 3 years (for a child with severe disabilities, this right is extended until the child reaches the age of 18 years). In case of two (or more) children, the right to work part-time due to childcare responsibilities is extended until the younger child reaches the age of 8 years (before the ZSDP-1F, the age limit was until the younger child completes first grade of primary school). Partial absence from work may not exceed half of full-time work, i.e. 20 hours per week. One year of exercising this right is non-transferable for each of the parents. The most recent amendments to the ZSDP-1F have introduced the possibility for both parents to exercise this right at the same time, not just one parent at a time (ii.e. the partial absence from work of both parents together may not exceed half of full-time work, i.e. 20 hours per week) – see new para 8 of Article 50 of the ZSDP-1.

Other flexible work arrangements have also already been regulated in the Employment Relationships Act, ‘*Zakon o delovnih razmerjih (ZDR-1)*’, OJ RS No 42/13 et subseq.), see, for example, Article 148, para 3 of the ZDR-1 on the possibility for working parents to propose a different distribution of working hours to enable better reconciliation of work and family responsibilities, and other provisions supporting working parents.

1.2 Road transport

The Act Regulating the Working Time and Compulsory Rest Periods of Mobile Workers and on Recording Equipment in Road Transport has been amended ('*Zakon o spremembi in dopolnitvah Zakona o delovnem času in obveznih počitkih mobilnih delavcev ter o zapisovalni opremi v cestnih prevozih (ZDCOPMD-H)*' OJ RS No 153/22, 6.12.2022, p.12472-12473), referring to EU Regulations Nos. 165/2014/EU and 561/2006/EC. The amendments concern the transportation of passengers in scheduled services of less than 50 km and the transportation of passengers in the city in scheduled services shorter than 50 km.

It is worth noting the new provision of point 10.a of para 1 of Article 3 of the ZDCOPMD, which was introduced as part of the most recent amendments and reads as follows:

> *"drivers' working time in scheduled passenger transport, except in the city in scheduled services shorter than 50 km" means the time from the commencement to the end of the work, when the driver is available to the employer or performs tasks and activities for the employer, with the exception of the time of availability (as defined in point 2 of this paragraph), which does not count as working time"*.

The 'time of availability' ('*čas razpoložljivosti*', defined in point 2 of the same paragraph) refers to:

> *"(a) for mobile workers, the time when the mobile worker is not required to remain at his/her workplace, but must be available to commence or to continue driving or to perform other work. This type of availability includes, in particular, periods in which the mobile worker accompanies a vehicle that is being transported by ferry or train, as well as the time spent waiting at borders or waiting times due to driving bans. The mobile worker must be aware of this time and its estimated duration in advance before departure or immediately before the actual commencement of his/her time of availability, (b) for mobile workers who drive as part of a crew, this refers to the time during which the employ is sitting next to the driver or resting on the bed in the vehicle while the vehicle is moving"*.

1.3 Data protection

The new Personal Data Protection Act ('*Zakon o varstvu osebnih podatkov (ZVOP-2)'*, OJ RS No 163/22, 27.12.2022, p.13676-13699) was passed by the National Assembly, and transposes the EU's General Data Protection Regulation (GDPR) from 2016 into Slovenian law. The European Commission has reminded Slovenia of its failure to implement the GDPR several times.

1.4 Foreign nationals

The Order determining occupations for which the employment of foreigners is not linked to the labour market has been amended ('*Odredba o spremembi Odredbe o določitvi poklicev, v katerih zaposlitev tujca ni vezana na trg dela'*, OJ RS No. 163/22, p. 13720).

A new profession was added to the list, namely "medical doctors, specialists in general medicine" (new point 14 of para 1 of Article 2 of the Order), and the Order was extended until 30 June 2023. See also December 2020 Flash Report and June 2022 Flash Report.

