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Newsletter 01 – 2022 (Working time, Crowd working, social dumping) - update

▪ National legislation

1) **Spanish Labour Law Reform**

Spanish Government introduced through Royal Law Decree No. 32/2021 of 28 December – confirmed by the Parliament in early February 2022 – a wide labour law reform.

The "pro-labour" inspiration of the whole reform has implications also in the field of social dumping.

In this context, the reform amends:

- Article 84 of the Workers' Statute, reinstating the favourability principle in terms of wages. According to these modifications, company collective agreements are no longer allowed to derogate from higher level collective agreements in terms of workers' wages. Nonetheless, derogation is still allowed in other relevant topics, like working time, classification of workers and work-life balance.

- Article 86 of the Workers' Statute, that reinstates automatic ultra-activity of collective agreements. The amended version of Article 86 establishes that a collective agreement that has expired or has been terminated, maintains its effects until it is not substituted by a new one, also in case negotiations between the parties would fail and/or would be interrupted. The former version of Article 86 provided for ultra-activity for one year after the termination of the agreement. After that, the collective agreement lost any effect, although it was possible to apply to work relationships a collective agreement of a higher-level, if present.

Source: Gemma F. Monfort, *Una primera y sintética aproximación al RDL 32/2021, de reforma laboral*, Aranzadi digital 1 (2022).

2) **Amendment to the Austrian Wage and Social Dumping Prevention Act**

In the view of a judgment (at that time) pending before the Court of Justice of the European Union (CJEU) (see below, section EU case-law, No. 4), also disputing the direct applicability of the proportionality requirement of Article 20 of Directive 2014/67/EU, the Austrian legislator amended the Wage and Social Dumping Prevention Act (Federal Law Gazette I) 10 2021/174.

More in detail the amendment, introduced in summer 2021, abolished the accumulation principle of penalties for breaches of the Wage and Social Dumping Prevention Act. The accumulation principle formerly has been contested, especially by employers, since it originated high sanctions also for a series of minor offences.

At the same time, the new regulation increases sanctions for specific and dangerous offences. For instance, obstructing the authorities in wage control is now sanctioned with a total penalty of up to 40.000 Euro, while before the reform it was 20.000 Euro. As well, a sanction of up to 400.000 Euros is still possible for criminal offences in connection with underpayment of employees.

Sources: DerStandard, Neue Regeln gegen Lohn- und Sozialdumping ab September, 16 June 2021; Bundesgesetzblatt Für Die Republik Österreich, 9 September 2021.

▪ National Case law

1. Germany:

German Federal Labour Court (BAG) of 1 December 2020 , 9th Senate, reference 9 AZR 102/20, Judgment, ECLI:DE:BAG:2020:011220.U.9AZR102.20.0

German Federal Labour Court (BAG) of 1 December 2020 , 9th Senate, reference 9 AZR 102/20, Judgment

Employee Status of a Crowdworker

ECLI:DE:BAG:2020:011220.U.9AZR102.20.0

Guiding principle

The continuous execution of a large number of micro jobs by users of an online platform ("crowdworkers") on the basis of a framework agreement concluded with the operator ("crowd sourcer") can lead to the assumption of an employment relationship within the framework of the overall assessment required under section 611a para. 1 sentence 5 of the German Civil Code (BGB), if the crowdworker is obliged to provide services personally, the activity owed is simple in nature and its execution is predetermined in terms of content, and the awarding of the contract and the concrete use of the online platform is controlled by the crowd sourcer in the sense of external control.(para.45)

Regional Labour Court Hamm (Westphalia)

Decision of 27.07.2021 - 2 TaBV 79/20 -

Co-determination of the works council - electronic time recording . Right of initiative

Guiding principle:

The works council has a right of initiative in the introduction of electronic time recording for the employees of the establishment (deviation from Federal Labour Court, decision of 28.11.1989 - 1 ABR 97/88 -).

Similarly: Regional Labour Court Munich, decision of 10.08.2021 - 3 TaBV 31/21- and Regional Labour Court Düsseldorf, decision of 24.08.2021 - 3 TaBV 29/21 -.

Labour Court Emden

Final Judgement 24.09.2020, 2 Ca 144/20

Overtime compensation – recording and control of working time

Guding principles (excerpt).

