



# Flash Reports on Labour Law June 2020

Summary and country reports

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Contact: Marie LAGUARRIGUE

E-mail: [Marie.LAGUARRIGUE@ec.europa.eu](mailto:Marie.LAGUARRIGUE@ec.europa.eu)

European Commission

B-1049 Brussels

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Country	Labour Law Experts
Austria	Martin Risak Daniela Kroemer
Belgium	Wilfried Rauws
Bulgaria	Krassimira Sredkova
Croatia	Ivana Grgurev
Cyprus	Nicos Trimikliniotis
Czech Republic	Nataša Randlová
Denmark	Natalie Videbaek Munkholm
Estonia	Gaabriel Tavits
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	Kristine Dupate
Liechtenstein	Wolfgang Portmann
Lithuania	Tomas Davulis
Luxemburg	Jean-Luc Putz
Malta	Lorna Mifsud Cachia
Netherlands	Hanneke Bennaars Suzanne Kali
Norway	Marianne Jenum Hotvedt Alexander Næss Skjønberg
Poland	Leszek Mitrus
Portugal	José João Abrantes Rita Canas da Silva
Romania	Raluca Dimitriu
Slovakia	Robert Schronk
Slovenia	Barbara Kresal
Spain	Joaquín García-Murcia Iván Antonio Rodríguez Cardo
Sweden	Andreas Inghammar
United Kingdom	Catherine Barnard

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## Executive Summary

### National level developments

In June 2020, **extraordinary measures triggered by the COVID-19 crisis** still dominated the development of labour law in many Member States and European Economic Area (EEA) countries.

This Summary is therefore divided into an overview of developments relating to the crisis measures, and a second part summing up other labour law developments with particular relevance for the transposition of EU labour law.

### Developments related to the COVID-19 crisis

#### Measures to diminish the risk of infection in the workplace

**All countries** still have measures in place to prevent the spread of the virus in workplaces. By now, the state of emergency, danger or lockdown has expired in many countries, including **Hungary** (where transitional measures still affect labour law), **Luxembourg**, **Portugal**, **Slovakia** and **Spain**, and is due to expire soon in **Ireland**. By contrast, measures were extended in countries such as **Bulgaria**. Many reports (e.g. **Norway**, **Portugal**, **Spain**) describe a process of gradual re-opening of societal and economic life. Restrictions have generally been eased in **Cyprus**, the **Czech Republic**, and **Denmark**, whereas free movement restrictions have been prolonged in **Spain** and even extended to new target countries in **Croatia**. Opening hour restrictions have been amended in **Croatia**.

Measures to facilitate work from home have been clarified in **Poland**.

New health and safety standards for workplaces have been enacted in **Croatia**, **Liechtenstein** and **Spain**, and the application of previously introduced measures has been temporarily extended, e.g. in **Italy**.

### Measures to alleviate the financial consequences for businesses and workers

State-supported short-time work, temporary layoffs or equivalent schemes remain in place in many countries. Previously enacted temporary schemes have been temporarily extended in **Cyprus**, **Luxembourg** and **Slovenia**, further elaborated in **France** and **Luxembourg**, and re-launched under an amended programme in the **Netherlands**, **Portugal** and **Spain**. Programmes providing financial benefits for workers and/or self-employed persons have been temporarily extended in **Finland**, the **Netherlands**, and **Spain**. The coverage of such support schemes has been clarified in **Luxembourg**. A specific scheme for flex workers has been introduced in the **Netherlands**, and benefits for independent and informal employees in **Portugal**. Subsidies to employers, including loan arrangements, have been amended in **Croatia**, **Cyprus** and **France**, and made more comprehensive in **Poland** and **Portugal**. In **Norway**, subsidies for re-hiring dismissed employees have been introduced. The duration of the existing scheme has been extended in **Ireland**, **Italy** and **Spain**. In **Belgium**, tax-free consumption cheques can be granted to workers.

A deferral of social security contribution payments has been introduced in **Poland**, and in the **Czech Republic**, the penalties for non-payment of social security contributions have been reduced significantly.

In **Luxembourg**, the suspension of collective dismissals has expired.

### Leave entitlements and social security

Special rules on entitlements to family- and care-related leave and sick leave continue to apply in many countries. In June, care-related leave rights were introduced in **Belgium** (maternity and parental leave) and **Luxembourg** (parental leave). The duration of sick leave

schemes was extended in **Denmark**, and leave entitlements and benefits for persons in quarantine have been introduced in **Slovenia**. Other amendments improving sickness benefit entitlements have been made in **Ireland**. By contrast, special leave entitlements for vulnerable persons were discontinued in **Cyprus**, and parental leave entitlements have returned to the pre-crisis level in **Norway**.

Measures to increase the generosity of unemployment benefit schemes have been extended in **Finland** and **Ireland**, and introduced in **Cyprus**, **Denmark**, **Luxembourg** and **Norway**. In **Norway**, benefits are being paid earlier after a shortened period of continued wage payments by the employer.

### Reduction of employee protection

In **France**, exceptions to rules on fixed-term and temporary agency work (e.g. number of possible renewals) can be introduced by plant-level collective agreements. In **Poland**, employers can impose annual leave entitlements to be used. There is also a limit on the amount of severance pay, and non-competition arrangements that require the employer to provide compensation can be unilaterally terminated by the latter.

### Measures to ensure the performance of essential work

Previously enacted rules to ensure that essential tasks in areas such as health care, public administration and services can be performed remain in place in many countries. Beyond that, **Luxembourg** has passed amendments to facilitate work by early retirees and students. In **Poland**, self-employed workers can be ordered to perform work beyond the tasks envisaged in their contract. In **France**, the employment of foreigners has been facilitated. The suspension of working time restrictions for certain groups of essential workers in **Luxembourg** has been discontinued.

### Suspension and changes of time limits

In **Luxembourg**, the suspensions of various time limits are due to expire. Court service has recommenced and has "almost returned to normal". The validity of collective agreements has generally been extended in **Romania**. In **Slovakia**, the expiry of fixed-term contracts has been suspended.

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

Topic	Countries
<b>Restriction of business activity by lockdown measures</b>	BG CY CZ DK ES HR HU LU IR PT SI
<b>Employer subsidies</b>	CY CZ ES FR HR IE IT NO PL PT
<b>Short-time work / technical employment</b>	CY ES FR LU NL PT SI
<b>Unemployment benefits</b>	CY DK FI LU NO
<b>Sick leave and benefit entitlements</b>	CY DK LU IE SI
<b>Benefits for workers / self-employed prevented from working</b>	ES FI LU NL PT
<b>Health and safety measures</b>	ES HR IT LI
<b>Family / parental leave</b>	BE LU NO
<b>Measures to ensure performance of essential work</b>	FR LU PL
<b>Suspension of time limits</b>	LU RO SK
<b>Deferral of contributions payment / reduced penalties</b>	CZ PL
<b>Reduced employee protection</b>	FR PL
<b>Dismissal</b>	LU
<b>Telework / work from home</b>	PL

## Other developments

The following developments in June 2020 were particularly relevant from an EU law perspective:

### Working time

Three countries reported court decisions in which the question of the qualification of breaks as working time was at issue. In the **Czech Republic**, the Supreme Court ruled that breaks are not to be considered part of working time. Similarly, in **France**, the Labour Division of the Court of Cassation refused to qualify breaks as working time, even if there were certain limitations to the employee's choice of how to spend that break time. By contrast, in **Latvia**, the Supreme Court considered that breaks without the right to leave the workplace qualify as working time based on the CJEU's decision in *Matzak*.

In **Germany**, a Labour Court ruling has stipulated the employer's obligation to record working time in accordance with the CJEU's judgment of 14 May 2019 in case C-55/18 (*CCOO*). In **Iceland**, a legislative amendment permits exceptions from working time regulations corresponding with Articles 3 and 8 of Directive 2003/88/EC by collective agreement for employees who provide user-managed personal assistance. In **Romania**, fines for non-compliance with provisions on weekly working hours and overtime have been increased.

### Annual leave

The **Austrian** Supreme Court has requested a preliminary ruling by the CJEU on the question of the loss of financial compensation of unused annual leave in case of a termination of the employment relationship by unjustified constructive dismissal. In **Bulgaria**, rules on the calculation of an allowance in lieu have been amended. In **Finland**, the Labour Court decided two cases based the CJEU's reply to a request for a preliminary ruling in joined cases C-

609/17 and C-610/17, 19 November 2019, on incapacity for work at the beginning of an annual leave period. The **German** Federal Labour Court has asked the CJEU for a preliminary ruling concerning the compatibility of a rule that does not take holiday periods into account when calculating overtime bonuses with Article 31(2) of the Charter of Fundamental Rights and Article 7 of Directive 2003/88/EC.

### Posting of workers

In **Belgium**, the previously mentioned law transposing Directive 2018/957/EU has been published. A draft transposition legislation for this Directive is currently being discussed in Parliament in **Finland**, **Germany** and **Poland**.

### Atypical employment

In **France**, the Labour Division of the Court of Cassation refused to re-qualify an "intermittent employment contract as a full-time contract for a lack of specification of working hours. In **Norway**, new regulations on the enforcement of rules regarding temporary agency workers and equal treatment have been passed.

### Transfer of undertaking

In **Austria**, the Supreme Court rejected the extraordinary review in a case of privatisation, in which the transferee had argued a breach of EU law with reference to the case *Alemo-Herron*. The **Norwegian** Supreme Court referred to the CJEU's decisions in cases C-164/00 (Beckmann) and C-4/01 (Martin) to rule on the criteria for the transfer of pension schemes to the transferee.

### Other

In the **Czech Republic**, the Constitutional Court ruled that national law does not currently require any particular protection for whistleblowers



and emphasised the need to transpose Directive (EU) 2019/1937. The **Latvian** Parliament has adopted amendments to the Sea Code with a view to implementing Directives (EU) 2017/159 and (EU) 2018/131. In **Spain**, new rules

on stevedoring companies are to adapt national law to the findings in the CJEU's ruling of 11 December 2014 in case C-576/13. New rules on fishermen are to implement the provisions of Council Directive (EU) 2017/159.

Table 2: Other major developments

Topic	Countries
Working time	CZ DE FR IS LV RO
Annual leave	AT BG DE FI
Posting of workers	BE DE FI PL
Transfer of undertaking	AT NO
Collective bargaining	EE IS
Social security	IS NL
Whistleblowers	CZ
Pay transparency	DE
Non-competition clauses	FI
Strikes	FI
Bereavement leave	FR
Disability	FR
Fixed-term work	FR
Public servants	HR
Wages	HR
Internship	LU
Third-country nationals	LT
Seafarers	LV
Temporary agency work	NO
Active ageing	PL
Health and safety	SI

## Implications of CJEU Rulings

### Working time

This FR analyses the implications of two CJEU rulings relating to working time.

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

Regarding the CJEU's findings on the personal scope of the Working Time Directive, the clear **majority of national reports** indicate that the same criteria are mostly applied by the courts to establish whether a person is working in a relationship of subordination.

In **Italy**, an amendment from late 2019 introduced specific rights for "riders", defined as autonomous workers who carry out activities of goods delivery on behalf of others in urban areas by bicycle or motor vehicles. In **Luxembourg**, the labour inspectorate has opened investigations into bogus self-employment in the delivery industry. In the **Netherlands**, similar

situations have in the past been found to constitute employment contracts.

In **Germany**, the judgment had been expected to bring further clarifications regarding the possible significance of economic dependence in view of the underlying facts. In countries such as **Iceland**, the issue is currently a much-debated topic.

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

As regards this decision, **most countries'** national laws deal with overlapping entitlements to annual and "special leave" for specific reasons similarly as in the case at issue before the CJEU. In countries such as **Belgium**, a right to compensatory leave is at least not assumed by the prevailing opinion. In **Slovakia**, entitlements in such a case are not clearly regulated. In **Estonia, Iceland, Ireland, Latvia** and **Malta**, comparable special leave entitlements are not envisaged under national law.

However, in **Bulgaria, Lithuania** and **Luxembourg**, compensatory leave is granted in comparable cases of overlapping entitlements.

# Austria

## Summary

(I) The time limit for lodging claims based on the Epidemics Act has been extended; administrative measures for workplace security remain mostly unchanged.

(II) Two decisions of the Supreme Court deal with the responsibilities of the transferee in case of a transfer of an undertaking, and with a request for a preliminary ruling on the question of loss of financial compensation of unused annual leave in case of termination of the employment relationship by unjustified constructive dismissal.

## 1 National Legislation

### 1.1 Measures to respond to COVID-19 crisis

Austrian Parliament has continued to amend legislation in the field of employment law to address the current COVID-19 crisis, and the respective ministries have continued to amend and specify the respective administrative ordinances. The Austrian government has continued its approach to carefully return to more 'normal' life. The obligation to wear masks has been reduced (to public transport, taxis, pharmacies, hairdressers, etc.), hence shop assistants and waiters/waitresses can perform their work without such protective devices since 10 July. General administrative measures to ensure work safety, and to protect members of risk groups from exposure to COVID-19 have not been modified.

#### 1.1.1 Compensation under the Epidemics Act

The Epidemics Act ('*Epidemiegesetz*', 76/BNR), in certain cases, allows for compensation for remuneration paid if either the employee and/or the companies are prevented from performing their economic activity due to official administrative measures taken which are based on the Epidemics Act.

Such compensation entitlements may arise if a company is shut down by officials, or if an employee is quarantined based on an official order. In those cases, employers are required to continue paying remuneration but may claim compensation for these costs from the State. The time frame to request compensation has been six weeks so far. It has now been extended for the duration of the SARS-CoV-2 pandemic (unofficial translation by the author):

*"Special provision for the duration of the SARS-CoV-2 pandemic*

*§ 49 (1) Differing from § 33, the entitlement to compensation for remuneration resulting from an official measure taken due to the occurrence of SARS-CoV-2, must be claimed within three months of the date on which the administrative measures are lifted by the district administrative authority in whose area these measures were implemented."*

The law passed the National Assembly on 18 June 2020, and the Federal Assembly on 03 July 2020, and will enter into force the day following its official publication.

Information on the legislative process and the amendment are available [here](#).

### 1.2 Other legislative developments

Nothing to report.



## 2 Court Rulings

### 2.1 Transfer of undertaking

*Supreme Court, No. 8 ObA 38/20a, 24 April 2020*

When the Austrian Postal Service was privatised in 1996, the contractual public servants were transferred to the new private entity based on the provisions of law. Their statutory working conditions had to be maintained but they are also subject to transferees' collective agreement. As their pay scheme was later considered to discriminate employees due to their age because their service times prior to their 18<sup>th</sup> birthday had not been taken into account, the new employer, i.e. the transferor, had to compensate them financially. In the present [case](#), the transferor claimed that this obligation breached EU law, namely the free movement of capital and entrepreneurial freedom, referring to the CJEU's decision in the case of *Alemo-Herron*.

Firstly, the Supreme Court pointed out that the obligation to compensate the employees was actually based on EU anti-discrimination legislation as well as on Directive 2001/03/EC, which also applies to privatisations and does not justify any derogations.

Secondly, the Court explained that the CJEU decision in the *Alemo-Herron* case only allows for the conclusion that the transferee may not be bound by a dynamic reference to collective agreements negotiated and concluded after the transfer if he/she is not able to participate in the relevant collective bargaining procedure. As the transferor was expressly granted collective bargaining capacity, it had the opportunity to directly influence the content of future collective agreements. Hence, the quoted ruling is not applicable.

The Supreme Court therefore rejected the extraordinary review of the appeal by the transferee.

This is one of the side effects of the decisions of the CJEU in the cases *Hütter* and *Starjakob* that not only affect the Austrian state itself, but privatised entities as well, which continued their discriminatory pay schemes. They are now attempting to shift the costs back to the state, claiming that fundamental rights and freedoms of the EU are being breached. The Austrian Supreme Court, however, rejected those arguments by pointing out that there is no basis in EU law to limit the transferee's responsibility.

A similar decision (Supreme Court, No. 8 ObA 79/19d, 27 February 2020) is available [here](#).

### 2.2 Annual leave

*Supreme Court, No. 9 ObA 137/19s, 25 May 2020*

The [Austrian Annual Leave Act](#) ('*Urlaubsgesetz*' – hereinafter: *UrlG*) provides for financial compensation for unused annual leave at the end of the employment relationship (unofficial translation by the author):

*"§ 10 UrlG*

*For the annual leave year in which the employment relationship ends, the employee is entitled to compensation for unused annual leave corresponding to the length of service in that annual leave year in relation to the entire annual leave year. Annual leave already taken is to be credited against the pro rata amount of leave. Continuation of payment during annual leave taken in excess of the aliquot amount is not refundable, except in the event of termination of the employment relationship by*

1. *unjustified constructive dismissal, i.e. if the employee resigns prematurely without good cause or*

2. *summary dismissal which is the fault of the employee.*

*The amount to be refunded must correspond to the continuation of payment received for the excess annual leave at the time of its consumption.*

*(2) No compensation shall be due if the employee resigns prematurely without good cause (constructive dismissal).*

*(...)”*

In the present [case](#), the question was raised whether such a loss of annual leave compensation in case of constructive dismissal without good cause is in line with Article 31 (2) of the CFR and Article 7 of the Working Time Directive 2003/88/EC. The Labour and Social Court as well as the Court of Appeals Linz rejected the claim. The latter argued that in this case, the employer has no influence on the actual consumption of annual leave, as the employee makes this impossible by immediately terminating the employment relationship without good cause. It incentivises the employee to fulfil his/her contractual duties.

The Supreme Court pointed out that this question has not yet been resolved as the CJEU's decisions in the cases *Kreuzinger*, *Max-Planck-Gesellschaft* and *Schulz-Hoff* are not as straightforward as it might look at first glance. It refers in particular to paragraph 48 of the decision *Max-Planck-Gesellschaft*, which asserts that any interpretation of Article 7 of Directive 2003/88/EC that may encourage the worker from deliberately refraining him/her from taking paid annual leave during the applicable authorised reference or carry-over period in order to increase his/her remuneration upon the termination of his/her employment relationship is incompatible with the objectives pursued by the introduction of the right to paid annual leave. The prevailing opinion in the Austrian legal literature is that the provisions in the Austrian Act on Annual Leave breaches EU law. On the other hand, however, it has also been argued that this is not the case, with reference in particular to the CJEU decision in the case of *Max-Planck-Gesellschaft*.

The Supreme Court therefore decided to stay its proceedings and to ask the CJEU for a preliminary ruling on the following questions:

*“1. Is it compatible with Article 31(2) of the Charter of Fundamental Rights of the European Union (2010/C 83/02) and Article 7 of the Working Time Directive 2003/88/EC for a national provision to provide that compensation for unused annual leave for the current (last) year of the employment relationship is not due if the employee unilaterally terminates the employment relationship prematurely ('resignation') without good cause?*

*2 If the answer to that question is in the negative:*

*2.1. Is it then necessary to examine in addition whether it was impossible for the employee to take the leave?*

*2.2. According to what criteria must that examination be carried out?”*

The Supreme Court pointed out that this issue does not fall under the doctrine of *acte éclairé*. The CJEU had not yet dealt with such a question and on the basis of its most recent rulings on annual leave, arguments can be made for both results. This, in fact, has been the case in the Austrian legal literature, where the question is very much disputed.

### 3 Implications of Rulings of the CJEU and the ECHR

#### 3.1 Worker status

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

In the *Yodel* case, which was ruled by reasoned order, the CJEU gave guidance on how to apply the criteria of the notion of “worker” under the WTD. Four aspects (right to use subcontractors/substitutes, right to accept or not various tasks requested by the putative employer, lack of a non-competition clause, right to determine own hours of work) were highlighted and if an individual is afforded discretion with regard to these aspects, he/she will not be classified as a worker under the WTD. This is only the case, however, if this independence does not appear to be fictitious and if it is not possible to establish the existence of a relationship of subordination. The order for the first time deals with a contractual arrangement in the so called ‘gig economy’ and, in our view, it is fairly disappointing that the CJEU did not use the opportunity to argue the criteria of the notion of worker in this specific context. The ruling remains quite shallow and does not provide real guidance for platform work arrangements considering the reservation that the ‘independence ... does not appear to be fictitious’.

In Austria, the same criteria mostly are applied by the courts to establish whether a person works in a relationship of subordination or, as it is called here, in ‘personal dependence’. It is ultimately essential that the freedom of the person providing the services is significantly restricted and that he/she therefore requires special protection. Whether this definition of the personal scope of labour law still meets its purpose is as widely discussed in Austria as it is in the EU context.

To establish whether a person is a worker requires an overall assessment of all the facts and circumstances of the case, which is very much in line with the CJEU, and the criteria mentioned by the CJEU play an important role in this assessment in Austria as well. It seems, however, that the Austrian courts are more critical about certain rights only being included in the contract to avoid it being classified as an employment contract. Especially in the 1990s, the right to use substitutes was often included in service contracts and jurisprudence stressed that for this right to exist not only on paper, it must actually be used in practice and, if not, the circumstances must ensure that it can be used (Supreme Court, No. [8 ObA 86/03](#), 13 November 2003). The same applies to the service provider’s right to refuse tasks offered by his/her contractual partner. The setup of the service must be organised in a way that makes it likely to be delivered if putative service providers do not accept individual tasks, i.e. if the pool is large enough (Supreme Court, No. [9 Ob A 118/07d](#), 19 December 2007). The two other criteria are not that important in Austria, especially the existence of a non-competition clause that seems to be especially relevant in the UK context, as the law there explicitly refers to it. The freedom to arrange working hours may also exist in the context of an employment contract, including flexitime arrangements. Also, the exemption in the WTD for autonomous workers (and accordingly, in the Austrian Working Time Act) suggests that working time flexibility itself does not preclude worker status.

To conclude, Austrian jurisprudence interprets the notion of worker along the lines followed by the CJEU, although it seems to place more emphasis on the primacy of facts and closely checks that formal independence according to the contract is not fictitious but can also be used in practice. We would argue that in many gig economy arrangements with low pay and little alternatives, it is likely that such independence is in fact fictitious.

#### 3.2 Working time and leaves

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

The *Fetico* case focusses on national rules providing for special leave. They do not, however, allow those workers to claim this special leave if the occasions for that special leave arise during weekly rest periods or during periods of paid annual leave. The CJEU concluded that Directive 2003/88/EC does not apply to such national rules, as such entitlements exceed the minimum annual leave entitlements under the Working Time Directive 2003/88/EC.

In Austria, such special leave entitlements exist in statutory law and in collective bargaining agreements. Both the Act on Salaried Employees (§ 8 para 3 AngG) as well as the General Code on Civil Law (§ 1154b para 5 ABGB) contain the following provision:

*"The employee shall also retain the right to remuneration if he/she is prevented from providing the service for a relatively short period of time through no fault of his/her own for other important reasons relating to his/her person."*

"Other important reasons relating to his/her person" is generally understood to cover the attendance of a funeral of a close relative, one's own wedding or the wedding of one's own child, the birth of one's child (for the parent not giving birth), as well as doctors' appointments and emergencies within the immediate family, official duties and functions, etc. In addition, collective bargaining agreements regularly regulate the entitlement to remuneration despite not working for certain events (weddings, funerals, etc) and define the period the employee does not need to work but continues to receive remuneration.

These entitlements are not labelled 'special holidays' but entitlements to leave of absence, regulating the entitlement to pay despite not performing work. Hence, the regulation itself links the entitlement to paid absence from work to the duty to perform work. Hence, it is clear that there is no such entitlement on days on which the employee is not required to perform work, e.g. weekends and public holidays.

As for paid annual leave, Austrian employment law (§ 4 para 1 Annual Leave Act) requires the employer and employee to reach an agreement on when the leave is to be taken, and to what extent it is being taken. The law prescribes that ideally, leave should be taken in no more than two portions, yet no sanction applies if the employer and employee do not adhere to that principle.

Both the employer and employee may withdraw from an agreement on paid annual leave for important reasons. If a situation arises that prevents the employee from taking his/her annual leave/its recreational effects, such as a call-up for military services, the employee has the right to withdraw from the agreement on paid annual leave.

When it comes to care leave (by the employee in order to take care of a child/close relative) during paid annual leave, the situation slightly differs: the Austrian Supreme Court has ruled that in case the employee is entitled to take care leave for at least three days, the employee may *suspend* her annual leave to take up her care leave entitlement (the same rationale applies in case the employee falls sick during her annual leave, § 5 Annual Leave Act).

Subsequently, the Court's decision does not affect or alter Austrian employment law.

## 4 Other Relevant Information

Nothing to report.

# Belgium

## Summary

(I) The Federal Law of 12 June 2020 transposing Directive 2018/957/EU amending Directive 96/71/EC concerning the posting of workers has been enacted and published.

(II) New federal laws and royal decrees on additional maternity leave, the suspension of the period of notice, parental leave, a tax-free so-called 'consumption cheque' of EUR 300, and a specific paid leave scheme have been adopted.

## 1 National Legislation

### 1.1 Measures to respond to COVID-19 crisis

#### 1.1.1 Maternity leave

The Federal Law of 12 June 2020, amending the prenatal leave period, stipulates that this period can be taken as an extension of post-natal leave if that specific period falls within temporary unemployment for reasons of force majeure or temporary unemployment for economic reasons that arise during prenatal leave. This period can now be taken as an extension of post-natal leave (*Moniteur belge*, 18 June 2020). This law has retroactive effect from 01 March 2020. The amendments may therefore have an impact on current maternity leave.

The Law of 12 June 2020 amends the period of pre-natal maternity leave and can now be taken as an extension of post-natal maternity leave. The Law amends the regulations on maternity leave.

Article 39 of the Labour Code of 16 March 1971 provides that if the worker has continued working during the six weeks (or eight weeks in the case of multiple births) preceding the birth of a child, she can extend her maternity leave after the ninth week of compulsory maternity leave by five weeks (or seven weeks in the case of multiple births). These five (or seven) weeks are optional and may be taken either before the birth or after compulsory post-natal leave, at the choice of the worker.

This law now extends the list of periods of absence that can be assimilated to periods of work with a view to extending compulsory post-natal rest beyond the ninth week following childbirth.

Through this amendment, the following periods of absence that take place from the sixth week up to and including the second week before childbirth are now also assimilated to periods of work for the purpose of extending the leave:

- temporary unemployment for reasons of force majeure (Article 26 of the Employment Contracts Law of 03 July 1978);
- economic unemployment for white collar workers (Articles 77/1 to 77/8 of the Employment Contracts Law of 03 July 1978);
- incapacity for work (Article 31 of the Employment Contracts Law of 03 July 1978);
- complete removal from work (Articles 42 to 43 of the Labour Code of 16 March 1971).

In other words, if these absences occur during the prenatal period, they no longer reduce the right to maternity leave.



### 1.1.2 Suspension of the period of notice

The Federal Law of 15 June 2020 suspends the notice period for dismissals given before or during the period of temporary suspension of the execution of the employment contract for reasons of force majeure due to the COVID-19 crisis (*Moniteur belge* 22 June 2020).

Until at least the end of August 2020, the National Employment Office, which has competence over unemployment benefits, is applying a flexible procedure to temporary unemployment, whereby all temporary unemployed persons due to the coronavirus can be considered cases of temporary unemployment due to force majeure. In those circumstances, the execution of the employment contract will be suspended due to force majeure.

If an employer terminates the employment contract during a period in which the performance of the employment contract is suspended due to force majeure, the notice period will usually continue during the period of suspension. However, with effect from 22 June 2020, this will change in cases where the force majeure is due to the COVID-19 crisis.

In the event of termination by the employer before or during a period of suspension of the execution of the employment contract due to force majeure resulting from the COVID-19 crisis, the notice period will cease to run during that suspension. The notice period will only start (again) when the employee returns to work. In such circumstances, the originally envisaged end of the notice period will only fall within a later point in time.

The new rule applies to all notice periods given by the employer that have not yet expired on 22 June 2020. However, this only applies to such days of temporary unemployment from the date of publication of the Law in the Belgian Official Gazette, i.e. 22 June 2020.

Moreover, there is one exception as regards the notice periods that had already started before 1 March 2020. These notice periods remain subject to the general rule and will therefore continue during the period of suspension of the execution of the employment contract due to force majeure resulting from the corona crisis. In that case, the notice period will not even be suspended during days of temporary unemployment due to force majeure.

The law will therefore not be applied retroactively. The originally intended retroactive effect of the law as of 01 March 2020 was cancelled following a negative opinion of the Legislation Section of the Council of State (*Parliamentary Documents*, Chamber of Representatives, 2019-2020, No. 55-1212/010, 7-8).

### 1.1.3 Parental extension

Royal Decree No. 45 of 26 June 2020 implementing Article 5, § 1, 5° of the Law of 27 March 2020 authorising the King to take measures to fight the spread of COVID-19 (II), extending certain measures, clarifying certain modalities of the corona parental leave and the consumption cheque has been enacted and published (*Moniteur belge*, 30 June 2020).

From 01 May 2020, Royal Decree No. 23 introduced corona parental leave to allow a better combination of childcare and work during the COVID-19 epidemic (see May 2020 Flash Report).

Royal Decree No. 45 of 26 June 2020 extends the personal scope and the period of validity from 01 July 2020 until 30 September 2020.

It was already envisaged that corona parental leave could be taken from 01 May 2020 until 30 June 2020. This period has now been extended until 30 September 2020.

However, the leave is not automatically extended. Any worker wishing to take corona parental leave during the period from 01 July 2020 to 30 September 2020 will have to submit a new application to his/her employer.

From 01 July 2020, single parents and parents of a child with a disability will also be able to take corona parental leave on a full-time basis (i.e. completely interrupting their work), regardless of their full-time or part-time working regime. The amount of the interruption allowance for single parents and for parents of a child with disabilities will also be increased from 01 July 2020.

### 1.1.4 Consumption cheque and legal wage moderation

The aforementioned Royal Decree No. 45 of 26 June also introduces the possibility for the employer to grant a consumption cheque of EUR 300 for the purchase of goods and services in the hospitality sector, the cultural sector, etc. This cheque is tax-free and not subject to social security contributions. The cheques will not be considered for the legal maximum wage determined in the Law of 26 July 1996 on wages moderation. This is good news for employers and employees, because many companies have already reached the maximum margin for wage increases for 2019-2020 of 1.1 per cent.

## 1.2 Other legislative developments

### 1.2.1 Posting of workers

The Federal [Law](#) of 12 June 2020 transposing Directive 2018/957/EU amending Directive 96/71/EC concerning the posting of workers, already adopted in Parliament (see May 2020 Flash Report point 1.2.2) has been enacted and published (*Moniteur belge*, 18 June 2020).

## 2 Court Rulings

Nothing to report

## 3 Implications of CJEU Rulings and ECHR

### 3.1 Working time and leaves

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

This case concerned a Spanish scheme of special paid leave, which allows employees to be absent from work with full pay to meet certain needs or obligations which require personal presence, such as marriage, the birth of a child, hospitalisation or surgery, the death of a close relative and the performance of representative trade union functions (point 17). This special leave can only be paid outside the weekly rest periods or periods of paid annual leave (point 20).

The referring national court was uncertain whether that legislation implies that the weekly rest period and annual leave are thus not eliminated because the employee would then have to deal with the needs and obligations for which the special leave was created.

With reference to the *TSN and AKT* ruling of 19 November 2019, C-609/17 and C-610/17, the Court of Justice reiterated that the Working Time Directive only lays down minimum requirements for annual leave. The Court of Justice has ruled on several occasions in the past on the concurrence of sickness and annual leave: sick leave must enable the employee to recover from an illness (CJEU cases C-350/06 and C-520/06,

20 January 2009, *Schultz-Hoff and others*), the purpose of which differs from the entitlement to annual leave. As a result, an employee has the right to take annual leave outside a period of sick leave.

The Court of Justice stated that such arrangements as the special leave in Spain cannot be assimilated to sick leave. In addition, the Spanish legislation refers to needs and obligations that justify a granting of special leave when it occurs when work is in progress. Finally, it is a national scheme of special leave which is outside the scope of case law of the Court of Justice, i.e. leave guaranteed by European Union law cannot affect the right to take another type of leave guaranteed by European Union law whose purpose differs from that of the first leave.

This ruling is particularly relevant for Belgium because the Spanish scheme is very similar to the Belgian one on 'short term leave' or 'circumstantial leave'. The circumstances are listed exhaustively in the Royal Decree of 28 August 1963. The circumstances for which a person is entitled to a short term paid leave of absence are diverse: birth, death, legal appearance, solemn communion, member of a jury at a court, etc. However, not every event entails the right to a short leave. For example, the death of a cousin or an aunt, moving house or donating blood are not included.

The prevailing legal opinion in Belgium is as follows.

If such an event occurs during annual leave, the employee cannot recover this paid absence. The days of annual leave take precedence over short term leave. The employee therefore loses these days of permitted absence. The employee must be informed that 'circumstantial or short-term leave' cannot be mixed with 'ordinary leave'.

### 3.2 Worker status

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

The delivery company Yodel and a neighbourhood courier concluded a service agreement classifying him as 'self-employed independent contractor'. According to the agreement, he was not required to perform the service personally, to perform the tasks assigned by the putative employer, to be bound by fixed working hours, or to perform the service exclusively for Yodel. The courier used her own vehicle to deliver the parcels and used her own mobile telephone. Under that agreement, Yodel was not required to use the services of the couriers with whom it had concluded a services agreement, just as those couriers were not required to accept any parcel for delivery. In addition, those couriers could fix a maximum number of parcels they were willing to deliver. As for remuneration, a fixed rate, which varied according to the place of delivery, was set for each parcel (points 5-13).

Nevertheless, courier B sought reclassification as a worker under the Working Time Directive.

The CJEU already established that the concept of "worker" in EU legislation has an autonomous meaning which is specific to the EU. The essential feature of an employment relationship is that for a certain period of time, a person performs services for and under the direction of another person in return for remuneration (for instance, CJEU 21 February 2018, *Matzak*, C-518/15). Notwithstanding, an 'independent contractor' under national law can be classified as a worker under EU law, if the independency of the service provider is merely notional and disguises an employment relationship after an assessment of all of the factors and circumstances characterising the relationship between the parties.

After having analysed the objective nature of the activities carried out by the courier, as well as the relevant factors of the case, the CJEU concluded that, first, the independence of a courier, such as that at issue in the main proceedings, did not appear



to be fictitious and, second, did not appear, a priori, to be a relationship of subordination between the worker and her putative employer (point 43). It follows that the concept “worker” in the Working Time Directive must be interpreted as precluding a person engaged by a principal under a services agreement, which stipulates that the courier is a self-employed independent service provider, from being classified as a ‘worker’ for the purposes of the Working Time Directive,

*“where that person is afforded discretion:*

- to use subcontractors or substitutes to perform the service which he has undertaken to provide;*
- to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks;*
- to provide his services to any third party, including direct competitors of the putative employer, and*
- to fix his own hours of ‘work’ within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer,*

*provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer. However, it is for the referring court, taking account of all the relevant factors relating to that person and to the economic activity he carries on, to classify that person’s professional status under the Working Time Directive 2003/88” (point 45).*

This judgment of the Court of Justice is less relevant in terms of the legal-technical aspects of the Working Time Directive but reflects the previous case law of the Court on the European legal concept of ‘worker’.

Belgian case law is largely in line with the case law of the Court of Justice. Indeed, the factual elements assessed by the Court of Justice to determine whether an employment relationship exists, would, according to Belgian labour law, exclude reclassifying the employment relationship as an employment contract.

## 4 Other Relevant Information

Nothing to report.

# Bulgaria

## Summary

(I) The extraordinary situation due to the COVID-19 crisis has been extended.

(II) The Council of Ministers adopted a decree amending the Order for Working Time, Rest and Leave.

## 1 National Legislation

### 1.1 Measures to respond to COVID-19 crisis

The extraordinary situation declared in April has been extended to 15 July.

### 1.2 Other legislative developments

#### 1.2.1 Paid annual leave

The Council of Ministers adopted Decree No. 130 of 18 June 2020 on the Supplement of the Order for Working Time, Rest and Leave. It was published in the State Gazette No. 56 of 23 June 2020. The new paragraph 4 of Article 42 provides that the amount of compensation for unused paid annual leave in case of termination of the employment relationship shall be calculated according to the duration of service in the enterprise on the day of termination.

## 2 Court Rulings

Nothing to report. The civil courts were not operation in June.

## 3 Implications of CJEU Rulings and ECHR

### 3.1 Working time and leaves

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

Bulgarian labour legislation regulates special leaves such as those dealt with in C-588/18 in Articles 157 and 162 of the Labour Code and Articles 50-55 of the Order on Working Time, Rest and Leave. The general rule is that the corresponding leave shall be used within the timeframe when it is due – e.g. leave for taking care of a family member who is ill. Cases are explicitly provided in which leave may be used on another day, e.g. leave for marriage (two working days), for blood donation (the day of the examination and of the donation, as well as the following day) and in the event of the death of a parent, child, spouse, brother, sister and the spouse's parent or other lineal relatives, two working days shall be used, namely the day of the event and the next working day (Article 157, para. 1, items 1–3 of the Labour Code). If the event concurs with the employee's weekly rest period, the leave shall be used in the first two working days after this period. This does not seem to conflict with C-588/18.

### 3.2 Worker's status

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

Bulgarian labour law does not regulate cases of self-employed independent contractors classified as "workers" such as those dealt with under C-692/19.



#### **4 Other Relevant Information**

Nothing to report.

# Croatia

## Summary

(I) A number of measures have been introduced to address the COVID-19 crisis. Some of these measures relate to the prohibition of crossing the borders of Croatia, some relate to the protection of public sector employees, and others relate to loans for working capital, etc.

(III) New members of the European Economic and Social Committee from Croatia have been appointed for the period 21 September 2020 to 20 September 2025.

