Case Law

2021/1

EELC's review of the year 2020

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Introduction

Prof Ruben Houweling[1]

When the going gets tough, the tough get going

Last year I finished the introduction to the Law Review in Switzerland where I was 'locked down' with my family after a short visit (which eventually took more than eleven weeks). At the time, many of us thought that 'Covid' would affect our country as much as it did others and by summer time it would all be over. We couldn't be more mistaken. Impressive Covid aid schemes were introduced, both at an EU level as well as a national level. In many countries Covid aid included all workers, including the self-employed. At the same time Covid not only showed us how vulnerable we are when it comes down to health, but also how fragile most labour markets have become, with increased numbers of self-employed workers, platform workers and fixed-term workers. In times of prosperity most of these workers have a tough time in making all ends meet. In times of crises these workers are often the first to endure negative impacts on the labour market. In a way Covid showed us that the gap between the haves and the have nots has become bigger and in some Member States too big. National labour law reforms are likely to follow.

Despite this huge Covid shadow, national labour courts and the ECJ did not rest. On the contrary, the ECJ for instance delivered a few long-anticipated rulings, such as the *Van den Bosch* case (posting of workers in transnational transport, see **Andrej Poruban**) and the *Grafe and Pohle* case (transfers of undertakings, see **Niklas Bruun**). The *Yodel* case ruling came as a surprise to some, because at first glance one could read it as a 'pro-self-employed' ruling. As **Anthony Kerr** points out in his contribution, the ECJ added that it was a matter for the referring tribunal to decide whether, in spite of all this apparent discretion, the courier's 'independence' was merely notional and whether there was a relationship of 'subordination'. Another important case is the ECJ *AFMB* ruling, on the applicable social security legislation for lorry drivers working for a Dutch undertaking but formally hired (and contracted) in Cyprus (see **Jean-Philippe Lhernould**). At a national level the *Uber/Deliveroo* rulings continued (mostly in favour of the workers). Other topics dealt with in EELC 2020 were fixed-term contracts (**Francesca Maffei and Luca Calcaterra**), equal treatment (**Daiva Petrylaitė/Marianne Hrdlicka**), fundamental rights (**Filip Dorssemont**), dismissal (**Attila Kun**) and annual leave (**Luca Ratti and Jan-Pieter Vos**).

At a legislative level, the EC proposed a directive on sufficient minimum wages (COM(2020) 682 final). Although not undisputed, the proposal shows the ambition of the EC's social agenda. At a national level most Member States are preparing the implementation of the transparent and predictable working conditions directive (deadline August 2022). And amongst all this, the EU is still dealing with the consequences of Brexit. So yes … a lot has gone on and a lot is going on. As it will always be. Even in tough times. 'Cause, when the going gets tough, the tough get going.

Age, religious, sexual orientation and other discrimination

Prof. Daiva Petrylaitė[2]

Non-discrimination case reports make up a significant part of the EELC reports in 2020. The eight judgments

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about age, religious, sexual orientation and other general discrimination issues were reviewed: three of them are judgments of the ECJ and five judgments are of national courts.

Age

The two ECJ judgments about age discrimination issues were reported in EELC. The first one – Joined Cases *Land Sachsen-Anhalt* (C-773/18 to C-775/18) – needs to be highlighted since it dealt with so-called secondary age discrimination. In 2011, the ECJ ruled that certain public sector employees were discriminated against under German law when their basic salary was determined on the basis of their age (*Hennigs and Mai*, C-297/10, C-298/10). Later, in 2014 and 2015 the ECJ delivered judgments on the very same aspect (*Specht and Others*, C-501/12 to C-506/12, C-540/12 and C-541/12; *Unland*, C-20/13). In the course of the implementation of the above-mentioned Court judgments, the national law was changed and it was decided to compensate the part of the unpaid salary to the civil servants and judges who received lower remuneration due to age discrimination. However, the percentage of this pay gap was calculated by applying the basic salary, which was determined in accordance with the provisions of the basic salary national legal norms, i.e. directly related to age. The ECJ recognised that such legal regulation must be held as a new form of different treatment for the purpose of Article 2(1) of Directive 2000/78. However, in assessing the limited temporal scope of the measure, its objective of ensuring adequate remuneration for judges and civil servants according to the importance of their functions, and the absence of any other appropriate system of comparative reference during the transitional period, the Court found that such difference in treatment between civil servants and judges of their age is justified under Article 6(1) of Directive 2000/78. The second aspect which was investigated in this judgment was the limitation period for compensation for damage suffered as a result of discrimination. The Court justified the existence of such limited period as such, but its duration must be set in such a way as to comply with the principles of equivalence and effectiveness.