(1) The judgment of the European Court of Justice (ECJ) of 14 May 2019, Case C-55/18 [CCOO], Juris, modifies the burden of proof in over-time proceedings. The - positive - knowledge previously required by the Federal Labour Court (cf. BAG, judgment of 10 April 2013 - 5 AZR 122/12, Juris paras. 21 and 22) as a prerequisite for "tolerating" the performance of any overtime and thus for imputability or causation on the part of the employer is no longer required. As a result of the aforementioned ECJ judgment, the positive knowledge required as a pre-requisite for "tolerating" the performance of any overtime hours and thus for imputability or causation on the part of the employer is not necessary if the employer could have obtained knowledge of the employee's working hours by inspecting the recording of working hours, which the employer is obliged to introduce, monitor and control. (para.60)

(2) The objection that conclusions for questions of remuneration law could not result from the judgment of the ECJ of 14 May 2019, loc. cit, [CCOO], because the European Union has no regulatory competence in matters of remuneration law, cannot be accepted (for details, see ECJ, judgments of 15.4.2008 - C-268/06, "Impact" , Juris paras. 121 to 126, and of 21.02.2018, C-518/15, "Matzak" , paras. 24 to 26).(para.138)

(4) As a rule, it must be assumed that the working time documented under working time law and the working time subject to remuneration are congruent. The documentation of working

hours prepared in compliance with the requirements of the law on working hours will, apart from exceptional cases which must be justified, regularly constitute a meaningful indication that work was actually carried out during the documented working hours (margin note 158).

(11) The ECJ's ruling in the CCOO case does not constitute an inadmissible further development of the law, but is within the framework of the interpretation of the Working Time Directive. According to Art. 3, 5 and 6 lit. b, the member states are obliged to take the "necessary measures". The ECJ interprets this indeterminate legal concept and relies on the "effet utile" principle as a recognised principle of interpre-tation of European law as well as on the teleological argument of the protection of workers (para. 92).

(12) The employer's obligation to record and monitor time established by the ECJ's judgment of 14 May 2019, loc. cit. [CCOO], is not pre-cluded by the fact that the Member States have leeway in the design of the time recording system. The requirements of the aforementioned ECJ judgment must be implemented by the specialised courts, the labour courts, by interpreting national law in conformity with European law. Otherwise, the requirement of the most effective possible implementation of European law and the case-law of the ECJ would not be sufficiently met.

(13) An obligation of the national courts to interpret the aforementioned provisions of national (labour) law in conformity with European law or the Directives exists irrespective of whether there is possibly - in addition - an obligation on the German legislature to make amendments to the statutory provisions of sections 16(2) ArbZG, 21a(7) ArbZG, 17 MiLoG etc. as a result of the ECJ's judgment of 14.05.2019, C-55/18, [CCOO].(para.84).

Dissent:

Lower Saxony Regional Labour Court

Judgment of 06.05.2021 5 Sa 1292/20

Guiding principle (excerpt):

Persuant to Art.153 (5) TFEU, the ECJ lacks the competence to comment on questions of working time remunaration.

Revision pending at the Federal Labour Court 5 AZR 359/21 ; Date of decision: 04.05.2022

2. **Hungary:**

Judgement of the Supreme Court, BH2001. 189

The case is about a judgment (BH2001. 189) of the Hungarian Supreme Court (Kúria) on the application of the Rome I Regulation (593/2008/EC).

An employee was hired by a Hungarian employer, but worked at a construction site in Germany, where he suffered a work accident. His employment contract stipulated that Hungarian labour law shall apply to all types of paid leave, but that German law would have been the one applicable for working time matters, and for any matter relating to his work in Germany.

The parties debated whether the labour relationship was that of a worker hired to work in Germany only, or of a posted worker sent in Germany to work. As well as about the law regulating the labour relationship.

The Hungarian Supreme Court remarked that the employee had worked in Germany only, and that this was also the parties' intention for the future. It established, hence, that the employment contract was deemed to have been concluded only for work in Germany. In addition, the Supreme Court stated that the provisions of the employment contract can be interpreted as selecting German law as the applicable national labour law under Article 8 of the Rome I Regulation. Therefore, the Supreme Court found that German law must be applied in this case.