1.5 Reimbursement of work-related costs

The amount of reimbursement of work-related costs and some other payments in employment relationships that are non-taxable have been adjusted ('*Uredba o*

spremembah in dopolnitvi Uredbe o davčni obravnavi povračil stroškov in drugih dohodkov iz delovnega razmerja', OJ RS No. 162/22, 23. 12. 2022), p.13550).

1.6 Ban on Sunday trading

The Trade Act ('*Zakon o trgovini (ZT-1)*', OJ RS No. 24/08 et subseq.) which regulates, among others, Sunday trading, has been amended several times. The amendments from October 2020 introduced a ban on Sunday trading with certain exceptions. The regulation was (unsuccessfully) challenged before the Constitutional Court.

In July 2021, additional exceptions were added as part of the measures in response to the COVID-19 epidemic: "until 31 December 2022, as an exception to the ban on Sunday trading, shops at airports, in tourist information centres and museums may remain open on Sundays and holidays".

These exceptions (shops at airports, in tourist information centres and museums) which was set to expire on 31 December 2022, have now been included as permanent exceptions in the Trade Act ('Zakon o spremembah in dopolnitvi Zakona o trgovini (ZT-1C)', OJ RS No. 161/22, 23.12.2022, p.13242).

See more on ban on Sunday trading in the October 2020 Flash Report and the May and July 2021 Flash Reports.

2 Court Rulings

2.1 Annual leave

Constitutional Court, 10 November 2022, OJ RS No 157/22

A decision of the Constitutional Court of the Republic of Slovenia concerning annual leave was made public and published in the OJ RS (Decision No. U-I-101/18-16 Up-276/18-19 of 10 November 2022, OJ RS No. 157/22, 16.12.2022, p. 12937-12945).

The Constitutional Court found that the rules which temporarily introduced the upper limit, i.e. the maximum number of days of paid annual leave to which public employees can be entitled, were in breach of the prohibition of discrimination guaranteed by the Slovenian Constitution as well as numerous international treaties that are binding for Slovenia, whereby the Constitutional Court also referred to the Charter of Fundamental Rights of the EU, Article 31, as well as to Directive 2003/88/EC and, in particular, to Directive 2000/78/EC, and to the corresponding CJEU case law. However, the Constitutional Court explained that, in principle, EU law may be relevant in relation to the issue of discrimination with respect to the right to paid annual leave; however, in the present case, EU law was not decisive.

In short, the Constitutional Court decided that the upper limit to the right to paid annual leave for public employees was unconstitutional, because in certain cases, due to this rule, additional days of leave envisaged for older workers and workers with disabilities could not be used by the workers concerned if the upper limit was exceeded due to these additional days of annual leave. Some older workers and workers with disabilities were therefore victims of discrimination with respect to their right to paid annual leave.

Relevant reference to EU law, i.e. Article 31 of the CFREU, Directive 2003/88 and Directive 2000/78) as well as to CJEU case law can be found, in particular, in paras. 29 and 43 of the decision, and in footnotes Nos 3, 7, 8, 17, 19, 20 and 29.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-311/21, 15 December 2022, TimePartner Personalmanagement

The case concerned temporary agency workers and, in particular, the interpretation of Article 5(3) of Directive 2008/104. The CJEU developed the interpretation of the concept of 'overall protection of temporary agency workers' and of 'basic working and employment conditions', and addressed the issue of collective agreements which, while respecting the overall protection of temporary agency workers, may establish arrangements concerning the working and employment conditions of temporary agency workers which may differ from those referred to in para 1 of that article (which establishes the equal treatment rule: basic working and employment conditions of temporary agency workers shall be at least those that would apply to them if they had been directly recruited by the undertaking in which they are carrying out their temporary assignment to occupy the same job).