(IV) Annexes to the Basic Collective Agreement for Public Servants and Employees in the Public Sector and the Basic Collective Agreement for Civil Servants have been concluded.

## 1 National Legislation

### 1.1 Measures to respond to COVID-19 crisis

#### 1.1.1 Temporary prohibition of crossing the borders of the Republic of Croatia

The Civil Protection Headquarters of the Republic of Croatia issued the [Decision](#) on the temporary prohibition of crossing the borders of the Republic of Croatia on 30 June 2020 (Official Gazette No. 74/2020). It applies until 15 July 2020.

The prohibition does not apply to nationals of Member States of the European Union or of the Schengen area and states that have signed agreements with the Schengen area states, as well as members of their families, and third-country nationals who are long-term residents in accordance with Council Directive 2003/109/EC. There are some exceptions to the prohibition for third-country nationals to cross Croatia's borders. For instance, healthcare workers or cross-border workers, etc. are entitled to enter Croatia.

#### 1.1.2 Public transport employees

Drivers and other employees as well as passengers in the public transport sector are required to use medical masks or face masks when on board the given means of transport and must follow the general COVID-19 measures and special recommendations and instructions of the Croatian Institute of Public Health relating to driving ([Amendment](#) to the Decision on the Manner of Organisation of Public Transport During the Declared Epidemic of the COVID-19 Disease, Official Gazette No. 73/2020).

#### 1.1.3 Loans for working capital

The [Amendments](#) to the Programme 'COVID-19 Working Capital Loan' and 'ESIF Guarantees' of the Croatian Agency for Small Business, Innovation and Investment have been adopted. They are in line with the State Aid Temporary Framework adopted by the Commission on 19 March 2020 and amended on 03 April and 08 May 2020.

#### 1.1.4 Amendment to the Ordinance on Eligibility Expenditure

According to the [Amendment](#) to the Ordinance on Eligibility Expenditure, expenditure on crisis response capacity-building operations in the context of the outbreak of COVID-19 is eligible in line with Article 65 (10) of Regulation (EU) 1303/2013.

### 1.1.5 Opening hours of stores and markets

The Civil Protection Headquarters of the Republic of Croatia has adopted the [Amendment](#) to the Decision on Opening Hours in Trade Activity During the Declared Epidemic of the COVID-19 Disease (Official Gazette No. 69/2020).

According to the amendment, the opening hours of shops, warehouses, wholesale markets, retail markets and other forms of sales of goods outside the store shall be determined in accordance with Article 57 of the Trade Act, as was the case before COVID-19 was declared a pandemic.

### 1.1.6 Self-isolation at home

The Minister of Health has issued the [Amendment](#) to the Decision on the special security measure of isolation of persons in their home or other suitable space (Official Gazette No. 65/2020).

All persons who on the basis of an epidemiological survey are assessed to have been in contact with a confirmed case of COVID-19 are ordered to comply with a special security measure of self-isolation in their home or other appropriate space for a maximum period of 14 days.

## 1.2 Other legislative developments

Nothing to report.

## 2 Court Rulings

Nothing to report.

## 3 Implications of CJEU Rulings and ECHR

### 3.1 Worker status

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

The *Yodel* case relates to the notion of 'worker' in the context of Directive 2003/88/EC of the European Parliament and of the Council of 04 November 2003 on certain aspects of the organisation of working time. The CJEU ruled that a person engaged by his/her putative employer under a services agreement, which stipulates that he/she is a self-employed independent contractor, is not a 'worker' for the purposes of that directive, where that person is afforded discretion:

- to use subcontractors or substitutes to perform the service which he/she has undertaken to provide;
- to accept or not accept the various tasks offered by his/her putative employer, or unilaterally sets the maximum number of such tasks;
- to provide his/her services to any third party, including direct competitors of the putative employer, and
- to determine his own working hours within certain parameters and to tailor his/her time to suit his/her personal convenience rather than the sole interests of the putative employer.

However, when that individual's independence is fictitious and that person is subordinated to the employer, that individual shall be considered and protected as a worker in accordance with Directive 2003/88/EC. Since this is an issue of facts, it is for the referring court—taking account of all the relevant factors relating to that individual and to the economic activity he/she carries out—to classify that person's professional status in accordance with Directive 2003/88.

This judgment will not have any implications for Croatian labour law because the notion of 'worker' in the case law of the Croatian courts coincides in substantive terms with the ruling in this case. Subordination is a crucial element when determining whether an employment contract or some other service contract has been established (see more in: I. Grgurev, *The concept of employee: The position in Croatia*, in: *Restatement of Labour Law in Europe Volume I: The Concept of Employee/Waas, B.; Heerma van Voss, G. (Eds.)*, Hart Publishing, 2017).

### 3.2 Working time and leaves

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

This case related to workers' entitlements to special paid leave in case of marriage; the birth of a child; hospitalisation; surgery; the death of a close relative, and the performance of representative trade union functions. The issue raised referred to situations when such cases occur during annual leave or weekly rest periods. The National High Court of Spain decided to stay the proceedings and to refer the following questions to the CJEU for a preliminary ruling:

- "(1) *Must Article 5 of Directive [2003/88] be interpreted as precluding national rules under which the weekly rest period is permitted to overlap with [special] paid leave that is intended to serve purposes other than rest?*
- (2) *Must Article 7 of Directive [2003/88] be interpreted as precluding national legislation under which annual leave is permitted to overlap with [special] paid leave intended to serve purposes other than rest, relaxation and leisure?"*

Although the CJEU ruled that Articles 5 and 7 of Directive 2003/88 are not applicable to national rules on special leave, the CJEU emphasised that the purpose of different leaves differs. For instance, the purpose of annual leave differs from the purpose of sick leave (paragraph 33).

The judgment in the *Fetico* case will not have any implications for Croatian labour law. Paid leave is regulated in Article 86 of the Labour Act of 2014 (amended in 2017 and 2019), which explicitly states that employees can take paid leave on working days for different reasons such as marriage, the birth of a child, serious illness or death of a close family member. More precisely, Article 86 (1) and (2) states:

- "(1) *During a calendar year, an employee is entitled to exemption from the obligation to work with compensation of salary (paid leave) for important personal reasons, especially in connection with marriage, the birth of a child, serious illness or death of a close family member.*
- (2) *An employee is entitled to the leave referred to in paragraph 1 of this Article for a total duration of seven working days per year, unless otherwise regulated by a collective agreement, work rules or employment contract."*

Paid leave can be regulated more favourably for employees in a collective agreement, in the work rules or employment contract than in the cited provision of the Labour Act. Article 86 applies if such leave is not regulated more favourably in another agreement. It derives from Article 9(3) of the Labour Act. Since the legislator does not use the phrase 'calendar days' but 'working days' in the context of paid leave, the only possible



conclusion is that employees can discontinue to use annual leave in order to take paid leave for marriage, the birth of a child, serious illness or death of a close family member.

## 4 Other Relevant Information

### 4.1 European Economic and Social Committee

New members of the European Economic and Social Committee from Croatia have been [appointed](#) for the period 21 September 2020 to 20 September 2025 (Official Gazette No. 68/2020).

### 4.2 Public sector salaries

Annexes ([Annex II](#), [Annex III](#)) to the Basic Collective Agreement for Public Servants and Employees in the Public Sector and the Basic Collective Agreement for Civil Servants have been concluded (Official Gazette No. 66/2020). Although the respective collective agreements contained clauses on raises in the basic calculation of public sector salaries for June and October 2020, they will not be applied. The Annexes contain some basic calculations for the salaries that shall be raised on 01 January 2021.

# Cyprus

## Summary

Restrictive emergency measures to contain the COVID-19 pandemic have been eased. New support packages have been introduced, while special leave rights have been discontinued. The impact of the crisis on vulnerable groups is being discussed.

## 1 National Legislation

### 1.1 Easing of restrictive emergency measures

In June, the restrictions of the lockdown which has affected labour relations due to the outbreak of the coronavirus pandemic, have been eased. This is the third phase of the measures (9 June-13 July), and the fourth phase will begin from 14 July onwards.

### 1.2 State support schemes for employers and unemployed persons

Six days before the end of June, the government announced a new support package for employers, employees and unemployed persons, excluding 35 economic activities. This phase covers the period 13-30 June. The schemes were budgeted at EUR 150 million and will cover an estimated 50 000 of beneficiaries (In-Cyprus (2020), 'New [conditions](#) for state support schemes', 24 June 2020).

The 35 areas of economic activity excluded from the support schemes are supermarkets, telecommunication companies, banks, insurance companies, doctors, nursing services, senior homes, pharmaceutical companies, pharmacies, traders in medical products, bakeries, retail trade, wholesale trade of electrical, shoes, clothing, perfumes, cosmetics, carpets, furniture, petrol stations and construction sites. Road construction, vets, lawyers and accountants, hairdressers, beauticians, sports activities, trade unions and other associations, funeral homes, flower shops, IT services, lotteries and betting offices, immovable property services and cleaning are also excluded. The criteria for excluding these areas of economic activity are not clear and were not explained; some of them were operational throughout the lockdown, such as supermarkets and doctors, whilst others were the first that were ordered to shut down and only allowed to reopen recently, such as hairdressers and gyms (In-Cyprus (2020), 'New [conditions](#) for state support schemes', 24 June 2020).

The new support schemes differ significantly from the schemes of previous months. Under the new package, state funds are paid to the employer instead of directly to the beneficiaries. Previously, in the case of companies that only paid part of the employees' remuneration with the other part being paid by the State, the employer paid the social security contributions that corresponded only to the amount paid by the employer. The employer will now be required to pay social security contributions for the full amount. In the event of a conviction of supplying false information, the penalty is a fine of up to EUR 40 000. Hotels and tourism businesses must offer 'attractive prices' to promote local tourism, in cooperation with the Deputy Ministry of Tourism (In-Cyprus (2020), 'New [conditions](#) for state support schemes', 24 June 2020).

Unemployed persons who have exhausted their entitlement to unemployment benefits, which is 156 days for each interruption of occupation (Cyprus, Ministry of Labour, '[Guide to unemployment benefit](#)' (Οδηγός επιδόματος ανεργίας), undated), are eligible for a special unemployment grant, provided they are not simultaneously receiving sick leave, maternity leave, paternity leave benefits, a pension or any other grant from the special schemes of the Ministry of Labour. The grant is a lump sum of EUR 360 per month (Cyprus, Law on special measures adopted by the Ministry of Labour, Welfare and Social



Insurance to address the Covid-19 pandemic of 2020 (*Ο περί έκτακτων μέτρων που λαμβάνονται από το Υπουργείο Εργασίας, Πρόνοιας και Κοινωνικών Ασφαλίσεων για την αντιμετώπιση της πανδημίας του ιού COVID-19 Νόμοι του 2020*), Decision under Article 7,8,9,10 and 12, Regulatory Administrative Act No. 273, 23 June 2020).

### 1.3 Leave schemes

On June 12, the Finance Ministry announced that the special measures applicable to vulnerable groups and parents caring for their children up to the age of 15 years or for children with disabilities, irrespective of age, would cease by midnight of the same day (Cyprus, Ministry of Finance (2020), *Κατάργηση ειδικών ρυθμίσεων Κατηγορίας Β του καταλόγου των ευπαθών ομάδων και εργαζομένων γονέων που έχουν την ευθύνη φροντίδας παιδιών ηλικίας μέχρι 15 ετών ή παιδιών με αναπηρία ανεξαρτήτως ηλικίας*, Circular No. 1623, 12 June 2020). Under the regulations applicable until that date, persons classified as vulnerable were to remain at home and carry out any tasks assigned to them by their employer, whilst those for whom remote working was not feasible due to the nature of their duties or because they did not want to work remotely were eligible for sick leave benefits. These arrangements were terminated on 12 June.

The parents of children with disabilities or with children under the age of 15 years could make use of their right to annual leave according to the applicable contractual terms.

The workers' union 'Isotitia' issued a press release expressing its opposition to the measure which forces parents without warning to either commit a crime by leaving their children unattended or to leave their children with grandparents, risking the lives of the elderly or alternatively, to take them to work. The union criticised the fact that the measure was announced without warning or consultation, giving the workers no time to make arrangements for their children, and forcing parents to make use of their annual leave as a measure to reduce the number of persons eligible to payments from the support scheme (Workers Union Isotita (2020), Press release 13 June 2020). The Finance Ministry's announcement was also criticised by the main opposition party AKEL, accusing the government of unilaterally, suddenly and arbitrarily deciding on this issue, ignoring the problems it causes workers, society and public health (Dialogos (2020), *ΑΚΕΛ: Ένδειξη παντελούς αδιαφορίας η περικοπή του επιδόματος σε εργαζόμενους γονείς*, Statement by the party spokesperson 15 June 2020). The workers' union has filed complaints with the Commissioner for Administration and Protection of Human Rights and the Commissioner for the Protection of the Rights of the Child alleging violations of labour rights and children's rights (Workers Union Isotita (2020), Press release 13 June 2020).

## 2 Court Rulings

Nothing to report.

## 3 Implications of CJEU Rulings and ECHR

### 3.1 Worker status

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

The CJEU in *Yodel Delivery Network Ltd* issued an important [ruling](#) that could have implications for Cypriot labour law, and to a limited extent, affect couriers in Cyprus, who are working under rather hazardous and precarious working conditions that expose them to serious dangers. The effect is likely to be limited because of the conditions laid down. The Court ruled that Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working

time must be interpreted as precluding a person engaged by his/her putative employer under a services agreement, which stipulates that he/she is a self-employed independent contractor, from being classified as a 'worker' for the purposes of that Directive, where that person is afforded discretion:

- to use subcontractors or substitutes to perform the service which he/she has undertaken to provide;
- to accept or not accept the various tasks offered by his/her putative employer, or unilaterally set the maximum number of those tasks;
- to provide his/her services to any third party, including direct competitors of the putative employer, and
- to fix his/her own hours of 'work' within certain parameters and to tailor his/her time to suit his/her personal convenience rather than solely the interests of the putative employer.

The preconditions the Court has reiterated are unlikely to arise in the Cypriot context for the work of couriers, given that the Court ruled that "the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer". In that sense, it is unlikely that a Cypriot court, after having taken into account all of the relevant factors relating to that person and to the economic activity he/she carries out, to classify that person's professional status under Directive 2003/88.

### 3.2 Working time and leaves

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

This [case](#) may have some implications for Cypriot labour law, but does not affect the current application of labour law in Cyprus. The CJEU ruled that Articles 5 and 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as not being applicable to national rules providing for special leave on days when workers are required to work, which do not allow those workers to claim that leave in so far as the needs and obligations met by that special leave arise during weekly rest periods or periods of paid annual leave that are the subject of those articles.

In Cyprus, leave is regulated by the *Laws on Annual Leave with Pay* (Ετήσιων Αδειών με Απολαβές Νόμος του 1967, Ν. 8/1967), which provide the general framework for paid leave and the WTD law, known as the *Law on Organisation of Working Time* (Law 63(I)/2002 as amended). The WTD Law provides that all employees are entitled to four weeks of paid leave, in accordance with the terms and conditions provided by the legislation or the collective agreements and/or the practice on obtaining the right and granting leave (Art. 8(1)).

## 4 Other Relevant Information

### 4.1 Unemployment statistics

Statistics issued by the Cyprus Statistical Service indicate that salaries and benefits in many professions are feeling the effects of the first phase of the COVID-19 crisis. During the first quarter of 2020, the cost of labour increased by a mere 0.8 per cent compared to the previous quarter, which essentially means it remained at the low levels of 2013, when the first economic crisis hit, with the collapse of the banking sector in Cyprus. The number of unemployed persons increased by 3 984 persons in May compared to February before the outbreak of COVID-19, i.e. from 25 620 to 29 604. After a correction of the data following seasonal fluctuations, the total number of unemployed persons increased by 12 273 persons, i.e. from 21 809 to 34 082 (Ergatiko Vima (2020),

‘Έντονες πιέσεις σε μισθούς και θέσεις εργασίας λόγω κορωνοϊού’ 29 June 2020). Some of the sectors most severely hit are the following:

- *Accommodation and catering services*: this is the economic activity with lower salaries and the sector in which salaries are expected to be affected most severely, since many hotels remained closed. In May, the number of registered unemployed persons rose to 9 293, whilst before the pandemic, there were only 1 563 vacancies.
- *Administrative and support services*: there are currently 1 211 registered unemployed persons and 208 vacancies.
- *Commerce*: 5 162 unemployed persons and 906 vacancies.
- *Factories*: the monthly salary cost dropped by 0,2 per cent in the first quarter, suggesting that the activity was negatively affected in the first stage of the pandemic. There are 1 700 registered unemployed and 876 vacancies.
- *Other services*: there are 632 registered unemployed and there were 175 vacancies before the pandemic.
- *Construction*: there are 1 611 unemployed and 1 052 vacancies.
- *Water treatment and provision, sewage management*: there were 100 registered unemployed and 37 vacancies.
- *Arts and entertainment*: there are 658 registered unemployed and 77 vacancies.
- *Media and communication*: There are 624 registered unemployed and 131 vacancies (Ergatiko Vima (2020), ‘Έντονες πιέσεις σε μισθούς και θέσεις εργασίας λόγω κορωνοϊού’ 29 June 2020).

## 4.2 Impact of the pandemic on vulnerable groups

### 4.2.1 Persons with disabilities

The Pancyprian Confederation of Disability Organisations (KYSOA) raised concerns that the austerity agenda, as a means of addressing the economic crisis resulting from the pandemic, is negatively impacting the long-term project of de-institutionalisation and independent living of persons with disabilities. The Confederation highlighted the fact that the imperative need for independent living has become more evident in the past few weeks, when half of the victims of the pandemic in Europe were persons in closed institutions and homes, fully dependent, without rights and forgotten both by the State and society. Persons with disabilities and chronic illnesses were the first to have to self-isolate to protect their health and that of their family members and were more negatively affected by the impacts of isolation, the rise in domestic violence, the degradation of health care, the reduction of their income, the suspension of operations of essential services, the educational inequalities and increasing poverty and unemployment. In order to address these issues, the Confederation is submitting a comprehensive proposal for the implementation of the right of persons with disabilities to independent living. The claims and recommendations put forward include the calculation and adoption of measures for the coverage of the actual cost of disability and the cost of welfare and the development of a comprehensive legislative framework for the implementation of an adequately funded deinstitutionalisation strategy through the reallocation of funds currently expended on institutionalisation, premised upon the respect of dignity of persons with disabilities and chronic illnesses (Dialogos (2020), ‘ΚΥΣΟΑ: Οχι στο άλλοθι της λιτότητας για μη υλοποίηση δικαιωμάτων αναπήρων’, 7 May 2020).

The Confederation of Organisations for Persons with Disabilities (KYSOA) reported a significant deterioration in access to welfare for persons with disabilities. The category

affected most adversely were persons with intellectual disabilities, although other categories also experienced a reduction and in some cases, a termination of welfare benefits. Persons with intellectual disabilities who participate in the State programme of assisted employment, operated by the same government department that also manages welfare benefits, received amounts of EUR 30 to EUR 50 for two months through procedures which the Confederation described as humiliating. Almost all of the hundreds of persons with intellectual disabilities employed under the programme of assisted employment, earning wages of between EUR 1,8 to EUR 3 per hour, were forced to stay at home for two or more months during the COVID-19 lockdown, on the justification that they belonged to a vulnerable category. During this period, no salary was paid to them by their employers (communication via e-mail with the Confederation of Disability Organisations (KYSOA), 6 July 2020).

The Confederation reported that the Ministry of Labour, Welfare and Social Insurance issued a circular encouraging persons with disabilities, who were forced to refrain from working during the lockdown, to apply for the loss of wages benefit, without explaining that this will lead to a reduction of their minimum guaranteed income. Those who applied received benefits which were often equal to one-third of the amount subsequently deducted from their minimum guaranteed income, leading to a loss of income crucial for their subsistence. Other persons with disabilities reported to the Confederation that their minimum guaranteed income was suspended during the lockdown without warning or explanation up until the time of writing (communication via e-mail with the Confederation of Disability Organisations (KYSOA), 6 July 2020).

Many persons employed under the State programme of assisted employment were informed by their mentors that the application for a benefit for loss of wages during lockdown was a trap and would lead to deductions of amounts much higher than the benefit or even an indefinite suspension of their minimum guaranteed income. As a result, they refrained from applying for this benefit. Many of the persons with intellectual disabilities who returned to work after the lockdown received only 50 per cent of their salaries whilst others had their employment terminated on the justification that the workspace is limited or that the circumstances of the post-COVID-19 situation led to a reduction in their volume of work and there was no longer any work for them to perform (communication via e-mail with the Confederation of Disability Organisations (KYSOA), 6 July 2020).

The Confederation reported that during the lockdown, the Social Welfare Services searched the files of persons with disabilities who have been public benefit receivers for decades, and are now receivers of the minimum guaranteed income in order to identify cases in which the minimum guaranteed income could be terminated. The result was the unlawful termination of the minimum guaranteed income for persons with disabilities and their families without any explanation or warning, including pensioners with disabilities who were classified as 'willingly unemployed', persons with disabilities whose child was in paid employment for a short period of time in 2019 or persons with disabilities who allegedly changed their address without informing the authorities (communication via e-mail with the Confederation of Disability Organisations (KYSOA), 6 July 2020).

#### 4.2.2 Working women

A survey conducted in June shows that the pandemic hit working women significantly worse than men for a variety of reasons related to stereotypes at home and at work, and the type of jobs that attract mainly women, who at the same time had responsibility for additional household chores and the extra responsibility for the care and education of their children. For the purposes of this survey, the journalist interviewed working mothers whose responses were consistent with the findings of the survey conducted by the Boston Consulting Group ([Krentz M.](#), [Kos E.](#), [Green A.](#), [Garcia-Alonso J.](#) (2020), '[Easing the COVID-19 Burden on Working Parents](#)', *Boston Consulting Group*, 21 May 2020), according to which women spent, on average, 65 hours per week in unpaid work

during the lockdown, which is one-third more than men. The pandemic weighed more heavily on women in a number of ways, including the increase of domestic violence, lower salaries, as some women were forced to give up some of their paid work to carry out unpaid work at home, since the lockdown kept the entire family at home, which created a high volume of household work. The hours of unpaid household work doubled for women; two-thirds of the women who participated in the survey responded that they were concerned about their mental health, compared to only half of the men who expressed similar concerns. The Women's Office of the trade union Pancyprrian Confederation of Labour (PEO) raised concerns about the fact that (Michael, A. (2020), ['Η πανδημία έπληξε περισσότερο τις εργαζόμενες γυναίκες'](#), Ergatiko Vima, 25 June 2020):

- The pandemic and the increased unpaid work in the household, caring for children and the elderly posed obstacles to women's professional lives.
- At the same time, during the pandemic, women were at the frontline serving the public, since the vast majority of workers in the healthcare sector and retail shops are women, who were forced to work and at the same time, find ways to care for and protect their families.
- Women represent the majority of workers in flexible forms of employment, with seasonal, part-time, and uninsured work as a result of which their share in the support schemes available for affected workers during the pandemic and the amount of benefits received was lower than for other workers and, in some cases, non-existent.
- Migrant women faced a particularly difficult situation, as many did not have a supportive environment nor access to government schemes available during the pandemic. Many had to seek help to secure food for themselves and their children.

The survey included interviews with a number of working women who reported their experiences during the pandemic as particularly stressful.

- A teacher who was also a mother reported having experienced stress and fear and struggled to find time to assist both her children at home and her pupils at school. The long hours of preparation of material for distant education and assessment of her pupils could only be afforded after her own children had gone to bed, so that she would not deprive them of her company and care, given the fact that her children had been deprived of their school environment, friends and grandparents.
- A woman working in a retail shop, whose operations were suspended during the pandemic, reported fear and insecurity because her husband's work was also suspended and the benefit which she was expecting from the government scheme never reached her. Her repeated efforts to contact the authorities to enquire about this benefit did not yield any results as she was unable to speak to the person in charge. After the lockdown, she was not asked to return to work and she fears she will be unable to find work in the current environment.
- A woman working as a cashier in a supermarket and a mother of two school children had to work throughout the pandemic. She was afraid that if she had asked to stay at home, this would impact her possibilities of returning to her post after the pandemic. She lived in fear of catching COVID-19 at work and transmitting it to her family. Her husband was also forced to continue working, and she was forced to ask relatives and friends to look after her children when school was closed.
- A public sector worker and a mother of three small children, who was permitted to work from home, reported having difficulties combining work with the care of her children who were constantly seeking her attention and needed her assistance



with distant education (Michael, A. (2020), [‘Η πανδημία έπληξε περισσότερο τις εργαζόμενες γυναίκες’](#), Ergatiko Vima, 25 June 2020).

### 4.2.3 Single parents

The Pancyprian Association of Single Parent Families reported that single parents were hit particularly hard by the pandemic and yet remained invisible to policymakers throughout the lockdown (consultation with President of the Association of Single Parent Families, 30 June 2020). The social distancing measures made it impossible for them to leave their children with a relative or friend to conduct their necessary chores or to go to work. Most single mothers work in the informal sector, because their responsibilities at home do not allow for a full-time job with afternoon working hours and shifts. Before the pandemic, many used to work from home as beauticians, nail artists, hairdressers or tailors. With the outbreak of the pandemic, they were left without work and without any type of state support because there were no support schemes for the uninsured workers. Despite pleas to the Minister of Labour to include an extra scheme for single parent families in the plan, the Ministry of Labour did not envisage any scheme for this category and did not request budget from Parliament for support to single parents in the informal market. There was no time to apply for the government minimum income because processing the applications takes several months under normal circumstances and much longer when government services have effectively been brought to a standstill because of the lockdown. For single parents, there is no other income in the family and the loss of livelihood without any state support led many into extreme poverty, their only support coming from initiatives of NGOs and private initiatives in the form of food and supermarket coupons. In many cases, single mothers did not receive the alimony payment from their former partner because they had also stopped working. The Pancyprian Association of Single Parent Families estimates that there are approximately 30 000 single parent families in Cyprus, but only about 10 000 receive the single parent benefit because of the stringent conditions of eligibility foreseen in the law (consultation with President of the Association of Single Parent Families, 30 June 2020).

# Czech Republic

## Summary

(I) An update on the extraordinary measures adopted by the government to address the COVID-19 crisis is provided. The law introducing the Antivirus Programme – Regime C has passed Parliament and entered into effect on 01 July 2020.

(III) A law amending the Labour Code to transpose Directive (EU) 2018/957 has been passed by Parliament.

(IV) The Constitutional Court has ruled on the protection of whistleblowers.

(V) The Supreme Court found that 30-minute rest and meal breaks are not part of working time.

## 1 National Legislation

### 1.1 Measures to respond to COVID-19 crisis

#### 1.1.1 Update on extraordinary measures

The government and individual ministries (as well as other authorities) have adopted a number of extraordinary measures with the aim of limiting the spread of the COVID-19 disease.

We already informed about the relevant measures in the March to May 2020 Flash Reports. In the present report, we reflect on recent developments. Most of the measures adopted in relation to the COVID-19 crisis have been lifted.

- Travel ban

Protective [Measure](#) of the Ministry of Health No. MZDR 20599/2020-13/MIN/KAN of 30 June 2020

With effect from 01 July 2020 (00:00), all persons who entered the territory of the Czech Republic after this date are required:

- to report to a medical services provider in case they develop any symptoms indicating an infection with the COVID-19 disease;
- to agree to take a test when crossing the border into the territory of the Czech Republic and be cooperative in case he/she develops any symptoms.

All persons who remained in the territory of one of the countries not listed as low-risk countries for more than 12 hours in the last 14 days are required to contact the public hygiene authorities after entering the territory of the Czech Republic (with exceptions).

All foreign citizens from third countries not listed as low-risk countries and that do not meet the reciprocity criteria, and all foreign citizens who have temporary stay or permanent stay visas registered in one of those countries are banned from entering the territory of the Czech Republic (with certain exceptions).

Persons entering the territory of the Czech Republic still have the obligation to notify the competent hygiene station in listed cases, to be tested for COVID-19, etc. Quarantine or isolation may be ordered for persons entering the territory of the Czech Republic.

A list of low-risk countries and such countries that do not meet the criteria of reciprocity as of 01 July 2020 is available [here](#).

- Restrictions on the provision of goods and services

Extraordinary [measure](#) of the Ministry of Health No. MZDR 20581/2020-8/MIN/KAN of 25 June 2020

With effect from 01 July 2020 until further notice, the Ministry of Health has re-issued restrictions on the retail sale of goods and the provision of services in establishments (i.e. shops).

Establishments (shops) are now open, but must comply with specific hygienic rules.

- General restrictions on the free movement of persons

Extraordinary [measure](#) of the Ministry of Health No. MZDR 20588/2020-9/MIN/KAN of 17 June 2020

Restrictions on the free movement of persons have been lifted to a large degree.

Most events with an attendance of over 1 000 persons continue to be banned (with exceptions).

During mass events with an attendance of 1 000 and fewer persons, social distancing of at least 2 metres must be maintained (this does not apply to members of the same household), and disinfectants must be made available.

Specific rules have been set forth for sporting events, religious services and weddings.

- Prohibition of the free movement of persons not wearing protective equipment (of mouth and nose)

Extraordinary [measure](#) of the Ministry of Health No. MZDR 15757/2020-25/MIN/KAN of 25 June 2020

With effect from 01 July 2020, the order of the Ministry of Health by which movement and stay is subject to restrictions for all persons not wearing protective equipment (such as drapes, face masks, headscarves, etc.) has been cancelled.

The obligation to wear a mask can still be adopted by regional hygiene stations (locally, not as a general measure).

- Ban on personal attendance in schools and other similar facilities

Extraordinary [measure](#) of the Ministry of Health No. MZDR 20584/2020-7/MIN/KAN of 19 June 2020

With effect from 27 June 2020 until 30 June 2020, the ban on personal attendance in schools and other similar facilities (which we informed about in our previous Flash Report) was re-adopted by the Ministry of Health.

However, the extraordinary measure now lists a large number of exceptions – limited personal attendance in relevant facilities is possible if certain conditions are met and certain rules adhered to.

With effect from 01 July 2020, the restrictions no longer apply.

### 1.1.2 Antivirus Programme – Regime C

[Act No. 300/2020 Coll.](#), on the remission of social security insurance contributions and contributions to the state employment policy paid by certain employers as taxpayers in connection with the emergency measures during the 2020 pandemic has been published in the Collection of Laws.



We have already informed about this piece of legislation in the May 2020 Flash Report. The Act has been published and entered into effect on 01 July 2020.

## 1.2 Other legislative developments

### 1.2.1 Amendment to the Labour Code

[Act No. 285/2020 Coll.](#), amending Act No. 262/2006 Coll., the Labour Code, as amended, and other legislation, has been published in the Collection of Laws. We informed about this Act in the July 2019 and May 2020 Flash Reports. The Act will enter into effect in two phases:

- the provisions relating to the transposition of Directive (EU) 2018/957 will enter into effect on 30 July 2020;
- the rest of the provisions will enter into effect on 01 January 2021.

## 2 Court Rulings

### 2.1 Protection of whistleblowers

*Constitutional Court, No. IV.ÚS 3508/19, 12 May 2020*

The Constitutional Court has **ruled** that the legal order of the Czech Republic does not (as of yet) provide for any explicit general protection of so-called whistleblowers (e.g. a period of protection against dismissal as is provided to employees who are temporarily incapacitated for work). This protection cannot be inferred from the principles of a democratic state governed by the rule of law, either. The decision was issued on 12 May 2020 under File No. IV.ÚS 3508/19.

An employee reported an alleged breach of law by his employer (in connection with public procurement). The employee was subsequently dismissed by the employer for organisational reasons. The employee claimed that he had been dismissed as a result of reporting the mishandling of the public procurement procedure. In the subsequent court proceedings, the general courts found no causal link between the report made by the employee and his dismissal. The case was then brought before the Constitutional Court, which evaluated the constitutionality of the general courts' decisions.

The Constitutional Court found the decisions to be constitutional. It stated that:

*"the legal order of the Czech Republic does not yet provide for any explicit general protection of so-called whistleblowers (such as the period of protection against dismissal similarly provided to employees who are temporarily incapacitated for work). This protection cannot be inferred from the principles of a democratic state governed by the rule of law, either".*

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 has not yet been transposed into national law. With the deadline for transposing the Directive imminent, a bill is currently being deliberated by the government, which aims to establish explicit legal protection of so-called whistleblowers. This bill is projected to enter into force on 01 January 2020. It should be noted that the parameters of the bill as well as the bill's date of entry into force may change (considering that the bill is at the very beginning of the legislative procedure).

The decision of the Constitutional Court emphasises the need for the transposition of Directive (EU) 2019/1937 and the establishment of explicit protection for whistleblowers against retaliation.

The ruling diverges from earlier case law.

## 2.2 Working time, rest and meal breaks

*Supreme Court, No. 21 Cdo 3521/2019, 24 March 2020*

The Supreme Court has [ruled](#) that 30-minute rest and meal breaks are not part of working time, even if the need for the employee to perform work unexpectedly arises at any time during the course of such a break. The decision was issued on 24 March 2020 under File No. 21 Cdo 3521/2019.

The Labour Code (Sec 88) essentially provides for two types of rest and meal breaks:

- (ordinary) rest and meal breaks – a 30-minute break provided to every employee after 6 hours of uninterrupted work (4,5 hours for employees under 18 years of age) – rest and meal breaks are not considered part of working time; and
- so-called “adequate time for rest and meal breaks” – a necessary amount of time for rest and meal breaks provided in cases where work cannot be interrupted and where ‘ordinary’ rest and meal breaks cannot be provided to employees – such adequate time is considered to be part of working time.

In the present case, an employee (an airport firefighter) worked under an “uninterruptable shift regime” according to which employees rotate in 12-hour shifts covering 24 hours a day and 7 days a week. Within one 12-hour shift, the employee was scheduled by the employer to take two ordinary 30-minute rest and meal breaks. The employees were, however, required to respond to the employer’s call within 3 minutes. The employee claimed that he performed work that could not be realistically interrupted, that the rest and meal breaks were in reality an inadequate amount of time for a meal and rest and that they therefore were working time, and that he was entitled to remuneration for those breaks. The employees were not prohibited from leaving the workplace. It was found that during the relevant period, the employee was not called to respond when taking a rest and meal break. The employer claimed that the schedule had been created in such a way as to allow for employees to be able to enjoy 30-minute rest and meal breaks and for them to be substituted by another employee in case of a call to respond.

The Supreme Court stated that:

*“when assessing whether the employee was provided a rest and meal break or an adequate time for a rest and meal break, the nature of the work being performed by the employee is decisive. The sole fact that the employee performs work during an uninterruptable shift regime does not automatically lead to the conclusion that the employee could not have been provided an adequate rest and meal break. The main characteristic of work that is uninterruptable is that it cannot be interrupted in the course of the shift for objective reasons. Objective reasons can only be associated with technology of production, the labour process, or the performance of work that requires continuous control and activity on the part of the employee. The organisation of work within a given workplace does not constitute such an objective reason”.*

The Supreme Court concluded that the employee was not limited in taking his rest and meal breaks and that the work performed by the employee was not “uninterruptable work” – in this regard, the Supreme Court stated that not even the continuous possibility of a sudden necessity for the employee to interrupt his/her rest and meal break in order to perform work can influence these conclusions. The Court decided that in the present case, the employee was able to enjoy ordinary rest and meal breaks that were not considered to be a part of his working time.

The Supreme Court also stated that:

*"the conclusions reached by the CJEU in its judgment C-518/15 in the matter of Ville de Nivelles v Rudy Matzak cannot be applied in the present case. The CJEU dealt with the question whether the stand-by time of a worker who stays at home but is required to respond within 8 minutes in case of a call by the employer—and as such restricts the employee from using such time for other activities—can be considered working time or whether it should be considered rest time. The CJEU judgment does not deal with breaks for meals and rest in the workplace or with the nature of uninterruptable work".*

The Supreme Court reaffirmed its earlier position.

### 3 Implications of CJEU Rulings and ECHR

#### 3.1 Worker status

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

The CJEU ruled that

*"Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as precluding a person engaged by his putative employer under a services agreement which stipulates that he is a self-employed independent contractor from being classified as a 'worker' for the purposes of that directive, where that person is afforded discretion:*

- to use subcontractors or substitutes to perform the service which he has undertaken to provide;*
- to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks;*
- to provide his services to any third party, including direct competitors of the putative employer, and*
- to fix his own hours of 'work' within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer,*

*provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer. However, it is for the referring court, taking account of all the relevant factors relating to that person and to the economic activity he carries on, to classify that person's professional status under Directive 2003/88".*

Section 2(1) of the Labour Code states that dependent work means *"work that is performed within the relationship of superiority of the employer and subordination of the employee, on the employer's behalf, according to the employer's instructions, and in person".* Pursuant to Section 2(2) of the Labour Code, dependent work *"is performed in exchange for a salary, public sector pay, or remuneration, at the employer's expense and responsibility, during working time, and at the employer's workplace or any other agreed place".*

The Supreme Administrative Court has stated (see Decision No. 6 Ads 46/2013-35, 13 February 2014) that *"the common characteristic of dependent work is personal and economic dependence of the employee on the employer"*. It stated that the subordination of the employee is to a degree a "subjective category" – dependent on the employee's subjective perception. The consistency of an activity and the provision of remuneration for the performance of such an activity is not necessary for the activity to be deemed dependent work.

When assessing whether a given activity constitutes dependent work, the authorities must always take the individual circumstances of a given case into account.

According to Section 304 of the Labour Code, the employee can perform concurrent work for a competing entity operating in the same area of business as the employer only with the employer's prior written consent.

The flexibility of working hours is subject to the agreement between the employee and the employer (within the limits set by labour law).