Source: EU Commission Flash Report on Labour Law – September 2021

3. **Italy:**

Judgement of the Supreme Court, Joint Session, No. 20819 of 21 July 2021

The Italian Supreme Court declared as discriminatory – and so void – a clause of the company regulation imposed by Ryanair to cabin crew staff operating in the Bergamo Airport.

This clause was stating that the company regulation would have terminated in case of any work stoppage or collective action of employees, or in case Ryanair would have been forced to recognize any trade union representing cabin crew. The consequences of such termination would have been that workers would have lost benefits provided by the company regulation, such as increases of wages and allowances.

The Italian Supreme Court issued a wide-ranging judgment, touching diverse aspects of Italian and European labour law. From the point of view of social dumping, the judgment is relevant since it framed in those "personal convictions" that can originate a sanctionable discrimination – according to Directive 2000/78/CE and Article 19 TFUE – also workers' beliefs relating to participation to work stoppages and collective actions, or relating to the decision to become member of a trade union or of a workers' association.

Source: Bollettino ADAPT 30 August 2021, No. 29; CGIL - Collettiva.it 21 July 2021.

Judgement of the Supreme Court, Criminal Section, No. 38423 of 19 October 2021

The case addressed by the Italian Supreme Court in late 2021 is about the extension of the main contractor's duty of control on the suitability of subcontractors, in order to prevent work-related accidents.

More in detail, an Italian company, in 2013, subcontracted some construction works to another company. The subcontractor, in its turn, subcontracted again part of the works to another company. A worker of the latter company, while realising the works and without wearing protections required by law, had an accident reporting physical injuries.

Despite limitation periods for criminal charges had already expired, the Italian Supreme Court decided anyway the case, because its possible consequences in terms of reimbursement of damages.

In this view, the Supreme Court confirmed the liability of the legal representative of the main contractor, for the crime of personal injuries caused with negligence (Articles 113 and 590 of Italian Criminal Code).

The rationale for the judgment is that the main contractor is obliged to effectively verify that (direct) subcontracting companies are in condition to realize works, according to Article 90, par. 9, lett. a) of Legislative decree No. 81 of 2008. That includes also verify that these companies are adopting adequate measures to prevent work-related accidents, considering

the level of danger of subcontracted works. If these controls are missing, the main contractor may respond also of work-related accidents involving further (and indirect) sub-contracting companies.

Such controls, in the case at hand, were omitted by the main contractor. Moreover, liability is not excused by the fact that the first subcontractor accepted to realize works, and thus implicitly suggested being apt for them. As well, the fact that the main contractor was unaware of the further sub-contracting of works where the accident actually occurred – the Supreme Court says – does not exempt the main contractor from liability. At the opposite, it consists of another sign of negligence.

Source: Bollettino ADAPT 22 November 2021, No. 41.

Tribunal of Naples, Labour Section, 4 January 2022

The Tribunal of Naples issued a provisional order, upon request of workers of an Italian company, directed to obtain a voidness declaration of a "collective" transfer of 27 employees in a new establishment, far more than 600 km from the former one.

The judge highlighted that the "collective" transfer was, actually, aimed to dismiss the employees (as afterwards actually happened), or to induce them to resign. This in consideration of the far distance of the new establishment from the former one, and because the new establishment was not adequate – for its dimensions and conditions – to host such a number of employees. Therefore, the transfer was an employers' unilateral measure adopted without the required good faith.

In this view, the judge identified this "collective" transfer as a significant and substantial modifications of working conditions of the claimants. It allows to frame the transfer in the definition of collective dismissal of Directive 98/59/CE. In this view, the "collective" transfer was declared void, because the information and consultation proceeding set by the Directive and by national law implementing it has not been respected.

Source: Bollettino ADAPT February 2022, No. 5.

4. Spain:

Judgement of the Supreme Court, Social chamber, No. 1206 of 2 December 2021

The judgment of the Spanish Supreme Court (*Tribunal Supremo*) deals with a case of utilization, by a foreign undertaking, exclusively of workers supplied by a temporary work agency, to carry out structural tasks.

More in detail, from 2012 to 2014, a Norwegian airline company utilized 74 cabin crew in its Spanish basis in Malaga, all supplied by a local temporary work agency. The airline did not have its own employees, and supplied workers were employed to provide air navigation services, that is the core business of the company.