The other ECJ judgment in the case *Comune di Gesturi* (C-670/18) also dealt with the age discrimination situation, when national law established a form of restriction for retired persons to deliver paid consulting services in public sector institutions, *inter alia*, by limiting the period of terms of office and stipulating that services were to be performed on a voluntary basis. The Court found that, referring to retirement, the national legislation at issue in the main proceedings was based indirectly on a criterion linked to age within the meaning of Article 1, in conjunction with Article 2(2)(b), of Directive 2000/78. In assessing the appropriateness and necessity of this legal instrument, the Court noted that the very purpose of employing young people and thus limiting the employment of persons of retirement age is justified. However, in each case, there must be clear circumstances that would actually constitute a change in the generations and careers of employees, rather than imaginary and only theoretical or existing temporarily. Finally, the Court noted that in each case not only the retirement age itself but also the amount of pension benefits as a whole must be assessed before deciding on the appropriateness and necessity of such a restrictive measure.

As regards the national precedents, the two decisions were reviewed. The Supreme Court of the Netherlands found that the Court of Appeal had not correctly come to the conclusion that a capped redundancy pay measure was age discriminatory (**EELC 2020/17**). The Court, *inter alia*, noted that such social measures are subject to a wide discretion granted to the social partners in both the aims of social policy and means to implement it. Still, the necessary procedural steps must be taken – whether there are legitimate aims, and whether the measure is necessary and proportionate. In line with ECJ case law, it also held that there cannot be any difference depending on whether the measures are established by law or collectively agreed. The Brussels Labour Tribunal ruled that an age limit of 25 for the recruitment of air traffic controllers constituted direct discrimination (**EELC 2020/2**). The Court found that the employer could not substantiate its position by any scientific and objective facts that such a maximum age for novice air traffic controllers was objectively justified because of the link between the cognitive ability of employees and safety needs related to air traffic. The Court decided that such age limit was disproportionate to the legitimate objective and indicated that the fact that very similar legal regulations exist in other Member States was not sufficient to justify the Belgium legal regulation. I wonder how this situation will be assessed in the higher national courts, should the case end up there.

Religion

Although issues of religious discrimination in the workplace are becoming more relevant every year, in 2020 only one national court judgment was reviewed. The German Federal Labour Court appealed to the ECJ for final clarification in particular regarding the relationship between the basic rights of a private company to establish relevant internal rules to prohibit the wearing of religious symbols and the employee's constitutional right to religious freedom. In this case the Muslim employee working as a cashier was not allowed to wear any headgear at work. The employer based this internal regulation on the ECJ rules indicated in the case *G4S Secure Solutions* (C-157/15) that the wearing of religious symbols may be prohibited if the company wants to achieve the aim of company neutrality and if the prohibition applies to all religious beliefs and ideologies without any distinction. The first two lower instance courts found that the situation was discriminatory and a violation of the employee's freedom of religion, while the Supreme Court held that a decision in this matter required the clarification and interpretation of EU and national constitutional law. The legal community has

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high hopes for this pending ECJ case (C-341/19) and expects the Court to provide clear criteria and indications, i.e., to extend its 2017 judgment in the case *G4S Secure Solutions* on neutrality requirements in terms of religious freedom.[3] [Editorial remark: in fact, shortly after this contribution was finished, the opinion of Advocate General Rantos was published under Joined Cases C-804/18 and C-341/19 (*WABE*).]

Sexual orientation

The ECJ judgment in the case *Associazione Avvocatura per i diritti LGBTI* (Case C-507/18) needs to be highlighted. This judgment received a lot *of* attention from both practitioners and *legal* scholars.[4] The Court decided that statements suggesting the existence of a homophobic recruitment policy can fall within Directive 2000/78 as long as the link between the statements and the recruitment policy is not merely hypothetical. The three main criteria, which must be assessed in each situation before justifying it, were also indicated by the ECJ: first, the status of the person making the remarks, and the capacity in which they were made, which must show that the person is a potential employer, or is capable of exerting a decisive influence on recruitment policy or decisions (or may be so perceived); second, the remarks must relate to the conditions for access to employment with the employer concerned and establish an intention to discriminate contrary to Directive 2000/78; and third, the context in which the statements at issue were made – in particular, their public or private character, or the fact that they were broadcast to the public, whether via traditional media or social networks – must be taken into consideration. Moreover, the Court held that in the context of Directive 2000/78 the freedom of expression is not absolute and may be subject to limitation. The ECJ indicated that if the statements fell outside the concept of 'conditions for access to employment … or to occupation' in Article 3(1)(a) of Directive 2000/78 solely because they were made outwith a recruitment procedure, in particular in the context of an audiovisual entertainment programme, or because they allegedly constitute the expression of a personal opinion of the person who made them, the very essence of the protection afforded by that Directive in matters of employment and occupation could become illusory. Even more, the expression of discriminatory opinions in matters of employment and occupation by an employer or a person perceived as being capable of exerting a decisive influence on an undertaking's recruitment policy is likely to deter the individuals targeted from applying for a post.