Based on the above and with regard to current case law and administrative practice, Mr B.—the person for whom the CJEU formulated the above conclusions—would not be considered an employee under Czech law. In this regard, therefore, the definition of employee under national law conforms to the definition of the worker under Directive 2003/88/EC (as interpreted by the CJEU), and the scope of application of protection under Directive 2003/88/EC has been correctly transposed.

### 3.2 Working time and leaves

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

The CJEU ruled that

*"Articles 5 and 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as not being applicable to national rules providing for special leave on days when workers are required to work which do not allow those workers to claim that leave in so far as the needs and obligations met by that special leave arise during weekly rest periods or periods of paid annual leave that are the subject of those articles".*

"Special leave" within the meaning of the ruling above would, under Czech law, fall under the term "obstacles to work on the part of the employee". During obstacles to work on the part of the employee, the employee cannot perform work and fulfil his/her rights and obligations arising from the employment relationship (the employee can take leave and his/her salary is compensated in such cases to the extent determined by law) – as such, obstacles to work are (such as the special leaves considered by the CJEU) "inextricably linked to working time".

Obstacles to work, as a rule, only have effects in relation to and during the employee's working hours (and do not have any effect in the context of the employee's weekly rest period) – e.g. if an employee wants to attend his/her wedding outside his/ her working hours (during his/her weekly rest period), it does not constitute an obstacle to work and has no effect on his/her working hours.

As regards annual leave, pursuant to Section 217(4) of the Labour Code, the employer may not schedule the employee to take annual leave during a military exercise or an extraordinary military exercise, when the employee is recognised to be temporarily unfit to work, or during a time when a female employee is on maternity leave or parental leave or a male employee is on parental leave. In case of other obstacles on the part of the employee, e.g. a medical examination, wedding, birth of a child, death in the family, etc., the employee can only be scheduled to take annual leave upon his/her request.

Pursuant to Sec 219(1) of the Labour Code, if an employee commences a military exercise or an extraordinary military exercise in the armed forces, if he/she has been deemed temporarily incapacitated for work or if he/she is taking care of a sick family member while on annual leave, the annual leave will be considered as having been interrupted; this shall not apply if the employer specifies the period during which the employee is to take leave to take care of a sick family member or to participate in a military exercise or an extraordinary military exercise at the request of the employee.



The leave of a female employee is also deemed to have been interrupted upon the commencement of maternity leave and parental leave and the leave of a male employee is deemed to have been interrupted upon the commencement of parental leave. In other cases, the taking of annual leave is not considered to have been interrupted when an obstacle to work arises.

Based on the above, we can conclude that Czech legislation is in line with the CJEU's present ruling, as well as with the CJEU's preceding case law (in particular with regard to the concurrence of annual leave and illness).

#### **4 Other Relevant Information**

Nothing to report.

# Denmark

## Summary

COVID-19 has had a relatively low impact on Denmark in comparison to neighbouring countries and has reopened its society to a very large extent. Help packages have been extended but are now being phased out. A final suspension on the use of unemployment and sick leave benefits has been adopted. New legislative measures have been taken to improve the conditions for unemployed persons. First, unemployed may receive unemployment benefits of 110 per cent during vocational training or education. Second, the unemployed can, for a limited time, receive unemployment benefits from the first day of registration.

## 1 National Legislation

### 1.1 Measures to respond to COVID-19 crisis

#### 1.1.1 Easing of restrictions

Danish society was partially locked down by the government on 11 March 2020 due to the COVID-19 pandemic. As of 15 April 2020, a partial reopening of society began due to the relatively low number of intensive care patients. From 06 July 2020 onwards, society has reopened to a very large extent.

- **Restrictions of large gatherings** have been eased and may now include up to 100 persons (from 08 July) and up to 200 persons (from 08 August). Restrictions do not apply to private homes and gardens, at workplaces, inside religious buildings, at funerals, demonstrations with a political purpose, summer activities for children, schools and child care facilities.
- Borders are slowly reopening. Since 27 June, travel to and from countries are evaluated on the basis of objective criteria. The borders are open for citizens from countries that meet objective criteria (e.g. low number of infections), and depending on the country's testing regime. The same applies to Danes who want to travel, they are no longer required to self-isolate for 2 weeks upon returning from travel to countries that meet the relevant criteria. The Ministry of Foreign Affairs continually updates the list of countries/regions that meet the relevant criteria. Information on the criteria and the ongoing process of the reopening of borders is available [here](#).
- Restaurants, cafés, gyms, swimming pools, cinemas and theatres have reopened, with restrictions as well as guidelines to be followed.

Some new legislative measures are still being taken to mitigate the financial consequences of the COVID-19 pandemic and to improve the conditions for unemployed persons.

#### 1.1.2 Increased unemployment benefits during vocational training

A broad political majority has adopted measures to enhance the skill levels of unemployed persons. From 01 August 2020, unemployed persons who are over 30 years old will be entitled to vocational training or education while receiving unemployment benefits of 110 per cent. It is a requirement for the training to lead to obtaining a job that is in high demand. The scheme will apply until the end of 2021. Unemployed persons are normally only entitled to unemployment benefits of 80 per cent during vocational training or education (with the possibility of a loan for the remaining 20 per cent up to 100 per cent of benefits).



A press release on this issue is available [here](#).

### 1.1.3 Unemployment and sick leave benefits; right for self-employed persons

As mentioned in the March 2020 Flash Report, the Danish Parliament decided to suspend the use of unemployment benefits during the COVID-19 crisis, as it will be nearly impossible for unemployed persons to find full employment. The use of unemployment benefit hours was suspended for the period from 01 March to 31 May 2020. Effectively, this added three months of benefits and three months to the period of the right to receive benefits.

With a new [Act](#), Parliament has decided to extend and phase out the suspensions, so that the use of unemployment benefits is suspended until 31 August 2020. The use of supplementary unemployment insurance has likewise been suspended, as has the employer's right to not pay g-days, cf. March 2020 Flash Report.

Furthermore, the period of the right to sick leave benefits from the local municipality has been extended by three more months and will be phased out by 30 September 2020.

Finally, the Act introduces two new measures for self-employed persons.

First, self-employed persons are entitled to an extraordinary right to unemployment benefits without 12 months of prior contributions to an unemployment insurance fund ('a-kasse') in the period 9 July – 8 August 2020. Under the existing rules, a person is only entitled to unemployment benefits after one year of contributions to an unemployment insurance fund. The amendment confirms that self-employed persons are immediately entitled to benefits from the first day of registration. The self-employed person will have to pay one year of unemployment insurance back and commits him-/herself to pay one year of unemployment insurance going forward to the Unemployment Insurance Fund.

Second, between 09 July – 08 September 2020, self-employed persons are not required to shut down their business entirely while receiving unemployment benefits, if their business has been closed due to COVID-19 restrictions laid down by the authorities. Under the existing rules, self-employed persons are only entitled to unemployment benefits, if they have ceased their business activities, i.e. fully shut down the business. Currently, facilities such as discotheques and music venues are still closed.

Sources:

Information on the preliminary works to the Act is available [here](#).

A press release of the Employment Ministry on the proposal of the bill is available [here](#).

## 1.2 Other legislative developments

Nothing to report.

## 2 Court Rulings

Nothing to report.

## 3 Implications of CJEU Rulings and ECHR

### 3.1 Worker status

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

The case concerns the classification of a parcel delivery courier, who had entered into a service agreement with Yodel, a parcel delivery undertaking.

Although the service agreement concluded between Yodel and the courier classified the courier as a "self-employed independent contractor", B claims that his status was that of a "worker" for the purposes of Directive 2003/88/EC.

The case was decided by a reasoned order by the CJEU, as the case could clearly be deduced from existing case law or the answer to the question referred was of no reasonable doubt, cf. Article 99 of its rules of procedure.

Directive 2003/88/EC does not define the concept of "worker", but the CJEU has ruled that the concept has an autonomous meaning specific to EU law.

The Court reiterated its prior case law and stated that it is for the referring court to decide on the classification in the present case.

However, some points were made. The Court evaluated the facts presented and concluded first, that the courier's independence did not appear to be fictitious and, second, there did not, a priori, appear to be a relationship of subordination between him and his putative employer.

The ruling does not have implications for Danish law.

The Working Time Directive has been transposed in the [Danish Working Time Act](#), Act No. 896 of 24 August 2004. The Act applies to a worker who is defined as "... *a person that receives remuneration for personal work in an employment relationship*". This definition is commonly used in Danish labour law legislation.

There is, however, nothing to suggest that Danish courts will not apply the EU law concept of worker when determining the scope of applicability of the Danish Working Time Act, taking into consideration the points made by the Court.

It can be added that Danish courts have interpreted cases on working time in conformity with CJEU case law.

As an example, the rationale of the *Matzak* case, C-518/15, has been applied and explicitly referred to in a Danish High Court ruling concerning a paid driver and the interpretation of how to assess on-call time spent in the private home and whether it counts as working time, cf. Western High Court ruling of 26 August 2019 (ruling has not been made available publicly).

### 3.2 Working time and leaves

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

The dispute concerned the interpretation of the right to paid special leave in a Spanish collective agreement, which gives effect to minimum requirements set out in the Spanish Workers' Statute.

Such leave may be granted in case of e.g. marriage, the birth of a child, hospitalisation, surgery, the death of a close relative, and the performance of representative trade union functions.

The employees and the employer who were part of the dispute disagreed on whether that paid special leave must be calculated from the day the worker is required to work and should to be taken by the worker on such days (except for leave for marriage).

The referring court linked these questions with EU law and the associated rights for weekly rest and annual leave.

The question for the Court was, in essence, whether Articles 5 and 7 of Directive 2003/88/EC must be interpreted as precluding national rules that do not allow workers



to claim the special leave, when the right to such leave arises during weekly rest periods or periods of paid annual leave.

First, the Court (Grand Chamber) emphasised that the aim of Directive 2003/88/EC is simply to lay down minimum requirements for the health and safety of workers.

Second, the Court found that the special leave granted under the collective agreement did not fall within the scope of Directive 2003/88/EC, but rather was a result of a Member State exercising its own competences.

Such exercise of competences cannot have the effect of undermining the minimum protection enforced by the Working Time Directive. In this regard, the Court referred to its prior case law on sick leave, e.g. *Pereda C-277/08*.

The Court did not, however, find the right to paid special leave to be comparable to sick leave, as the right to special leave is inextricably linked to working time as such, and consequently, workers will not have recourse to such leave during weekly rest periods or periods of paid annual leave.

The Court found it untenable to conclude that workers should be able to use paid special leave in a subsequent working period, when that special leave forms part of the national rules that stand apart from the body of rules established by Directive 2003/88/EC.

In addition, the Court noted that the Spanish rules on paid leave appeared to—at least in part—fall within the Framework Agreement on Parental Leave (and therefore within Directive 2010/18/EU), although this was not clear from the information provided.

The Court did not, however, find that the minimum rights in Clause 7 of the Framework Agreement was comparable to the leave covered by the Court's settled case law stating that a period of leave guaranteed by EU law cannot affect the right to take another period of leave guaranteed by EU law, which has a different purpose from the former, cf. e.g. *Dicu, C-12/17*.

In conclusion, Articles 5 and 7 of Directive 2003/88/EC could not be interpreted as precluding national rules that do not allow workers to claim the special leave, when the right to such leave arises during weekly rest periods or periods of paid annual leave.

The ruling does not have implications for Danish law.

The Danish legislation does not contain a provision similar to the Spanish one, which grants the right to paid special leave in case of e.g. marriage, the birth of a child, the death of a relative, serious accident, illness, or hospitalisation of a close relative, the performance of trade union functions, etc.

Under Danish legislation and collective agreements:

- There is typically no right to paid leave in case of marriage;
- In case of childbirth, the mother is granted 14 weeks of maternity leave after the birth, and the father or co-mother is granted two weeks of paternity leave according to an agreement with the employer before the child reaches 14 weeks, cf. [Act on Maternity Leave](#). The leave may be with pay or daily allowances;
- There is a right to "bereavement leave" in case of the death of a child up to the age of 18 years. The Danish Parliament has recently [agreed](#) on a right to "bereavement leave" for up to six months for both parents. Today, parents are only granted leave from work in case of a stillborn baby or the death of a child up to the age of seven months. See link to Parliament Agreement below;
- In case of a close relative's serious accident, illness or hospitalisation, the leave entitlement depends on the individual employment relationship or collective agreement, whether leave (with or without pay) is granted or absence is justified. For instance, municipal employees may leave work for a "short duration" in case

of an accident or immediate illness in the family. It is up to the employer whether such leave is paid. Municipal employees may take up to ten days of leave per year in case of a child's hospitalisation. Such leave is paid with the ordinary salary (see also the [Municipal Collective Agreement on Absence from Work due to Family Matters, 2018](#));

- The performance of trade-union functions is, as a general rule, considered justified absence, and representatives are specifically granted "necessary time" for this work in public collective agreements;
- Outside the scope of the abovementioned rules and collective agreements, an employee may only take leave if he/she can reach an agreement with the employer.

It does not appear that these Danish rules on the right to special leave have been made subject to EU-conform interpretation in light of the rules on working time. There is no case law on this.

The ruling of the Court underlines/clarifies that these nationally adopted rules (or practices) on the right to absence from work or leave in special cases are not covered by Directive 2003/88/EC, and that such national rules do not conflict with the Directive, where such right is not granted during weekly rest periods or periods of paid annual leave.

The Danish legislation and collective agreements contain provisions extending the annual leave periods in excess of the 4 weeks provided by the Working Time Directive:

- The Danish Holiday Act grants employees a right to 5 weeks of paid annual leave, i.e. an additional week;
- Many collective agreements grant employees an additional 5 days of paid leisure days ('*Feriefridage*'), i.e. a further additional week of leave.

These additional weeks/days are not a result of implementation of the minimum guarantees in the provisions of the Working Time Directive. The weeks that are not part of the Working Time Directive are not perceived as falling within the scope of the rights provided there, and i.e. are not subject to the right to replacement leave in case a person falls sick during annual leave. Replacement leave is applied to the 4 weeks provided in the Working Time Directive, but the rules on replacement for the remaining 1 week in the Danish Holiday Act is not subject to the rules on replacement with regard to annual leave, i.e. *Pereda C-277/08*.

The ruling of the Court confirms the Danish perception of the *EU acquis*.

## 4 Other Relevant Information

Nothing to report.

# Estonia

## Summary

The Estonian Supreme Court has ruled that an extension of a collective agreement is only possible for employers who have participated in collective bargaining.

## 1 National Legislation

### 1.1 Measures to respond to COVID-19 crisis

Nothing to report

### 1.2 Other legislative developments

Nothing to report.

## 2 Court Rulings

### 2.1 Extension of collective agreements

*Supreme Court, No. 2-18-7821, 15 June 2020*

According to the [Estonian Collective Agreements Act](#) ('kollektiivlepingu seadus'), it is possible to extend certain categories of collective agreements.

Section 4 of the Collective Agreements Act states that a collective agreement entered into between an association or a federation of employers and an association or a federation of employees and a collective agreement entered into between a confederation of employers and a confederation of employees may be extended by agreement of the parties in respect of the conditions determined in the law. Those conditions are wage conditions and working and rest time conditions. The scope of extension is to be determined in the collective agreement. The terms and conditions of extended collective agreements is published by the minister responsible in the official publication '*Ametlikud Teadaanded*' (Official Notifications). The terms and conditions of extended collective agreements enter into force on the day following the publication of the notice.

To date, there have been a number of collective agreements, especially in the transport sector where the conditions of a collective agreement were extended without question.

In a recent case, the Estonian Supreme Court [stated](#) that an extension of a collective agreement by an employer who was not a part of the collective bargaining process is not in line with the meaning of the law. Therefore, the extension of a collective agreement is only possible if the employer had an opportunity to influence the negotiations.

The decision of the Estonian Supreme Court questions quite a number of collective agreements and leaves a number of employees without the necessary protection (especially in terms of minimum wages and work and rest time).

## 3 Implications of CJEU Rulings and ECHR

### 3.1 Working time and leaves

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

The present CJEU case concerned the specific issue of special leave for employees and how and when such leave should be granted to an employee. The case also concerned the application of a collective agreement and the application of more favourable conditions.

The implications of the case for Estonian labour law is modest. Estonian labour law does not have a similar list of situations when an employee may take leave for personal reasons with pay. Only one situation is specified in the law. According to the Employment Contracts Act S 38, an employee can take leave for a short period if he/she has personal reasons. An employer will pay the employee's average wage for a reasonable period of leave for personal reasons.

As e no other special leaves exist, it is possible for the parties of a collective agreement to agree on such periods of leave as well as on the conditions of such leaves. Only in such situations would the present case bear any relevance.

### 3.2 Worker status

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

The present case concerned the application of the Working Time Directive, but at the same time addresses the classification of the notion of "worker". The case is of relevance for Estonian labour law, because it clarifies how the notion of worker can be understood and what types of characteristics apply. The case does not provide any new characteristics of an employment relationships, but clarifies what characteristics apply in which situations.

## 4 Other Relevant Information

Nothing to report.

# Finland

## Summary

(I) The government has extended the validity of the amendments to the labour legislation that were enacted in response to the COVID-19 crisis in March 2020. The validity of these temporary amendments was extended until the end of 2020.

(II) A government proposal for the implementation of the renewed Posted Workers Directive is still being discussed in Parliament.

(III) The Supreme Court issued a judgment on the announced sympathy actions that targeted only a specific group of undertakings that were excluded from the collective bargaining process in question. The Supreme Court held that the undertakings had not proven that the announced sympathy actions would have been discriminatory and that they contradicted good custom.

## 1 National Legislation

### 1.1 Measures to respond to COVID-19 crisis

#### 1.1.1 Extension of temporary amendments to several laws

On 05 June 2020, the Government Proposal on amendments to the Employment Contracts Act, the Seafarers' Employment Contracts Act and the Act on Cooperation within Undertakings Proposal No. 92/2020) was submitted to Parliament. The Proposal was based on a proposition by the Finnish labour market confederations to extend the validity of the temporary amendments to these Acts. These temporary amendments were enacted in March 2020. According to the Government Proposal, it is deemed necessary to continue the measures that have secured the livelihoods of jobseekers and entrepreneurs and have helped businesses overcome the severity of the crisis. The extension of the temporary amendments' validity was accepted by Parliament and they were thus extended until the end of 2020.

Similarly, based on Government Proposal No. 93/2020, the temporary amendments made to the Unemployment Security Act, the Act on Financing Unemployment Benefits and the Act on Unemployment Funds will be in force until the end of 2020.

### 1.2 Other legislative developments

#### 1.2.1 Posted workers

Parliament is still discussing Government Proposal No. 71/2020 to transpose the renewed Posted Workers Directive (EU) 2018/957. The Proposal was submitted to Parliament in May. In the Proposal, the government proposes the amendments to the Posted Workers Act to enter into force on 30 July 2020.

## 2 Court Rulings

### 2.1 Collective Action

*Supreme Court, No. 2020:50, 24 June 2020*

Trade unions had decided to support a trade union in its collective bargaining efforts with sympathy actions, which would have involved a group of undertakings that were outsiders to the bargaining process. The undertakings of the group requested for the trade unions to be prohibited from taking sympathy action measures. They claimed that

the measures would have been discriminatory and contradicted good custom. The Supreme Court held that the undertakings had not proven that the announced sympathy actions would have been discriminatory or that they violated the law or good custom or that they were unreasonable.

According to the Supreme Court, trade unions that take sympathy actions have discretion *per se* about how they target their actions. This discretion was not used wrongly or in a discriminatory way only because the sympathy action was meant to target specific undertakings. only.

## **2.2 Annual leave**

*Labour Court, No. TT 2020:61, 30 June 2020*

The Labour Court decided two cases based on a CJEU judgment issued on the basis of the Labour Court's reference to the CJEU (joined cases C-609/17 and C-610/17, 19 November 2019). In the case TT 2020:61, the Labour Court, referring to the CJEU judgment in cases C-609/17 and C-610/17, held that a collective agreement provision, which was based on the Annual Holidays Act, could state that an employee who was incapacitated for work at the beginning of an annual leave period or a part thereof, did not have the right to transfer the annual leave based on the applicable collective agreement.

*Labour Court, No. TT 2020:62, 30 June 2020*

In another case, TT 2020:62, based on the above mentioned CJEU judgment, the Labour Court stated that a collective agreement provision, which was based on the Annual Holidays Act and did not provide the employee the right upon request to transfer the first six annual leave days due to incapacitation for work which started at the beginning of the annual leave period or part thereof, was not contradictory to Article 7.1 of the Working Time Directive, if these days did not diminish the employee's right to four weeks of annual leave.

## **3 Implications of CJEU Rulings and ECHR**

### **3.1 Worker status**

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

The CJEU held that Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as precluding a person engaged by his putative employer under a services agreement, which stipulates that he is a self-employed independent contractor, from being classified as a 'worker' for the purposes of that Directive, where that person is afforded discretion: to use subcontractors or substitutes to perform the service which he has undertaken to provide; to accept or not accept the various tasks offered by his putative employer, or to unilaterally set the maximum number of those tasks; to provide his services to any third party, including direct competitors of the putative employer, and to fix his own hours of 'work' within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer, provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer. However, it is for the referring court, taking account of all the relevant factors relating to that person and to the economic activity he carries out, to classify that person's professional status under Directive 2003/88.

The Working Hours Act contains provisions on the personal sphere of application of the Act, which are to be interpreted in line with CJEU case law.

### **3.2 Working time and leaves**

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

The Court ruled that that Articles 5 and 7 of Directive 2003/88 must be interpreted as not being applicable to national rules providing for special leave on days when workers are required to work, which do not allow those workers to claim that leave in so far as the needs and obligations met by that special leave arise during weekly rest periods or periods of paid annual leave that are the subject of those articles.

The Working Hours Act contains provisions on working hours and weekly rest and the Annual Holidays Act provisions on annual leave must be interpreted in line with the case law of the CJEU.

## **4 Other Relevant Information**

### **4.1 Non-competition clauses**

The Council of Regulatory Impact Analysis issued its statement on a draft of a government proposal containing plans for a reform of labour legislation concerning non-competition clauses on 18 June 2020. The Council made suggestions to develop an impact assessment provided by the draft proposal. The Council stated that the analysis of the present situation and use of non-competition clauses should be carried out in more detail so that the impact of the amendments planned and available alternatives in terms of the most effective means to address the existing problems can be assessed.

### **4.2 Gender pay gap**

*European Committee of Social Rights, No. 129/2016, 29 June 2020, Groupe européen des femmes diplômées des universités (UWE) c. Finlande*

The European Committee of Social Rights stated in its decision that measures to reduce the gender pay gap have not been sufficiently effective in Finland when measured by the gender pay gap in the entire labour market. The legal remedies available are not sufficient in a situation where a person is dismissed as a countermeasure to the requirement of equal pay because Finnish law does not require reinstatement of employment. The Committee stated that Finland should take measures to ensure that the gender pay gap is reduced within a reasonable time. The Committee issued its ruling on a collective complaint concerning pay equality lodged by the University Women of Europe against Finland and 14 other states. The complaint concerned Article 4 on the right to a fair remuneration and Article 20 on the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex of the revised European Social Charter. The Committee considered that Finnish legislation violates Article 4, paragraph 3 and Article 20 of the Charter.



# France

## Summary

- (I) Laws, ordinances and decrees in the context of COVID-19 anti-crisis measures have been published.
- (II) New rules on bereavement leave and the early release of employee saving schemes have been enacted.
- (III) The Court of Cassation has ruled on working time, part-time employment, the dismissal of a disabled worker, and Sunday rest.

## 1 National Legislation

### 1.1 Measures to respond to COVID-19 crisis

[Law No. 2020-734 of 17 June](#) published on 18 June 2020 provides for new labour regulation measures to deal with the economic impact of the health crisis.

#### 1.1.1 Partial activity

(i) Donation of rest days to compensate employees for loss of remuneration (Article 6)

A collective bargaining agreement (company or branch level) may authorise the employer to require employees a in partial activity with their full remuneration to assign rest days as set out in the collective agreement or part of their annual leave exceeding 24 working days to a solidarity fund to be monetised to compensate for the reduction in pay of employees placed in partial activity who do not receive full remuneration.

In addition, a company or branch agreement may authorise the monetisation of rest days set out in the collective agreement or part of the annual leave exceeding 24 working days for employees placed in partial activity without full remuneration to compensate for their loss of remuneration.

(ii) Creation of a specific programme for long-term partial activity (Article 53)

The Extended Partial Activity Programme ("*Activité Partielle Longue Durée*" - "APLD") was established to limit the risk of mass redundancy.

The creation of this programme entitles companies facing a long-term reduction of their activity to an increase of the partial activity allowance paid to the employees and to an increased rate of the partial activity allowance, under conditions to be set by decree.

The programme enters into force on 01 July 2020 and will apply until 30 June 2022.

It can be implemented by a collective agreement, authorised by the Direccte (Regional Directorate for Companies, Fair Trading, Consumer Affairs, Labour and Employment).

The agreement must provide for :

- the duration of the agreement ;
- the targeted activities and employees,
- the reduction of working time to be compensated (maximum reduction of 40 per cent per employee);
- the specific commitments taken into consideration, inter alia, in terms of job maintenance and possible reduction of the headcounts.

A decree will be published to provide further details in this regard.

This new programme can also be implemented by a unilateral document. In this case, the document must comply with a nationwide agreement and requires prior consultation of the works council (the Social and Economic Council).

[Decree No. 2020-794 of 26 June](#) introduces new amendments to the conditions of recourse to partial activity.

(i) The prior opinion of the Social and Economic Council in companies with more than 50 employees (Article 1)

According to [Article R. 5122-2 of the Labour Code](#), the request for authorisation of partial activity submitted by the employer must be attached with the prior opinion of the Social and Economic Council (hereinafter: CSE).

The decree specifies that this prior opinion is only compulsory in companies with at least 50 employees. This clarification was necessary because the decree of 25 March 2020 did not mention a minimum number of employees and therefore implied that consultations of the CSE were also compulsory for undertakings with fewer than 50 employees.

(ii) Procedure in case of individualised partial activity (Article 3)

[Ordinance No. 2020-460 of 22 April 2020](#) allows employers to individualise the implementation of partial activity within their company. The employer may

*"place only part of the employees of the company, establishment, service or workshop, including those belonging to the same professional category, in partial activity or apply a different distribution of hours worked and not worked to these employees, when this individualisation is necessary to ensure the continuity or recovery of activity"*

on the basis of:

- a company or establishment collective agreement or, in the absence thereof, of a branch agreement;
- in the absence of an agreement, after a favourable opinion from the CSE.

The decree specifies that the company or establishment collective agreement or the favourable opinion of the CSE must be submitted to the administrative authority:

- at the time of submission of the request for prior authorisation of partial activity;
- or, if the authorisation has already been issued on the date of signature of the agreement or delivery of the opinion, within 30 days of that date.

Employers who had already set up individualised partial activity prior to the publication of the Decree have 30 days after its publication to submit the agreement or opinion to the administration, i.e. by 28 July 2020 at the latest (the decree having been published in the Official Journal on 28 June).

(iii) Prior request for partial activity for companies with 50 or more establishments (Article 4)

Pursuant to [Article R. 5122-2 of the Labour Code](#), any prior request for partial activity must be addressed by the employer to the prefect of the department where partial activity is established.

To facilitate the administrative procedures for multi-establishment companies, the decree, when the request for prior authorisation for partial activity relates for the same reason and for the same period to at least 50 establishments located in several departments, allows for the employer to submit a single request for all establishments to the prefect of the department in which any of the respective establishments are located.

### 1.1.2 Fixed-term employment

(i) Fixed-term employment contracts (CDD) and temporary employment contracts (CTT) (Article 41)

To deal with the economic, financial and social consequences of the COVID-19 pandemic, a company agreement will be able to adapt several rules relating to precarious contracts. Thus, for fixed-term employment contracts and temporary employment contracts concluded until 31 December 2020, a company agreement will be able to:

- set the maximum number of possible renewals, without this number having either the object or the effect of permanently filling a job linked to the company's normal and permanent activity. With regard to fixed-term contracts, this provision does not apply to contracts concluded in application of [Article L.1242-3 of the Labour Code](#) (fixed-term employment contracts concluded to promote the recruitment of persons who have difficulties accessing the labour market or to provide them with additional training);
- set the methods for calculating the waiting period between two successive contracts for the same job;
- provide for cases in which the waiting period is not applicable.

For temporary employment contracts exclusively, Article 41 of the law provides that the company agreement may authorise the use of temporary employees outside the cases listed in [Article L.1251-6 of the Labour Code](#) (replacement, temporary increase in activity, seasonal or customary employment, in particular). Consequently, user companies may conclude temporary employment contracts for any purpose. Nevertheless, temporary employment contracts shall not have the purpose or effect of permanently filling a job related to the normal and permanent activity of the user company.

(ii) Loan of workforce (Article 52)

To be legal, the loan of workforce must be for non-profit purposes and must comply with the conditions set out in [Article L. 8241-2 of the Labour Code](#) (agreement of employee formalised by an amendment with compulsory information specifying, in particular, the working hours in the user company, employee assignment agreement for each employee concerned, etc.)

In the context of the current health crisis, the aim of Article 52 of Law No. 2020-734 of 17 June 2020 is to make the use of the loan of workforce more flexible to facilitate the temporary transfer of employees.

- *A single employee assignment agreement for several employees*

Until 31 December 2020, the lending company and the user company can sign one labour loan agreement only for the provision of several employees.

This loan of workforce may be agreed between undertakings belonging to the same group but also between unrelated undertakings.

- *Content of the amendment to the employment contract*

The loan of workforce also requires the signing of an amendment to the employment contract of the employee concerned. As a reminder, such an amendment must normally specify the work the assigned employee will be performing in the user company, the time and place of performance of the work, and the specific characteristics of the work.

Until 31 December 2020, this amendment does not have to include the working hours but must specify the weekly volume of working hours during which the employee is made available.

The working hours are set by the user company with the agreement of the employee.

- *Information and consultation of the Social and Economic Council (CSE)*

Prior information and consultation of the Social and Economic Council mentioned in the twelfth and last paragraphs of [Article L. 8241-2 of the Labour Code](#) may be replaced by consultations on the various agreements signed, carried out within a maximum period of one month from the signing of the assignment agreement.

- *Principle of non-profit making*

Until 31 December 2020, if the interest of the user company justifies it and in view of the economic difficulties related to Covid-19 and when it falls within sectors that are essential for the continuity of economic life and the security of the nation determined by decree, the loan of workforce is not for profit within the meaning of [Article L. 8241-1 of the Labour Code](#) for user companies, even when the amount invoiced by the lending company is less than the wages paid to the employee, the related social security contributions and the professional expenses reimbursed to the person concerned in respect of his/her temporary assignment or is equal to zero.

### 1.1.3 Foreign workers

Articles 9 and 15 of the Law No. 2020-743 extends:

- the multi-annual residence permit for seasonal workers in France from 16 March 2020 until 10 January 2021 and;
- the period of validity of residence permits expiring between 16 May and 15 June 2020, up to a maximum of 180 days.

### 1.1.4 Employer subsidies

[Ordinance No. 2020-770 of 24 June](#) published on 25 June 2020 reflects some of the changes in force since 01 June on the rate of the partial allowance paid to the employer as a reimbursement of the indemnities paid to its employees.

Article 1 of the Ordinance provides that

*"by derogation from the provisions of [Article L. 5122-1 of the Labour Code](#), the hourly rate of the partial activity allowance may be modulated according to the sectors of activity and the characteristics of the companies, taking into account the economic impact of the health crisis on the latter, as from 1 June 2020 and until a date fixed by decree, and no later than 31 December 2020".*

In this respect, [Decree No. 2020-810](#) published on 30 June 2020 indicates that this hourly rate is applicable from 01 June until 30 September 2020.

The Ordinance distinguishes:

- the sectors of activity that fall under the ordinary rate of allowance, as amended since 01 June;
- and other sectors particularly affected by the health crisis in view of the reduction in their activity due in particular to their dependence on public reception. These sectors will thus be able to continue to benefit from 100 per cent coverage of the compensation paid to employees until 30 September 2020. The following are covered:

- tourism, hotels, restaurants, sports, culture, air transport and events;
- companies in related sectors that have suffered a significant decline in activity and a significant decline in their turnover;
- employers whose main activity is in other sectors involving public reception and which is interrupted due to the spread of the COVID-19 pandemic, excluding voluntary closures.

## 1.2 Other legislative developments

### 1.2.1 Bereavement leave

Law No. 2020-692 "*to improve workers' rights and support families after the death of a child*" published on 09 June 2020 extends the leave in case of a child's death and introduces a new leave.

The law also extends the mechanism for donating rest days already provided for in the Labour Code to bereaved parents and improves their social rights.

#### (i) Extension of leave in case of the death of a child

The law extends the leave in case of a child's death to a minimum of 7 working days in the event of the death:

- of a child under 25 years of age;
- of a child, regardless of age, if the child was a parent;
- a person under 25 years of age who was effectively and permanently dependent on the employee.

In other words, the leave remains for a minimum of 5 days in the event of the death of a child aged 25 years and older who does not have a child of his/her own.

This extension to 7 days applies to deaths that occur on or after 1 July 2020.

#### (ii) Eight days of bereavement leave

The law creates an eight day bereavement leave granted in the event of the death of a child or person under the age of 25 years who was effectively and permanently dependent on the employee. This bereavement leave applies in the context of deaths that occur after 01 July 2020 ([Article L.3142-1-1 of the Labour Code](#)).

Such leave may be taken within one year of the child's death and may be divided under the conditions laid down by the decree (to be published). The employee must inform his/her employer at least 24 hours before the start of such leave and of each period of absence.

The duration of such leave is treated as working time for the purposes of determining the entitlement to paid leave ([Article L. 3142-2 of the Labour Code](#)) and profit-sharing schemes "*intéressement*" ([Article L. 3314-5, 1° of the Labour Code](#)) and "*participation*" ([Article L. 3324-6, 1° of the Labour Code](#)).

The Labour Code provides that bereavement leave must not entail any loss of remuneration for the employee ([Article L.3142-2 of the Labour Code](#)).

#### (iii) A new case of donation of rest days

Article 3 of 08 June 2020 extends the procedure for the donation of rest days provided for in [Article L. 1225-65-1 of the Labour Code](#) to employees in the event of the death of a child or a person under the age of 25 years who was effectively and permanently dependent on them. This donation of rest days may occur within one year of the child's death.

(iv) Donation of rest days

The law extends the mechanism for the donation of rest days provided for in [Article L. 1225-65-1](#) of the Labour Code to employees in the event of the death of a child or a person under the age of 25 years who was effectively and permanently dependent on them. This donation of rest days may occur within one year of the child's death.

(v) Protection against dismissal

A period of protection against dismissal is established, during the 13 weeks following the death of a child under 25 years of age or of a person under the age of 25 years who was effectively and permanently dependent on the employee.

Only serious misconduct or the impossibility of maintaining the employment contract for a reason unrelated to the death of the child may be invoked by the employer to terminate the employment contract during this period.

### 1.2.2 Employee saving schemes

[Decree No. 2020-863 of 04 June 2020](#) creates a new case for the early release of employee saving schemes for victims of domestic violence.

A member of a company savings plan ('*Plan d'épargne d'entreprise*' – PEE) or inter-company savings schemes ('*Plan d'épargne inter-entreprise*' – PEI) may release the assets in the event of violence committed against him/her by his/her spouse, common-law spouse ('*concubin*') or PACS partner (civil pact of solidarity), but also by his/her former spouse, former common-law spouse or former PACS partner ([Article R. 3324-22 of the Labour Code](#)):

- when a protection order is issued in his/her favour by the family court pursuant to [Article 515-9 of the Civil Code](#);
- or when the acts he/she has suffered fall within the scope of [Article 132-80 of the Criminal Code](#) and give rise to an alternative to prosecution, a criminal composition, the opening of an investigation by the public prosecutor, referral to the criminal court by the public prosecutor or the investigating judge, an indictment or a criminal conviction, even if not final.

Contrary to the other cases of early release of assets from such savings schemes, the requests do not have to be made within 6 months of the occurrence of the event.

## 2 Court Rulings

### 2.1 Working time

*Labour Division (Chambre sociale) of the Court of Cassation, No. 18-18.836, 03 June 2020*

In the present case, an employee, who had been hired as an airport security operating officer, argued that her employer did not pay her break times, which should have been qualified as working time, in particular because the employee had to remain at her workplace and in uniform, could be called on at any time, in particular because of the delayed arrival of an aircraft and was subject to unannounced checks by the employer. According to her, this meant that she was at the employer's disposal during her break, which had to be considered working time.

Pursuant to [Article L. 3121-1 of the Labour Code](#), "*the effective working time is the time during which the employee is at the employer's disposal and complies with its instructions without being able to freely carry out personal activities*". The time needed for performing work and the time for breaks are regarded as effective working time



when the employee is in fact at the employer's disposal and must comply with his/her instructions without being able to freely carry out personal activities ([Article 3121-2 of the Labour Code](#)).

The Court of Appeal considered that the mere fact that the employee was required to wear a work uniform during her break or that she was unable to leave the establishment during the break time could not be considered effective working time.

The French Supreme Court [confirmed](#) the decision handed down on appeal, emphasising that it was clear in this case that during her break, the employee was free to stay in the break room or to move around freely. The mere obligation to behave professionally and to remain in her working clothes when within the airport premises were not sufficient elements to requalify the break time as working time. The employee was not at the employer's disposal during her breaks.