After some intermediate judgments, the Supreme Court was requested to decide about the conduct of the airline company as well as of the temporary work agency. It stated that the two companies had realised an actual illegal transfer of workers, that is a very serious offence according to Article 8.2 of the Spanish Law on Infractions and Sanctions concerning Social Order (*LISOS*, Royal Legislative Decree No. 5 of 4 August 2000). The Supreme Court, instead, disregarded the option to assume the conduct under Article 18.2 LISOS, regarding the mere utilization of work supply agreements outside the cases typified by law, and for which is established a milder sanction.

The Supreme Court justified its orientation through a plurality of reasons. First, the high number of supplied workers utilised by the airline company which, moreover, did not have any proper employee in Spain. In addition, cabin crew were hired through temporary contracts due for production circumstances. Nonetheless, these agreements were executed for a time period further exceeding the maximum limits established by Article 15, par. 1, lett. b) of the Spanish Workers' Statute (Royal Legislative Decree No. 2 of 23 October 2015). That integrated – the Court says – also an illegal deprivation of these workers of their right to a stable employment.

Text of the judgment available in vLex (in Spanish).

5. Sweden:

Judgement of the Labour Court, AD 2021 No. 42, 25 August 2021

In case AD 2021 No. 42, the Swedish Labour Court addressed a situation in which a Lithuanian company had workers posted in Sweden. The Lithuanian employer executed an arrangement (*hängavtal*) with Swedish trade unions to extend to these posted workers provisions of a Swedish collective agreement. Claims raised by the Swedish trade union concerned a wide range of topics, including wages, overtime, working time and partial payment of the occupational pension scheme.

The most interesting issue concerns wages of posted workers. More in detail, according to Lithuanian labour law, posted workers are entitled to an additional remuneration to the statutory wage. In this case, this particular remuneration consisted of additional 29,50 Euro for each posted day. The question was if, according to the Swedish transposition of the Posting of Workers Directive – and to the local interpretation of foreign law in parallel to a domestic collective agreement – this additional remuneration was to be considered as part of normal wage of posted workers, or as separated and diverse item.

The Swedish Labour Court, first, established that such a form of additional remuneration does not breach any EU provision. Nonetheless, according to the Labour Court, this remuneration cannot be considered as part of ordinary or overtime salary owed to posted workers according to the relevant collective agreement.

At the opposite, the Lithuanian employer had considered this additional remuneration as included in the basic wage of posted workers. The Labour Court established, thus, that the Lithuanian employer violated the Swedish collective agreement.

Although the employer objected that this interpretation represents an unsurmountable burden for its work and services, contrary to free movement under Article 56 TFEU, the Labour Court rejected the employer's request to submit the case to the CJEU.

Source: EU Commission Flash Report on Labour Law – August 2021

▪ EU case-law

a. ECJ 14 May 2019, CCOO v. Deutsche Bank, judgement in case C 55-18

Court of Justice of the European Union, Luxembourg, 14 May 2019
Judgment in Case C-55/18
Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE
Consequently, in order to ensure the effectiveness of the rights provided for in the Working Time Directive and the Charter, the Member States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured. It is for the Member States to define the specific arrangements for implementing such a system, in particular the form that it must take, having regard, as necessary, to the particular characteristics of each sector of activity concerned, or the specific characteristics of certain undertakings concerning, inter alia, their size.

b. European Union: Judgment of the Court (Grand Chamber) of 3 June 2021 – C-784/19 - TEAM POWER EUROPE EOOD v Direktor na Teritorialna direktsia na Natsionalna agentsia za prihodite – Varna

The case decided by the CJEU concerns a temporary work agency pretending to apply the social security legislation of the Member State in which it was established and in which it was allegedly normally carrying out its activity (Bulgaria), in relation to a temporary agency worker supplied to a company in another Member State (Germany).

The legal basis for this case is Article 12(1) of Regulation No. 883/2004, according to which an employee "*[…] who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the* [social security] *legislation of the first Member State […]*."

According to the CJEU, Article 12(1) must be read in the light of the specifications set by Article 14(2) of Regulation (EC) No. 987/2009. In this view, the CJEU affirmed that a temporary work agency established in a Member State must – in order to be considered as 'normally carrying out its activities' in that Member State – conduct a significant part of its business of assigning temporary agency workers toward companies established and operating in the territory of the same Member State [para. 62]. Otherwise, the company is prevented to rely on Article 12(1), in order to apply the social security legislation of the Member State in which it is established to its employees supplied to companies in another Member State.