Among others, the CJEU emphasised that where the social partners, by means of a collective agreement, allow differences in treatment with regard to basic working and employment conditions to the detriment of temporary agency workers, that collective agreement must, in order to respect the overall protection of the temporary agency workers concerned, afford them advantages in terms of basic working and employment conditions which are such as to compensate for the difference in treatment they suffer. The Court explained what is needed to fulfil the obligation to respect the overall protection of temporary agency workers in such cases. According to the CJEU, appropriate comparison must be made, in concrete terms, between the basic working and employment conditions applicable to workers recruited directly by the user undertaking and those applicable to temporary agency workers; however, this obligation does not require the temporary agency worker concerned to have a permanent contract of employment with a temporary work agency, and the national legislature is not required to lay down the conditions and criteria designed to respect this requirement of overall protection of temporary agency workers in such cases, and such collective agreements must be amenable to effective judicial review

The case has no major implications for Slovenian law, as the legislature in Slovenia has not given social partners the option of upholding or concluding collective agreements that may authorise differences in treatment with regard to basic working and employment conditions to the detriment of temporary agency workers.

4 Other Relevant Information

4.1 Collective bargaining

Several annexes to the existing sectoral collective agreements have been concluded and published in the OJ RS, which mainly adjust the amounts of minimum basic wages and some other work-related payments (reimbursement of travel costs, etc.). See, for example, OJ RS No. 155/22, 9.12.2022, p.12644-12645 – for the trade sector; in OJ RS No 156/22, 14.12.2022, p.12833; in OJ RS No 161/22, 23.12.2022, p. 13310, etc.).

The Annex to the Collective Agreement for Radiotelevizija Slovenia was concluded ('*Aneks št. 14 h Kolektivni pogodbi javnega zavoda RTV Slovenija'*, OJ RS No. 155/22, 9.12.2022, p.12633-12644) which regulates several issues, but also entitles top management to relatively high severance pay in case of redundancy. This Annex was not negotiated/ concluded with all relevant representative trade unions and caused a delicate situation and led to tensions. It also raises, among others, the issue of possible misuse of the institution of collective agreement and the question of the validity of collective agreements.

The government concluded an agreement on strike demands in the health care sector, followed by amendments/annexes to the respective collective agreements (‘*Sporazum o razreševanju stavkovnih zahtev in o realizaciji Dogovora o nujnih ukrepih na področju plač v dejavnosti zdravstva in socialnega varstva in nadaljevanju pogajanj*’, OJ RS No. 165/22, 29.12.2022, p. 13841-13919; ‘*Aneks h Kolektivni pogodbi za dejavnost zdravstva in socialnega varstva Slovenije*’, in the same OJ, p.13920-13953, ‘*Aneks h Kolektivni pogodbi za zaposlene v zdravstveni negi’, in the same OJ,* p.13953-13954; ‘*Aneks k Posebnemu tarifnemu delu Kolektivne pogodbe za zdravnike in zobozdravnike v Republiki Sloveniji’, in the same OJ,* p.13954-13958); however, only with some of the trade unions, whereas FIDES, the main trade union of medical doctors and dentists, still has not agreed and announced further strikes and an intensification of their activities to achieve their demands.

Spain

Summary

(I) A new law has introduced new rules to facilitate the residence of international teleworkers in Spain.

(II) The Criminal Code has been amended to include bogus self-employment as a crime.

(III) The Supreme Court has reiterated that the stand-by time of health care staff shall be considered working time when they are required to remain at the employer's premises and/or need to be permanently available.

1 National Legislation

1.1 Teleworking

With the implementation of Law 28/2022 of 21 December 2022, new rules will apply to international teleworkers to facilitate their residence in Spain. As a general principle, entry into Spain requires applying for and obtaining the relevant administrative authorisations. The so-called 'digital nomads' raise different concerns because they can perform their work from anywhere. These new rules allow people who telework for undertakings outside Spain to live in Spain. They need a residence authorisation that does not permit them to work for an undertaking based in Spain (otherwise, they would need an employment permit), but the requirements are significantly laxer. These new rules are intended to create a new type of residence permit for people who are not looking for a job in Spain.