*"Mais attendu qu'ayant constaté que pendant ses temps de pause la salariée était libre de rester dans le local prévu à cet effet ou d'aller où bon lui semblait et que pesait sur elle la seule obligation de présenter un comportement irréprochable et de rester en tenue de travail pour évoluer au sein de l'aéroport, la cour d'appel, qui n'était tenue de procéder ni à une recherche qui ne lui était pas demandée ni à une recherche que ses constatations rendait inopérante, a pu en déduire que la salariée ne se trouvait pas, pendant son temps de pause, à la disposition de l'employeur ; que le moyen, qui en sa troisième branche manque par le fait qui lui sert de base, n'est pas fondé ;"*

This ruling is in line with previous case law. For instance, the fact that the employee is required to wear working clothes during the break does not result in this time being considered effective working time ([Cass. soc., No. 05-44.396, 30 May 2007](#) and [Cass. soc., No. 13-16.645, 15 October 2014](#)).

## 2.2 Part-time work

*Labour Division (Chambre sociale) of the Court of Cassation, No. 13-16.645, 03 June 2020*

In the present case, an employee was hired as an occasional worker and brought a claim regarding his intermittent employment contract to be reclassified as a full-time contract of indefinite duration because his contract did not indicate the "adjustment provisions" provided for by the collective agreement when the periods worked could not be defined in advance in the employment contract.

The investigators' appendix of 16 December 1991 attached to the Syntec national collective agreement provides that when the employment contract does not contain any distribution of working hours, the employer must respect a period of notice of three days to call on the occasional employee. However, this was not indicated in the employee's employment contract. Thus, according to him, this omission should have led to the reclassification of his intermittent employment contract as a full-time employment contract.

In accordance with [Article L. 3123-34 of the Labour Code](#), the intermittent employment contract is a written contract and must include the employee's qualifications, the elements of remuneration, the employee's minimum annual working time, the work periods and the distribution of working hours within these periods.

In certain sectors, the list of which is determined by decree, where the nature of the activity does not make it possible to precisely set the working periods in the contract, the agreement or extended collective agreement must determine the necessary adaptations and, in particular, the conditions under which the employee may refuse the dates and working hours proposed to him/her ([Article L. 3123-38 of the Labour Code](#)).



It should be noted that since [Law No. 2016-1088 of 08 August 2016](#) was introduced, a decree determines the sectors in which the nature of the activity does not allow a precise setting of working periods and the distribution of working hours within these periods. Today, this derogation is only allowed in the live and recorded entertainment sector ([Article D. 3123-4 of the Labour Code](#)).

In the present case, the Court of Appeal held that this failure created only a simple presumption of full-time work, the employer being allowed to prove otherwise.

The Court of Cassation [upheld](#) the decision of the Court of Appeal. Accordingly, "*the omission of such an indication creates a simple presumption of full-time work which the employer may refute by providing evidence that the employee did not have to be at his disposal permanently*".

In other words, the failure to indicate in the contract (in the absence of indicating the working periods), the contractual notice period (adjustments provided for by the collective agreement applicable to the company) does not automatically lead to the reclassification of the intermittent permanent contract as a full-time permanent contract. This omission only creates a simple presumption of full-time work. It is up to the employer to prove that the employee did not have to be at his disposal permanently (which the employer managed to demonstrate in this case).

*«Réponse de la Cour*

*6. Il résulte de l'article L. 212-4-9 du code du travail, applicable au litige, que dans les cas où la nature de l'activité ne permet pas de fixer avec précision les périodes de travail et la répartition des périodes de travail au sein de ces périodes, la convention ou l'accord collectif étendu détermine les adaptations nécessaires et notamment les conditions dans lesquelles le salarié peut refuser les dates et les horaires de travail qui lui sont proposés.*

*7. En application de ces dispositions, l'article 3 de l'annexe enquêteurs du 16 décembre 1991 attachée à la convention Syntec, dans sa partie applicable aux chargés d'enquête intermittents à garantie annuelle, intitulé conditions d'accès, prévoit que les périodes de travail n'étant pas définies au contrat, l'employeur devra respecter un délai de prévenance de trois jours ouvrables, que toutefois, l'employeur pourra faire appel aux chargés d'enquêtes intermittents à garantie annuelle pour toutes les enquêtes qui ne permettent pas le respect de ce délai, mais dans ces cas, la non-acceptation du salarié ne pourra pas être considérée comme un refus de travail et sera sans conséquence sur la relation contractuelle entre le salarié et son employeur, et l'article 8 de ce même texte se rapportant à la forme du contrat prévoit que l'engagement du chargé d'enquête précise le délai de prévenance de trois jours ouvrables prévu à l'article 3 de la présente annexe.*

*8. La cour d'appel, après avoir constaté que le contrat de travail ne comportait pas de mention du délai de prévenance, a exactement retenu que l'omission d'une telle mention crée une présomption simple de travail à temps complet que l'employeur peut renverser en rapportant la preuve que le salarié n'avait pas à se tenir en permanence à sa disposition.*

*9. Le moyen n'est donc pas fondé.»*

The Court of Cassation aligned the sanction with the one it applies in the absence of indication in the employment contract of the minimum working hours or the distribution of working hours within the work periods ([Cass. soc., No. 09-42.682, 30 November 2010](#)).

## 2.3 Dismissal of a disabled worker

*Labour Division (Chambre sociale) of the Court of Cassation, No. 18-21.993, 03 June 2020*

An employee was a victim of a work accident and was classified as being disabled. He was subsequently dismissed for incapacity and impossibility of redeployment.

According to case law, in the event of an employer's failure to comply with its obligation to redeploy an unfit employee (Articles [L. 1226-2](#) and [L. 1226-10](#) of Labour Code), the dismissal has no real and serious cause. However, the dismissal may be null and void if it concerns an employee who has the status of a disabled worker, for whom the redeployment obligation is reinforced.

Indeed, pursuant to [Article L. 5213-6 of the Labour Code](#), to ensure compliance with the principle of equal treatment with regard to disabled workers, employers must take appropriate measures according to the needs of the specific situation, to enable workers to access or keep their job corresponding with their qualifications, to exercise or advance or to provide them with training adapted to their needs. These measures must be taken provided that the costs resulting from their implementation are not disproportionate (*Cass. soc.*, No. 15-28.991, 22 June 2017), taking into account the assistance provided for in [Article L. 5213-10](#), which may offset all or part of the expenses borne by the employer in this respect.

The Court of Appeal found that the employer had not seriously fulfilled its redeployment obligation and that the employee was the victim of discrimination because of his state of health and disability. It thus annulled the employee's dismissal:

- the e-mails sent by an HR trainee to the other regional departments of the group did not indicate that redeployment searches were carried out within the group among the activities authorising the permutation of staff in areas of activity other than cleaning;
- the employer did not produce all the responses from the agencies contacted by the trainee and did not justify job studies or research into the layout of the workstation in accordance with medical recommendations;
- the stereotypical and purely formal e-mails sent to the agencies, which were not justified as being the only agencies likely to be questioned, did not give rise to any serious exploitation and no request for additional information was made;
- the employer did not consult the SAMETH (service responsible for preventing the loss of employment of disabled workers) to find a solution that would allow the disabled employee to keep his job, even though the disabled employee had twice asked him to do so and thus lost his chance of keeping his job.

The employer contested the Court of Appeal's decision, claiming that it had carried out serious redeployment research in line with the employee's wishes not to be reclassified outside a specific area, that the employer was not required to refer the matter to the SAMETH in the context of its redeployment obligation and that, finally, the employer's failure to fulfil its redeployment obligation entails dismissal without real and serious cause and not the nullity of the dismissal.

However, the French Supreme Court considered that the employer had not seriously and loyally fulfilled its redeployment obligation. Indeed, it did not justify job studies or research of adjustments to the employee's position, nor did it consult the SAMETH, despite having been requested to do so twice by the employee. The Court [concluded](#) that the employer had refused to take appropriate measures to enable the worker to retain his job, and hence the dismissal constituting discrimination on the ground of disability was null and void.

*«Mais attendu, d'abord, que la cour d'appel a estimé, par une appréciation souveraine des éléments de preuve qui lui étaient soumis, hors toute dénaturation, que l'employeur n'avait pas exécuté sérieusement et loyalement son obligation de reclassement ;*

*Attendu, ensuite, que si le manquement de l'employeur à son obligation de reclassement a pour conséquence de priver de cause réelle et sérieuse le licenciement prononcé pour inaptitude et impossibilité de reclassement, l'article L. 5213-6 du code du travail dispose qu'afin de garantir le respect du principe d'égalité de traitement à l'égard des travailleurs handicapés, l'employeur prend, en fonction des besoins dans une situation concrète, les mesures appropriées pour leur permettre d'accéder à un emploi ou de conserver un emploi correspondant à leur qualification, de l'exercer ou d'y progresser ou pour qu'une formation adaptée à leurs besoins leur soit dispensée, que ces mesures sont prises sous réserve que les charges consécutives à leur mise en œuvre ne soient pas disproportionnées, compte tenu de l'aide prévue à l'article L. 5213-10 qui peut compenser en tout ou partie les dépenses supportées à ce titre par l'employeur, et que le refus de prendre ces mesures peut être constitutif d'une discrimination au sens de l'article L. 1133-3 ;*

*Et attendu que la cour d'appel, qui a constaté que l'employeur, nonobstant l'importance de ses effectifs et le nombre de ses métiers, ne justifiait pas d'études de postes ni de recherche d'aménagements du poste du salarié, et qu'il n'avait pas consulté le Service d'appui au maintien dans l'emploi des travailleurs handicapés (SAMETH), bien qu'il y ait été invité à deux reprises par le salarié, a pu en déduire qu'il avait refusé de prendre les mesures appropriées pour permettre à ce dernier de conserver un emploi, ce dont il résultait que le licenciement constitutif d'une discrimination à raison d'un handicap était nul;»*

In a previous judgment, the Court of Cassation, for example, held that there was no breach of the employer's obligation to take appropriate measures within the meaning of Article L. 5213-6 of the Labour Code

*"having initiated a process of assistance and redeployment in favour of the employee through the intermediary of an association specialised in information, advice and maintaining employment of employees in the building and the public works sector (...), which, after having met the disabled employee, had offered skills assessment twice carried out at the employer's expense in order to define a professional or training project, which the employee had refused" (Cass. soc., No. 15-26.037, 06 March 2017).*

## 2.4 Sunday rest

*Labour Division (Chambre sociale) of the Court of Cassation, No. 18-18.836, 03 June 2020*

In the present case, an employee claimed that her employer did not grant her the number of Sunday rest days to which she was entitled.

The applicable National Collective Bargaining Agreement provides for special conditions for the granting of weekly rest days: weekly rest periods for full-time employees are organised in such a way as to leave two resting Sundays per month, on average, over a period of three months, with Sundays adjoining either a Saturday or a resting Monday.

Because of the nature of their activity, establishments whose operations or opening times is made necessary by production requirements, activities or the needs of the public benefit may apply a permanent derogation from the right to Sunday rest. They may thus make their employees work on Sundays and allocate the weekly rest period on a day other than Sunday ([Articles L. 3132-12 and R. 3132-5 of the Labour Code](#)).

The Court of Appeal granted the employee's request insofar as according to the court, the employee should have been entitled to at least 24 Sundays off during the year and an average of six weekends per quarter. However, she was not able to take all the Sundays she was entitled to (53 Sundays over two years).

The French Supreme Court [upheld](#) the Court of Appeal's decision. According to the Supreme Court, in accordance with the provisions of the collective bargaining agreement, "*the weekly rest period from which the employee benefits must be assessed over a period of three months, without this resulting in the existence of an annual quota of Sundays off*". The trial judges did not have to interpret the content of the collective agreement by annualising the number of Sunday rest days.

The collective agreement strictly applies to the exemption from Sunday rest. When a collective agreement grants two Sundays off per month on average over three months, this does not translate into 24 Sundays per year.

*"Qu'en statuant ainsi, alors qu'en application des dispositions conventionnelles le repos hebdomadaire dont bénéficie le salarié doit être apprécié sur une période de trois mois sans qu'il en résulte l'existence d'un contingent annuel de dimanches de repos, la cour d'appel a violé le texte susvisé;"*

### 3 Implications of CJEU Rulings and ECHR

#### 3.1 Worker status

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

France grounds its national labour law system on a fundamental binary divide between subordinate or dependent employment, on the one hand, and autonomous or independent self-employment, on the other. There are no legal provisions that set out both the employee and the independent worker status (i.e. there is no legal definition of an employee vs. an independent contractor). However, criteria have been set out by the French Court of Cassation regarding the employment contract. According to the French Supreme Court, an employment contract exists when a person undertakes to work in the name and under the supervision of another in return for remuneration.

Therefore, the qualification given by the parties to their agreement and the terms that may be used are totally irrelevant. In deciding whether a relationship of legal subordination exists or not, the judges take into consideration how the professional activity is carried out in practice. In other words, judges look at factual elements and attempt to identify the characteristic features of the employment relationship.

The three elements required to prove the existence of an employment contract emerge from this definition (i) the performance of an activity (ii) in return for remuneration; and (iii) the existence of the powers of instruction, control and sanction ([Cass. Soc., No. 94-13.187, 13 November 1996](#)).

By contrast, an independent worker is a person who provides services to another party in an independent and non-subordinate manner. Although the French Labour Code does not define the independent contractor status, it does provide in [Article L8221-6](#) that any person registered with the Commercial and Companies Registry or the Commercial Agents Register (whose registers are not for employees) is presumed to not be an employee and to not provide services in a subordinate manner. This presumption can be challenged and that same article of the French Labour Code further provides that the existence of an employment contract can be established when the aforementioned person establishes services to a party directly or indirectly under conditions that place such a service provider under the permanent subordination of the other party.

After the Labour Division of the Court of Cassation issued a ruling on the qualification of platform workers in March 2020, the Court of Justice of the European Union in the present case also ruled on this qualification.

In the ruling of 04 March 2020 ([Cass. Soc., No. 19-13.316, 04 March 2020](#)), the French Court of Cassation approved the Paris Court of Appeal's decision to reclassify the relationship between a former driver and the Uber platform as a superior-subordinate one. In this decision, the judges found that:

- the driver who uses the Uber application does not have his/her own customers, does not freely set his/her rates and does not determine the conditions of performance of his/her transport service, which are unilaterally defined by the Uber company;
- the rates are contractually set by the platform's algorithms by means of a predictive mechanism imposing on the driver a particular route over which he/she has no control and for which rate corrections are applied if he/she follows another route;
- in addition, the driver can be temporarily disconnected from the application after three or more refusals of rides and can lose access to his/her account if a cancellation rate is exceeded or may lose access to the application if users report "problematic behaviour".

All of these elements indicated that the Uber company had issued instructions to their drivers, monitored their performance and exercised its power to sanction. Consequently, there was a superior-subordinate relationship, and therefore, an employment contract between the platform worker and the company existed. The self-employed status was considered "fictional".

In this Order of 22 April 2020, the Court of Justice merely recalled its case law on the concept of "worker". The question was whether a delivery driver working for the Yodel delivery platform could be considered a 'worker' within the meaning of Directive 2003/1988/EC concerning certain aspects of the organisation of working time.

The Court of Justice confirmed that an employment relationship implies the existence of a hierarchical relationship between the worker and his/her employer, (Ord., pt. 28) and also reiterated that the characteristic of an employment relationship is that for a certain period of time, a person performs services for and under the direction of another person in return for remuneration (Ord., pt. 29).

It pointed out that an "independent contractor" must be qualified as a "worker", within the meaning of Union law, if his/her independence is merely fictitious (paragraph 30), and leaves it to the national courts to determine the appropriate qualification.

Hence, if 'for tax, administrative or organisational reasons, a company hires an independent service provider, but in reality the worker acts under the direction of his/her employer as regards, in particular, his/her freedom to choose the time, place and content of his/her work, does not share in the employer's commercial risks and, for the duration of that relationship, forms an integral part of that employer's undertaking, thereby forming an economic unit with that undertaking, that person must be regarded as being a "worker" (Ord., pt. 31).

The Court of Justice considered that a courier is not an employee within the meaning of the Working Time Directive if he/she is free to use subcontractors or substitutes to perform the service, is free to fix his/her own hours of "work" and to accept or not accept the various tasks requested, and if he/she is not exclusively linked to the principal, if his/her independence does not appear to be fictitious and if no link of subordination with the platform can be identified.



The Court of Justice's position does not have any implications for French legislation: regardless of what the contract stipulates, only the factual conditions for the performance of the work are relevant. In other words, French case law also focusses on the nature of the employment relationship rather than on the contractual terms.

### 3.2 Working time and leaves

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

In the context of a question referred by the Spanish courts for a preliminary ruling, the Court of Justice of the European Union has ruled that a national law may provide that an employee loses his/her right to leave for family reasons when the special leave occurs during periods of paid annual leave, paid leave or weekly rest periods.

This ruling does not call into question the French case law of the Court of Cassation.

The French Labour Code provides for leave for family events. Indeed, in accordance with [Article L. 3142-1](#) of the Labour Code, the employee is entitled, upon justification, to a leave of absence:

- For marriage or for the conclusion of a civil solidarity pact;
- For the marriage of a child;
- For each birth that occurs or for the arrival of an adopted child. These days of absence shall not be cumulated with the leave granted for the same child within the scope of maternity leave;
- For the death of a child, spouse, partner or partner bound by a civil solidarity pact, father, mother, father-in-law, mother-in-law, brother or sister;
- For the announcement of the occurrence of a disability in a child.

However, according to settled case law, leave for family events is not legally due when the employee is already absent for any other reason: sickness, paid leave, etc. ([Cass. soc., No. 93-42.310, 11 October 1994](#)). In this case, the Court of Appeal has considered that the leave for family reasons, in particular due to the birth of a child, is not—even if it qualifies as an exceptional authorisation of absence—limited to the period during which the employee is working. The Supreme Court overruled the decision.

According to the Court of Cassation, days of leave for family events must be taken within a "reasonable period" around the event, but not necessarily on the day itself ([Cass. soc., No. 96-43.323, 16 December 1998](#)). When the employee is already absent for another reason, these days are not added and do not give rise to additional remuneration (unless otherwise customary or agreed upon).

The CJEU thus reinforces the position of the Court of Cassation.

## 4 Other Relevant Information

Nothing to report.

## Germany

### Summary

(I) The Federal Government's draft bill to transpose the Directive on Posting of Workers has met with a divided response at a hearing of the Working Committee of the Federal Parliament on 15 June 2020.

(II) The Federal Labour Court has held that an employee-like person has information rights under the Pay Transparency Act.

(III) According to a decision of the Federal Administrative Court, parcel service providers who have the transport and delivery of consignments carried out by subcontractors cannot be required to provide information on the basis of the so-called Driving Personnel Act.

(IV) The Federal Labour Court asked the CJEU for a preliminary ruling regarding annual leave.

(V) The Labour Court Emden ruled that Article 31(2) CFEU imposes a direct obligation on the employer to introduce an objective, reliable and accessible system for recording working time.

## 1 National Legislation

### 1.1 Measures to respond to COVID-19 crisis

Nothing to report.

### 1.2 Other legislative developments

#### 1.2.1 Posting of workers

The Federal Government's draft [bill](#) to amend the German law on the posting of workers with the aim of transposing the EU Directive on Posting of Workers into German law met with a divided response at a hearing of the Working Committee of the Federal Parliament on 15 June 2020. Representatives of the trade unions criticised that the bill did not meet the political objectives. The employers' associations, on the other hand, fear that the planned regulation could lead to more bureaucracy.

One of the most controversial aspects of the hearing was that regional collective agreements are not covered by the draft law. The German Federation of Trade Unions (hereinafter: DGB) stressed that the regional collective agreements would only be effective in case of long-term assignments. In addition, the DGB considered it problematic that the draft only provides for an extension to three pay levels. Such a provision would be likely to encourage wage dumping. In contrast, the Confederation of German Employers' Associations (hereinafter: BDA) asserted that it was actually impermissible to extend regional collective agreements in the case of short-term postings of less than 12 to 18 months. In the BDA's view, the EU Directive only requires collective wage agreements to be concluded at this stage if they are binding. The invited experts were divided. One of the experts said that the regional collective agreements were very much compatible with the German system. This was contradicted by another expert. He pointed out that the EU Directive was basically based on generally binding collective agreements. In Germany, the link to federal collective agreements, and thus the exclusion of regional agreements, was the applicable law. The EU Commission has not criticised this approach.

Additional information on the legislative process is available [here](#).



## 2 Court Rulings

### 2.1 Information rights of employee-like persons

*Federal Labour Court, No. 8 AZR 145/19, 25 June 2020*

The aim of the so-called Pay Transparency Act (*Entgelttransparenzgesetz*), according to its section 1, is “to enforce the principle of equal pay for women and men for equal work or work of equal value”. The central instrument for checking compliance with the principle of equal pay is an individual right to information. This right is derived from section 10 (1) of the Act, with its more detailed requirements being broken down in sections 11-16. The right to information serves to monitor compliance with the equal pay principle as defined in section 3. To be able to determine this, employees must be in a position to know what the relevant comparison group of members of the opposite sex employed in the same/equivalent work earns and according to which criteria and procedures their own remuneration and that of the comparison group are assessed (sections 11 and 2). The right to information may therefore include the following elements: information on the remuneration of the relevant peer group, consisting of the statistical median of gross remuneration and two separate remuneration components, and the criteria and procedure for determining one's own remuneration and the remuneration of the relevant peer group.

In the underlying case, the plaintiff worked for the defendant, a television company under public law, as an editor, having been employed for some time as a freelancer in accordance with a collective agreement applicable to the defendant. On the basis of a legally binding decision of the Regional Labour Court, it is clear that the plaintiff is not an employee in the sense of national law. Rather, the plaintiff was to be regarded as a so-called employee-like person (*arbeitnehmerähnliche Person*), since she worked predominantly for the defendant and only to a minor extent for third parties and received her income predominantly from the defendant.

In the opinion of the Federal Labour Court, whose decision, however, is only available as a press release, the plaintiff is entitled to information in the sense described above, since she is a freelancer working for the defendant and thus an “employee” as defined within the meaning of section 5(2) No. 1 of the Pay Transparency Act and a worker (*Beschäftigter*) within the meaning of section 10(1) sentence 1 of the Act. In the Court's opinion, the terms “female employee” and “employee” in section 5(2) No. 1 of the Pay Transparency Act are to be interpreted broadly in conformity with the concept of employee in Directive 2006/54/EC, since there would otherwise be a lack of implementation in German law of the provisions thereof. In the Court's view, an adequate transposition has not yet been achieved either in the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*) or otherwise. Only the Pay Transparency Act contained provisions aimed at implementing the provisions of Directive 2006/54/EC on equal pay.

A press release related to this ruling is available [here](#).

### 2.2 Obligation to provide information on parcel deliverers

*Federal Administrative Court, No. 8 C 2.19, 17 June 2020*

According to a decision of the Federal Administrative Court, parcel service providers who have the transport and delivery of consignments carried out by subcontractors cannot be required to provide information on the basis of the so-called Driving Personnel Act (*Fahrpersonalgesetz*).

The applicant was an internationally active company that provides parcel delivery services through subcontractors. According to the contested decision, the defendant,

the Land of Bavaria, requested the applicant to submit a list of all subcontractors that provide parcel and courier services for a particular depot of the applicant.

The action against this was unsuccessful in the lower courts. The Court of Appeal upheld the challenged order. It found its legal basis in section 4(3), sentence 1 No. 1 of the Driving Personnel Act. According to this provision, entrepreneurs, vehicle owners and members of the driving staff were required to provide certain information specified in the provision in more detail. On appeal by the plaintiff, the Federal Administrative Court overturned the contested decision as in its view, it could not be based on section 4(3), sentence 1 No. 1 of the Act. Contrary to the opinion of the Administrative Court, the plaintiff was not an entrepreneur within the meaning of this provision. This would only be the case if the plaintiff itself employed drivers or carried out goods or passenger transport.

A press release containing information on this judgment is available [here](#).

## 2.3 Annual leave

*Federal Labour Court, No. 10 AZR 210/19 (A), 17 June 2020*

A collective agreement which, for the purposes of calculating overtime pay, only takes the hours actually worked into account and not the periods during which the worker has taken minimum paid annual leave, could be contrary to Union law. The Federal Labour Court asked the CJEU for a preliminary ruling on this question by order of 17 June 2020.

The Tenth Senate of the Federal Labour Court has asked the Court of Justice of the European Union to clarify whether the collective agreement is compatible with Article 31(2) of the Charter of Fundamental Rights of the European Union and Article 7 of the Working Time Directive 2003/88/EC. The interpretation of the collective agreement does not permit holiday periods to be taken into account when calculating overtime bonuses. It needs to be clarified whether the collective agreement thereby creates an incentive, which is inadmissible under Union law, to waive leave.

A press release about this request is available [here](#).

## 2.4 Working time

*Labour Court Emden, No. 2 Ca 94/19, 20 February 2020*

The Court has [ruled](#) that Article 31(2) CFEU imposes a direct obligation on the employer to introduce an objective, reliable and accessible system for recording working time. If the employer does not have such a system, according to the court, the burden of proof in the compensation process lies with the employer. The decision it seems is the first after the ruling of the CJEU 14 May 2019 – C-55/18 (Federación de Servicios de Comisiones Obreras [CCOO]) that affirms a direct obligation to record working time.

# 3 Implications of CJEU Rulings and ECHR

## 3.1 Worker status

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

With its decision, the CJEU has held that Directive 2003/88/EC must be interpreted as precluding a person engaged by his/her putative employer under a services agreement, which stipulates that he/she is a self-employed independent contractor, from being classified as a 'worker' for the purposes of that Directive, where that person is afforded discretion to use subcontractors or substitutes to perform the service he/she has undertaken to provide; to accept or not accept the various tasks offered by his/her

putative employer, or unilaterally sets the maximum number of those tasks; to provide his/her services to any third party, including direct competitors of the putative employer, and to fix his/her own hours of 'work' within certain parameters and to tailor his/her time to suit his/her personal convenience rather than solely the interests of the putative employer, provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his/her putative employer.

The criteria used by the CJEU correspond to a large extent to the criteria that are also applied in German case law when qualifying employment relationships (see, in particular, Federal Labour Court of 27 June 2001 – 5 AZR 561/99: *"A courier driver, who alone decides whether, when and to what extent he wants to work, and who receives full remuneration payable by the client for executed freight orders, is not an employee of the company that accepts the freight orders and passes them on to the courier drivers"*). They can also be found to some extent in section 611a of the Civil Code:

*"The employment contract obliges the employee to perform externally determined work in the service of another person and in personal dependence. The right to issue instructions may relate to the content, performance, time and place of work. Those who are not essentially free to organise their work and determine their working hours are bound by instructions. The degree of personal dependency also depends on the nature of the respective activity. To determine whether an employment contract exists, an overall consideration of all circumstances must be made. If the actual implementation of the contractual relationship shows that it is an employment relationship, the designation in the contract is irrelevant"*.

In German literature, the hope has been expressed that the CJEU would also comment on the possible significance of economic dependence in view of the underlying facts (cf. Holthusen, ZESAR 2020, p. 218).

### 3.2 Annual leave

*CJEU joined cases C-762/18 and C-37/2019, Varhoven kasatsionen sad na Republika Bulgaria, 25 June 2020*

The CJEU has ruled that a worker is entitled to paid annual leave for the period between his/her unlawful dismissal and the resumption of his/her previous employment or, upon termination of his/her employment relationship, to an allowance in lieu of paid annual leave not taken.

The situation is difficult to compare to Germany's as the legal consequence of an inadmissible dismissal under the Dismissal Protection Act is the dismissal's invalidity (see section 1(1) of the Act: *"Termination of the employment relationship in respect of an employee whose employment relationship has existed without interruption in the same establishment or undertaking for more than six months shall be legally ineffective if it is socially unjustified."*).

However, the Federal Labour Court assumes that if the employer does not grant the leave requested by the employee in due time, the expired leave entitlement during the delayed period is converted into a claim for damages for granting substitute leave as in rem restitution. This is of significance if the employee and employer are in dispute about the termination of the employment relationship and the employee has unsuccessfully requested the employer to grant him/her leave during the termination dispute. If the employer, after giving notice of termination, denies the existence of the employment relationship and does not grant the requested leave despite a corresponding request by the employee, the employer is in default without the need for a reminder from the

employee. Unless there are special circumstances that prevent this, the employee may conclude from the employer's conduct that he/she will not grant him/her leave. In this case, a warning proves to be a mere formality. If, during the period of delay, it becomes impossible for the employer to grant the employee leave as a result of the limitation of leave entitlement, the employee's claim for damages in case of a continued employment relationship is based on the granting of substitute leave pursuant to section 249(1) of the Civil Code (see, in particular, Federal Labour Court of 14 May 2013 – 9 AZR 760/11). According to section 249(1), *"a person who is liable for damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred"*.

### 3.3 Working time and leaves

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

The position in Germany seems to be essentially in line with the assessment by the CJEU. In Germany, statutory annual leave is regulated by the Federal Leave Act (Bundesurlaubsgesetz). It is generally agreed that vacation under the Act is to be distinguished from other claims of the employee to time off work. The latter include, among other things, special leave under collective or individual agreements, reduced working hours, educational leave under the educational leave laws of the federal states, cases of so-called personal prevention under section 616 of the Civil Code and, job search under section 629 of the Civil Code as well as leave under the Works Constitution Act. With regard to section 616 of the Civil Code, for example, this provision states that the person obliged to provide a service does not lose his or her entitlement to remuneration if he or she is prevented from providing the service for a relatively insignificant period of time for a reason attributable to him or her without fault. The provision covers not only cases of actual impossibility to provide the owed service, but also facts of unreasonableness of fulfilling the obligations arising from the employment relationship (section 275(3) of the Civil Code). These include, in particular, family events, where it is considered indispensable to be present, but also personal accidents such as burglary, fire, traffic accidents for which no blame is attached. An example of collectively agreed special leave is section 28 of the Collective Agreement for the Public Sector, which stipulates that employees may be granted special leave if there is an important reason for doing so.

## 4 Other Relevant Information

Nothing to report.

## Greece

### Summary

Nothing to report.

## 1 National Legislation

### 1.1 Measures to respond to COVID-19 crisis

Nothing to report.

### 1.2 Other legislative developments

Nothing to report.

## 2 Court Rulings

Nothing to report.

## 3 Implications of CJEU Rulings and ECHR

### 3.1 Worker status

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

The judgment addresses an important issue.

Greek labour law provides that the contract of employment is characterised by a relationship of personal dependence or subordination between the parties. In this regard, it is crucial to determine whether and to what extent a person is subjected to another person's power to direct and exercise control. Pursuant to the established line of judicial decisions, the power of direction may concern work content, the mode of performing work, working time, the working period and the place of work. In 'measuring' whether a person is sufficiently subordinated to justify the relationship with another person as qualifying as an employment relationship, the Supreme Court employs the co-called 'qualitative' criterium. Accordingly, the Court puts aside the quantity of the relevant criteria ascertained in each case and highlights the 'qualitative' element, i.e. the quality of the worker's engagement and dependence which 'make his protection necessary in accordance with the rules of labour law'. Notably, this qualitative appreciation of these criteria may differ as the case may be, taking into account the type and nature of the work.

The decisive criteria must not all necessarily be met in an individual case. Moreover, the Supreme Court does not determine abstract criteria in advance that must be fulfilled by every individual case. There is neither a single criterion among the many criteria that have to be applied in the process that could be deemed indispensable. Instead, various criteria are used by the courts as indicative with regard to the existence of an employment relationship. The basis of the corresponding legal qualification of the contract in any event is an 'overall general assessment'.

The freedom of a person to organise his/her own work and to decide on the working hours is certainly of key importance. The extent of the necessary power to direct may, however, vary from case to case with respect to location, time and work content. The

fact that the person forms part of the organisational structure of an undertaking is ultimately of little value, as it constitutes a secondary indicator only.

Another primary indicator of subordination is that work may be carried out within specific hours or at an agreed place. As a general rule, the Greek Supreme Court denies employee status if a person is proved to be essentially free to decide when to perform work ('*Areios Pagos*' {Supreme Court} 1657/1995, '*Δελτίον Εργατικής Νομοθεσίας*' (Bulletin of Labour Law} 1997, p. 955; '*Areios Pagos*' {Supreme Court} 1045/1997, '*Δελτίον Εργατικής Νομοθεσίας*' (Bulletin of Labour Law} 2001, p. 1102). That the availability of a person is required under a contract, on the other hand, points to subordination ('*Areios Pagos*' {Supreme Court} 1657/1995, '*Δελτίον Εργατικής Νομοθεσίας*' (Bulletin of Labour Law} 1997, p. 955).

Another question is the existence or not of entrepreneurial risks. An individual who voluntarily bears such risks is to be qualified as a self-employed person ('*Areios Pagos*' {Supreme Court} 1657/1995, '*Ελληνική Δικαιοσύνη*' (Greek Justice} 1997, p. 1550). On the other hand, persons who either do not bear such a risk or do so involuntarily are employees.

Therefore, Greek jurisprudence is in line with the above judgment.

### 3.2 Working time and leaves

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

Greek rules provide for special leave in many circumstances on days when workers are required to work. The days on which a worker is not required to work for the employer do not include public holidays and days of leave. Therefore, in most cases, the days of leave concern working and not calendar days. The concrete conditions for granting each leave depend on the rules that provide it. However, sick leave does not reduce the days of annual leave, in any case.

## 4 Other Relevant Information

Nothing to report.



# Hungary

## Summary

Once the state of emergency ceases, the Labour Code will be applied with four amendments up to 01 July 2020.

## 1 National Legislation

### 1.1 Measures to respond to COVID-19 crisis

#### 1.1.1 Transitional measures after the lifting of the state of emergency

The government submitted [Bill No. T/10747](#) to Parliament on the lifting of the state of emergency on 26 May 2020. Parliament voted on this bill on 16 June 2020. Act 57 of 2020 came into force on 18 June (published in the [Official Journal No. 144](#)). This new law does not lift the state of emergency, but calls upon the government to end it by issuing a decree (Article 1 of Act 57 of 2020). However, the so-called Authorisation Act (Act 12 of 2020), and the Government Decrees issued during the state of emergency will lapse with the lifting of the state of emergency (on 18 June).

Government Decree No. 282/2020 (VI. 17) on the lifting of the state of emergency entered into force on 18 June (published in the [Official Journal No. 145](#)). The only content of the decree is the lifting of the state of emergency from 18 June 2020. It repeals Government Decree No. 40/2020 on the declaration of the state of emergency.

The government also submitted [Bill No. T/10748](#) to Parliament on the transitional rules associated with the cessation of the state of emergency and on rules of the new institution, the so-called pandemic alert ('járványügyi készség') on 26 May. Parliament voted on it on 16 June, and Act 58 of 2020 came into force on 18 June (published in the [Official Journal No. 144](#)).

Article 56 of the Act contains labour law provisions, which were described in detail in the May 2020 Flash Report. The only change to the Act is that the authorisation for a reference period up to 24 months is given by the 'Békés' County Government Office instead of the minister responsible for employment (as was originally set forth in the proposal, see Article 56.4).

### 1.2 Other legislative developments

Nothing to report.

## 2 Court Rulings

Nothing to report.

## 3 Implications of CJEU Rulings and ECHR

### 3.1 Worker status

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

*"Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as precluding a person engaged by his putative employer*



*under a services agreement which stipulates that he is a self-employed independent contractor from being classified as a 'worker' for the purposes of that directive, where that person is afforded discretion:*

- to use subcontractors or substitutes to perform the service which he has undertaken to provide;*
- to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks;*
- to provide his services to any third party, including direct competitors of the putative employer, and*
- to fix his own hours of 'work' within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer,*

*provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer."*

Article 42 of the Labour Code:

*"Section 42 (1) An employment relationship is deemed established by entering into an employment contract.*

*(2) Under an employment contract:*

*a) the employee is required to work as instructed by the employer;*

*b) the employer is required to perform work for the employee and to pay wages."*

It is for the Hungarian labour courts, and particularly the Curia (Supreme Court) to interpret these definitions in accordance with the above CJEU decision.

### 3.1 Working time and leaves

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

*"Articles 5 and 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as not being applicable to national rules providing for special leave on days when workers are required to work which do not allow those workers to claim that leave in so far as the needs and obligations met by that special leave arise during weekly rest periods or periods of paid annual leave that are the subject of those articles."*

The ruling will have no implications for Hungarian labour law.

## 4 Other Relevant Information

Nothing to report.

# Iceland

## Summary

- (I) Amendments to the Act on Unemployment Insurance and the Act on Working Conditions, Hygiene and Safety at Work have been published.
- (II) The Labour Court has ruled on the voting procedure for collective agreements.

## 1 National Legislation

### 1.1 Measures to respond to COVID-19 crisis

Nothing to report.

### 1.2 Other legislative developments

#### 1.2.1 Unemployment insurance

On 29 June, [Act No. 54/2006, on Unemployment Insurance](#) was [amended](#). The amendments add the condition that the applicant must have a registered residence in Iceland. Secondly, the weight of the employer certificate has been reduced. The employer certificate typically included information on the reasons for termination of employment, information on whether the employee has any unused annual leave days and how his/her severance payments will be compensated. Instead of the employee submitting a certificate from the employer, which includes this information, the employee shall now be responsible for submitting this information him-/herself. The Directorate of Labour will, however, be entitled to confirm this information with the employer, if necessary. Thirdly, the amendments authorise the Directorate of Labour to pay an employee of a bankrupt company unemployment benefits from the day the company is declared bankrupt. These payments are later subtracted from potential payments from the Wage Guarantee Fund. Fourthly, slight changes to the wording in Articles 57 and 59 have been made, namely the word "intentionally" has been removed, and finally, the provisions on sanctions have been further clarified.

#### 1.2.2 Health and safety

On 29 June, a [temporary provision](#) in [Act No. 46/1980, Working Conditions, Hygiene and Safety at Work](#) was extended until 31 December 2020, but the provision has been in use since 01 October 2018. The provision allows for the social partners to derogate from Articles 53 and 56 for employees who provide user-managed personal assistance in line with Article 11 of [Act No. 38/2018, on Services for People with Disabilities with Long-standing Support Needs](#). Those articles, respectively, provide for daily rest and maximum nightly work and correspond with Articles 3 and 8 of Directive 2003/88/EC concerning certain aspects of the organisation of working time. The amendment also states that if the minimum daily rest period is reduced, the employee shall enjoy such rest as soon as possible.