In the present case, the temporary work agency was selecting and recruiting workers in Bulgaria (the Member State in which it was established), exclusively in order to supply these workers to companies in Germany. The CJEU considered this activity as insufficient for the

temporary work agency to be considered performing 'substantial activities' in Bulgaria. And, thus, to apply Bulgarian social security legislation to its workers supplied to companies in other EU Member States, according to Article 12(1). Furthermore, the CJEU specified that also an activity aimed to supply only 'most' of (instead of all) recruited workers toward another Member State would be, as well, insufficient for the purposes of Article 12(1) [para. 67].

This judgment is important because the CJEU intervenes to prevent temporary work agencies from 'forum shopping', barring them from establishing in a given Member State with the sole purpose to benefit from social security legislation which is most favourable to them.

The orientation assumed by the Court is in contrast with the position of the Advocate General in the same case. Indeed, he advised that "*unless the existence of fraud or abuse is established, it is not necessary that a substantial part of its* [the worker agency's] *employee placement activity is performed for hirer undertakings established in the same Member State*". If the position of the Advocate General would have been shared by the CJEU, it would have opened for temporary work agency the possibility to establish in Member States with social security legislation providing less guarantees for workers – and more convenient for employers – for the mere purpose to apply this legislation to employees supplied to companies in other EU Member States.

Source: EUTCLEX case law and related references.

c. European Union: Judgment of the Court of Justice (First Chamber) of 8 July 2021 – C-428/19 – Rapidsped

The judgment of the CJEU was issued upon a request of preliminary ruling referred by a Hungarian court. It concerns posting of workers in the transnational provision of services in the road transport sector. It is relevant since it treats of remuneration components concurring to the minimum wage owed to workers while they are in the country of posting. As well as of compatibility of fuel saving bonuses with EU law.

The case concerned Hungarian drivers posted to France. The drivers received from their employer, besides ordinary wage, a daily allowance for the work realised abroad, increasing with the duration of the posting. In addition, the employer was paying them, on its discretion and as established in work agreements, a fuel-saving allowance. The amount of the allowance was calculated according to the fuel consumption, in relation to the distance travelled.

Considering together wage and allowances, the employer was assuming to pay to posted drivers a salary in line with what contractually agreed, and, relating to the activity conducted in France, above the French minimum wage for the transport sector.

The drivers contested these calculations, and raised a claim before the competent Hungarian court. They sustained that daily and fuel allowances should not have been considered part of their wage. In this sense, their hourly salary for their time working in France would have been

significantly below the wage contractually agreed, as well as below the French sectoral minimum wage.

While examining the case, the Hungarian Court filed a request for a preliminary ruling to the CJEU. The most important questions were if: (i) An infringement of Directive 96/71/EC and of the French minimum wage legislation can be relied upon by Hungarian workers as against their Hungarian employers in proceedings instituted before Hungarian courts; (ii) The second subparagraph of Article 3(7) of Directive 96/71/EC must be interpreted as establishing that a daily allowance intended to cover expenditure incurred during the posting of workers abroad must be regarded as part of the minimum wage; and (iii) Whether Article 10 of Regulation No. 561/2006 must be interpreted as precluding a transport company from granting drivers a bonus calculated on the basis of the fuel-savings in relation to the journey made.

The CJEU first established that Directive 96/71/EC is applicable to the case [para. 36]. The Court, thus, acknowledges that a claim against an employer established in one Member State (Hungary), for breach of another Member State's (France) provisions concerning minimum wage, can be raised by workers posted from the first Member State (Hungary). The claim can be brought before a court of this first State (Hungary), in case that local Court has jurisdiction. [Para 45].

As to the daily allowance, the CJEU emphasized that its amount varied according to the duration of the workers' posting. This allowed the CEJU to conclude that "*[…] the lump-sum and progressive nature of that allowance, seem to indicate that the purpose of that daily allowance is not so much to cover the costs incurred abroad by the workers, but rather […] to provide compensation for the disadvantages entailed by the posting, as a result of the workers being removed from their usual environment*" [para. 50]. For the CJEU, hence, such an allowance is included in those that according to Article 3(7) of Directive 96/71/EC are usually part of the minimum wage, "*unless it is paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board or lodging, or unless it corresponds to an allowance which alters the relationship between the service provided by the worker […] and the consideration which he or she receives in return […]* [Para. 54].