1.2 Bogus self-employment

Article 311 of the Criminal Code has been amended to specifically include bogus self-employment as a crime. This amendment is linked to platform work. Law 12/2021 of 28 September created a platform-specific presumption (a rebuttable legal presumption) on the existence of an employment relationship in the field of delivery services (such as Glovo, Deliveroo or UberEats riders). Some platform companies continue to hire riders as self-employed persons, and disregard the legal presumption. This legal amendment aims to introduce a more dissuasive penalty to force compliance with the law.

1.3 Budget Law

The General State budget laws are not labour law acts, but usually include some relevant measures in this field related to the programming of public revenues and expenditures. The Budget Law regulates, for example, the capacity of public administration to hire staff, and is also responsible for setting the contributions that undertakings and workers must pay to the social security schemes. Law 21/2022 of 23 December 2022 covers these two objectives for 2023.

As in previous years, the Budget Law establishes the basic criteria for the remuneration of public employees (civil servants and workers with an employment contract) and for the recruitment of temporary staff during 2023. Wages of public employees will increase by 2.5 per cent in 2023.

The Budget Law traditionally includes some labour law rules, even amendments to the Labour Code. This was not the case this year. It is worth mentioning that Additional Provisions 86 to 89 provide funding to implement employment measures in Andalusia, the Canaries and Extremadura.

2 Court Rulings

2.1 Stand-by time

Supreme Court, ECLI:ES:TS:2022:4512, 22 November 2022

The Supreme Court reiterated that the stand-by time of health care staff is working time when they are required to remain at the employer's premises and/or need to be permanently available. The present case involved the staff of an ambulance transport and the Supreme Court expressly referred to Directive 2000/34/EC and to relevant CJEU case law.

2.2 Equal treatment

Supreme Court, ECLI:ES:TS:2022:4351, 23 November 2022

Workers of the same undertaking often have different working conditions depending on the date they were hired. This is usually connected with the difficult economic situations of the employer. When the employer faces a difficult economic situation, the employer seeks to cut costs, but the workers do not want to lose some of their benefits or advantages. Collective bargaining has played a major role in such situations, with workers who were already working for the employer to keep some of the established benefits, while newly hired workers were excluded from them.

Both the Supreme Court and the Constitutional Court have been very restrictive in their interpretation, considering that this difference is not permissible according to the principle of equality, unless the employer proves that it has a very valid reason that justifies such a difference in treatment. That reason was not proven in the present case, which concerned an additional period of annual leave granted to workers who had been hired before 2019 in the respective undertaking. The Supreme Court stated that a collective agreement could not exclude the new workers from that additional leave period without a relevant reason. The employer argued that the more senior workers had faced several sacrifices in the past and that additional days of rest was their compensation for those sacrifices, but the Supreme Court deemed that the 'sacrifices' had not been adequately proven, and hence there was no justification for the difference in treatment.

2.3 Dismissals related to COVID

Supreme Court, ECLI:ES:TS:2022:4658, 13 December 2022

The special provisions adopted during the COVID pandemic did not allow for dismissals related to COVID. Most undertakings faced various struggles, but the government considered these struggles to be of a temporary nature, hence temporary layoffs or other similar measures were permitted while more definitive measures, such as dismissals, were not allowed. However, the relevant provisions did not explicitly prohibit dismissals. They simply considered that COVID and, in general, economic difficulties due to the pandemic were not a valid reason for dismissal.

The legal rule was not sufficiently clear and generated legal uncertainty, because Spanish law distinguishes between unfair dismissal and a dismissal that is null and void. In case of unfair dismissal, the employer has the right to choose between the reinstatement of the worker and the termination of the employment contract and paying severance. In case of a dismissal that is null and void and that is associated with a violation of a fundamental right, the worker has the right to reinstatement.