## 2 Court Rulings

### 2.1 Collective agreements

*Labour Court, No. 6/2020, 23 June 2020*

On 23 June 2020, a judgment in [Labour Court Case No. 6/2020](#) was passed. The case concerned the interpretation of ballots cast for a collective agreement by a public sector trade union. 278 union members voted to reject the newly signed collective agreement, 265 voted in favour of it and 21 left their ballot blank. The State and the union argued whether the agreement had been rejected or not, with the State arguing that a majority of the votes cast had not rejected the agreement while the union argued that the majority of the valid votes had rejected the agreement.

The Court stated that no provisions in [Act No. 94/1986, on Collective Agreements of Public Sector Employees](#) determine how a vote on collective agreements should be interpreted with regard to blank votes. Additionally, such rules were not in place in the law of the Icelandic Confederation of University Graduates, which the trade union belonged to.

Article 5(3) of [Act No. 80/1938, in Trade Unions and Labour Disputes](#), which applies to the private sector, however, states that a collective agreement is in force unless a majority of the votes cast reject the agreement. The Court pointed out that the general comment on the bill states that when a collective bargaining agreement has been signed by a trade union's negotiating committee, which has a statutory mandate from the trade union and thus the members themselves should be able to trust that the collective bargaining agreement reflects the conclusion of the negotiating committee as to what the best possible conclusion of the collective agreement is. The Court applied this same principle to the vote conducted by the public sector trade union, deeming that with regard to all circumstances, a majority of votes cast had not rejected the agreement and the collective agreement was therefore rightly in force.

### 3 Implications of CJEU Rulings and ECHR

#### 3.1 Working time and leaves

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

The ruling does not have any implications for national law as comparable rights do not exist in Icelandic legislation, which provides for annual leave in [Act No. 30/1987](#), sick leave in [Act No. 19/1979](#) and maternity, paternity and parental leave in [Act No. 95/2000](#).

#### 3.2 Worker status

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

This ruling does not have any implications for national law. The general rule in Icelandic law is that a contractor and a contractee enjoy equal status to some degree compared with an employee who is a subordinate of his/her employer. An employee generally must perform his/her tasks personally, is subject to his/her employer's right to instruct and has some duty of confidentiality towards his/her employer. On the other hand, contractors are *inter alia* generally afforded more freedom about who should perform the contracted service, when to carry out the tasks, what tasks to accept, what other contractees they conclude contracts with, etc., with consideration to contractual clauses. Should a relationship, which is contractually labelled a contractor relationship, be deemed an employment relationship after an assessment of the nature of the relationship, the parties are subject to the same rights and obligations as other employer-employee relationships.

There has, however, been an ongoing discussion about fictitious contractual relationships in relation to, amongst other things, the 'gig economy', particularly among trade unions, hence this judgment could potentially be viewed in that context.

#### **4 Other Relevant Information**

Nothing to report.

# Ireland

## Summary

- (I) Some of the restrictions that were introduced to respond to the COVID-19 crisis have been eased.
- (II) The PUP and TWSS will be available until 10 August 2020. However, there are certain changes in response to the improving economic situation.
- (III) The High Court found that certain provisions of the Industrial Relations (Amendment) Act 2015 violate the Constitution and are therefore invalid.
- (IV) A new coalition has been formed.

## 1 National Legislation

### 1.1 Measures to respond to COVID-19 crisis

#### 1.1.1 Easing of restrictions

The restrictions on social and economic life initially imposed in March 2020 and detailed in previous Flash Reports, started being lifted on 18 May 2020. On 05 June 2020, the government announced a [Revised Roadmap](#) under which all retail stores can open from 8 June 2020, with shopping centres opening on 15 June 2020 and cafés and restaurants (including pubs serving a substantial meal) opening on 29 June 2020, provided social distancing (currently 2m) can be maintained. The lockdown will largely end on 20 July 2020.

#### 1.1.2 Unemployment benefits and wage subsidies

The Pandemic Unemployment Payment (hereinafter: PUP) and the Temporary Wage Subsidy Scheme (hereinafter: TWSS) are to continue until 10 August, but from 29 June, the EUR 350 PUP dropped to EUR 203 for those who earned, on average, EUR 200 per week or less. This followed the compiling of a [report](#) by the Department of Business, Enterprise and Innovation, which estimated that 38 per cent of those in receipt of the PUP were paid less than EUR 300 per week before the payment was introduced.

As of 29 June 2020, 51 850 workers have been medically certified for receipt of the COVID-19 enhanced illness benefit of EUR 350 per week. 23 per cent of these are employed in the human health and social work sector. Only 7 per cent of those 1 050 currently in receipt have been medically certified as having the virus. As of the same date, 438 933 workers, 51 per cent of whom are male and 45 per cent of whom are under 35 years, are in receipt of the PUP. This is a reduction from the 543 164 in receipt of the payment at the end of May 2020. Twenty-five per cent of workers in receipt of the payment were employed in the accommodation and food services sector and 13 per cent in the wholesale and retail trade. Since the peak on 05 May 2020 of persons receiving the payment, the number of recipients from the construction sector has fallen by 55 per cent.

The TWSS is available to employers who keep employees on payroll, thus avoiding layoffs and/or redundancies (for details, see previous Flash Reports). The TWSS is operated by the Revenue Commissioners through the payroll system and is now scheduled to last until 10 August 2020. As of 02 July 2020, 64 800 employers had registered for the scheme with 567 600 employees having been subsidised since the scheme began. Currently, some 382 000 employees are being subsidised, a reduction from 451 652 at the end of May 2020. The importance of the scheme for small

businesses is reflected in the fact that 94 per cent of employers on the scheme employ less than 50 per cent. As of 02 July 2020, the total subsidy payment is EUR 1.878 billion.

Sources:

Updated information on the PUP is available [here](#).

Preliminary statistics regarding the TWSS are available [here](#).

## 1.2 Other legislative developments

Nothing to report.

## 2 Court Rulings

### 2.1 Sectoral employment regulation

*High Court, No. 2019 280 JR, 23 June 2020, Náisiúnta Leictreach Contraitheoir Eireann v The Labour Court & ors*

Like most other European jurisdictions, Ireland has wage-setting mechanisms under which all employers within a particular economic sector are required to apply the prescribed terms and conditions to their workers. The original mechanism was by way of a 'Registered Employment Agreement' (hereinafter: REA) and was first introduced in 1936. The main REAs were in the construction and electrical contracting sectors. In [McGowan v Labour Court \[2013\] IESC 21](#), however, the Supreme Court declared the legislation to be invalid, having regard to the provisions of Article 15 of the Constitution because it did not contain sufficient principles and policies to guide the very broad discretion conferred upon the Labour Court. The Industrial Relations (Amendment) Act 2015 was then enacted to address *inter alia* the deficiencies identified by the Supreme Court by replacing REAs with Sectoral Employment Orders made by the relevant minister having regard to such matters promoting fair competition and ensuring fair and sustainable remuneration.

The High Court has now [declared](#) the relevant sections of the 2015 Act to be invalid because they abdicated the making of significant policy choices to the relevant minister again without providing sufficient principles and policies.

## 3 Implications of CJEU Rulings

Council Directive 2003/88/EC has been transposed in Ireland by the [Organisation](#) of Working Time Act 1997 (as amended by section 86 of the Workplace Relations Act 2015 and sections 15 and 16 of the Employment (Miscellaneous Provisions) Act 2018).

### 3.1 Worker status

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

This case concerned the classification of a "neighbourhood parcel delivery courier" for the purpose of deciding whether the UK's Working Time Regulations applied. The 1997 Act applies to employees, the definition of which in section 2(1) makes it clear that genuine self-employed independent contractors are not covered: see [Haugh v Keogh DWT1236](#), where the Labour Court held that a motorcycle courier, who provided his own motorbike and met the running costs thereof, was not an employee.

### 3.2 Working time and leaves

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

Articles 5 and 7 of the Directive are implemented by sections 13 and 19 of the 1997 Act.

Unlike Spain, Ireland does not provide statutory rights to paid time off in the event of marriage, moving house or the death of family members. Insofar as some employers may provide for such special leave, those additional days do not fall within the scope of the 1997 Act. Consequently, where the events justifying the grant of a type of special leave either during a weekly rest period or a period of annual leave to which employees are entitled under sections 13 or 19, those employees do not have the right to use that special leave at the time of a subsequent working period.

## 4 Other Relevant Information

### 4.1 New coalition formed

Following months of uncertainty, a coalition government has now been formed comprising 'Fianna Fáil' (aligned with Renew Europe in the European Parliament), 'Fine Gael' (aligned with the European People's Party) and the Green Party (aligned with the Greens/European Free Alliance). The new government has seen a reshuffling of ministerial responsibilities, with the former Taoiseach (Prime Minister), Leo Varadkar, becoming Minister for Enterprise, Trade and Employment.



# Italy

## Summary

The Italian government continues to adopt measures aimed to contain the spread of the COVID-19 virus and to mitigate its consequences on businesses.

## 1 National Legislation

### 1.1 Measures to respond to COVID-19 crisis

#### 1.1.1 Employer subsidies

The Act of 05 June 2020 No. 40 converts the Law Decree of 08 April 2020 No. 23 which extended the application of Articles 19-22 of the Law Decree of 17 March 2020 No. 18 to employees hired between 24 February 2020 and 17 March 2020. According to Articles 19-22, employers could apply for ordinary '*Cassa Integrazione*' with a simplified procedure without paying the additional contribution; if they already had an extraordinary integration, they could transform it into an ordinary one. Regions could authorise a special '*Cassa Integrazione*' for employers to which the ordinary one did not apply.

Act 40 of 2020 substantially confirms those provisions.

Article 1 of Law Decree of 16 June 2020 No. 52 provides that employers who made use of the period of '*Cassa Integrazione*' envisaged by the Law Decree of 17 March 2020 No. 18, as converted into the Act of 24 April 2020 No. 27, may enjoy an additional 4 weeks of '*Cassa Integrazione*' before September 2020. Articles 2 and 3 extend the application deadlines for emergency income to 31 July and for declarations of undeclared work to 15 August.

#### 1.1.2 Health and safety

The Decree of the President of the Council of Ministers of 11 June 2020 reiterates the obligation of all to respect the Shared Protocol regulating measures to fight and contain the spread of the COVID-19 virus in the workplaces, signed by the Italian government and social parties on 24 April 2020.

### 1.2 Other legislative developments

Nothing to report.

## 2 Court Rulings

Nothing to report.

## 3 Implications of CJEU Rulings and ECHR

### 3.1 Worker status

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

According to the Court of Justice, the Working Time Directive must be interpreted as

*"precluding a person engaged by his putative employer under a services agreement which stipulates that he is a self-employed independent contractor from being classified as a 'worker' for the purposes of that directive, where that person is afforded discretion:*

- to use subcontractors or substitutes to perform the service which he has undertaken to provide;*
- to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks;*
- to provide his services to any third party, including direct competitors of the putative employer, and*
- to fix his own hours of 'work' within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer,*

*provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer. However, it is for the referring court, taking account of all the relevant factors relating to that person and to the economic activity he carries on, to classify that person's professional status under Directive 2003/88."*

In Italy, a highly controversial turning point as regards the notions and classifications of work is found in Article 2(1) Legislative Decree of 15 June 2015, No. 81, as recently modified by Article 1 Act 2 of November 2019, No. 128. In its original version, Article 2(1) provided for the application of protective status of subordinate work to *"collaborations that consist of exclusively personal and continuous work, the execution modalities of which are organised by the client, with particular reference to time and place of work"*. The difference with subordination is found in the use of "organisation" instead of "direction" to describe the way in which the client relates to the collaborator: as a result, the former could not be defined as an employer. Contrary to coordinated and continuous collaborations, the execution modalities of the performance are unilaterally organised by the client, excluding any negotiation with the "collaborators", a decisive element of the notion contained in Article 409 No. 3 Civil Procedure Code.

Scholars have referred to this as 'hetero-organisation' to distinguish it from 'hetero-direction'. They have also debated whether such a notion can be classified under subordination or autonomy. In our view, however, one has to refer to how the performance 'collocates' with the structure of the client undertaking, and to the notion of "organised by the client". This also applies to the understanding of the concept of subordination. Clearly, the clash between 'hetero-direction', as a typical feature of 'traditional' subordination, and 'hetero-organisation', as the main characteristic of what we can call "autonomised subordination", in which 'neither ethero-direction power nor full autonomy is at stake'. As for the very notion of 'hetero-organisation', an important point was represented by the prerogative of the client to unilaterally determine the time and place of the performance of work. This specification has, however, been withdrawn by Article 1 of the Act of 02 November 2019, No. 128, which has also changed the reference from "exclusively" to "mostly" as far as the personal characteristic of the performance is concerned.

It is clear that as far as notions and classifications are concerned, the very meaning of 'hetero-organisation' must be investigated. This is necessary to understand whether there is a typological justification for the application of the protective status of subordination to relationships that do not fall under the scope of 'hetero-direction', not being integrated the same way into the structure of the undertaking. In this regard, it must be stressed that the Constitutional Court has declared a legislative provision denying the classification of subordination to work relationships that actually show the

typical features thereof unlawful on the ground of its irrationality and self-contradictoriness. In the same vein, one could argue that even if to the benefit of the worker, the choice to apply the protective statue of subordination to 'hetero-organised' relationships may be deemed unconstitutional as well. In fact, it imposes a *disproportionate burden* on the client who is not entitled to the managerial prerogatives he/ she may enjoy as an employer in terms of 'hetero-direction'.

A tremendous opportunity to clarify the situation has been offered by the case of food delivery riders, contracted as coordinated and continuous collaborators, who have lodged claims before several Italian courts to be recognised as subordinated workers and to have access to the relevant protective status. In parallel to the court proceedings, with quite unfortunate timing, the legislator has classified riders as autonomous workers by adopting a specific regulation (see below) that could not have been taken into account by the judges due to its non-retroactive effect.

Deciding on the first claim brought before the courts, the '*Cassazione*' (Cassazione, sez. lav., 24 January 2020, No. 1663) although aware of the position taken by the legislator, upheld the judgment of the Court of Appeal of Turin, according to which the activity of riders must be classified as "hetero-organised" collaboration, thus falling within the scope of application of subordination according to Article 2(1) Legislative Decree 81 of 2015. However, without a motivation worthy of the name, the '*Cassazione*', confirming the conclusions of the Court of Appeal, limited the application of the protective status of subordinated work, excluding, among others, the right to a wage and working time.

Moreover, the '*Cassazione*' has deemed any investigation of the very meaning of 'hetero-organisation' irrelevant, on the assumption that by recognising entitlement to the protective status of subordination, Article 2(1) constitutes a 'remedial provision'. In the '*Cassazione*'s' view, the legislator does not intend to classify 'a new typology of work relationship', focussing, on the contrary, on the positive effects that the remedy will have on the worker. What remains obscure is how to figure out when a work relationship falls within the scope of Article 2(1) without fully understanding the real meaning of 'hetero-organisation'. By abandoning its supreme interpretation role, the '*Cassazione*' puts that provision at risk of unconstitutionality for the reasons mentioned in the above.

Against this background, one could conclude that 'hetero-organisation' might be an option for entrepreneurs only if they have decided to bear the costs of subordination, renouncing, however, the traditional understanding of the managerial prerogatives it entails and opting in favour of 'autonomised subordination'. From a classification point of view, 'hetero-organised' collaborations are neither subordinated nor autonomous. The subordination protective status applies, however, including social security. The practical effects of such a solution are as of yet not perceivable.

From this perspective, one could ask how all this applies to platform work. Since 2017, the Italian legislator has intervened three times with reference to the possibility that work is performed through "technological instruments", platforms included. This occurred once in the Act of 22 May 2017, No. 81, with reference to "smart working" (Article 18), and twice by Legislative Decree No. 81 of 2015, as modified by Act 128 of 2019, in Article 2(1) and Articles 47-*bis* ff., respectively, with reference to hetero-organised collaborations and autonomous work in the delivery sector. We will concentrate on the latter.

Article 2(1) Legislative Decree No. 81 of 2015, as modified by Act No. 124 of 2019, provides an explicit reference to platforms, not to be understood as an employer or client, but only as the 'technical tool' through which the modalities of work are defined (see below). As already illustrated in the above, one could think about 'hetero-organisation', to which the protective status of subordination applies, in terms of "autonomised subordination" within the framework of an achievement-oriented approach to work organisation. In such a framework, it is not at all problematic to

reconcile platform work with subordination that has abandoned the dogma of 'hetero-direction', above all, if the very notion of work organisation is an immaterial one.

As already highlighted, Act No. 128 of 2019 adds a Chapter V-*bis* to Legislative Decree No. 81 of 2015, with the very promising heading "Protection of work through digital platforms" (Articles 47-*bis* to 47-*octies*).

Quite surprisingly, however, Chapter V-*bis* does not apply to all forms of platform work, but only to "*autonomous workers who carry out activities of goods delivery on behalf of others, in urban areas by bicycle or motor vehicles*", so-called riders (Article 47-*bis*).

What is of particular interest, on the contrary, is how the legislator defines digital platforms as "*the software used by the client (undertaking) for the delivery service to fix the remuneration due to the rider and to determine the way in which the service is performed*". Therefore, in the legislator's view, the platform is only an instrument that can be used to organise work, but is not an employer as such. This is a very important assumption, since it means that the physical or legal person owning the platform can be held responsible for the violation of any labour law and social security provision as a 'normal' employer or client. Moreover, that person takes the risk that the self-learning algorithm will act unlawfully, outside any possible human control. As the algorithm is not a legal person, it cannot be sanctioned as would be the case of a real employer.

The contracts of riders shall be concluded in written form *ad probationem*, meaning the absence of the written form does not produce the nullity of the contract. In the absence of the written form, one may advocate the existence of a subordinate contract, as it is useful to prove the actual conditions applied to the relationship and, if need be, the infringement of workers' rights. Riders shall receive adequate information on their rights and on health and safety regulations. Failure to comply with this information duty results in a violation of Legislative Decree No. 152 of 1997, implementing the Written Statement Directive. Effective sanctions are provided in such a case (Article 47-*ter*; According to Article 4 Legislative Decree No. 152 of 1997, the worker can contact the Provincial Labour Office so that the latter requires the employer to provide the information required by the decree within 15 days. If the employer does not comply with the order, the worker is entitled to an indemnity that cannot exceed the remuneration received in the last year, which must be determined based on the seriousness and duration of the violations and the behaviour of the parties).

Riders shall receive remuneration ('*compenso*') that, notwithstanding their classification as autonomous workers, can be determined by national collective agreements, signed by the comparatively more representative trade unions at national level. This is a very controversial point since it implies that in order to have their pay defined by collective bargaining, riders shall be represented by already existing unions, usually focussed on subordinate workers. The same reference to '*contratti collettivi*', typical of subordinate work, instead of '*accordi collettivi*', typical of autonomous work, confirms the ambiguity of the legislative intervention. On the other hand, by defining pay, collective agreements shall take into account the modalities of the provisions of service and the organisation of the client (undertaking). In the absence of collective agreements, workers cannot be paid by the piece (delivery) and shall have a minimum hourly wage, taking into account those already set by collective agreements of similar sectors. Such a provision seems to be aimed at stimulating the conclusion of collective agreements that could introduce piecework payment in the light of the modalities of the provision of services and of the organisation of the undertaking.

In any case, workers shall be entitled to a supplementary indemnity, not less than 10 per cent of the minimum hourly wage, for work performed at night or on holidays or in adverse weather conditions. The amount of the indemnity is fixed by collective agreements or, in their absence, by a decree of the Ministry of Labour (Article 47-*quarter*).

Wage setting through collective agreements risks clashing with the case law of the Court of Justice. In fact, as decided in *FNV*, a collective labour agreement containing minimum rates for self-employed persons who carry out the same activity for an employer as that employer's employees, falls outside the scope of Article 101 TFEU (and therefore does not conflict with Competition Law) only where such workers are "fictitiously self-employed", i.e. workers who are in the same situation as employees. Since the legislator has explicitly classified riders as 'real' self-employed persons, the regulation or even the definition of criteria determining their remuneration by collective agreements is difficult to reconcile with the Court's statements. One must assume that the just mentioned ambiguous approach has been adopted on purpose to cast doubt on the 'real' autonomous nature of riders and to avoid the clash with Competition Law. On the other hand, the classification of riders as autonomous workers seems to imply a non-rebuttable presumption to exclude that they could also be hired as subordinate (hetero-organised) workers, thus eliminating the comparator needed to make the *FNV* doctrine applicable.

Provisions on the remuneration of riders will apply from November 2020.

Anti-discrimination Law and the guarantee of workers' freedom and dignity, as provided by the subordinate protective status, shall apply to riders. This is a further sign of the ambiguity mentioned in the above, taking into account that, at least as far as Anti-discrimination Law is concerned, autonomous work has its own rules. Refusal to accept a delivery does not justify their exclusion from the platform, nor does a reduction of delivery opportunities, which is, on the contrary, a clear signal of the autonomous nature of riders, since no subordinate worker can lawfully refuse to perform a task as required by the employer (Article 47-*quinquies*).

Riders shall be insured against work accidents and occupational diseases, which is no longer a typical feature of subordinate work only. Contributions are fixed according to the risk rate of the activity performed with reference to the general minimum daily remuneration for social security and assistance contribution (EUR 48.98 - INPS Circular Letter No. 9 of 29 January 2020), related to the days of actual activity. The physical or legal person using the platform is responsible for complying with work accidents and occupational disease legislation, as provided by the Decree of the President of the Republic 30 June 1965, No. 1124, as well as of the health and safety regulation, as provided by Legislative Decree of 09 April 2008, No. 81 (Art. 47-*septies*).

Although in a different way, compared to 'hetero-organisation' being protected as subordination, also in the case of riders, a further inconsistency is at stake between their formal classification and the protective status that the legislator applies to them. In fact, that status is closer to subordination than to autonomy. Indeed, formally classified as autonomous workers, riders seem to have been provided by the same legislator with all that is needed to be reclassified by the Court of Justice as "fictitious self-employment".

### 3.2 Working time and leaves

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

Directive 2003/88 states that "all workers should have adequate rest periods (...) workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks.", but "this Directive shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers".



Clause 1.1 of the revised Framework Agreement on parental leave concluded on 18 June 2009, provides: *"This agreement lays down minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents"*. Clause 7 states that *"Member States and/or social partners shall take the necessary measures to entitle workers to time off from work, in accordance with national law, collective agreements and/or practice, on grounds of force majeure for urgent family reasons in cases of sickness or accident making the immediate presence of the worker indispensable"*.

According to the Court, the aim of Directive 2003/88/EC is to lay down minimum requirements intended to improve the living and working conditions of workers through approximation of national provisions concerning, in particular, the duration of working time. Days of special leave granted under Article 46 of the collective agreement of 13 July 2016 enabling workers to meet specific needs or obligations, fall within the scope not of Directive 2003/88/EC, but rather of the exercise by a Member State of its own competences. This leave is linked to working time and consequently, workers will not have recourse to such leave during weekly rest periods or periods of paid annual leave. In fact, that special leave cannot be regarded as comparable to sick leave.

In Italy, parental leave is continuous and also includes public holidays that fall within it. Fractional use of this leave is possible if there is at least one day of actual service.

The illness terminates optional leave, but it is necessary to return to work to subsequently enjoy the following leave period. Mandatory leave cannot be interrupted (Message INPS, National Institute for Social Security, 25 October 2006, No. 28379).

## 4 Other Relevant Information

Nothing to report.

# Latvia

## Summary

(I) Parliament has adopted amendments to the Sea Code with a view to implementing Directives (EU) 2017/159 and (EU) 2018/131.

(II) The Supreme Court delivered decisions providing the interpretation of the concept of 'working time' in accordance with Directive 2003/88/EC and CJEU case-law.

## 1 National Legislation

### 1.1 Measures to respond to COVID-19 crisis

Nothing to report.

### 1.2 Other legislative developments

#### 1.2.1 Seafarers

On 28 May 2020, Parliament adopted [amendments](#) to the Sea Code ('*Grozījumi Jūras Kodeksā*', OG No. 110 A, 09 June 2020). The amendments aim to transpose Directives (EU) 2017/159 and (EU) 2018/131. According to the [Explanatory Note](#) to the amendments, a new specific group of employees had to be introduced in the Sea Code, namely 'fishers', as Directive (EU) 2017/159 covers this specific group. Until the amendments were introduced, the Sea Code provided employment conditions for one group only – 'seafarers'.

## 2 Court Rulings

### 2.1 Working time

*Supreme Court, No. SKC-481/2020, No. SKC-577/2020 and No. SKC-698/2020, 18 June 2020*

On 18 June 2020, the Senate of the Supreme Court delivered decisions in three cases involving the same issue and the same respondent – the municipal police. The dispute involved the concept of working time in the light of the fact that municipal police officers were granted 30 minute breaks every 4 hours within a shift lasting 12 or 24 hours without the right to leave the workplace, and such breaks were not paid, because they were not considered to be working time. The Senate in all decisions referred extensively to the case law of the CJEU on working time under Directive 2003/88/EC, and in particular the decision in *Matzak* (C-518/18). In addition, the Senate acknowledged that although amendments to the national laws (Article 145(3) of the Labour Law) explicitly stating that if an employee is not allowed to leave the workplace during his/her break, that break must be considered working time entered into force on 16 August 2017, the Senate, despite the dispute in question arising prior to the introduction of the amendments, is bound to apply Directive 2003/88/EC as interpreted by the CJEU regarding any period of time, i.e. even before the respective amendments to the national law entered into force.

Sources:

The decisions of the Supreme Court are available [here](#) (SKC-481/2020), [here](#) (SKC-577/2020) and [here](#) (SKC-698/2020).



### 3 Implications of CJEU Rulings and ECHR

#### 3.1 Worker status

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

The definition of a “worker” as defined under national law, in particular, Article 3 of the [Labour Law](#) (*‘Darba likums’*, OG No. 105, 06 July 2001), is similar to that provided by the CJEU, namely the relationship must be characterised by subordination and work must be performed in exchange for remuneration. The problem in Latvian law is that it does not refer to the fact that the notion of ‘worker’ is not defined with respect to all aspects of employment law, in particular, the EU’s autonomous definition of ‘worker’ is not necessarily taken into account. Case law on the status of ‘worker’ and the distinction of ‘self-employed persons’ in terms of employment law is not yet very extensive and has mostly dealt with the status of executive board members. More extensive criteria for the distinction between a ‘worker’ and a ‘self-employed person’ is provided by the [Law on Residents’ Tax](#) (Article 8(2)<sup>2</sup>) (*‘Likums “Par iedzīvotāju ienākuma nodokli”*’, OG No. 32, 01 June 1993).

The CJEU’s judgment seems to approve the approach of Latvian courts when dealing with discrimination between a worker and a self-employed person. Consequently, the novelty of the judgment in *Yodel* is the reaffirmation of the fact that Directive 2003/88/EC could be applicable to persons who are not considered workers under national law.

#### 3.2 Working time and leaves

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

The CJEU’s decision in *Fetico* does not have any direct implications for Latvian law. Latvian law does not provide for leaves outside the scope of EU law, i.e. under Latvian law only those leaves regulated by EU law are provided for, thus such leaves cannot overlap (see paragraph 40 of the judgment). Other types of leave can be provided in collective agreements or employment contracts, however, the law does not regulate situations in which specific circumstances raise the right to specific leave that coincides with the rest period.

### 4 Other Relevant Information

Nothing to report.

# Liechtenstein

## Summary

During the reporting period, the Government of Liechtenstein amended a number of measures to mitigate the coronavirus (COVID-19). Some measures directly affect labour law and concern preventive measures for the protection of employees, enforcement, controls and obligation to cooperate as well as specifications for protection plans.

## 1 National Legislation

### 1.1 Measures to respond to COVID-19 crisis

During the reporting period, the Government of Liechtenstein amended a number of measures to mitigate the coronavirus (COVID-19). The following measures directly affect labour law:

#### 1.1.1 Preventive measures for the protection of employees

According to Article 8 of the [Ordinance on measures to fight the coronavirus \(Covid-19\)](#) (*Verordnung über Massnahmen zur Bekämpfung des Coronavirus, Covid-19*, LR 818.101.24), employers must ensure that employees are able to comply with the recommendations of the government and of the Department of Health regarding hygiene and distance. To this end, appropriate measures must be provided and implemented.

If the recommended distance cannot be maintained, measures must be taken according to the STOP principle (substitution, technical measures, organisational measures, personal protective equipment), namely the possibility of home office, physical distancing, separate teams or the wearing of masks.

#### 1.1.2 Enforcement, controls and obligation to cooperate

Pursuant to Articles 9(2) and (3) of the Ordinance on Measures to Combat the Coronavirus (Covid-19), the competent enforcement authorities may carry out unannounced checks of establishments and premises at any time. Employers must allow the competent enforcement bodies access to the premises.

#### 1.1.3 Specifications for protection plans

According to section 1.2(2) of the [Annex to the Ordinance on Measures to Fight the Coronavirus \(Covid-19\)](#), the measures for guests, visitors and participants must be coordinated in the protection plan, with the measures for the protection of employees, if the employees work in establishments that are open to the public and at events.

### 1.2 Other legislative developments

Nothing to report.

## 2 Court Rulings

Nothing to report.

### 3 Implications of CJEU Rulings and ECHR

#### 3.1 Worker status

CJEU case C-692/19, *Yodel Delivery Network*, 22 April 2020

In case C-692/19, the CJEU (Eighth Chamber) ruled as follows:

*"Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as precluding a person engaged by his putative employer under a services agreement which stipulates that he is a self-employed independent contractor from being classified as a 'worker' for the purposes of that directive, where that person is afforded discretion:*

- to use subcontractors or substitutes to perform the service which he has undertaken to provide;*
- to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks;*
- to provide his services to any third party, including direct competitors of the putative employer, and*
- to fix his own hours of 'work' within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer,*

*provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer. However, it is for the referring court, taking account of all the relevant factors relating to that person and to the economic activity he carries on, to classify that person's professional status under Directive 2003/88."*

In the present ruling, the CJEU formulated conditions under which a person is not to be classified as a 'worker' for the purposes of Directive 2003/88/EC. These conditions are fully in line with Liechtenstein law:

- According to section 1173a Article 3 of the [Civil Code](#) ('*Allgemeines bürgerliches Gesetzbuch*', LR 210), the worker must, in principle, personally carry out the contractually agreed work, which excludes the involvement of a subcontractor or substitute;
- The worker must accept the various tasks assigned by his/her employer. Pursuant to section 1173a Article 7 of the Civil Code, the employer is entitled to issue general directives and specific instructions regarding the performance of the work and the conduct of employees in his/her business or household. The employee must comply in good faith with the employer's general directives and specific instructions;
- The worker is not allowed to provide his/her services to any third party, including direct competitors of the employer. According to section 1173a Article 4(3) of the Civil Code, the employee may not perform any paid work for third parties in breach of his/her duty of loyalty for the duration of the employment relationship, in particular if such work is in competition with his/her employer;
- In general, the worker cannot determine his/her own hours of 'work'. Unless otherwise agreed, the employer may determine the working time within the framework of the statutory provisions. This follows from the above mentioned section 1173a Article 7 of the Civil Code;

- The independence of the person who performs the work must not appear to be fictitious. The manifest abuse of a right is not protected by law;
- The fact that someone is not a worker implies that it is not possible to establish the existence of a relationship of subordination between that person and his/her putative employer. This follows from section 1173a Article 1 of the Civil Code: 'By means of an individual employment contract, the employee undertakes to work in the service of the employer (*'im Dienst des Arbeitgebers'*) for a limited or unlimited period and the employer undertakes to pay him/her a salary based on the amount of time he/she works (time wage) or the tasks he/she performs (piece work).' This wording expresses the relationship of subordination.

Case C-692/19 is not particularly relevant for Liechtenstein law. There is no deviation from previous lines of reasoning. Implications neither for the legal and political area nor for the EU acquis are expected.

### 3.2 Working time and leaves

CJEU case C-588/18, *FETICO u.a.*, 04 June 2020

In case C-588/18, the CJEU (Grand Chamber) ruled as follows:

*"Articles 5 and 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as not being applicable to national rules providing for special leave on days when workers are required to work which do not allow those workers to claim that leave in so far as the needs and obligations met by that special leave arise during weekly rest periods or periods of paid annual leave that are the subject of those articles."*

The starting point for the present case are Spanish provisions of statutory law and collective agreements that provide for paid special leave in addition to weekly rest periods and paid annual leave guaranteed by EU law (C-588/18 No. 16 et seqq.). The special leave is based on particular events such as marriage or the birth of a child. The question arises whether the special leave can be postponed or taken at a later point on working days if the triggering event occurs during the employee's weekly rest period or a period of paid annual leave.

The CJEU ruled that there is no obligation under EU law for Member States to provide that such special leave can be postponed in national law: since the purpose of paid special leave established by the provisions at issue in the main proceedings is solely to enable workers to take time off from work to meet specific needs or obligations that require their personal presence, that leave is inextricably linked to working time as such, and consequently workers will not have recourse to such leave during weekly rest periods or periods of paid annual leave. Accordingly, that special leave cannot be regarded as comparable to sick leave (C-588/18 No. 36).

Liechtenstein law is in line with this judgment of the European Court of Justice. Liechtenstein law regulates such special leave in section 1173a Article 29(3) of the Civil Code. According to this provision, the employer must allow the employee the *customary* hours and days off work and, once notice has been given to terminate the employment relationship, the time required to seek other employment. These 'customary hours and days off work' may be specified in collective agreements. This provision also primarily serves the purpose of enabling workers to take time off from work to meet specific needs or obligations that require their personal presence.

Case C-588/18 is not particularly relevant for Liechtenstein law. There is no deviation from previous lines of reasoning. Implications neither for the legal and political area nor for the EU acquis are expected.



#### **4 Other Relevant Information**

Nothing to report.

# Lithuania

## Summary

The Lithuanian Supreme Court allowed an individual labour dispute involving an employee who resides in another country to be dealt with in the Lithuanian courts, because of the legal nature of the employer's claim – the continuation of the proceedings initiated by the foreign employee against the Lithuanian employer. The decision can be supported by the lacking reciprocity in jurisdictional matters between EU States and Eastern European countries, but it may also have an effect on the restrictive interpretation of Article 22 of Regulation No 1215/2012, if the employee domiciled in another Member State would use Lithuanian pre-trial proceedings against Lithuanian companies.

## 1 National Legislation

### 1.1 Measures to respond to COVID-19 crisis

Nothing to report.

### 1.2 Other legislative developments

Nothing to report.

## 2 Court Rulings

### 2.1 Third-country nationals

*Supreme Court, No. e3K-3-145-823/2020, 06 May 2020*

The Lithuanian Supreme Court clarified the interplay of the national rules on the jurisdiction of individual labour disputes involving a third-country national as a respondent (the case had relevance for the Brussels' Regulation (EU) No. 1215/2012). The main issue was the (apparently defective) transposition of Article 22 (1) of the Regulation in Article 215 (3) of the Labour Code, which stipulates that an employer may only bring proceedings against an employee in the courts of the country in which the employee resides. By virtue of this provision, the national rule on the beneficial position of the employee in terms of place of litigation not only became applicable to the citizens of Member States, but also to third-country nationals, such as temporary or fixed-term employees from Ukraine, Belarus, etc. A Ukrainian citizen with permanent residence in Ukraine but employed as a foreign employee with a work permit in a Lithuanian company successfully sued his employer in the Lithuanian Labour Disputes Commission (obligatory pre-trial institution for labour disputes in Lithuania). The Lithuanian courts refused to accept the claim of the Lithuanian company, referring to Article 215 (3) of the Labour Code, because the respondent's permanent address was in Ukraine. The Lithuanian Supreme Court made the claim admissible to Lithuanian courts on the ground that the employer did not initiate a new labour dispute, but that the claim was the continuation (i.e. similar to an appeal) of the labour dispute and therefore, Lithuanian courts (and not Ukrainian courts) were competent to hear the case. The decision of the Supreme Court solves part of the difficulties related to the unnecessary and imprecise transposition of the Regulation. The decision of the Supreme Court seems to be reasonable because of the lack of reciprocity in relation to other jurisdictions from Eastern European countries. However, it may also affect the establishment of *forum* in future disputes involving employees residing in other Member States, because it allows

them to be sued in Lithuanian courts, if they have initiated pre-trial proceedings against their Lithuanian employers in the Lithuanian Labour Dispute Commission.

### 3 Implications of CJEU Rulings and ECHR

#### 3.1 Worker status

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

The legislation of the Directive's transposition is not applicable to self-employed persons in Lithuania, but for dependent workers, as they are perceived as "employees" under the Labour Code. Such a case has not arisen in Lithuania yet, i.e. individual contractors do not provide courier and parcel delivery services. However, this case is relevant for the recently booming food delivery services. The present ruling should help authorities identify the specificities of dependent employment for the purpose of full application of the Labour Code. In the present ruling, the CJEU reiterated its own criteria in the context of a modern business pattern. The criteria established by the CJEU in the present case seem to be fully in conformity with the national perception of dependent and non-dependent employment relationships.