In the judgment the Court ruled against homophobia in the recruitment process and emphasised that such a process must be non-hypothetical, in other words, the Court did not rule directly on this form of discrimination in employment relations in general. However, this decision clearly establishes the relationship between freedom of expression and the prohibition of discrimination, and also emphasises the responsibility of the employer as a stronger party in the recruitment process. Therefore, this judgment opens up the possibility of raising issues of homophobia, liability for bullying and psychological harassment in the workplace and claiming protection in such cases *relying* upon Directive 2000/78.

Harassment at work

Harassment, both physical and psychological, is becoming a serious issue in today's employment relationship. For employees who deal with this social problem, and who submit the relevant complaints, national legislation lays down certain rules of protection, *inter alia*, against unlawful dismissal. However, as the judgment of the Belgian Court of Cassation (**EELC 2020/13**) shows, such legal protection is not absolute and does not automatically work. In this particular case, the mere submission of a complaint of violence at work was not recognised by the Court as a legitimate and sufficient ground for declaring the dismissal of the employee illegal. The Court found that even if the grounds for dismissal and the complaint have a certain connection, where the employer can prove that the grounds for dismissal are not related to the submission of the complaint on the merits, such dismissal cannot be considered unlawful.

Disability and gender discrimination

Marianne Hrdlicka[5]

Gender discrimination on the one hand, and discrimination on the basis of a disability on the other hand, are both topics that kept courts at the European level (ECJ, ECtHR and EFTA Court) as well as at the national level busy in 2020.

Gender discrimination

Relying on CJEU case law such as *Praxair* and the framework agreement on parental leave in the appendix to Directive 96/34/EC of 3 June 1996, the French Supreme Court ascertained that the failure to reintegrate an employee into her former role after parental leave can constitute indirect gender discrimination due to the considerably higher number of women than men choosing to go on such leave (**EELC 2020/3**). In another case (**EELC 2020/18**), the Romanian Constitutional Court deviated from a restrictive interpretation of the national provisions protecting pregnant employees to a

3. See also the article of Filip Dorssemont, 'Freedom of religion: a tale of two cities' in **EELC 2020/27**.
4. For example: A. Tryfonidou, 'Case C-507/18 *NH – v – Associazione Avvocatura per i diritti LGBTI – Rete Lenford*: Homophobic speech and EU anti-discrimination law', *Maastricht Journal of European and Comparative Law*, 27(4), 2020, pp. 513-521, doi.org/10.1177/1023263X20946535; V. Passalacqua, 'Homophobic Statements and Hypothetical Discrimination: Expanding the Scope of Directive 2000/78/EC', *European Constitutional Law Review*, 16(3), 2020, pp. 513-524, doi.org/10.1017/S1574019620000267.
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more balanced approach, which also considers the employer's freedom to conduct its business due to ECJ case law (C-103/16, *Guisado – v – Bankia S.A. and others*). It held that Article 10 of Directive 92/85/EEC does not apply to cases in which the dismissal of the pregnant employee is based on disciplinary misdemeanors, unjustified absences from work, non-observance of work discipline, closure of the workplace or collective dismissal. The comments from other jurisdictions to this case show that other countries follow a more protective approach ranging from outright prohibitions of dismissal (The Netherlands and Slovakia) to the need for permission from administrative authorities (Germany) or courts (Austria).

Not only national courts but also the ECtHR (33139/13 *Napotnik – v – Romania*) is looking to the ECJ's example in its holdings. In its *Napotnik* judgment, while referencing ECJ cases *Dekker* and *Webb*, the ECtHR came to a different conclusion and found no violation of Article 1 of Protocol No. 12 (General prohibition of discrimination) when the applicant's diplomatic posting abroad was terminated immediately after announcing her pregnancy. By recalling her from her post abroad Romania pursued the legitimate aim of the protection of the rights of others, notably Romanian nationals in urgent need of consular assistance which is not reconcilable with absences for medical appointments and maternity leave. Additionally, the diplomat did not suffer any long-term setbacks in her career due to being recalled.