The Supreme Court deemed that the relevant provisions did not explicitly provide for clear indications on the consequences of the breach of that legal rule. A dismissal that is null and void would have required more precision. Therefore, dismissals related to

COVID prior to February 2022 (this limitation was then removed) were considered unfair, but not null and void, hence reinstatement is not mandatory.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU Case C-311/21, 15 December 2022, TimePartner Personalmanagement

This ruling will not have any implications for Spain because Law 14/1994 does not allow the same room for manoeuvre as the German legislation. The worker assigned to a user undertaking is entitled to conditions that should be at least equivalent to those of the user undertaking's regular workers. Moreover, the collective agreement of the user undertaking also applies indirectly to temporary agency workers (Article 11 of Act 14/1994) and there are no derogations or any possibilities for collective bargaining. Therefore, differences in treatment with regard to basic working and employment conditions to the detriment of temporary agency workers are not allowed, so the interpretation of the meaning of 'overall protection of temporary agency workers' is not an issue in Spain.

4 Other Relevant Information

Nothing to report.

Sweden

Summary

(I) The Labour Court has held that the summary dismissal of an employee due to unlawful absence from work due to not having been granted annual leave was lawful.

(II) The Labour Court has ruled in a case on temporary agency work, concluding that the duty to negotiate does not apply when the contracting partner outsources the staffing to another sub-supplier.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Termination after unlawful absence

Labour Court, AD 2022 No. 56, 14 December 2022.

An employee's request for five consecutive weeks of annual leave in December 2019 and January 2020 for a family trip to Nigeria was rejected by the employer. In December 2019 and January 2020, the employee was absent from work. As a reason for his absence, the employee claimed that he had been unable to work due to sickness and invoked medical certificates from Sweden and Nigeria. The employer asserted that the employee had not really been sick but had been unlawfully absent. Consequently, the employer decided to summarily dismiss the employee. The employee initiated, with support from his trade union, proceedings against the employer for wrongful termination.

The Labour Court held in its judgment that the summary dismissal was lawful as the employee's absence from work had been unlawful. In its assessment, the Court held that it was proven that the trip had been planned, regardless of the lack of leave consent by the employer. The Court also found that the Nigerian medical certificate was fraudulent.

2.2 Employer's duty to negotiate

Labour Court, AD 2022 no 59, 21 December 2022.

The Labour Court decided on a case on the employer's duty to negotiate with trade unions on the employment of temporary agency workers in AD 2022 No. 59. The Swedish Co-determination Act explicitly states that the employer has a duty to negotiate with the trade union that is party to the collective agreement prior to engaging with staff under agency work arrangements (38 § Co-determination Act), which is combined with an option for the trade union to execute a veto if the labour conditions under law or collective agreements are expected to be set aside.

In the present case, the employer, SAS, had agreed with the trade union to outsource some parts of the flight operations to an external company, which had, in turn, arranged with yet another sub-contractor to staff the aircrafts. The Labour Court concluded that SAS (employer with a collective agreement) was under no obligation to negotiate when the contractor operated the SAS flights with staff from another sub-contractor. The duty only applied to the first situation when they also had negotiated with the Pilot Union.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-311/21, 15 December 2022, TimePartner Personalmanagement

The CJEU's decision in case C-311/21 raises some interesting questions from a Swedish perspective, but does not necessarily provide as many explicit answers. The Swedish tradition of collective bargaining offers far-reaching opportunities for industrial partners to deviate from statutory labour law by collective agreements, also *in pejus*. This has been a re-emerging issue when EU labour law has been transposed in Sweden; to what extent can collective partners set legislation aside and what forms of compensation to the workers is obligatory?

In its ruling, the CJEU points to the fact that the legislation in the Member States does not have to contain specific provisions on labour conditions which collective agreements have to adhere to, as long as the collective agreement respects the overall protection guaranteed by the Directive, i.e. the protection of temporary agency workers. According to the judgment, the assessment of whether overall protection has been guaranteed must follow a strict methodology. Negative deviations of one of the protected "*basic working and employment conditions*" must be compensated within one of the other such conditions. This formalised bargaining procedure is, from a Swedish perspective, restrictive of the industrial partners' contractual freedom. Deviations in Swedish collective agreements can normally not be traced in the way that the judgment seems to demand.