#### 3.2 Working time and leaves

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

In Lithuania, 'special purpose leave' includes maternity leave, paternity leave, parental leave, education leave, sabbatical leave and unpaid leave. Collective agreements usually slightly increase the number of days of the special purpose leave, but the conditions for granting such types of leave are not modified. The legislator strictly stipulates that the right to special purpose leave cannot be restricted because of planned or taken annual leave. Article 129 (1) of the Labour Code *expressis verbis* states that in the event that an employee cannot use annual leave for its intended purpose because he/she is temporarily incapacitated or is exercising his/her right to special purpose leave, specified in Articles 132-134 -1 of this Code, or he/she is granted unpaid leave as established in paragraph 1 of Article 137 of this Code, the annual leave for that period of time granted to him/her shall be transferred. In other words, the employer or parties to the collective agreement cannot force an employee to use his/her days of annual leave for special purpose leave days, if all preconditions are met.

### 4 Other Relevant Information

Nothing to report.



# Luxembourg

## Summary

(I) As the state of emergency has ended, some temporary measures have been enacted in formal laws.

(II) A law on internships has been adopted.

## 1 National Legislation

### 1.1 Measures to respond to COVID-19 crisis

The constitutional state of emergency ended after 3 months on 24 June 2020. This implies that the government is no longer entitled to issue grand-ducal decrees that have legislative value. Thus, a certain number of laws have been adopted as some provisional measures remain necessary in the context of the COVID-19 pandemic.

#### 1.1.1 General law

A general law (*Loi 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*) concerning a series of labour law measures was voted on on 20 June.

For measures that ceased when the state of emergency was lifted, there was no need to enact them. The main purpose of this 'omnibus' law is to give provisional measures a legal basis that might have an effect/incidence after 25 June. As these measures are purely provisional, it was decided not to implement them in the Labour Code, but as a special law. Only a few changes were intended to be permanent, hence the Labour Code was modified.

The most important of the provisional measures introduced by the law were:

Article of the law	Reference to details in the April 2020 Flash Report	Observations
Article 1	1.1.6.	The suspension of the probation period introduced during the period of crisis, will end. The probation period was suspended from the moment the undertaking had to close or the employee was switched to short-time work; the suspension ends on the day after the end of the state of emergency, i.e. 25 June. The various concerns about the practical implementation of this suspension (for example, for workers that were only on partial short-time work), mentioned in the April 2020 Flash Report, are not specifically addressed.

Article 2	1.1.8.1.	This article concerns the rule that after 26 weeks of continuous sick leave, employees are no longer protected against dismissal. This deadline was suspended during the crisis; the period starts running again on 25 June, if the employee is still on sick leave. However, in any case, after 27 weeks of sick leave, dismissal with immediate effect for serious misconduct ( <i>'licenciement avec effet immédiat pour faute grave'</i> ) is possible.
Article 3	1.1.14.	An exception on working time was introduced in certain sectors for hiring students; the maximum weekly working time was raised from 15 to 40 hours per week. These exceptional contracts will end and cannot be renewed.
Article 4	1.1.16.1.	All deadlines on collective dismissals (conciliation procedure and negotiation of a social plan) were suspended during the crisis. This suspension ends on 25 June.
Article 6		The law confirms that any short-time work between 01 January 2020 and 31 July 2020 will not be deducted from the annual limit of 1 022 hours of short-time work. For part-time workers, a <i>pro rata</i> calculation must be made.
Article 7	1.1.3.	The simplified procedure for declaring short-time work (i.e. not requiring individual signatures from each of the employees concerns) is extended until the end of the month after the crisis ends.
Article 8		For all applications for short-time work that fall within the period of crisis, the foreclosure period to submit the application will remain at 3 months (instead of 2 months), notably because the automated procedure is not yet fully functioning.
Article 9	1.2.11.2.	Normally, jobseekers must be offered a special agreement ( <i>'convention de collaboration individualisée'</i> ) within 3 or 6 months (Article L. 521-9 (4)); as this was not possible during the crisis, it was decided that this offer must be made at the latest 6 months after the end of the state of emergency.  A suspension is also implemented on the obligation for jobseekers to accept suitable employment.
Article 10	1.1.16.2.	Entitlement to unemployment benefits of any kind is extended by the duration of the state of emergency (i.e. 3 months).
Articles 11, 12 and 13	1.1.15.	These articles stipulate that for some subsidised insertion contracts ( <i>'contrat de réinsertion, contrat appui-emploi, contrat d'initiation à l'emploi'</i> ), the indemnities paid are fully at the State's expense during the state of emergency.
Article 15		The deadlines to be observed by occupational doctors are suspended for the duration of the crisis.

Article 16	1.1.5.2.	Persons on early retirement ( <i>'préretraite'</i> ) may usually only earn a limited salary; otherwise, their retirement benefits cease. For persons hired in certain sectors, these additional revenues were excluded. As some undertakings may still require hiring such persons, this measure will apply until 31 December 2020.
Article 17	1.1.5.1.	The time the Job Administration (ADEM) has to propose candidates that meet the required profile before the employer can recruit the candidate of his/her choice is increased from 3 weeks to 6 weeks during the state of emergency.

Article 19 implements these permanent changes in the Labour Code. The most important one is the increased penalty in case of unjustified recourse to short-time work or in case of unjustified use of the allocated subsidies (see also May 2020 Flash Report)

### 1.1.2 Family support leave

As mentioned in the March and April 2020 Flash Reports, a special family support leave (*'congé pour soutien familial'*) was introduced by grand-ducal decree because of the closure of certain facilities for the elderly or persons with disabilities. It was initially projected that this leave would be extended for exceptional circumstances in general, but due to the opposition of the State Council and the urgency to vote on the law prior to the end of the state of emergency, it was decided to adopt the State Council's proposition to enact the content of the provisional grand-ducal decree. The law itself (*'Loi du 20 juin 2020 portant introduction d'un congé pour soutien familial dans le cadre de la lutte contre la pandémie Covid-19'*) is provisional, and will expire after 5 months.

In short, workers, self-employed persons and public servants can benefit from this leave if:

- 1) the approved service has ceased its activities or part of its activities in the context of the COVID-19 pandemic;
- 2) the employee, self-employed person or public servant is taking care of a person who is disabled or of an elderly person with whom he/she resides.

A certain number of certificates must be provided and approved by the Ministry.

The leave is defined as sick leave and the sick pay is paid by the State. If the employer has been duly informed and has received the required certificates, the worker is protected against dismissal.

### 1.1.3 Occupational reclassification

Persons that have benefitted from an occupational reclassification (*'reclassement professionnel'*) because they were no longer able to perform their former job, but could not be immediately transferred to a new position, are paid a "standby payment" (*'indemnité d'attente'*).

If they are recognised as being able to work in their former position again, this allowance expires after 12 months. As a social measure, it has been decided that allowances that expire during the state of emergency are extended for one month after the end of the state of emergency.

*Reference: 'Loi du 24 juin 2020 portant prorogation de la dérogation aux dispositions de l'article IV de la loi du 23 juillet 2015 portant modification du Code du travail et du Code de la sécurité sociale concernant le dispositif du reclassement interne et externe'*

### 1.1.4 Procedure

Bill No. 7587, which deals with procedural rules in general, has been adopted (*'Loi du 20 juin 2020 portant 1° prorogation de mesures concernant - la tenue d'audiences publiques pendant l'état de crise devant les juridictions dans les affaires soumises à la procédure écrite, - certaines adaptations de la procédure de référé exceptionnel devant le juge aux affaires familiales, - la suspension des délais en matière juridictionnelle, et - d'autres modalités procédurales, 2° dérogation temporaire aux articles 74, 75, 76 et 83 de la loi modifiée du 9 décembre 1976 relative à l'organisation du notariat, 3° dérogation temporaire aux articles 15 et 16 de la loi modifiée du 10 août 1991 sur la profession d'avocat, et 4° modification de l'article 89 de la loi modifiée du 8 mars 2017 sur la nationalité luxembourgeoise'*).

Court services have mostly returned to 'business as usual' in Luxembourg. Some adaptations have been made to written procedures; for labour law, this only affects appeals, as first instance procedures are oral.

Furthermore, all procedural deadlines to file claims were suspended during the crisis. For the period after the crisis, it has been decided that:

- the time limits that expire during the state of emergency shall be extended by two months from the date of the end of the state of emergency;
- periods expiring in the month following the entry into force of the law (25 June) shall be postponed by one month from their expiry date.

The suspension of time limits *in* proceedings ceased with the end of the state of emergency.

### 1.1.5 Sick leave benefits

Bill No. 7582 referred to in the previous Flash Report has been voted on (*'Loi du 20 juin 2020 portant prorogation des dérogations aux dispositions des articles 11, alinéa 2, 12, alinéa 3 et 428, alinéa 4 du Code de la sécurité sociale et L. 121-6, paragraphe 3 du Code du travail'*). During the crisis, sick leave was fully covered by the health insurance fund. For reasons of administrative ease, the rule that sickness benefits are fully paid by the State does not cease on the day the state of emergency ends but continues until the end of the given month (i.e. until the end of June).

To help companies facing economic difficulties, interest on arrears of social security contributions will remain suspended until 31 December 2020.

### 1.1.6 Family leave

Bill No. 7583 announced in the former Flash Report was adopted, albeit with some changes to the initial project (*'Loi du 20 juin 2020 portant dérogation aux dispositions des articles L. 234-51 et L. 234-53 du Code du travail'*). During the COVID-19 crisis, and due to the closure of schools, entitlement to family leave was substantially extended (see also March and April Flash Reports). Now, as schools have reopened, this provisional extension is only maintained in specific cases.

As a transitional measure between 25 May 2020 and 15 July 2020, it continues to apply for:

- a child who is vulnerable to COVID-19, provided that a medical certificate is produced attesting to that vulnerability;
- a child is born on or after 01 September 2015;
- a schoolchild under the age of 13 years, whose school is closed or whose classes remain suspended for reasons directly related to the health crisis or who cannot be cared for by any school or childcare facility due to the implementation of a plan for alternating the care of pupils or the application of imposed barrier measures, on condition that he/ she produces a certificate attesting to the given situation issued by the Ministry of Education. For cross-border workers, a certificate issued by the foreign authorities must be provided.

### 1.1.7 Apprenticeship contracts

Bill No. 7593 announced in Flash Report 5/2020 has been adopted. The deadline by which new apprentices must find a training supervisor/employer has been extended (from November to December 2020). The six-week period within which an apprentice must find a new supervisor after the termination of his/her apprenticeship contract has also been extended; new contracts can be concluded until the end of the school year.

*Reference:* [Loi du 20 juin 2020 relative aux mesures temporaires dans le domaine de la formation professionnelle et portant dérogation à l'article L. 111-3, paragraphe 4, du Code du travail.](#)

### 1.1.8 Student contracts

The derogations mentioned in the May 2020 Flash Report (title 1, "Student contracts") temporarily reducing the restrictions to the hiring of students in the context of extra-curricular care for children, initially implemented by a grand-ducal decree, have been enacted in a law (*'Loi du 20 juin 2020 portant dérogation aux dispositions: 1° des articles L. 151-1, alinéa 1er, et L. 151-4, du Code du travail; 2° de l'article 16 de la loi modifiée du 19 mars 1988 concernant la sécurité dans les administrations et services de l'État, dans les établissements publics et dans les écoles ; 3° des articles 6 et 17 de la loi modifiée du 10 juin 1999 relative aux établissements classés ; 4° des articles 22, 25, 26 et 28bis de la loi modifiée du 4 juillet 2008 sur la jeunesse'*). These provisions will cease on 15 July 2020.

*Reference :* [Loi du 20 juin 2020 portant dérogation aux dispositions : 1° des articles L. 151-1, alinéa 1er, et L. 151-4, du Code du travail ; 2° de l'article 16 de la loi modifiée du 19 mars 1988 concernant la sécurité dans les administrations et services de l'État, dans les établissements publics et dans les écoles ; 3° des articles 6 et 17 de la loi modifiée du 10 juin 1999 relative aux établissements classés ; 4° des articles 22, 25, 26 et 28bis de la loi modifiée du 4 juillet 2008 sur la jeunesse.](#)

## 1.2 Other legislative developments

### 1.2.1 Internships for pupils and students

The only law that has been voted on which is not COVID-related is a law on internships for pupils and students (*'stages pour élèves et étudiants'*), as announced in previous Flash Reports.

Indeed, this topic was not clearly regulated until now. The purpose of the new law (*'Loi du 4 juin 2020 portant modification du Code du travail en vue d'introduire un régime de stages pour élèves et étudiants'*) was to provide for legal certainty, to avoid the abusive use of internships and to ensure the quality of internships.

The law does not cover internships regulated by special laws (such as doctors, lawyers, etc.).

For all other internships, a common set of rules is laid down:

- *Definition.* There is no specific definition of an internship. However, to clearly delimit such contracts from employment contracts, the law states that traineeships must supply knowledge, guidance and vocational training and must not assign the pupil or student to tasks that require performance that is comparable to that of an employee and must not be used to fill permanent jobs, to replace an employee who is temporarily absent or to deal with temporary work overload (Article L. 152-10 (1)).
- *Contractual relationship.* Any traineeship must be specified in a written agreement (*'convention de stage'*) to be signed by the trainee (or, if he/she is a minor, by his/her legal representative) and the employer/traineeship supervisor (*'patron de stage'*) (L. 152-3, L. 152-7). The agreement may, depending on the case, be signed by the educational establishment involved. This agreement must mention:
  1. the activities the trainee will perform;
  2. the starting and finishing dates of the traineeship and the maximum weekly duration of the trainee's presence at the employer's premises;
  3. the arrangements for authorising absence, in particular to report to a potential employer;
  4. where appropriate, compensation for the trainee;
  5. the appointment of a trainer;
  6. the trainee's possible benefits from the traineeship;
  7. the social protection scheme the trainee shall benefit from, in particular as regards accident insurance;
  8. the arrangements for terminating the traineeship agreement unilaterally or by mutual agreement before the end of the traineeship.
- *Monitoring and evaluation.* Each trainee is assigned a trainer (*tuteur*) who is responsible for integrating him/her to the furthest extent possible into the company, ensuring regular follow-ups, answering his/her questions, providing advice and guidance and issuing a critical and detailed assessment at the end of the internship and for internships lasting at least four weeks (Art. L. 152-10 (2)). For traineeships lasting less than 4 weeks, a detailed assessment would constitute an excessive administrative burden for companies.
- *Control.* The traineeship supervisor (*'patron de stage'*) must keep a register of traineeships accessible to the staff representatives and to the labour inspectorate (*'Inspection du Travail et des Mines'*) (Article L. 152-11). The labour inspectorate is in charge of supervising the legal provisions on traineeships (L. 152-16). Any dispute falls within the jurisdiction of the labour courts (*'tribunal du travail'*) (Article L. 152-17).
- *Occupational health and safety.* The rules on working time, rest periods, holidays and paid annual leave are applicable to trainees, as well as the entire legal framework on occupational health and safety (L. 152-12). Trainees must be covered by an accident insurance (L. 152-15).

Beyond these general rules, the law differentiates between two types of traineeships:

1. traineeships provided by a national or foreign educational establishment (*'stages prévus par un établissement d'enseignement luxembourgeois ou étranger'*).



These traineeships must form an integral part of the training in accordance with the programme of the educational establishment.

2. other practical traineeships for the acquisition of professional experience (*'stages pratiques en vue de l'acquisition d'une expérience professionnelle'*). These traineeships can only be concluded by:
  - students or pupils enrolled in an educational establishment, who regularly participate in courses,
  - persons holding a secondary school leaving certificate (*'diplôme de fin d'études secondaires'*) or who have successfully completed a first cycle of higher or university education. In this case, the entire duration of the traineeship must be concluded within 12 months of the end of the last school year.

The law does not clearly state it, but in the author's opinion, no traineeship contract may be concluded outside of this legal framework (or special laws). Such a contract would have to be qualified either as an employment contract or as volunteer work.

In both cases, traineeships lasting less than 4 weeks may not be remunerated. Beyond this period, a distinction is made between the two types of traineeships:

1. The traineeships mentioned under "1" must be remunerated at least 30 per cent of the social minimum wage for unqualified work (Article L. 152-4). Exceptionally, the Minister may agree to waive such remuneration if the educational establishment's internal rules prohibit the student from performing any paid traineeships.
2. Traineeships mentioned under "2" must be remunerated as follows (L. 152-8):

< 4 weeks	No remuneration
4-12 weeks	40 per cent of the social minimum wage
> 12 and ≤26 weeks	75 per cent of the social minimum wage

The minimum wage for unqualified work applies in such cases. If the trainee has a bachelor's degree, the percentage applies to the minimum wage for qualified work (which is 20 per cent higher).

The question of remuneration was one of the main divisive issues between employer and employee representatives. According to the parliamentary documents, traineeships of less than 4 weeks are not remunerated because the company invests a great deal of effort in organising them. Beyond that, the principle that every effort deserves pay has prevailed. Furthermore, young persons should not get used to the fact that work does not pay.

Furthermore, "b"-type traineeships (those not organised in the context of an educational establishments) are subject to anti-abuse measures, as they are limited in time and in number:

- They may not exceed 6 months over a 24-month period for the same employer (traineeship supervisor) (Article L. 152-6)
- Except for the period from 01 July to 30 September, the number of traineeships is limited to 10 per cent of the company's workforce (and to 1 per cent for the companies employing less than 10 employees) (L. 152-9).



The law also implements two minor changes concerning the special employment contract for pupils and students:

- This contract, normally limited to pupils and students, can also take place within 4 months after a youth voluntary service (*'service volontaire des jeunes'*) has been completed.
- The annual limit of 2 months per year is flexibilisation for part-time student jobs, as they can also amount to 366 hours per year.

## 2 Court Rulings

Nothing to report.

## 3 Implications of CJEU Rulings and ECHR

### 3.1 Worker status

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

This decision provides additional details on the definition of a "worker". In Luxembourg, the rules on working time apply to all "*salaries*" and to some persons working in a vocational training context, especially trainees (see above).

The criteria used in Luxembourg to define the employment relationship and subordination are closely linked to those emphasised by the Court.

Thus, the right to use subcontractors, the right to refuse certain tasks, the possibility to work for direct competitors and the freedom to set working hours would be considered very strong indicators that no employment relationship exists.

However, especially because this case involved a delivery service, the Court would pay close attention to determine whether these freedoms are simply mentioned in the contract to avoid having to conclude an employment relationship or if they are also exercised in practice. As the contract appeared to not have been an employment contract, it would be up to the "employee" to prove that he/she was subordinated and that in practice, he/she had no freedom at all. If it can be proven, however, that the claimant benefitted from contractual freedoms, he/she would very likely be considered a self-employed worker.

As regards food delivery services, the labour inspectorate has opened an investigation and recently transmitted the file to the Public Prosecutor's Office.

An article of 'RTL' of 14 June 2020 relating to the labour inspectorate's investigation is available [here](#).

### 3.2 Working time and leaves

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

Considering the Court's ruling, there is no question whether national law complies with European law or not, as the Court did not establish any specific requirement deriving from the Directive. The situation of special leaves in Luxembourg is summarised below.

Article L. 233-16 of the Labour Code grants special leaves in certain cases, such as marriage (3 days), the marriage of a child (1 day), the death of a close relative (1 to 5 days), the birth of a child (10 days), etc.

For most of these extraordinary leaves, the Labour Code states that they must be taken at the time of the event and cannot be postponed. However, if the employee would not



have worked that day, the leave is postponed to the employee's first working day. If the event takes place during annual leave, the annual leave is deemed to have been interrupted; this means that the days off are not deducted from the employee's leave balance.

#### **4 Other Relevant Information**

Nothing to report.

# Malta

## Summary

Nothing to report.

## 1 National Legislation

### 1.1 Measures to respond to COVID-19 crisis

Nothing to report.

### 1.2 Other legislative developments

Nothing to report.

## 2 Court Rulings

Nothing to report.

## 3 Implications of CJEU Rulings and ECHR

### 3.1 Worker status

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

The CJEU ruled that:

*"Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as precluding a person engaged by his putative employer under a services agreement which stipulates that he is a self-employed independent contractor from being classified as a 'worker' for the purposes of that directive, where that person is afforded discretion:*

- to use subcontractors or substitutes to perform the service which he has undertaken to provide;*
- to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks;*
- to provide his services to any third party, including direct competitors of the putative employer, and*
- to fix his own hours of 'work' within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer,*

*provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer. However, it is for the referring court, taking account of all the relevant factors relating to that person and to the economic activity he carries on, to classify that person's professional status under Directive 2003/88."*

The [Employment Status \(National Standard\) Order, 2012](#) includes a list of criteria as follows:

- He/she depends on one single person for whom the service is provided for at least 75 per cent of his/her income over a period of one year;
- He/she depends on the person for whom the service is provided to determine what work is to be performed and where and how the assigned work is to be carried out;
- He/she performs the work using the equipment, tools or materials provided by the person for whom the service is provided;
- He/she is subject to a working time schedule or minimum work periods established by the person for whom the service is provided;
- He/she cannot subcontract his/her work to other individuals to substitute him-/herself when carrying out work;
- He/she is integrated in the structure of the production process, the work organisation or the company's or other organisation's hierarchy;
- The person's activity is a core element in the organisation and pursuit of the objectives of the person for whom the service is provided; and
- He/she carries out similar tasks as existing employees, or, in case work is outsourced, he/she performs tasks similar to those formerly undertaken by employees.

If five out of eight criteria are present in any relationship, then that relationship shall be deemed to be an employment relationship.

Furthermore, the parties to the relationship shall be deemed to be the "employer" and the "employee". Hence, this judgment of the CJEU must be read in the light of this Law.

### 3.2 Working time and leaves

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

The CJEU stated that

"Articles 5 and 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as not being applicable to national rules providing for special leave on days when workers are required to work which do not allow those workers to claim that leave in so far as the needs and obligations met by that special leave arise during weekly rest periods or periods of paid annual leave that are the subject of those articles."

Maltese law has no provision with regard to national rules providing for special leave on days when workers are required to work, which do not allow those workers to claim that leave in so far as the needs and obligations met by that special leave arise during weekly rest periods or periods of paid annual leave that are the subject of those articles.

## 4 Other Relevant Information

Nothing to report.

# Netherlands

## Summary

(I) A second package of economic measures related to the COVID-19 crisis has been introduced.

(II) The Dutch government and the social partners have reached an agreement on the future of the Dutch pension system.

## 1 National Legislation

### 1.1 Measures to respond to COVID-19 crisis

#### 1.1.1 Income subsidies

##### 1.1.1.1 Emergency bridging measures to preserve employment (NOW 2.0)

*Regulation by the Minister of Social Affairs and Employment dated 22 June 2020 establishing a second temporary subsidy scheme as a contribution towards wage costs in order to maintain jobs in exceptional circumstances, [Stcrt.2020, 34308](#).*

NOW 1.0 ended on 05 June 2020. On 25 June 2020, NOW 2.0 was officially published. In essence, the scheme is very similar to NOW 1.0 (see earlier Flash Reports): a company that faces a decline in turnover of 20 per cent or more can apply for compensation of wage costs.

The differences between NOW 1.0 and 2.0 are highlighted below:

- Subsidy period: 4 months (01 June 2020-30 September 2020) (it was 3 months under NOW 1.0);
- Period of decline in turnover: 4 months (starting by choice on 01 June, 01 July or 01 August for new applicants. For those who already applied for NOW 1.0, the period directly follows the selected period under NOW 1.0);
- Reference turnover: turnover 2019 divided by three (NOW 1.0: divided by four);
- Reference month for wage sum: March 2020, increased with a 40 per cent flat-rate surcharge for additional wage costs (NOW 1.0: January 2020, with a 30 per cent flat-rate surcharge);
- Obligations for the employer have remained in place (mainly, keeping the wage sum at the same level as much as possible and refraining from dismissals for economic reasons). One difference is that under NOW 2.0, the sanction of a 50 per cent fine in case of dismissal has been lifted. Dismissals will still result in a deduction of the dismissed employee's wage from the wage sum;
- Additional conditions in case of collective dismissal: (i) 5 per cent rebate on the amount of the subsidy, unless there is an agreement with the relevant trade unions or, if there are none, with the works council. A agreement must be reached on the number of dismissals. Alternatively, if no agreement is reached, the employer can ask the Labour Foundation to rule whether the number of dismissals is reasonable. If ruled reasonable, there is no 5 per cent rebate. (ii) The employer must wait at least 4 weeks to file for dismissals after a notification has been made based on the Collective Redundancy Notification Act;
- Employers are required to stimulate their employees to participate in retraining or reskilling courses (NOW 1.0 did not mention this obligation at all);

- Prohibition of bonus payments and dividend distribution if the employer applied for an advance payment of EUR 100 000 or more or an amount of subsidy of EUR 125 000 or more (under NOW 1.0, this prohibition was only applicable in case of a group company that applied on behalf of a subsidiary entity).

With respect to NOW 1.0, the [latest data](#) of UWV, published on 07 July 2020, indicate that between the introduction of the scheme on 06 April 2020 until it ended on 05 June 2020, 148 000 applications were filed and 139 000 were granted. Advance payments up to a total amount of EUR 8 billion have been made. With these advance payments, 2.6 million employees have been reached.

#### 1.1.1.2 Temporary benefits for self-employed professionals (TOZO)

*Government Decree of 17 April 2020 establishing temporary rules on benefits for self-employed persons that have been financially hit by the consequences of the crisis connected to COVID-19, [Stb. 2020, 118](#) (see also earlier Flash Reports).*

This scheme, which consists of income support for self-employed persons, has been extended. The application period has been extended by four months up to and including 30 September 2020, and the period for obtaining additional temporary benefits has been extended from three to seven months. The main change with respect to the first scheme is that a partner income test will apply again. This means that if the joint income exceeds the social minimum, there is no entitlement to benefits for the self-employed worker

#### 1.1.1.3 Temporary bridging measure for flex workers (TOFA)

*Regulation by the Minister of Social Affairs and Employment dated 8 June 2020 establishing a temporary bridging measure for flex workers, [Stcrt. 2020, 31395](#).*

This new scheme applies as of 22 June 2020 and aims to compensate employees with any form of a flexible employment contract who cannot claim any other benefit. The following conditions apply to employees who have:

- in February 2020, earned at least EUR 400;
- in March 2020, earned at least EUR 1;
- in April 2020, earned at least 50 per cent less wages compared to February 2020 and in any event, less than EUR 550;
- no other benefits received in April 2020.

If the conditions are met, there is an entitlement to a one-off benefit of EUR 1 650 for a period of three months (01 March 2020 to 31 May 2020). The scheme is executed by UWV, the Dutch public employment services. Applications can be filed from 22 June 2020 up to and including 12 July 2020.

### 1.2 Other legislative developments

Nothing to report.

## 2 Court Rulings

Nothing to report.



### 3 Implications of CJEU Rulings and ECHR

#### 3.1 Working time and leaves

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

This case concerns Spanish national legislation and provisions from a collective agreement regarding a special type of leave. Workers are entitled to this special leave only in case of events described in the collective agreement (such as marriage). The referring court asked whether it is compatible with Articles 5 and 7 of Directive 2003/88, if the needs and obligations arising from the events covered by the collective agreement may justify the special leave laid down therein only outside the weekly rest periods or periods of paid annual leave, even though those needs and obligations reflect purposes that differ from those served by the latter periods. In that context, the referring court referred to sick leave, which has a different purpose from annual leave. A worker who is on sick leave during a period of previously scheduled annual leave has the right to take annual leave at a time that does not overlap with the period of sick leave, so that he/she may actually use the annual leave. In the instance of special leave, the events that could entitle a worker to special leave might also occur during weekly rest periods or periods of paid annual leave.

The CJEU considered that the aim of Directive 2003/88/EC is to set down minimum health and safety requirements for the organisation of working time, and that it does not affect the right of the Member States to apply provisions of national law that are more favourable to the protection of workers. The CJEU also considered that the days of special leave granted under the collective agreement fall within the scope not of Directive 2003/88/EC, but rather of the exercise by a Member State of its own competences. The exercise by a Member State of its own competences cannot, however, have the effect of undermining the minimum protection guaranteed to workers by that Directive. The Court considered that the special leave at issue depends on two cumulative conditions. Those conditions are the occurrence of one of the events specified and the fact that the needs or obligations justifying the grant of special leave arise during a working period. Since the purpose of the paid special leave established by the provisions at issue is solely to enable workers to take time off from work in order to meet specific needs or obligations that require their personal presence, that leave is inextricably linked to working time as such, and consequently, workers will not have recourse to such leave during weekly rest periods or periods of paid annual leave. The special leave is thus not comparable to sick leave. Articles 5 and 7 of Directive 2003/88 do not lead to the obligation that workers should be able to use the special leave at the time of a subsequent working period if the events occur during rest periods or periods of paid annual leave.

In conclusion, the CJEU ruled that Articles 5 and 7 of Directive 2003/88/EC should be interpreted as not being applicable to national rules providing for special leave on days when workers are required to work, which do not allow those workers to claim that leave in so far as the needs and obligations met by that special leave arise during weekly rest periods or periods of paid annual leave that are the subject of those articles.

The CJEU ruling is not contrary to Dutch national legislation on leave. Dutch national law is in compliance with the CJEU ruling. No attention has been paid to the case so far in case notes or academic literature, nor in societal debate.

#### 3.2 Worker status

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

In this Article 99 decision of the CJEU, the relevant legal question was whether a British parcel courier, who worked on the basis of a courier service agreement as a self-

employed worker, had to be classified as a “worker” for the purposes of Directive 2003/88/EC, given the freedom he has providing the services.

The CJEU considered that it had already ruled on this concept and that therefore, it is appropriate to apply an Article 99 procedure. The CJEU ruled that Directive 2003/88/EC must be interpreted as precluding a person engaged by his/her putative employer under a services agreement, which stipulates that he/she is a self-employed independent contractor, from being classified as a “worker” for the purposes of that Directive, where that person is afforded discretion:

- to use subcontractors or substitutes to perform the service which he/she has undertaken to provide;
- accept or not accept the various tasks offered by his/her putative employer, or unilaterally set the maximum number of those tasks;
- provide his/her services to any third party, including direct competitors of the putative employer, and
- fix his/her own hours of ‘work’ within certain parameters and to tailor his/her time to suit his/her personal convenience rather than solely the interests of the putative employer,

provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his/her putative employer. However, it is for the referring court, taking account of all the relevant factors relating to that person and to the economic activity he/she carries out, to classify that person’s professional status under Directive 2003/88.

The scope of the Working Time Act is in compliance with the scope of the Working Time Directive, so there does not seem to be a direct implication.

In a broader sense, parcel couriers who have very comparable contracts to the courier in the *Yodel* decision (including Deliveroo riders), have been considered ‘employees’ under Dutch law in lower case law (not specifically with respect to working time). The question arises whether this type of case would be ruled differently, bearing in mind the *Yodel* decision. Given the last part of the ruling that leaves national courts extensive discretionary power to classify a person’s professional status, a conservative estimate would be that this CJEU decision will not introduce a change in Dutch case law.

So far, only descriptive case notes have been published. Most of them note that the choice for an Article 99 ruling raises a lot of questions. Not a lot of attention has been paid to the decision in societal debate or in the political debate.

## 4 Other Relevant Information

### 4.1 Pension agreement

On 12 June 2020, the Dutch government and the social partners reached an agreement on the future of the Dutch pension system. This agreement is a clarification of the focal points for the new pension system that was agreed on in June 2019. However, it will take some time until the new pension provisions actually go into effect. The agreement still needs to be formally approved by the parties involved. Then, legislation will need to be drafted and passed. Therefore, the content of the agreement made might still be changed. Nonetheless, this is an important step towards revising the Dutch pension system.

Some key points from the agreement are as follows. A large part of the system will remain as is. The Dutch pension system is currently a collective system with elements of solidarity and will remain that way. Another important feature of the current Dutch



pension system is mandatory participation in pension schemes and this, as well, will remain. However, there will also be changes. Currently, pension agreements in the Netherlands are mainly set up as defined benefit agreements. This will change in the future, where defined contribution agreements will become the standard. These new pension agreements will not be structured in the exact same way as existing, defined contribution agreements in the Netherlands. For instance, the level of contribution and the pension entitlements that will be received in return, will change. Currently, in defined benefit agreements, both the contribution and the entitlements based on that contribution are independent of age. In current defined contribution agreements, the contribution depends on age, whereas the entitlements are independent of age. In the future system, there will be defined contribution agreements with a contribution rate independent of age, but the entitlements provided in return will decrease with age. This means pension entitlements will be more in conformity with their economic value than in current Dutch (mainly defined benefit) agreements. Another major change is that at present, pension funds need to calculate their future obligations with a certain interest rate. The outcome of this calculation heavily influences whether these pension funds need to cut pensions or not. This mandatory calculation will be abolished. Seeing how the defined contribution system—contrary to the defined benefit system—does not make any promises on the amount of the pension on the date of retirement, there will no longer be a need to cut pensions. Generally, existing pension agreements will be converted into the new type of agreement. There will be a transition phase and compensation as needed, but the details of these are not yet known.

## Norway

### Summary

(I) Norway has gained control over the COVID-19 outbreak and the lockdown measures are gradually being lifted. In June, some of the existing measures associated with the COVID-19 outbreak continue to apply and/or have been adapted.

(II) New regulations on the enforcement of rules on temporary agency workers and equal treatment have been passed.

(II) The Norwegian Supreme Court has passed two judgments, in one case on pay during suspension, and in another case regarding the transfer of an undertaking from the State to the private sector, which clarifies the scope of the pension exemption.

## 1 National Legislation

### 1.1 Adaption of measures to respond to the COVID-19 outbreak

Norwegian society was partially locked down by the government on 12 March 2020 due to the COVID-19 outbreak. A number of measures were introduced to prevent the virus from spreading and to mitigate the effects of the pandemic on society. See Flash Report 5/2020 for a description of the relevant legislative measures.

The gradual reopening of society, which started in April, continued in June. Amusement parks were allowed to reopen on 1 June, fitness studios and swimming pools on 15 June, and at present, virtually all business activities have reopened. From 15 June, it is permitted to have events for up to 200 people with a requirement to distance of at least 1 metre between all participants, with some exceptions. Travel and quarantine restrictions were also lifted to some extent. Strict infection control measures still apply.

The unemployment rate rose sharply during the lockdown, but has been declining since the reopening started. By the end of May, there were approx. 355 400 unemployed persons, amounting to 12.6 per cent of the workforce. By the end of June, the number was 272 400, i.e. 9.6 per cent of the workforce.

In June, the government passed several regulations to continue and/or adapt existing measures to the COVID-19 outbreak, most importantly:

- The employer's duty to pay employee's salaries during a layoff period was reduced from 15 to 2 days in March. In June, it was **decided** to increase the number of days to 10 from 1 September onwards.
- On 23 June, a new temporary scheme for subsidies to employers who requested workers that had been laid off during the lockdown to return to work was **introduced**. The scheme applies to employees who were laid off after 28 May 2020 and who returned to work before 1 July or 1 August 2020.
- Temporary **regulations** on parental leave have been modified. From 1 July, the number of days of parental leave was changed back to the usual number of days in accordance with the National Insurance Act. This implies that an employee for the rest of 2020 will be entitled to the same number of leave days (as a main rule, 10 days) he/ she would normally be entitled to each year pursuant to the Act.
- Temporary regulations on advanced payments of unemployment benefits were continued and **adapted**.

## 1.2 Other legislative developments

### 1.2.1 Temporary agency work

New [regulations](#) on the enforcement of rules on temporary agency workers and equal treatment in the Working Environment Act (and some other acts) were passed on 19 June 2020, and entered into force on 1 July 2020. The amendment gives the Norwegian Labour Inspection Authority (and some other agencies) authority to ensure that the conditions for hiring employees from temporary work agencies and the requirement of equal treatment are met, including competence to impose orders and to sanction violations.

Furthermore, some minor [changes](#) to the Labour Dispute Act were passed on 19 June 2020, and entered into force 1 July 2020. Most of the changes are of a procedural nature.

## 2 Court Rulings

### 2.1 Pay during suspension

*The Supreme Court of Norway, case No. HR-2020-1157-A (19-152288SIV-HRET), 3 June 2020*

An employer may, according to the Working Environment Act section 15-13, suspend an employee's contract if there is reason to assume that he/she is guilty of an offence that may entail summary dismissal and if the undertaking's needs require it. The suspended employee shall, according to Section 15-13 (3), "retain the salary he or she received on the date of the suspension until termination of the suspension".

A part-time employed nurse, who had been suspended for a certain period, had worked several extra shifts prior to the suspension, and had thus received a higher monthly salary than stipulated in the agreed employment terms. The Supreme Court [found](#), like the lower instance courts, that the basis for calculating the salary to which she was entitled during the suspension period did not comprise the compensation for extra shifts prior to the period of suspension. The wording of the provision and the preparatory works suggested this solution.

### 2.2 Transfer of undertakings

*The Supreme Court of Norway, case No. HR-2020-1339-A (19-152294SIV-HRET), 26 June 2020*

In 2016, it was decided that the cleaning of the buildings of the Norwegian Armed Forces was to be tendered. ISS Facility Services AS (ISS) won the tender, and 209 employees were transferred from Forsvarsbygg to ISS. The transferor and the transferee agreed that this was a transfer of ownership according to the Norwegian Working Environment Act section 16-1, which transposes Directive 2001/23. The question in the present case was whether the employees could, after the transfer, still claim notice of termination, special old age pension and early retirement pension (AFP) which applied to them as state employees.

According to the Civil Servants Act (now State Employees Act), state employees are normally entitled to longer periods of notice than employees in the private (and municipality) sector according to the Working Environment Act. After the transfer, the cleaners were covered by the Working Environment Act, not the Civil Servants Act. The cleaners claimed, however, that they still had the same entitlement to longer periods of notice, regardless whether this right had a contractual basis or only was a right according to the Act.

The Supreme Court **found** that the reference in the cleaners' employment contracts to the periods of notice in the Civil Servants Act was contractually binding and thus comprised the transfer of rights to ISS under section 16-2. The provision states that the "rights and obligations" of the former employer "ensuing from the contract of employment or employment relationships" shall be transferred to the new employer. Hence, it was not necessary for the Court to decide whether the transfer comprised purely legislative rights according to section 16-2.