Finally, on the matter of fuel-saving bonus, the CJEU affirmed that recognizing a bonus calculated on the basis of the savings made in the form of reduced fuel consumption in relation to a journey should not always be considered an infringement of Article 10(1) Regulation No. 561/2006. Article 10(1), indeed, prohibits to transport companies to pay their drivers bonuses or wage supplements "*related to distances travelled and/or the amount of goods carried*" only if this would endanger road safety or encourage drivers to breach the protective provisions of Regulation (EC) No. 561/2006. Conversely, the CJEU points out that the provision does not generally forbids the promotion of an economical driving style through financial incentives [para. 59 et seq.].

Sources: HSI Report on European Labour Law and Social Security Law 3/2021; ETUCLEX case law.

d. European Union: Judgment of the Court (First Chamber) of 15 July 2021 – Joined cases C-152/20 and C-218/20 - DG and EH v SC Gruber Logistics SRL and Sindicatul Lucrătorilor din Transporturi v SC Samidani Trans SRL

The case concerns route transport sector, and in particular is about the law applicable to the remuneration of lorry drivers working for a company established in Romania, and carrying out their activity also in other EU Member States (Italy and Germany).

In this context, the referring court filed a request for a preliminary ruling of the CJEU, including three different questions. The most relevant of them was if "*the minimum wage applicable in the country in which the employee has habitually carried out his or her work"* is *"a right that falls within the scope of 'provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable', within the meaning of the second sentence of Article 8(1)"* of the Regulation (CE) No. 593/2008 (Rome I).

The CJEU replies to the request for a preliminary ruling affirming that, despite every decision should be taken in the view of the national applicable law, in principle rules about minimum wage are part of those that cannot be derogated from by an employment agreement [para 31].

For the rationale of this decision, the CJUE makes reference to the opinion of the Advocate General. He, first, points out that rules about minimum wage are aimed to protect employees and, thus, derogation to the detriment of the latter should not be admitted, especially through employment agreements [para 72, opinion of Advocate General].

Furthermore, for countries having specific laws about minimum wage, the prohibition of their derogation through an employment agreement also finds an indirect reference in former case law of the CJEU, concerning Article 3(1) of Directive 96/71/EC [para 72, opinion of Advocate General. See in particular C-396/13, *Sähköalojen ammattiliitto*, par. 29].

Source: Bollettino ADAPT 8 Novbember 2021, No. 39.

e. European Union: JUDGMENT OF THE COURT (Seventh Chamber) 13 January 2022, C-514/20, DS v Koch Personaldienstleistungen GmbH,

(Reference for a preliminary ruling – Social policy – Charter of Fundamental Rights of the European Union – Article 31(2) – Directive 2003/88/EC – Organisation of working time – Article 7 – Annual leave – Working time – Overtime – Calculation of working time on a monthly basis – No overtime pay when taking annual leave) 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, read in the light of Article 31(2) of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding a provision in a collective labour agreement under which, in order to determine whether the threshold of hours worked granting entitlement to overtime pay is reached, the hours corresponding to the period of paid annual leave taken by the worker are not to be taken into account as hours worked.

f. **<u>European Union</u>: Judgment of the Court (Grand Chamber) of 8 March 2022 – C-205/20 – NE v Bezirkshauptmannschaft Hartberg-Fürstenfeld**

The judgment of the CJEU deals with a request of preliminary ruling filed by an Austrian Court and regarding Article 20 of Directive 2014/67/EU concerning posting of workers.

The referring Court asks the CJEU to specify if Article 20 has direct effect, and may thus be relied on by individuals before national Courts against a Member State which has transposed it incorrectly (Judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16). In case of negative reply, the referring Court further requests the CJEU to indicate if an interpretation of national law in conformity with EU law is anyway compulsory. That is, requiring leaving national provisions contrasting with Article 20 unapplied. Or to supplement them with criteria developed by the CJEU.