As regards possibilities to subject collective agreements to effective judicial review for the determination of their compliance with the obligations under the Directive, the outcome is alien to the Swedish system. It is rare that an individual employee brings a case before the court for an assessment of an established collective agreement, especially if there was limited support by statutory law. However, a possibility to do so exists under Swedish law as well. In the Labour Court's judgment AD 2004 No. 73, for example, the Labour Court held that a collective agreement may not "*improperly deviate from the employee's statutory rights*". The precise threshold level of this concept has not been clarified. The EU Directive, with its limited clarifications regarding details of protection, will form a much stricter and more foreseeable legal basis for the claims of an individual worker. The judgment may therefore lead to more disputes raising questions about Swedish collective agreements.

4 Other Relevant Information

4.1 Minimum Wage Directive

The government has launched a public enquiry for assessing the transposition of the Minimum Wage Directive 2022/2042. The report, including suggestions for legislative changes, must be presented by 23 June 2023, the latest.

United Kingdom

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 European Works Councils

Employment Appeal Tribunal, [2022] EAT 183, 13 December 2022, Olsten Holdings Ltd v Addecco Group.

Olsten Holdings Ltd v Addecco Group, this case, the facts of which arose before the end of the Brexit transition period, concerned an appeal against a Central Arbitration Committee (CAC) decision on EWC. The EAT asserted the CAC had correctly concluded that 'proposed redundancies' in more than one EEA state proposed by undertakings in a group operating across numerous EEA states, gave rise to a 'transnational' matter, creating an obligation on the employer group under a European Works Council (EWC) agreement to call an extraordinary meeting to provide information and engage in dialogue with employee representatives. The CAC had correctly upheld the complaint of the respondent EWC, acting through its employee representatives. Redundancies proposed by group undertakings in more than one EEA state at the same or about the same time constituted a transnational matter, even if they did not share a common rationale. On the EWC's application to the Appeal Tribunal (exercising original not appellate jurisdiction) to impose a penalty on the appellant (as appointed representative of the Group with its headquarters in Switzerland) in respect of the two well-founded complaints, the EAT said there would be a penalty of: (1) GBP 20 000 for breaching the EWC agreement by failing to convene an extraordinary meeting with the steering group of employee representatives, established under the EWC agreement, to provide information and engage in dialogue about collective redundancies in Sweden and Germany (the redundancies complaint); and (2) GBP 5 000 for breaching the EWC agreement and Regulation 18A of the Transnational Information and Consultation of Employees Regulations 1999, as amended (the 1999 Regulations) by refusing to supply business sales performance data broken down by country in connection with the November 2020 Annual Plenary Meeting (the sales data complaint). This is only the second time a penalty has been imposed by the EAT under the TICE Regulations.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-311/21, 15 December 2022, TimePartner Personalmanagement

Case C-311/221 is the first major decision by the Court of Justice on the question of the meaning of Article 5(3) of the TAW Directive which provides that 'Member States may, after consulting the social partners, give them, at the appropriate level and subject to the conditions laid down by the Member States, the option of upholding or concluding collective agreements which, while respecting the overall protection of temporary agency workers, may establish arrangements concerning the working and employment conditions of temporary agency workers which may differ from those referred to in paragraph 1.' The consultation with the unions when the legislation was being adopted

in the UK led to the adoption of the 12 week qualifying period before the equal treatment rights applied. The UK did not take advantage of Article 5(3).

4 Other Relevant Information

4.1 Northern Ireland Protocol Bill (NIPB)

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

4.2 Retained EU Law

The Bill is now at the report stage having passed its second reading in the Commons. During the second reading debate, the government made a commitment to take the necessary action to safeguard the substance of any retained EU law and legal effects required to operate international obligations within domestic law, including those under the UK-EU Trade and Co-operation Agreement, the Withdrawal Agreement and the Northern Ireland Protocol.