ISS had invoked its existing collective pension scheme towards the cleaners. This implied, according to the Supreme Court, that their former right to special old age pension ("særalderpensjon") and to early retirement pension (AFP) had been lost in accordance with section 16-2 (3) second sentence of the Working Environment Act. The main regulation states that the employees' right to earn further entitlements to a retirement pension in accordance with a collective pension scheme is transferred to the new employer. The new employer may, however, elect to make existing pension schemes applicable to the transferred employees. The question was whether this exemption applied to the special old age pension and the AFP. With reference to C-164/00 Beckmann and C-4/01 Martin, the Supreme Court stated that the applicable criteria are whether the pension can be considered an expression of the employee's regular termination of employment in accordance with the general structure of the pension scheme.

The Norwegian Supreme Court has dealt with a few cases on the interpretation of section 16-2 Working Environment Act. This judgment clarifies important aspects of the pension exemption. The judgment furthermore provides important guidelines on the interpretation of employment contracts. The Court stated that, as part of such interpretation, the asymmetrical aspect of the employment relationship must be taken into consideration. Several other and more complex questions were covered by the case, e.g. whether the AFP scheme in collective agreements imply individual contractual rights.

### **3 Implications of CJEU Rulings and ECHR**

Nothing to report.

### **4 Other Relevant Information**

Nothing to report.



## Poland

### Summary

(I) The Law of 19 June introduced further amendments to the “anti-crisis shield” (the so-called ‘anti-crisis shield 4.0’).

(II) The draft of the law implementing Directive (EU) 2018/957 on the posting of workers has been submitted to Parliament.

(III) Representative trade unions and employers’ organisations have concluded an autonomous agreement on an active aging strategy.

## 1 National Legislation

### 1.1 Measures to respond to COVID-19 crisis

#### 1.1.1 Anti-crisis shield package 4.0.

##### 1.1.1.1 Introductory remarks

On 19 June 2019, the [Law on subsidies for interests on bank credits provided to entrepreneurs who suffered the consequences of COVID-19, and on simplified proceedings for approvals of agreements connected to COVID-19](#) (*‘ustawa o dopłatach do oprocentowania kredytów bankowych udzielanych przedsiębiorcom dotkniętym skutkami COVID-19 oraz o uproszczonym postępowaniu o zatwierdzenie układu w związku z wystąpieniem COVID-19’*, Journal of Laws 2020, item 1086) was enacted. The law took effect on 24 June.

Sources:

Information on the legislative process is available [here](#).

The substantiation of the draft is available [here](#).

The Law of 19 June 2020 is referred to as the ‘anti-crisis shield 4.0.’. It amended the original ‘anti-crisis shield’, i.e. the [Law of 02 March 2020 on specific measures to prevent, mitigate and fight COVID-19, other infectious diseases and crisis situations caused by them](#) (*‘Ustawa o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych’*, Journal of Laws 2020, item 374).

The original anti-crisis shield and subsequent amendments to it have been presented in the March to May Flash Reports.

The recent Law of 19 June introduced several amendments to the original ‘anti-crisis shield’, which concern labour law (indicated below).

##### 1.1.1.2 Provisions on labour law

###### (i) Remote work

Article 3 of the original anti-crisis shield provides that in order to respond to COVID-19, the employer can order the employees to perform the work agreed in the employment contract outside the usual workplace for a limited time. This regulation has been extended by the Law of 19 June. According to the current wording, remote working can be ordered if the employee has the skills and technical possibilities to carry out his/her activity, and if the type of work allows for remote working. The means and materials should be provided by the employer. The employee can use his/her own equipment, if protection of confidential information and personal data is safeguarded. Upon the



employer's instruction, an employee who performs his/her work remotely may be required to record his/her activities. The employer can renounce the instruction to perform remote work at any time. The employer is responsible for the health and safety of the employee only with regard to technical resources or means provided by him/her to the employee.

### (ii) Change of conditions of work performance of self-employed persons

The newly added Article 3a provides that during the COVID-19 crisis, the employer can order self-employed persons to perform work other than that agreed in the employment contract, if it corresponds to the employee's qualifications, at the same or another location, for a fixed period of no more than 3 months. The employee's remuneration cannot be reduced. In the case of pregnant employees, an employee who is taking care of a child up to the age of 4 years, or is the only custodian of a child up to the age of 15 years, the employee's consent is required.

### (iii) Public subsidies to finance employee remuneration for the period of work stoppage or reduction of working time

Article 15g of the anti-crisis shield provides financial subsidies for entrepreneurs to cover part of their employee remuneration in two situations, i.e. in case of work stoppage or reduction of working time due to economic reasons. Financial assistance can be granted to those entrepreneurs who have experienced a reduction in turnover as a result of the COVID-19 crisis. The financial assistance is provided by the Fund of Guaranteed Employee Benefits.

The scope of application of this provision has been extended by the Law of 19 June. Under current regulations, not only entrepreneurs, but also other entities i.e. those who have made use of voluntary work, or cultural event organisers, can apply for subsidies for remuneration, if they suffered negative consequences due to the coronavirus pandemic. The abovementioned entities can also apply for public subsidies to finance social security contributions.

Moreover, the new Article 15gb of the anti-crisis shield has introduced further possibilities to obtain public subsidies. This provision concerns employers who have experienced a decline in turnovers from the sale of goods or services and consequently, a major increase in remuneration expenditure (i.e. in practice, they are facing difficulties paying employees' remuneration). Such employers can reduce their employees' working time or introduce economic stoppage. Employees should receive at least the statutory minimum wage. The abovementioned steps can be introduced for a period of six months, and no longer than 12 months after the state of emergency has ended. An agreement with employee representatives, as provided by Article 15g of the anti-crisis shield, is necessary.

### (iv) Granting holiday leave

The new Article 15gc provides that during the COVID-19 emergency, the employer can grant an employee the use of up to 30 days of his/her annual leave accumulated in previous years. The employer is free to determine the date of the employee's annual leave, and he/she can also disregard the schedule of leaves. The employee's consent is not required.

### (v) Limitation of severance payments and compensation from the employer

The new Article 15gd states that during the COVID-19 emergency, if an employer, who has suffered negative consequences due to the coronavirus, terminates an employment contract, the amount of severance pay, compensation or other pecuniary benefit paid to the employee (if required by relevant provisions) should be no higher than ten times

the statutory minimum wage. This regulation also applies to terminations of civil law contracts.

### (vi) Suspension of certain employer's social duties

According to the new Article 15ge, during the COVID-19 emergency, employers who have suffered negative consequences due to the crisis (i.e. the decline of economic turnover) can suspend the execution of several social obligations. Thus, the employer can suspend the creation or operation of the company social benefits funds, as well as the provision of a holiday bonus. The consent of trade union(s) is required, if they operate at the given employer.

The [Law of 04 March 1994 on company social benefits funds](#) (*'ustawa o zakładowym funduszu świadczeń socjalnych'*, consolidated text: Journal of Laws 2019, item 1352, as amended) provides that employers, who employ at least 50 employees, are required to create a social fund to finance certain social benefits (e.g. loans or holiday bonus).

### (vii) Prohibition of competition

Article 101<sup>2</sup> [Labour Code](#) (consolidated text Journal of Laws 2019, item 1040) introduces a ban on competition following the termination of an employment contract, based on the contract between parties. According to this provision, an employer and an employee with access to particularly important information, the disclosure of which could expose the employer to damage, can conclude a contract on a competition ban after the expiry of the employment relationship. The contract must include provisions on the period of prohibition of competition, as well as the amount of compensation due to the employee from the employer (§ 1). Such competition ban becomes invalid prior to the expiry of the period for which the contract provided for in this provision has been concluded, if the reasons for the prohibition cease to exist, or the employer does not pay compensation (§ 2). The compensation cannot be lower than 25 per cent of the previous employee's remuneration; it shall be paid in monthly instalments (§ 3).

A new possibility for the employer to terminate such a contract has been added by the Law of 19 July. The newly added Article 15gf of the anti-crisis shield provides that the contract on prohibition of competition, following the termination of an employment relationship, agency contract, mandate contract or other civil law contract on the provision of services, a contract to complete a specific task, can be terminated by a beneficiary of the competition ban upon a seven-day notice.

### (viii) Additional financial subsidies for entrepreneurs

The anti-crisis shield provides for special regulations on work stoppage and the reduction of working time, as well as the possibility for public subsidies to employee remuneration in such a situation (Article 15g of the anti-crisis shield, see above section 3). The new Article 15gg provides further options for public subsidies by entrepreneurs who have experienced a decline in economic turnover. Such entities can apply for subsidies to remuneration and social security contributions from the Fund of Guaranteed Employee Claims, even if the employees are not covered by work stoppage or reduced working time for economic reasons. The subsidies can cover up to 50 per cent of employee remuneration. The subsidies to cover remuneration and social security contributions can be granted for a period of up to three months. Employers may only apply for such assistance if they did not receive any other public health benefits. During this period, dismissals justified by the reasons not concerning an employee are inadmissible.

### 1.1.1.3 Concluding remarks

In principle, the Law of 19 June (i.e. 'anti-crisis shield 4.0.') should be evaluated positively. Recent amendments to the anti-crisis shield provisions should be viewed as a continuation of previous measures introduced to fight the COVID-19 crisis and to preserve jobs. Fast legislative proceedings in Parliament should be emphasised here.

Several provisions clarify the existing regulations (e.g. for remote working), some provide further means of public assistance to employers (e.g. with regard to remuneration subsidies). In practice, the scope of assistance provided by the state has been further broadened. Additional measures provide room to reduce employers' expenditures (e.g. limits to severance pay or compensation). The only factor that should be evaluated negatively is the employer's option to terminate the contract on competition ban. Those measures are not connected to the coronavirus crisis.

All of the measures are ad-hoc provisions with temporal constraints, they are intended to fight COVID-19 crisis, and do not permanently amend the Labour Code or other statutes. It seems that no further legal action in the field of labour law in relation to the coronavirus measures can be expected in the future.

## 1.2 Other legislative developments

### 1.2.1 Posting of workers

On 15 June, the government submitted the draft amendment to the [Law of 10 June 2016 on the posting of workers in the framework of the provision of services](#) to Parliament (consolidated text Journal of Laws 2018, item 2206).

The aim of the draft is to implement Directive (EU) 2018/957 amending Directive 96/71/EC on the posting of workers.

Sources:

The draft and its substantiation is available [here](#).

The information on the legislative process is available [here](#).

The draft proposes the following amendments to the law on the posting of workers in the framework of the provision of services:

- The definition of an employer who posts workers to and from Poland has been made more precise. According to the new wording, each entity that posts workers to another Member State will be considered an employer, irrespective of its name or description, including any type of posting of temporary workers (new wording of Article 3, sections 4 and 5);
- The provisions on minimum employment conditions to be respected by an employer who posts workers to Poland have been modified. The amended Article 4 of the Law refers to "remuneration for work" instead of "minimum remuneration for work". The new Article 4 section 2 item 10 refers to allowances or reimbursement of expenditure to cover travel, board and lodging. This provision refers to postings that do not exceed 12 months. The new sections 3-6 concern the mode of determining the amount of remuneration for work: the overall gross amount should be the point of reference for comparison; overtime bonus should be included. Allowances for posted workers should be regarded as part of remuneration, unless they are paid as reimbursement of expenditures actually incurred on account of the posting, such as expenditures on travel, board and lodging;
- The newly added Article 4a of the Law refers to motivated notifications that allow an employer posting workers to Poland to observe the above mentioned

employment conditions for a period exceeding 12 months, but no longer than 18 months. The motivated notification should be submitted to the Labour State Inspectorate in writing or in electronic form, in Polish or English;

- The newly added Article 4b of the Law introduces the obligation of the employer who posts workers to Poland for a period exceeding 12 months or upon a motivated notification, for a period exceeding 18 months. In that case, the employer is required to observe all of the requirements provided by the Labour Code or other regulations. This requirement does not apply to formalities on concluding or terminating employment relationships, non-competition clauses and supplementary occupational retirement schemes;
- The newly added Article 4c of the Law introduces the obligation to cumulate the duration of the posting by the same employer of various workers to perform the same task at the same place;
- Under the new Article 4d of the Law, an employer who posts temporary workers to Poland should observe the employment conditions provided by national regulations on the employment of temporary workers, including collective labour agreements or other acts that determine the right and duties of the parties. The employer should also safeguard appropriate accommodation, if required by national regulations;
- Articles 7 and 8 of the Law on the posting of workers refer to joint and several liability of the contractor and of the employer who posts workers to Poland. This regulation concerns the construction sector. Its scope refers to minimum remuneration and overtime bonuses. The contractor is not jointly and severally liable, if he/she provided information about the employment conditions in force. This obligation has been made more precise under the new wording of Article 8 of the Law. The scope of the information to be provided differs according to the duration of the posting: 12 months, 18 months or for a longer period. The information on employment conditions may take the form of indicating the website that contains information on the legal regulations that apply to posted workers;
- The State Labour Inspectorate (hereinafter: SLI) has been granted new competences. The new wording of Article 9 of the Law corresponds to the amended Art. 4 of the Law (see above), and refers to information that should be provided, which differs depending on the duration of the posting. SLI has competence to receive motivated notifications on extending the period of posting. SLI should also cooperate with the authorities from other Member States, and inform the European Commission on repeated delays in the provision of information by authorities from other Member States, if they relate to the posting of workers to Poland. Under the new wording of Article 12 of the Law, SLI has the competence to demand information from other authorities (e.g. social security institutions and taxation offices), if there is suspicion that a Polish employer has violated the regulations of the host country;
- Amended Article 13 of the Law makes the requirements on the website that contains information on the legal regulations in Poland more precise. Under the new wording, the information should contain data on the remuneration for work and its components. The website should also provide information on the conditions of employment of temporary workers. It shall further provide transparent information and be updated without unjustified delay;
- Article 14 of the Law imposes the duty on the SLI to control postings, especially in case of doubt about the legality of the posting of workers to Poland. The newly added Article 14 section 6 provides that if it is established, after an overall assessment, that an improper or fraudulent posting of workers has occurred, the

relevant law shall apply. However, it cannot lead to the application of employment conditions that are less favourable than those for workers posted to Poland;

- Amended Article 25 section 1 item 3 of the Law requires an employer who posts workers to Poland to not only keep records that refer to the amount of the workers' remuneration, but also its components;
- The newly added Chapter 5a (Articles 25a and 25b of the Law) concerns the duties of a user undertaking that makes use of temporary workers posted from another Member State, or that intends to post such workers to another Member State. Article 25a of the Law provides that a user undertaking should inform the employer who posts temporary workers from another Member State about the website that contains the information on the employment conditions of such workers. The user undertaking shall also provide information about the relevant collective labour agreements and other sources that determine the rights and duties of the parties. Under Article 25b of the Law, if the Polish user undertaking intends to post temporary workers to another Member State, it should notify this intention to those workers' employer at least 15 working days in advance.

The draft is expected to take effect on 30 July 2020.

In the author's view, the above mentioned amendments should be evaluated positively. The draft provides amendments to the Law on Posting of Workers that are directly required by Directive (EU) 2018/957. The draft has been submitted by the government, which holds a majority in Parliament. Therefore, despite the holiday season, rapid legislative proceedings can be expected. At the same time, there will probably no longer be any major controversies concerning the proposed regulations. There is a good chance that Directive (EU) 2018/957 will be transposed in a timely and correct manner.

## 2 Court Rulings

Nothing to report.

## 3 Implications of CJEU Rulings and ECHR

### 3.1 Working time and leaves

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

In Poland, the overlap of annual leave and sick leave is expressly regulated in the Labour Code. Article 165 LC provides that if an employee is not able to begin his/her leave within the determined period on grounds justifying an absence from work, including i.a. a temporary incapacity for work due to illness, or isolation due to a contagious disease, the employer should change the leave to a later date. Under Article 166 LC, if the leave cannot be used because of the above mentioned circumstances, the employer must grant the leave at a later date. Thus, sick leave does not affect the use of annual leave, since in case of sickness, annual leave or part thereof will be postponed and granted at a later date.

The special leaves permitting time off from work are subject of the [Ordinance of the Minister of Labour and Social Policy on the manner justifying absence from work and releasing employees from work](#) (consolidate text: Journal of Laws 2014, item 1632).

The Ordinance provides circumstances under which the employer is required to release the employee from work (1 or 2 days, as the case may be), e.g. in case of summons of an administrative authority, a court, police (§ 6), summons to act as an expert (§ 7),



medical test or preventive vaccinations (§ 9), or personal life circumstances, such as marriage or the birth of a child, or the death of the employee's relative (§ 15).

Under Polish law, sick leave does not affect the employee's right to the actual benefit of his/her annual leave. Also, in case of urgent family reasons, the employee is entitled to special leave. If such reasons occur during annual leave, the employee does not enjoy the right for additional free days after his/her annual leave.

### 3.2 Worker status

CJEU case C-692/19, *Yodel Delivery Network*, 22 April 2020

Article 22 § 1 LC provides that

*"by establishing an employment relationship, an employee undertakes to perform work of a specified type for the benefit of an employer and under his supervision, in a place and at the times specified by the employer; the employer undertakes to employ the employee in return for remuneration".*

In the literature, it is commonly accepted that further conditions exist to qualify an individual as an employee, i.a., personal work performance or risks that lie on the employer's side. Employment relationships refer to subordinated work and are a "personalised" relationship. At the same time, the right to set one's own hours of work within certain parameters, or the possibility to provide services for other parties does not affect the status of an employee.

For further reference, see: L. Mitrus, *The Concept of 'Employee': The Position in Poland*, (w© B. Waas, G. H. van Voss (Eds.) *Restatement of Labour Law in Europe. Volume I. The Concept of Employee*, Hart Publishing, Oxford and Portland, Oregon, 2017, pp. 525 – 542.

The possibility to automatically appoint a subcontractor implies that a particular relationship does not constitute an employment relationship. Also, individuals' competence to accept or refuse specific tasks precludes classification as an employee.

## 4 Other Relevant Information

### 4.1 Active aging

On 08 June, the employee and employer representatives in the Social Dialogue Council concluded an [agreement on active aging](#). The agreement constitutes an element of implementation of the autonomous agreement concluded by the European Social Partners on 08 March 2017. The basic objective is to express social partners' demands on appropriate future amendments to the Labour Code and other statutes. Action should be dedicated to all age groups, and should aim at protecting the employee's health as well as to extend period of occupational activities.

The agreement refers to the following issues:

- Actions to improve employment conditions: additional paid breaks, if the daily working time exceeds nine hours, public subsidies to adapt workplaces to the needs of older employees, initiating discussions on new solutions concerning the working time of elderly workers (overtime, work at night upon the employee's consent);
- Measures to support the employment of elderly persons: incentives to employ older persons and extending their occupational activities, including taxation and social security aspects, encouraging the employment of women older than 55



and men older than 60 years of age; initiating a discussion on new solutions concerning protection against dismissal for employees in pre-retirement age;

- Management of skills and competences: supporting investment in human capital, including creating respective company funds, implementing so-called "mentor agreements" to transfer knowledge and experience between employees of different age groups, thereby supporting newly employed workers, and employees who attend re-training programmes;
- Promoting health protection at work and outside of work: identifying threats to the employee's health, reducing the burden at work, securing additional access to health services, prevention of "professional burn-out", organising appropriate training;
- Raising awareness and understanding of demographic trends and their consequences: taking measures on age management and active aging, including life learning programmes, appropriate work organisation, introducing high quality, flexible forms of employment (including telework and remote working);
- Promotion and monitoring of the agreement's implementation: rewarding companies that introduce good practices, elaborating a schedule of activities to be undertaken by the social partners within the framework of the Social Dialogue Council, the duty to submit reports to be evaluated by the Social Dialogue Council as of 2023.



# Portugal

## Summary

The Economic and Social Stabilisation Programme contains several measures that affect employment. A Decree Law extends the simplified layoff measure until 31 July 2020 and regulates other employment protection measures. A Resolution of the Council of Ministers has declared that a state of emergency applies to the national territory until 30 June 2020 and, for the period between 01 and 14 July 2020, will determine the application of three different situations (emergency, contingency and alert) in different areas of the Portuguese territory.

## 1 National Legislation

### 1.1 Measures to respond to COVID-19 crisis

#### 1.1.1 Economic and Social Stabilisation Programme

The [Resolution of the Council of Ministers No. 41/2020](#), published in the Official Gazette on 06 July 2020, approves the Economic and Social Stabilisation Programme ('*Programa de Estabilização Económica e Social*' or '*PEES*'), which consists of a set of macroeconomic stabilisation measures aiming to respond to the consequences of the COVID-19 pandemic. This Resolution entered into force on 07 June 2020.

The main employment measures envisaged in the Resolution are highlighted below:

- **"ATIVAR.PT" Programme** ('*Programa Reforçado de Apoios ao Emprego e à Formação Profissional*'): this programme aims to support the hiring of unemployed persons, especially youth.
- **Progressive resumption support** ('*Apoio à retoma progressiva*')

This measure will replace the simplified layoff measure and aims to gradually achieve 100 per cent remuneration for employees. The companies that have benefitted from the simplified layoff measure and continue to observe a drop in turnover of at least 40 per cent will be eligible to continue applying that measure, which will be in place from August to December 2020.

During the period referred to above, these companies may continue to benefit from:

- reduction of their normal period of work, although such reduction may not exceed certain limits depending on the registered decrease in turnover, and
- the measure of exemption from payment of social security contributions, although in the case of large companies, such an exemption will be reduced to 50 per cent in August and September, and eliminated thereafter and, in the remaining cases, such an exemption will be reduced to 50 per cent in October, November and December.

It should be noted that in case of application of this measure, the company must pay the working hours rendered by the employees at 100 per cent and the non-rendered hours at 66 per cent in August and September, and at 80 per cent in October, November and December.

The companies that benefit from this measure are prevented from:

- terminating contracts of employment by collective dismissal, dismissal based on redundancy and dismissal due to the employee's inadequacy while the measure is being applied, and for 60 days thereafter, and
- distributing profit during the period of application of this measure.
- **Extraordinary financial assistance for the normalisation of the company's activity** (*'Incentivo Financeiro extraordinário à normalização da actividade empresarial'*):

The companies that have applied the simplified layoff measure (and provided that do not have access to the gradual resumption support referred to above) can benefit from financial assistance for the normalisation of their business activity under one of the following types of assistance:

- One-off support corresponding to the amount equivalent to one national minimum wage for each post covered by the simplified layoff measure;
- Support paid over 6 months, corresponding to the amount equivalent to two national minimum wages per employee, and a reduction in 50 per cent of the social security contributions during the first 3 months.

Companies that receive such financial support are prevented from terminating contracts of employment by collective dismissal, dismissal based on redundancy and dismissal due to the employee's inadequacy. They are also required to keep the employment level during the period of application of this measure and for 60 days thereafter.

For more details on the requirements and conditions of this financial support, see the reference to Decree Law No. 27-B/2020 of 19 June below, which regulates this measure.

- **Stabilisation Supplement** (*'Complemento de Estabilização'*)

This measure applies to employees who received up to two national minimum wages in February 2020 and that suffered a loss of their base remuneration between April and June 2020 due to the application of the simplified layoff measure.

This benefit will be paid in July 2020 and corresponds to the amount equivalent to the loss of income of one month of layoff, between EUR 100 and EUR 351.

For more detailed information on this measure, see the reference to Decree Law No. 27-B/2020 of 19 June below, which regulates this measure.

- **Extraordinary measure for the protection of independent and *informal* employees:**

This measure aims to provide extraordinary support for independent and 'informal' employees who require social deprotection. This financial support consists of the payment of an amount equivalent to the Social Support Index (*'Indexante dos Apoios Sociais'*), i.e., EUR 438.81, between July and December 2020. Employees who benefit from this support will have to be linked to the public social security system for 30 months after the end of this measure (i.e. after December 2020).

- **Measures related to teleworking:**

This Resolution also establishes several measures related to teleworking, namely

- the increase of the number of civil servants covered by the teleworking regime;

- the measure '*Emprego Interior Mais*', which aims to encourage the creation of employment and the permanency of employees in the territory of Portugal, and
- support for hiring employees under the teleworking regime.
- **Social measures:**

Among other social measures, this Resolution establishes the automatic extension of social unemployment allowance until the end of 2020.

### 1.1.2 Extraordinary support and financial assistance

Following the approval of the Economic and Social Stabilisation Programme by the Resolution of the Council of Ministers No. 41/2020 of 06 June, referred to above, the [Decree Law No. 27-B/2020](#), published in the Official Gazette on 19 June 2020, extends the extraordinary support for the maintenance of employment contracts in businesses facing a crisis (simplified layoff), covered in Decree Law No. 10-G/2020, of 26 March (see also March 2020 Flash Report), and regulates other employment protection measures.

This decree establishes the following measures in the context of the COVID-19 pandemic:

- **Extraordinary support for the retention of employment contracts (simplified layoff):**
  - Companies that have used the extraordinary support for the retention of employment contracts (simplified layoff) may only submit their applications until 30 June 2020, in which case they may extend the application of the measure on a monthly basis up to a maximum of 3 months.
  - Companies and establishments that are subject to closure due to a legislative or administrative order in the context of the COVID-19 pandemic may have access or maintain the right to the above mentioned extraordinary support as well as to the respective extension while the duty of closure remains applicable, with the limit of 3 months referred to above not being applicable.
  - Companies that have used the extraordinary support for the retention of employment contracts (simplified layoff) and have reached the renewal limit of 3 months by 30 June 2020, may benefit from an extension of this support until 31 July 2020.
- **Stabilisation Supplement ('*Complemento de Estabilização*')**:

This decree clarifies that the stabilisation supplement referred to in the Resolution of the Council of Ministers No. 41/2020 consists of a benefit for employees whose base remuneration was equal to or less than 2 times the national minimum wage (i.e., EUR 1 270) in February 2020 and that were laid off by at least one full calendar month between April and June 2020.

This benefit corresponds to the difference between the declared base remuneration of February 2020 and the amount received in the full calendar month in which the employee was covered by the layoff scheme and in which the greatest difference is verified, with a minimum limit of EUR 100 and a maximum limit of EUR 351.

This benefit will be paid by the social security entity in July 2020, and is granted automatically.

- **Extraordinary financial assistance for the normalisation of the company's activity** (*'Incentivo extraordinário à normalização da actividade empresarial'*):

This Decree Law clarifies that this form of financial assistance, which is referred to in the Resolution of the Council of Ministers No. 41/2020, will be granted to employers who have benefited from the simplified layoff measure or the extraordinary training plan envisaged in Decree Law No. 10-G/2020 of 26 March.

The eligible companies may choose between one of the following options:

- One-off payment in the amount corresponding to one national minimum wage (i.e. EUR 635) per employee covered by the measures mentioned above; or
- Financial support in the amount corresponding to two national minimum wages (i.e. EUR 1 270) per employee covered by the measures mentioned above, paid in instalments over 6 months. In this case, the employer will also be entitled to a temporary exemption of 50 per cent of social security contributions for the employees covered by the referred measures. Furthermore, in case of net job creation through the hiring of employees under permanent employment contracts within 3 months after the end of the financial support scheme referred to above, the employer will be entitled to a total exemption from the payment of social security contributions for a period of 2 months.

Employers that benefit from this financial support are prohibited from terminating contracts of employment by collective dismissal, dismissal based on redundancy and dismissal due to the employee's inadequacy and, in the case of the second support referred to above, they are required to retain the employment level during the period of application of this measure and for 60 days thereafter. Furthermore, during the period of application of this measure, the employers should be in good standing with the tax and social security authorities. Non-compliance with the above referred duties entails the immediate termination of that measure and the obligation to refund any benefits that have been granted.

Employers that benefit from this measure cannot have access to the gradual resumption support (*'apoio à retoma progressiva'*) referred to in the Resolution of the Council of Ministers No. 41/2020 of 06 June.

This decree entered into force on 20 June 2020 and, as a rule, will apply until 31 December 2020.

### 1.1.3 State of emergency, contingency and alert

#### 1.1.3.1 Resolution of the Council of Ministers No. 43-B/2020 of 12 June

This [Resolution](#) renews the state of emergency for the entire national territory until 28 June 2020. This provision entered into force on 15 June 2020.

#### 1.1.3.2 Resolution of the Council of Ministers No. 45-B/2020 of 22 June

This [Resolution](#) defines special rules for the Lisbon Metropolitan Area in the context of the state of emergency, such as:

- Access, movement and presence of people in public spaces and the amount of people on public roads, are limited to 10 people (instead of 20 people as in the remaining territory);

- All retail and service establishments, as well as those located in commercial complexes, must close at 20:00;
- The operational activity of security forces and services operating in this area may be reinforced, if necessary, by personnel from other geographic areas, to ensure the implementation of these measures.

The measures envisaged in this Resolution entered into force on 23 June 2020.

### 1.1.3.3 Resolution of the Council of Ministers No. 51-A/2020 of 26 June

In the context of the COVID-19 pandemic, this [Resolution](#) declares a state of emergency in the national territory until 30 June 2020 and, for the period between 01 and 14 July 2020, determines the application of the following three different situations:

- state of emergency in certain districts of the Lisbon Metropolitan Area;
- situation of contingency in the Lisbon Metropolitan Area, except in the above mentioned districts, and
- situation of alert in the remaining territory.

This Resolution also establishes exceptional and temporary measures of response to the pandemic to be applied during this period, such as:

- limitation of access, movement and presence of people in public spaces and an amount of maximum 20, 10 or 5 people, depending on which situation has been declared for that area (alert, contingency or state of emergency, respectively);
- limitation of certain economic activities;
- restriction of the period of operation of commercial establishments in the Lisbon Metropolitan Area;
- concerning teleworking, the following measures are set forth:
  - the employer shall ensure the health and safety conditions of work to prevent the risk of infection arising from the COVID-19 pandemic;
  - the teleworking regime remains mandatory in the situations defined in the Resolution of the Council of Ministers No. 40-A/2020 of 29 May, except in the case of workers with a child or other dependent younger than 12 years of age or, regardless of age, with a disability or chronic illness, due to the end of the school year. In the other cases, the teleworking regime may be adopted under the terms defined in the Labour Code (which requires an agreement between the employer and the employee).

## 1.2 Other legislative developments

Nothing to report.

## 2 Court Rulings

Nothing to report.

### 3 Implications of CJEU Rulings and ECHR

#### 3.1 Worker status

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

The recent CJEU ruling issued in [Case C-692/19 \(Yodel\)](#) concerns the analysis of the concept of “worker” for the purpose of application of Directive 2003/88/EC of the European Parliament and of the Council of 04 November 2003, which regulates certain aspects of the organisation of working time.

Specifically, in this case, the CJEU assessed whether the referred Directive 2003/88/EC must be interpreted as precluding a person, engaged by his/her putative employer under a service agreement stipulating that he/she is a self-employed independent contractor, from being classified as a “worker” for the purposes of that Directive, where that person is afforded discretion:

- to use subcontractors or substitutes to perform the service he/she has undertaken to provide;
- to accept or not accept the various tasks offered by his/her putative employer, or to unilaterally set the maximum number of those tasks;
- to provide his/her services to any third party, including direct competitors of the putative employer, and
- to fix his/her own hours of ‘work’ within certain parameters and to tailor his/her time to suit his/her personal convenience rather than solely the interests of the putative employer.

Although Directive 2003/88/EC does not define the concept of “worker”, the CJEU has analysed this issue in previous cases, concluding that such a concept has an autonomous meaning in European Union law. For this Court, *“the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration”*.

The CJEU also considered that the classification of an “independent contractor” under national law does not prevent that person from being classified as a “worker” for the purposes of European law, if the requirements of an employment relationship referred to above are verified, namely if he/she acts under the direction of the employer regarding the time, place and content of the performance of his/her work.

The CJEU has therefore taken the specific circumstances of this case into consideration to assess the existence (or not) of a subordinate relationship between the parties, in particular:

- The discretion of the individual to appoint subcontractors or substitutes to carry out the requested tasks, which is only subject to the condition that the subcontractor or substitute has the basic skills and qualifications equivalent to the person with whom the putative employer has concluded a service agreement;
- The individual has an absolute right not to accept the tasks assigned to him/her under the service agreement entered into with the putative employer;
- The individual may set a binding limit on the number of tasks he/she is prepared to carry out;
- The individual may provide similar services to third parties, including to the benefit of direct competitors of his/her putative employer;
- The individual must provide the service during specific time slots, but this requirement is inherent to the nature of that service, considering that compliance with those time slots appears to be essential to ensure the proper performance of the service.



As regards all of these relevant factors, the CJEU concluded that the relationship between the individual and his putative employer did not appear to be a subordinated employment relationship.

As a result, the CJEU ruled in this case that:

*"Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as precluding a person engaged by his putative employer under a services agreement which stipulates that he is a self-employed independent contractor from being classified as a 'worker' for the purposes of that directive, where that person is afforded discretion:*

- *to use subcontractors or substitutes to perform the service which he has undertaken to provide;*
- *to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks;*
- *to provide his services to any third party, including direct competitors of the putative employer; and*
- *to fix his own hours of 'work' within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer;*

*provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer. However, it is for the referring court, taking account of all the relevant factors relating to that person and to the economic activity he carries on, to classify that person's professional status under Directive 2003/88".*

Portuguese law defines an employment agreement as a contract *"in which an individual undertakes to perform an activity for another person or persons, within their organisation and under their authority, against the payment of remuneration"* (Article 11 of the Portuguese Labour Code, approved by Law No. 7/2009, of 12 February, as subsequently amended).

In light of this, three essential elements constitute a contractual employment relationship:

- the rendering of an activity;
- in exchange for remuneration, and
- under the authority and pursuant to the instructions of another person.

These elements distinguish an employment contract from other related contracts, such as service agreements.

The first two elements are of limited effectiveness in terms of determining whether the relevant contractual bond is of an employment or services nature. The rendering of subordinate services or subordination, therefore, is the fundamental element in the definition of an employment agreement. By contrast, service agreements are characterised by the autonomy of the service provider in relation to the beneficiary of the activity (as opposed to the subordination of the employee to the employer) and, in certain cases, the contracting of a result (rather than an activity).

Under Portuguese labour law, *subordination* is understood as the legal situation of a person who is subject to the orders and instructions given by another with respect to carrying out a certain task. In the context of an employment relationship, the activity is

not self-determined or, in other words, it is organised according to the will of the beneficiary of the activity and not according to the provider of the activity.

In view of the difficulties connected with the assessment of subordination, the Portuguese courts defend the use of the topic method, in which subordination is determined based on factors that typically suggest or indirectly indicate such subordination.

The most relevant characteristics that may indicate the existence of an employment relationship are the following:

- the determination of working time by the beneficiary of the activity;
- the work being carried out at a place belonging to the beneficiary or determined by it;
- the payment of remuneration being made on a periodic and regular basis;
- the use of working equipment provided by the beneficiary;
- the carrying out of the activity under orders and indications of the beneficiary;
- the integration of the employee in the organisation of the beneficiary;
- the fact that there is only one beneficiary of the provision of the services, from which the provider's economic dependence derives;
- the non-existence of assistants in carrying out tasks and the impossibility of replacement of the person who carries out the relevant functions.

Portuguese law (Article 12 (1) of the Portuguese Labour Code) presumes that an employment relationship exists whenever some (at least 2) of the following characteristics are met:

- the place of activity is located at the premises of the activity's beneficiary or determined by it;
- the work tools and equipment belong to the beneficiary;
- the provider follows a time schedule determined by the beneficiary;
- the provider is paid a periodic and fixed amount;
- the provider executes management or supervisory functions within the beneficiary's organisation.

Should any of these features be present, the burden to prove that the contractual relationship is not an employment relationship in nature lies with the beneficiary of the activity.

Taking into account the legal framework above, the features that determine the existence of an employment relationship under Portuguese law are similar to those referred to by the CJEU in case C-692/19.

### 3.2 Working time and leaves

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

In case C-588/18 (*Fetico*), the CJEU interpreted certain rules of Directive 2003/88/EC of the European Parliament and of the Council of 04 November 2003, concerning certain aspects of the organisation of working time, namely Articles 5 and 7, which regulate, respectively, weekly rest periods and the annual leave.

The present case concerned a dispute between the employer and employees relating to the conditions governing the application of paid special leave provided for in a collective

agreement, which gives effect to the minimum requirements established in Spanish legislation, namely in Article 37 of the Workers' Statute, which grants employees paid special leave, enabling them to meet specific needs or obligations such as marriage, the birth of a child, hospitalisation, surgery, the death of a close relative and the performance of representative trade union functions.

According to the rules contained in the referred collective agreement, the duration of leave for marriage is expressed in "calendar days", whereas the duration of the other paid special leave is expressed in "days", with no indication as to whether those "days" are calendar days or working days.

In the present case, the CJEU assessed whether Articles 5 and 7 of Directive 2003/88/EC must be interpreted as precluding national rules that do not allow employees to use the referred special leave on days when they are required to work, in so far as the needs and obligations met by that special leave arise during the weekly rest periods or periods of paid annual leave.

Directive 2003/88/EC intends to guarantee better protection of employees' health and safety by ensuring that they are entitled to minimum rest periods and an annual period of leave. It does not affect the right of the Member States to apply provisions of national law that are more favourable to the employees' protection.

According to the CJEU, in the present case, the special leave granted in the collective agreement falls within the scope not of Directive 2003/88/EC, but rather of the exercise, by the Member State of its own competences. Nevertheless, it cannot have the effect of undermining the minimum protection guaranteed to employees by that Directive, in particular, regarding the minimum weekly rest periods and periods of paid annual leave set forth in the referred Articles 5 and 7 of Directive 2003/88/EC.