Article 20 establishes that national "*[…] rules on penalties applicable in the event of infringements of national provisions adopted pursuant to […] Directive [2014/67/EU] […] shall be […] proportionate […]*". The request of preliminary ruling comes after some decisions of the CJEU (Order of 19 December 2019, *Bezirkshauptmannschaft Hartberg-Fürstenfeld*, C-645/18; and, in similar factual circumstances, Judgment of 12 September 2019, *Maksimovic*, joined cases C-64/18, C-140/18, C-146/18 and C-148/18; as well as Order of 19 December 2019, *EX and others,* C-140/19, C-141/19 and C-492/19 to C-494/19), which pointed out that the Austrian system of accumulation of sanctions for violations of administrative provisions under posting law was not proportionate. Despite that, the legislator had not promptly intervened to adjust national legislation. This inertia opened the way for different interpretations by national courts, resulting in varying and contrasting case-law on the way to apply (or not) the above-mentioned sanctions.

The CJEU, relying on previous case-law, recalls that a rule included in an EU Directive has direct effects if it is unconditional and sufficiently precise.

According to the CJEU, Article 20 is unconditional, since stated in absolute terms. Furthermore, the wording of Article 20 indicates that it does not require the adoption of any further measure of the EU institutions, as well as it does not confer on Member States the right to limit its scope [para. 22-26].

The CJEU judges Article 20 also as sufficiently precise. Member States, indeed, keep a certain discretion in setting rules and sanctions for its implementation. Nonetheless, "*this discretion is limited by the prohibition, laid down by that provision in a general manner and in unequivocal terms, on imposing disproportionate penalties*" [para. 27]. Therefore, Article 20 has direct effect.

As to the consequences of the judgment, and replying to the second question included in the request of preliminary ruling, the CJEU points out that – in the view of the supremacy principle of EU law – national authorities should, first, "*interpret, to the greatest extent possible, their national law in conformity with EU law*" [para. 35]. Only if such an interpretation would be

impossible, national authorities should disregard those rules breaching EU law [para. 37]. In the case at hand, thus, Austrian authorities should "*disapply national legislation of which a part is contrary to the requirement of proportionality of penalties laid down in Article 20 […] only to the extent necessary to enable the imposition of proportionate penalties*" [para 44].

The position assumed by the CJEU with this judgment represents a change of orientation if compared with previous case-law about direct effect of the proportionality principle. A precedent in this sense is the judgment *Link Logistic,* in which the CJEU, assuming a restrictive interpretation of the requirements for direct effect, denied it for a similar provision on proportionality for sanctions (Judgment of 4 October 2018, *Link Logistic*, C-384/17, about Article 9a of Directive 1999/62/CE, in particular para. 43-45).

Text available on Eur-Lex. Sources (about the opinion of the Advocate General): HSI Report on European Labour Law and Social Security Law 3/2021; DerStandard, Neue Regeln gegen Lohn- und Sozialdumping ab September, 16 June 2021; Bundesgesetzblatt Für Die Republik Österreich, 9 September 2021.

g. JUDGMENT OF THE COURT (Second Chamber) 24 February 2022(*)

"Reference for a preliminary ruling - Social policy - Organisation of working time - Directive 2003/88/EC - Article 8 - Article 12(a) - Articles 20 and 31 of the Charter of Fundamental Rights of the European Union - Reduction in the normal duration of night work compared with that of day work - Workers in the public sector and workers in the private sector - Equal treatment"

The Court (Second Chamber) ruled that:

(1) Articles 8 and 12(a) 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 requiring the adoption of national legislation which provides that the normal duration of night duty for workers in the public sector, such as police officers and firefighters, is shorter than the normal duration of daytime duty laid down for them. Such workers must in any case be granted other protective measures in terms of working time, pay, compensation or similar benefits which make it possible to compensate for the particular burden imposed by the night work they perform.

2) Articles 20 and 31 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding the normal duration of night work of seven hours laid down by the legislation of a Member State for workers in the private sector from applying to workers in the public sector, including police officers and firefighters, where that difference in treatment is based on an objective and proportionate criterion, that is to say, where it is linked to a legally permissible objective pursued by that legislation and is proportionate to that objective.

https://curia.europa.eu/juris/document/document.jsf?text=&docid=254586&pageIndex=0&doclang=de&mode=req&dir=&occ=first&part=1&cid=698621

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