The Bill was considered not on the floor of the House but by the House of Commons Public Bill Committee for the Retained EU Law (Revocation and Reform) Bill. Very few changes were made at this stage. The latest version of the Bill can be found here. Rumours are currently swirling about the Bill with the Times reporting (02 January 2023) that it was 'inevitable' that the government would have to abandon its plans when the legislation reaches the House of Lords, suggesting that the deadline of 31 December 2023 would not survive. The Times also suggests that three government departments, including BEIS (where most employment legislation sits) expected to extend the deadline until 2026. However, a government spokesperson has said on twitter:

> *"There are 'no plans' to extend the deadline for scrapping / retaining / amending EU laws, says the Prime Minister's spokesperson. Secretaries of state are still being asked to complete this work - which involves around 4k pieces of EU-derived law - by the end of 2023, they add."*

4.3 Single Enforcement Body

The UK does not have a labour inspectorate. However, there are a number of agencies that enforce regulations but all with limited jurisdiction: HMRC (Her Majesty's Revenue and Customs) enforces the minimum wage; EASI (Employment Agency Standards Inspectorate) protects the rights of agency workers by ensuring that employment agencies and businesses treat their workers fairly; GLAA (Gangmasters Licensing and Abuse Authority) which licenses gangmasters who provide workers in agriculture, horticulture, shellfish gathering, and any associated processing and packaging as well as investigating reports of worker exploitation and illegal activity such as human trafficking, forced labour and illegal labour provision; and HSE (the Health and Safety Executive) with enforcement powers in respect of health and safety matters. The government committed itself to the creation of a single enforcement body (covering HMRC minimum wage enforcement, EASI and GLAA) as part of its Good Work Plan 2018. In a session of the Business Energy and Industrial Strategy (BEIS) Committee held on 13 September 2022, the Business Secretary, Grant Shapps, said that plans to introduce a single enforcement body were not currently being advanced. The focus instead now seems to be to get the existing enforcement bodies to work better. In evidence to the BEIS Committee of 13 December 2022, the Secretary of State confirmed that 'We have

had five separate Bills, which the Department has helped sponsor through Back Benchers. I do not think we have an Employment Bill on the cards per se.'

4.4 Seafarers Wages Bill

The Seafarers Wages Bill is currently going through Parliament. Introduced following the P&O dismissal of more than 700 workers without notice or going through the statutory consultation and their replacement by lower paid agency staff, the Bill gives ports the power to refuse access to ferry services that do not pay the equivalent of the national minimum wage to seafarers while in UK waters. However, it does not address the issues that arose concerning the protection of seafarers under collective redundancies legislation. The TUC has written to the government asking them to amend the Bill.

GETTING IN TOUCH WITH THE EU

In person

All over the European Union there are hundreds of Europe Direct information centres. You can find the address of the centre nearest you at: https://europa.eu/european-union/contact_en

On the phone or by email

Europe Direct is a service that answers your questions about the European Union. You can contact this service:

– by freephone: 00 800 6 7 8 9 10 11 (certain operators may charge for these calls),
– at the following standard number: +32 22999696 or
– by email via: https://europa.eu/european-union/contact_en

FINDING INFORMATION ABOUT THE EU

Online

Information about the European Union in all the official languages of the EU is available on the Europa website at: https://europa.eu/european-union/index_en

EU publications

You can download or order free and priced EU publications at: https://op.europa.eu/en/publications. Multiple copies of free publications may be obtained by contacting Europe Direct or your local information centre (see https://europa.eu/european-union/contact_en).

EU law and related documents

For access to legal information from the EU, including all EU law since 1952 in all the official language versions, go to EUR-Lex at: http://eur-lex.europa.eu

Open data from the EU

The EU Open Data Portal (http://data.europa.eu/euodp/en) provides access to datasets from the EU. Data can be downloaded and reused for free, for both commercial and non-commercial purposes.

Publications Office
of the European Union