The CJEU has explained that the purpose of the said paid special leave is to enable employees to take time off from work to meet specific needs or obligations that require their personal presence. Therefore, *"that leave is inextricably linked to working time as such, and consequently workers will not have recourse to such leave during weekly rest periods or periods of paid annual leave"*. However, according to the CJEU, it is untenable to claim that on the ground that those weekly rest periods or periods of paid annual leave fall within the scope of Articles 5 and 7 of Directive 2003/88/EC, those provisions require a Member State whose national rules provide for an entitlement to paid special leave, to grant such special leave solely by reason of the occurrence of one of the events specified in those rules during one of those periods while excluding, consequently, the other conditions laid down by those rules governing the entitlement to and the granting of that leave. It should be considered that that special leave and the rules applicable to it stand apart from the body of rules established by Directive 2003/88/EC.

Consequently, the CJEU ruled that

*"Articles 5 and 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as not being applicable to national rules providing for special leave on days when workers are required to work which do not allow those workers to claim that leave in so far as the needs and obligations met by that special leave arise during weekly rest periods or periods of paid annual leave that are the subject of those articles"*.

Portuguese labour law allows employees to be absent from work in certain situations, such as

- marriage;
- death of a relative;

- impossibility of providing work due to a fact not attributable to the worker, namely illness, accident or compliance with legal obligations related to illness, accident, compliance with another legal obligation;
- provision of urgent and essential assistance to a child, grandchild or member of the worker's householder, and
- exercise of functions in a structure of collective representation of employees (Article 249 (2) of the Portuguese Labour Code).

Some of these absences, although justifiable, determine the loss of remuneration by the employee, e.g. in case of absence due to illness, provided that the employee is covered by a social security scheme which includes protection in case of illness, and the absence due to a work accident, provided that the employee is entitled to an allowance or insurance (Article 255 (2) of the Portuguese Labour Code).

It should be noted that the duration of the absences envisaged in the Portuguese Labour Code is expressed in "days", as in the case of the Spanish legislation. Therefore, the issue analysed in case C-588/18 could arise in relation to the Portuguese legislation. For that purpose, the ruling issued by the CJEU in case 588/18 is of relevance.

## 4 Other Relevant Information

Nothing to report.

# Romania

## Summary

The Labour Code has been amended to punish non-compliance with the rules on overtime more severely.

## 1 National Legislation

### 1.1 Measures to respond to COVID-19 crisis

Nothing to report.

### 1.2 Other legislative developments

#### 1.2.1 Working time

The Labour Code has been amended, tightening the sanctions for non-compliance with the rules on overtime.

Thus, Law No. 85/2020 on the amendment of Article 260 (1) i) of Law No. 53/2003 - Labour Code, published in the Official Gazette No. 525 of 18 June 2020, stipulates that the fine of LEI 1 500 – LEI 3 000 (~ EUR 320 – EUR 640) for non-compliance with the provisions on overtime will be applied to the employer for each employee for whom the overtime limit has been breached. This limit is provided by the Labour Code, transposing Directive 2003/88/EC concerning certain aspects of the organisation of working time.

Until now, the fine was applicable only once, regardless of the number of employees that had not complied with the rules on overtime (ordered by the employer).

It should be noted that only full-time employees are considered. In the case of part-time employees, overtime is fully prohibited, and the fines for non-compliance are much higher. Overtime provided by part-time workers is considered undeclared work, and in case of non-compliance, the employer is sanctioned with a fine of LEI 10 000 (~ EUR 2 100) for each part-time worker who works overtime, without exceeding the cumulative value of LEI 200 000 (~ EUR 42 000).

## 2 Court Rulings

Nothing to report.

## 3 Implications of CJEU Rulings and ECHR

### 3.1 Worker status

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

Romanian labour legislation does not include either the definition of the notion of employee or the criteria for identifying and distinguishing such a worker from the concept of a self-employed person. Therefore, decisions such as that of the Court of Justice of the European Union in case C-692/19 are useful for the national courts to correctly identify workers to whom the provisions of the Labour Code transposing the Working Time Directive apply.

Otherwise, they have no other option than to apply the only criteria that can be found in Romanian law, i.e. the criteria provided in the Fiscal Code. According to the Fiscal

Code, an independent worker (not subject to the provisions on working time) meets at least 4 of the following 7 criteria: the worker is free to choose the place of work and the work schedule; he/she is free to perform activities for several clients; he/she assumes the risks inherent to the business; the activity is carried out under the direction of the person performing the work; the activity is carried out by the person using his/her intellectual and/or physical capacity, depending on the type of activity; the worker is a member of a professional body/association; he/she is free to carry out the activity directly, using employed staff or third-party contractors under the terms of the law.

The above criteria are comparable to those considered by the Court of Justice of the European Union in case C-692/10. However, the possibility offered by Romanian law to select only some of the criteria could, in practical terms, lead to a situation in which a person is treated as a self-employed person under Romanian law and as a dependent worker under EU law.

In addition, the Romanian criteria are stipulated in tax law and not in labour law, therefore, they are not directly binding for labour law courts.

### 3.2 Working time and leaves

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

In case C-599/18, the Court of Justice of the European Union ruled on the legal regime of paid days off for employees under the law or collective labour agreements. It has ruled that such special leave, and the body of rules applicable to it, stand apart from the body of rules established by the Working Time Directive.

This decision should not have any implications for Romanian law. In Romania, some categories of staff benefit from days off and periods of paid leave, other than rest periods and sick leave, established by normative acts and collective labour agreements. They are generally based on working days, not calendar days. The issue of possible applicability of the Working Time Directive has not been raised in practice.

## 4 Other Relevant Information

Nothing to report.



# Slovakia

## Summary

In June, important government resolutions were passed and the Act amending the Labour Code was adopted in relation to COVID-19 and the lifting of the state of emergency. No important court decisions were handed down.

## 1 National Legislation

### 1.1 Proposal to end the state of emergency

The Government of the Slovak Republic passed the [Resolution](#) of the Government of the Slovak Republic No. 147/2020 Coll. of 10 June 2020 on the proposal to end the state of emergency, the cancellation of the imposition of work obligation to ensure the provision of healthcare, the abolition of prohibiting the exercise of the right to strike by certain workers and the abolition of the ban to exercise the right to peaceful assembly declared by the Government of the Slovak Republic's Resolution No. 114 of 15 March 2020 and extended by the Government of the Slovak Republic's Resolution No. 115 of 18 March 2020, the Government of the Slovak Republic's Resolution No. 169 of 27 March 2020, by the Government of the Slovak Republic's Resolution No. 207 of 6 April 2020 and the Government of the Slovak Republic's Resolution No. 233 of 16 April 2020.

The government

- **approves**

A.1. the proposal to end the state of emergency, the cancellation of the imposition of work obligation to ensure the provision of healthcare, the abolition of prohibiting the exercise of the right to strike by certain workers and the abolition of the ban to exercise the right to peaceful assembly declared by the Government of the Slovak Republic's Resolution No. 114 of 15 March 2020 and extended by the Government of the Slovak Republic's Resolution No. 115 of 18 March 2020, the Resolution of the Government of the Slovak Republic's Resolution No. 169 of 27 March 2020, by the Government of the Slovak Republic's Resolution No. 207 of 6 April 2020 and the Government of the Slovak Republic's Resolution No. 233 of 16 April 2020;

- **terminates**

B.1. the state of emergency declared for the territory of the Slovak Republic with expiration on 13 June 2020;

- **cancels**

C.1. the work obligation to ensure the provision of healthcare imposed in accordance with point C.1. of the Government of the Slovak Republic's Resolution No. 114 of 15 March 2020 in relation to the employees of the entities listed in the annex to the Government of the Slovak Republic's Resolution No. 115 of 18 March 2020 and extended by the Government of the Slovak Republic's Resolution No. 169 of 27 March 2020, by the Government of the Slovak Republic's Resolution No. 233 of 16 April 2020 in the territory of the Slovak Republic with expiration on 13 June 2020,

C.2. the ban on exercising the right to strike under point D.1. of the Government of the Slovak Republic's Resolution No. 114 of 15 March 2020 imposed in relation to the entities listed in the annex to the Government of the Slovak Republic's Resolution No. 115 of 18 March 2020 and extended by the Government of the Slovak Republic's Resolution No. 169 of 27 March 2020, by the Government of the Slovak Republic's Resolution No. 233 of 16 April 2020 with expiration on 13 June 2020,

C.3. the prohibition of exercising the right of peaceful assembly pursuant to point C.1. of the Government of the Slovak Republic's Resolution No. 207 of 6 April 2020 by a statement in the Collection of Laws of the Slovak Republic;

- **states**

D.1. that the extraordinary situation declared by the Government of the Slovak Republic's Resolution No. 111 of 11 March 2020 continues after the end of the state of emergency.

The Government of the Slovak Republic's Resolution No. 147/2020 Coll. of 10 June 2020 has been in force since 10 June 2020.

### 1.2 Amendment of the Labour Code

Act No. 157/2020 Coll. amending Act No. 461/2003 Coll. on social insurance as amended and amending Act No. 311/2001 Coll. Labour Code as amended was passed.

Act No. 157/2020 Coll. also amends Act No. 311/2001 Coll. Labour Code. To maintain employment, according to Part II of Act No. 157/2020 Coll. it is possible for a transitional period to extend or renegotiate a fixed-term employment relationship, even beyond the existing legislation.

After Part II Article 252n (*of the LC*), the new Article 252o has been inserted, which, including the title, reads:

*Transitional provision during an extraordinary situation, state of emergency or exceptional state declared in connection with the COVID-19 disease*

*(1) Fixed-term employment relationships, which are to be terminated in accordance with Article 59 paragraph 2 during the time of an extraordinary situation, state of emergency or exceptional state declared in connection with the COVID-19 disease or within two months after its cessation, for which the conditions for its extension according to Article 48 paragraph 2 are not met, may be extended once for a maximum of one year. A fixed-term employment relationship that ended during an extraordinary situation, state of emergency or exceptional state declared in connection with COVID-19 or within two months of its cessation, for which the conditions for its re-agreement pursuant to Article 48 paragraph 2 are not met, may be renegotiated once for a maximum of one year during times of extraordinary situations, states of emergency or exceptional states declared in connection with the COVID-19 disease or within two months of its cessation.*

*(2) The employer is required to discuss the extension or renegotiation of the fixed-term employment relationship pursuant to paragraph 1 in advance with the employee representatives. If the negotiation provided for in the first sentence does not take place, the employment relationship shall be deemed to have been concluded for an indefinite period.*

Act No. 157/2020 Coll. 2020 has been in force since 17 June 2020.

## 2 Court Rulings

Nothing to report.

## 3 Implications of CJEU Rulings and ECHR

### 3.1 Worker status

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

Given the valid legal regulation, cases such as that dealt with in the present judgment should not arise in the Slovak Republic. The Labour Code ([Act No. 311/2001 Coll.](#)) as the main source of labour law regulates the performance of dependent work by employees on the basis of an employment contract.

According to Article 1 paragraph 1 of the Labour Code, this Act shall govern individual labour law relationships in connection with the performance of dependent work by natural persons for legal persons or natural persons and collective labour law relations. According to Article 1 paragraph 1, dependent work is work carried out in a relationship in which the employer is superior and the employee is subordinate, and in which the employee carries out work personally for the employer, according to the employer's instructions, in the employer's name, during working times set by the employer (*wage or remuneration for that work follows from the Constitution of the SR*).

Dependent work may only be carried out under an employment relationship, a similar labour relationship or in exceptional cases defined in this Act in another form of labour law relationship. Dependent work cannot be carried out under a contractual civil law relationship or under a contractual commercial law relationship according to special regulations (Article 1 paragraph 3 of the LC).

An employment relationship shall be established by a written employment contract between the employer and the employee, unless this Act provides otherwise. The employer shall be required to provide the employee with a written copy of the employment contract (Article 42 paragraph 1 of the LC).

According to Article 43 paragraph 1 of the Labour Code, in an employment contract, the employer shall be required to stipulate the following substantial items:

- a) the type of work for which the employee was accepted, and a brief description thereof,
- b) the place of work performance (municipality, part of municipality, or place otherwise determined),
- c) day of work take-up,
- d) wage conditions, unless agreed in a collective agreement.

In the employment contract, the employer shall indicate, beside items pursuant to paragraph 1, further working conditions, particularly concerning the terms of payment, working time, duration of paid annual leave and the length of the notice period (Article 43 paragraph 2 of the LC). Further conditions in the interest of the participants, particularly further material benefits, may be agreed in the employment contract. The provisions of the employment contract or other agreement by which the employee undertakes to maintain confidentiality about his/her working conditions, including wage conditions and employment conditions, are invalid (Article 43 paragraph 4 of the LC).

### **3.2 Working time and leaves**

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

The legal regulation of paid annual leave also presupposes the possible emergence of an obstacle to work on the part of the employee.

According to Article 111 paragraph 1 of the Labour Code ([Act No. 311/2001 Coll.](#)), the period of paid annual leave shall be determined by the employer upon negotiation with the employee in accordance with the paid leave timetable determined with the prior consent of the employee representatives in such a way that the employee can take

his/her paid leave in full by the end of the calendar year. When determining the period of paid leave, it is necessary to take the employer's tasks and the justified interests of the employee into account. The employer must grant employees at least four weeks of paid leave within a calendar year if they have a paid leave entitlement and if obstacles to work on the part of the employee do not prevent the granting of paid leave.

An employer may not request an employee to take paid leave during a period in which the employee is acknowledged to be temporarily incapacitated for work due to disease or accident, or for a period when the employee is on maternity or parental leave. For other periods of work in case obstacles on the part of the employee emerge, the employer may request the employee to take paid leave at his/her request only (Article 112 paragraph 2 of the LC). If during the employee's paid leave, a public holiday falls on a day that would otherwise normally be a working day for him/her, such a day shall not be included in the period of paid leave (Article 112 paragraph 3 of the LC). If the employer grants the employee compensatory leave for overtime work or for work performed on a public holiday and it falls on a paid holiday, he/she is required to provide him/her with compensatory leave for another day (Article 112 paragraph 4 of the LC).

According to Article 113 paragraph 3 of the Labour Code, if an employee is unable to use all of his/her paid leave due to maternity or parental leave, even by the end of the following calendar year, his/her employer shall grant the paid leave after the end of the maternity or parental leave. If an employee is unable to take all of his/her paid leave because he/she is deemed temporarily incapacitated for work by the end of the following calendar year as a result of disease or an accident, his/her employer shall grant paid leave after the end of the employee's temporary incapacity for work (Article 113 paragraph 4 of the LC). If the employee is unable to use all of his/her paid leave because of long-term leave to perform a public function or trade union function, his/her employer shall grant the employee that part of the paid leave after the end of the public function or trade union function (Article 113 paragraph 5 of the LC).

According to Article 114 of the Labour Code if an employee during the course of his/her paid leave takes up service in the armed forces, or if he/she was deemed to be temporarily incapacitated for work on grounds of disease or accident, or if he/she is caring for a sick family member, the period of paid leave is deemed to have been interrupted. This shall not apply where the employer determines whether paid leave for a period of treatment of a sick family member at the request of the employee shall be granted. Paid leave shall also be deemed to have been interrupted upon taking up maternity or parental leave (Article 166 paragraph 1).

The Labour Code regulates the continuous daily rest period (Article 92) and the continuous weekly rest period (Article 93). However, the possible concurrence in question is not explicitly regulated here. Nor is it mentioned in the legislation on obstacles to work on the part of the employee and on the part of the employer (Articles 136 - 145). Each specific case will therefore have to be assessed individually according to the nature of the obstacle at work.

## **4 Other Relevant Information**

Nothing to report.

# Slovenia

## Summary

(I) The proposal of the so-called Fourth COVID-19 mega package was prepared by the government and submitted to the National Assembly for adoption. Among others, the reimbursement of wage compensation for workers who have been temporarily laid off due to the epidemic is expected to be extended.

(II) New rules on taking the certification examination in the field of safety and health at work, issued by the Minister of Labour, Family, Social Affairs and Equal Opportunities, entered into force on 27 June 2020.

## 1 National Legislation

### 1.1 Measures to respond to the COVID-19 crisis

The [proposal](#) for the Fourth COVID-19 mega package (PKP4) was adopted by the government on 28 June 2020 and submitted to the National Assembly for adoption.

Among others, the measure of State reimbursement of *wage compensations for workers temporarily laid off due to the epidemic* (initially envisaged until the end of May 2020, extended until the end of June 2020 by the Third COVID-19 mega package; see Flash Report May 2020) is expected to be extended by the Fourth COVID-19 mega package, this time until the end of July 2020, with the possibility for the government to extend it twice, until the end of August and the end of September 2020, if needed.

The government announced that the Act would start to apply as of 1 July 2020 (retroactive effect, since the legislative procedure, despite being fast-tracked, cannot be completed before that date) in order to guarantee the uninterrupted continuous application of this measure, which turned out to be of crucial importance for many employers and workers and prevented mass dismissals due to closures of businesses and lack of work during the COVID-19 crisis.

The government proposal also includes new rules governing the amount and payment of *wage compensation if a worker is ordered to be in quarantine* (it is proposed that the State would cover all the costs and that the amount would be different depending on the reason for the quarantine, 50 per cent in case of quarantine for those entering the country from 'red list' countries and 80 per cent in case of quarantine for those who have been in close contact with an infected person within the country). However, the opposition presented an alternative proposal on wage compensation during quarantine (80 per cent, paid by health insurance).

Some changes have been proposed on *supervision*, especially as regards short-time work schemes and the reimbursement of wage compensation for workers who have temporarily been laid off to better prevent abuse in practice.

The most controversial issue within the proposed Fourth COVID-19 package (PKP4) is the proposal to introduce a legal basis in the legislation that would allow the use of the so-called *COVID-19 contact-tracing app*. The Information Commissioner has raised serious concerns in this respect. The outcome of this initiative is still uncertain.

### 1.2 Other legislative developments

#### 1.2.1 Health and safety at work

On the basis of Article 31 of the Health and Safety at Work [Act](#) ('*Zakon o varnosti in zdravju pri delu (ZVZD-1)*', Official Journal of the Republic of Slovenia No 43/2011),



new rules on taking the certification examination in the field of safety and health at work were **issued** by the Minister of Labour, Family, Social Affairs and Equal Opportunities ('Pravilnik o opravljanju strokovnega izpita iz varnosti in zdravja pri delu'; Official Journal of the Republic of Slovenia No. 85/2020, 12. 6. 2020). New rules entered into force on 27 June 2020 and replaced the previous ones. No major changes have been introduced by the new rules (some minor changes on the composition of the exam committee, the exam procedure, regular publication of an updated list of relevant legal acts and literature, etc.).

## 2 Court Rulings

Nothing to report.

## 3 Implications of CJEU Rulings and ECHR

### 3.1 Worker status

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

The CJEU case C-692/19 (Yodel), which deals with the issue of the concept of 'worker' for the purposes of Directive 2003/88, is of relevance for the Slovenian legal order. It concerns parcel delivery by couriers engaged on the basis of a courier services agreement, which stipulates that they are 'self-employed independent contractors'. A courier claimed that he should be considered and treated as a worker in line with the purpose of Directive 2003/88. The CJEU ruled by a reasoned order under Article 99 of its Rules of Procedure that Directive 2003/88 must be interpreted as precluding a person engaged by his/her putative employer under a services agreement which stipulates that he/she is a self-employed independent contractor from being classified as a 'worker' for the purposes of that Directive, where that person is afforded discretion in respect of various aspects of performance of services (the use of subcontractors or substitutes; no obligation to accept the tasks offered or the possibility to unilaterally set the maximum number of tasks; freedom to provide services to others, including direct competitors; autonomous organisation of working time within certain parameters), provided that the independence of that person does not appear to be fictitious and that it is not possible to establish the existence of a relationship of subordination between that person and his/her putative employer. The Court extensively refers to its existing case law.

The Court, in line with existing case law, emphasised that it is for the referring court, taking account of all the relevant factors relating to that person and to the economic activity he/she carries out, to classify that person's professional status and decide whether he/she is a worker or an independent contractor. The Court also identified a number of criteria that must be taken into account when assessing the situation.

Slovenian labour courts, when deciding whether the person performing work/services is a worker or an independent contractor, base such classification on objective criteria that can be deducted from the definition of an employment relationship in Article 4 of the Employment Relationships Act ('Zakon o delovnih razmerjih (ZDR-1)', Official Journal No 21/2013, as later amended), according to which "an employment relationship is a relationship between a worker and an employer, whereby the worker voluntarily integrates into the employer's organised work process and in which, in return for remuneration, he or she continuously and personally carries out work according to the instructions and under the supervision of the employer". Article 18 is relevant as well, according to which "in the event of a dispute on the existence of an employment relationship between the worker and the employer, it shall be presumed that an employment relationship exists if elements of an employment relationship exist". Slovenian courts follow the principle that the determination of the existence of an



employment relationship should be primarily guided by the facts of a particular case and that the formal status of an 'independent contractor' does not prevent that person from being classified as an employee, if his/her independence is merely notional, thereby disguising an employment relationship. The assessment can only be made on a case-by-case basis, taking into account all relevant circumstances of a particular situation (see also B. Kresal, Komentar k 18. členu [*Commentary on Article 18*] and B. Kresal/D. Senčur Peček, Komentar k 4. členu [*Commentary on Article 4*], V: več avtorjev, Zakon o delovnih razmerjih s komentarjem [*Commentary on Employment Relationships Act*], Ljubljana: GV 2019, 34-39 and 135-150; D. Senčur Peček, 'Pojem delavca s primerjalnega in EU vidika' [The concept of 'worker' from the comparative and EU perspective], *Delavci in delodajalci*, 2016, vol. 16, No. 2-3, p. 189-216).

To conclude, it seems that Slovenian case law, based on the relevant provisions of the Employment Relationships Act (in particular, Articles 4 and 18), is in line with the approach taken by the CJEU in *Yodel*. General principles arising from the *Yodel* case, as deducted from existing CJEU case law on this issue, are also evident in existing Slovenian case law on the concept of 'worker'.

### 3.2 Working time and leaves

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

The CJEU judgment in *Fetico* concerned Spanish labour law rules that grant workers paid special leave to meet specific needs or obligations such as marriage, the birth of a child, the death of a close relative, etc.; the duration of the paid leave for marriage is expressed in 'calendar days', whereas the duration of other paid special leave is expressed in 'days'. The referring court was doubtful whether a refusal to grant a worker the right to take such special leave where a specific event occurred during the employee's weekly rest period or period of paid annual leave, was compatible with Articles 5 and 7 of Directive 2003/88.

The CJEU found that the provisions of Directive 2003/88, in particular, Article 5 (weekly rest period) and Article 7 (paid annual leave) are not applicable to national rules on special leave. It emphasised that the right to special leave as regulated in Spanish law does not fall within the scope of Directive 2003/88, but rather within the exercise by a Member State of its own competences.

This CJEU judgment is of no relevance for the Slovenian legal order.

According to Slovenian law, the days of absence from work for personal reasons as regulated in Article 165 of the Employment Relationships Act ('*Zakon o delovnih razmerjih (ZDR-1)*', Official Journal No 21/2013, as later amended), are explicitly referred to as 'working days' and are not calculated in the annual leave or weekly rest period; the worker is entitled to this absence for personal reasons in addition to annual leave and weekly rest periods. According to Article 160, paragraph 3 of the Employment Relationships Act, national holidays and work-free days, absence from work due to illness or injury and other cases of justified absence from work (i.e. including absence for personal reasons) are not counted as days of annual leave. These days of absence must be used by the worker in a reasonable connection with the event, within a reasonable time framework (see also K. Kresal Šoltes, Komentar k 165. členu [*Commentary on Article 165*], V: več avtorjev, Zakon o delovnih razmerjih s komentarjem [*Commentary on Employment Relationships Act*], Ljubljana: GV 2019, 973-974)

## 4 Other Relevant Information

Nothing to report.

# Spain

## Summary

(I) The state of emergency ended on June 21 and the so-called 'new normal' has set in until treatment for COVID-19 is found. The objective now is to reactivate economic activity to avoid a huge losses of employment. Employers, unions and the government have reached an agreement to extend the exceptional measures taken during the state of emergency until September 30.

(II) New rules on stevedoring companies will be adopted in national law in line with the findings in the CJEU's ruling of 11 December 2014 in case C-576/13.

(III) New rules on fishermen will implement provisions of Council Directive (EU) 2017/159.

## 1 National Legislation

### 1.1 Measures to address the COVID-19 crisis

#### 1.1.1 Health and safety

As already reported in the last Flash Report, the government has approved measures for a 'new normal' following the state of emergency, and this will require enhanced hygiene, the use of masks, social distancing and new behaviours to minimise risks. This new normality will affect employment relationships, because employers will be required to adopt new measures to reduce the risk of COVID-19 exposure for their workers (and also for their clients). New regulations have been passed for that purpose, both by the [State](#) and several regions (e.g. [Madrid](#), [Aragón](#) and [Castilla-La Mancha](#)).

#### 1.1.2 Financial aid

The State and the regions continue to [provide](#) financial aid to promote employment. They are trying to avoid a recession with measures aimed at reactivating the economy. The economic impact of the lockdown is tremendous. Unemployment has risen significantly and public administrations have to address it. An agreement between the government, the employers and the unions seeks to facilitate financing in certain economic sectors, and to support employment in the tourism sector (primarily through a reduction in social security contributions). Several regions provide for similar [measures](#) (this month Extremadura).

#### 1.1.3 Temporary layoffs and working time reductions

As mentioned in previous Flash Reports, the measures adopted to halt the spread of COVID-19 have affected many businesses, which could not continue carrying out their activities, or could not continue operating. In this case, or if there was no possibility to continue the activities due to the sickness or confinement of the workers or the lack of supplies, Article 22 of Royal Decree Law 8/2020 allowed employers to introduce adjustment measures to the workforce, mainly temporary layoffs and a reduction in working hours.

These measures were initially approved for the state of emergency, but the economic situation has led to an extension of these measures until September 30. Therefore, temporary layoffs and reductions in working hours introduced as a result of the COVID-19 crisis have not automatically ended with the onset of the 'new normal'.

These [new](#) regulations are the result of an agreement between the employers, unions and the government. The objective is to avoid the loss of employment and therefore, workers affected by temporary layoffs will gradually return to work as activity increases. Precisely for this reason, undertakings in this situation cannot require their workers to work overtime nor can they hire new ones.

This provision also allows new temporary layoffs on economic, technical or organisational grounds, but with the same limitations for overtime and the hiring of new workers.

Prohibition of dismissals and reductions in social security contributions will also remain in force in these situations, although the reductions in contributions are not exactly the same as previously, because they affect all temporary layoffs and not only those decided by force majeure (and some provisions are in place in the event of a new lockdown in the near future). The exceptional unemployment benefits for workers affected by these temporary layoffs as well as for self-employed workers have been extended until 30 September (see March Flash Report).

### 1.1.4 Freedom of movement

The government has introduced major restrictions on the freedom of movement. In particular, border controls are tighter and also affect EU citizens. As a general rule, entering Spain is not allowed. The [restrictions](#) mentioned in the last Flash Report have been extended until July 8 and there are specific border control [rules](#) with Portugal. Regarding third country nationals, [restrictions](#) will be in force until 31 July, except for nationals of the following countries: Argelia, Australia, Canada, China, Georgia, Japan, Montenegro, Morocco, New Zealand, Rwanda, Serbia, South Korea, Thailand, Tunisia and Uruguay. People entering Spain [must](#) undergo a health test.

## 1.2 Other legislative developments

### 1.2.1 Stevedores

As reported in a previous Flash Report (5/2017), Spanish [law](#) forced stevedoring companies operating in Spanish ports of general interest to register in a 'port stevedores anonymous management company' (SAGEP). Thus, these companies could not go to the market to hire their own staff, permanent or temporary, except in the event that the workers proposed by the corresponding SAGEP were insufficient or not suitable.

A CJEU ruling of 11 December 2014 (case C-576/13) stated that Spain had infringed Article 49 TFEU by forcing undertakings to register with a SAGEP, and sometimes to participate in the company's capital, and to impose the obligation to hire the workers made available by the SAGEP and a minimum of such workers on a permanent basis. In order to comply with the requirements of Article 49 TFEU (and CJEU ruling of 2014), the government approved Royal [Decree Law](#) 8/2017, 12 May.

The Royal Decree Law adapted the Spanish system to EU law, but provides for a transitional period of three years for the complete replacement of the SAGEPs. That transitional period has now been extended for two months. The COVID-19 crisis has not made a complete transformation of the SAGEPs possible in the period initially provided, hence the government has decided to extend this period.

### 1.2.2 Fishermen

The government has [improved](#) the protection of fishermen, regulating rights such as repatriation paid by the fishing vessel owners (except in cases of lawful disciplinary dismissal) in certain circumstances (for example, the termination of the employment

contract). Fishermen are entitled to health protection and medical care and they must have adequate food and shelter while they are on board the vessel. These regulations include specific obligations for the employer to inform employees of the conditions applicable to the contract, detail the minimum contents of the employment contract and modify Article 8 of the Labour Code, i.e. employment contracts of fishermen will always be made in writing. Regarding minors, night work on ships is defined as work performed between 10 p.m. and 7 a.m.

These provisions implement Council Directive (EU) 2017/159 of 19 December 2016 transposing the agreement on the implementation of the Work in Fishing Convention, 2007 of the International Labour Organization, concluded on 21 May 2012 between the General Confederation of Agricultural Cooperatives in the European Union (Cogeca), the European Transport Workers' Federation (ETF) and the Association of National Organisations of Fishing Enterprises in the European Union (Europêche).

For more information, see [here](#).

## 2 Court Rulings

Nothing to report.

## 3 Implications of CJEU Rulings and ECHR

### 3.1 Worker status

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

According to CJEU Order B/Yodel Delivery Network Ltd (22 April 2020, [case C-692/19](#)), 'Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as precluding a person engaged by his putative employer under a services agreement which stipulates that he is a self-employed independent contractor from being classified as a 'worker' for the purposes of that directive, where that person is afforded discretion:

- to use subcontractors or substitutes to perform the service which he has undertaken to provide;
- to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks;
- to provide his services to any third party, including direct competitors of the putative employer, and
- to fix his own hours of 'work' within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer, provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer. However, it is for the referring court, taking account of all the relevant factors relating to that person and to the economic activity he carries on, to classify that person's professional status under Directive 2003/88'.

This Order could have had serious implications for Spain if it had considered the courier an employee. The scope of labour law of digital platform workers has been discussed over the last two years. There are conflicting court decisions so far, but the issue has not yet reached the Supreme Court. The government has repeatedly announced that it will approve a regulation for such workers, which will be included in labour law, but those rules have not yet passed.

### 3.2 Working time and leaves

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

According to CJEU *Federación de Trabajadores Independientes de Comercio (Fetico) and Others v Grupo de Empresas DIA S.A. and Twins Alimentación S.A.* (4 June 2020, [case C-588/18](#)), 'Articles 5 and 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as not being applicable to national rules providing for special leave on days when workers are required to work which do not allow those workers to claim that leave in so far as the needs and obligations met by that special leave arise during weekly rest periods or periods of paid annual leave that are the subject of those articles'.

This case was submitted by Spain and the ruling does not conclude with a declaration of non-conformity between EU law and Spanish labour law. Therefore, no adaptations or changes seem necessary. This ruling appears to put an end to a growing demand for the extension of the rules on annual leave to other breaks or leaves, so the worker can enjoy all of the available leaves in full, even when they overlap.

### 3.3 Annual leave

*CJEU, joined cases C-762/18 y C-37/19, 25 June 2020*

According to CJEU QH (25 June 2020, joined [cases C-762/18 y C-37/19](#), there is no English version available at the moment), 'where national legislation provides that a worker unlawfully dismissed must be reinstated in his or her work, Article 7(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as precluding national case-law according to which that worker is not entitled to paid annual leave for the period from the date of dismissal until the date of reinstatement'.

Spanish labour law does not provide an explicit rule for this situation, but a Supreme Court [ruling](#) of 27 May 2019 reached the exact same conclusion as this QH CJEU ruling. That Spanish Supreme Court ruling explicitly mentioned the Working Time Directive and also referred to CJEU case law, in particular to the Shimizu ruling (6 November 2018, case C-684/16).

## 4 Other Relevant Information

Unemployment increased in June by 5 107 people; there are already 3 862 883 unemployed people.

# Sweden

## Summary

Nothing to report.

## 1 National Legislation

Nothing to report.

## 2 Court rulings

Nothing to report.

## 3 Implications of CJEU Rulings and ECHR

### 3.1 Working time and leaves

*CJEU case C-588/18, FETICO u.a., 04 June 2020*

The CJEU has ruled in [case C-588/18](#) on the balance between paid annual leave and paid special leave in relation to Directive 2003/88/EC. The CJEU concluded that Arts. 5 and 7 of Directive 2003/88/EC are not applicable to national rules that provide for “special leave”, such as attending a close relative’s funeral, if this particular leave occurs during annual leave or weekly rest periods.

Swedish legislation leave for urgent family reasons stipulates a right for the employee to take such leave, but does not regulate the correlation to annual leave or weekly rest periods (Act on Leave for Urgent Family Reasons, [lagen \(1998:209\) om rätt till ledighet av trängande familjeskäl](#)). Neither does the Act regulate any right to pay during such leave, a matter that is, however, often addressed in collective agreements or in accordance with employer practices. The Swedish Act is very limited, but provides for protection for unfair dismissal in the event of urgent leave. Very limited case law exists under the Act and the impression is that most employers accept the reasons presented by the employee, and that at least a few to 10 days annually can be paid by the employer (in accordance with employer practice or [collective agreements](#)). There is no indication that any family emergency that occurred during annual leave would reflect any right, statutory or otherwise, to extend or delay the annual leave or weekly rest period. Employers might be willing to accept this, but are not required to do so. The understanding of the CJEU’s current case corresponds to the reading of the legal situation in Sweden.

### 3.2 Employee status

*CJEU case C-692/19, Yodel Delivery Network, 22 April 2020*

The CJEU returned in case C-692/19 to the concept of “worker” and the defining elements of an employment relationship or service agreement under partly “modern” or “new” forms of labour relationships. The Court of Justice concluded that a person engaged:

“by his putative employer under a services agreement which stipulates that he is a self-employed independent contractor from being classified as a ‘worker’ for the purposes of the that directive, where that person is afforded discretion:



- to use subcontractors or substitutes to perform the service which he has undertaken to provide;
- to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks;
- to provide his services to any third party, including direct competitors of the putative employer, and
- to fix his own hours of 'work' within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer,

provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer."

The decision by the Court of Justice in *Yodel* builds on a legal development of the concept of employment and self-employment. Swedish labour law does not entail any statutory definition of these concepts, but case law and other legal sources have developed a list of defining elements to determine whether a relationship qualifies as employment or not (see, for instance, Inghammar, "The Concept of Employee: The Position in Sweden", in, Waas, Heerma van Voss, *Restatement of Labour Law in Europe, Vol. 1, The Concept of Employee*, Hart Publishing, UK, p. 676-696). The aspects examined by the CJEU in *Yodel*, such as a personal duty to perform the tasks under the contract (and not to subcontract them), and the subordination in relation to time and performance of working tasks, as well as the exclusivity not to take other, at least not competing, assignments, have all been addressed under Swedish case law for the establishment of an employment relationship. The decision by the Court of Justice is—based on this and the case law referred to by the CJEU—well in line with the Swedish understanding of the concept of employment in relation to self-employment.

## 4 Other Relevant Information

Nothing to report.

# United Kingdom

## Summary

Various acts of legislation, directions and guidance have been passed in relation to the COVID-19 crisis.

## 1 National Legislation: COVID-19 crisis

### 1.1 Key documents

The relevant government web page can be found [here](#).

Specific advice for employees, employers and businesses can be found [here](#).

People in [Scotland](#), [Wales](#) and [Northern Ireland](#) have to follow the specific rules in those parts of the UK.

### 1.2 New documents

The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 can be found [here](#).

The furlough scheme for employees is still running: (latest update 3 July 2020 2020) can be found [here](#).

- The furlough scheme closed for new entrants on 30 June 2020 and then it can only be used to furlough employees who have previously been furloughed for 3 weeks
- The new scheme—flexible furlough—has been introduced from 1 July 2020. As DAC Beachcroft [explains](#), from 1 July 2020, the CJRS will change and employers can bring employees back to work on a flexible basis for any amount of time or shift pattern, while still being able to claim the CJRS grant for their normal hours not worked. However, employees must have previously been on furlough leave; employers will only be able to furlough employees that they have furloughed for a full 3-week period prior to 30 June. It is therefore too late to put employees on furlough for the first time, unless they fall into the exception in that they are returning from family leave (excluding unpaid parental leave) and were on PAYE payroll on or before 19 March 2020.
- As Edwin Coe [explains](#), from 1 August 2020, employers will have to pay employer national insurance contributions and employer pension contributions, with the government grant still covering 80 per cent of wages (up to the cap of £2 500). From 1 September 2020, employers will also have to pay 10 per cent of wages, with the government grant covering the other 70 per cent (up to a cap of £2 187.50) and from 1 October 2020, employers will have to pay 20 per cent of wages, with the government grant covering the other 60 per cent (up to a cap of £1 875) in each case for the periods of time qualifying employees are on furlough.
- The latest Treasury direction can be found [here](#) (published 25 June 2020); the direction takes precedence over the guidance issued by HMRC

The self-employment income support scheme can be found [here](#) (last update 22 June 2020). This scheme is being extended. For those eligible and if their business has been adversely affected on or after 14 July 2020, they can make a claim for a second and final grant from 17 August 2020, even if they did not make a claim for the first grant.



### **2 Court Rulings**

Nothing to report.

### **3 Implications of CJEU Rulings and ECHR**

Nothing to report.

### **4 Other Relevant Information**

Nothing to report.

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