Yet another case on parental leave (**EELC 2020/47**) concerns a dismissal due to operational reasons ten days after the return from maternity leave. The Danish Supreme Court held that although one has to disregard that the employee was unable to expand her work experience or complete further training during her absence due to pregnancy, other employees were materially distinct from her in terms of work experience and further training. Since the dismissal was necessary due to a decline in business and the selection was based on objective criteria, the employer was able to discharge the reversed burden of proof.

In the ECJ judgment of 24 September 2020 (C-223/19, *YS – v – NK*) the Court held that a deduction from pension does not necessarily constitute gender discrimination according to Directive 2006/54, even if far more male recipients are affected as opposed to female recipients. As long as gender was not the basis of this distinction and the consequences are justifiable by objective factors, Article 5(c) and Article 7(1)(a)(iii) of Directive 2006/54 do not preclude such reductions in the legislation of a Member State. The same applies to Article 2(1) and Article (2)(b) of the Framework Directive (2000/78/EC) and national provisions that only affect recipients above a certain age.

On 18 November 2020 (C-463/19, *Syndicat CFTC*) the ECJ found that Articles 14 and 28 of Directive 2006/54 do not preclude a collective agreement from granting an additional leave solely to mothers. This is the case as long as the provision of such national agreement is applicable only to female workers who bring up their child on their own and aims at protecting such workers from the effects of pregnancy and motherhood. The Equal Treatment Directive was again the subject of another case featured in the EELC, where a female employee was dismissed for serious cause (insubordination and abandonment of post) after she failed to comply with schedule changes that clashed with childcare pick up (**EELC 2020/33**). With a strong reference to ECJ case law (*Dekker*, *Hofmann, Lommers* to name a few) the Brussels Labour Court of Appeal held that a distinction must be drawn between maternity leave relating to the biological condition of women only and parental leave addressed at both parents. Childcare belonging to the latter cannot therefore be protected by the prohibition of gender discrimination. After all, protection of maternity shall not perpetuate a patriarchal role pattern. The final appeal is still pending. Interestingly, the applicant did not invoke indirect discrimination on the ground of sex, which could have been argued due to the higher number of women compared to men taking up childcare responsibilities. Another aspect that could change the outcome of future cases similar to this one is the recent insertion of 'paternity' as a protected criterion for direct discrimination in Belgium, since the rationale of the court regarding preventing the perpetuation of a traditional division of roles would no longer hold up.

EELC also featured an EFTA Court case from Norway in which the scope of the Equal Treatment Directive was at issue (**EELC 2020/48**). The Court ascertained that the Norwegian provision – which has been a controversial issue at the national level since 2006 – rendering a father's entitlement to parental benefits during a shared period of leave dependent on the mother's situation but not the other way around, did not concern employment and working conditions pursuant to Article 14(1)(c) of Directive 2006/54. The case was dismissed for falling outside the scope of the Directive and therefore the Court did not assess whether this provision amounts to discrimination.

Disability discrimination

The Danish Eastern High Court upheld an initial judgment by a Danish district court, which ruled the employee's sickness absence due to work-related anxiety to be a result of the employer's non-compliance with its obligation to reasonably accommodate the employee's impairment (**EELC 2020/14**). The fact that the employee did not express any specific needs herself did not satisfy the burden of proving that the employer had taken appropriate measures to accommodate her disability. The dismissal as a result of sickness absence was thus unjust and entitled the employee to compensation. The nature and extent of such reasonable accommodation of Article 5 of Directive 2000/78 was up for discussion in another EELC case report (**2020/16**). The Irish Supreme Court raised the bar for proving that appropriate measures have been taken as it held that the employer's obligation may go as far as redistributing duties. The question that remains is how far can a reduction of tasks go without changing the job description and creat-

ing an entirely new position? A dissenting judgment and the many comments from other jurisdictions suggest that the scope and proportionality of reasonable accommodation is a controversial topic.

In **EELC 2020/15** a method of calculation for severance payments based on the earliest possible change to pension was at issue. The statutory option for disabled persons to leave on early retirement pensions resulted in lower payments for the same. The Federal Labour Court of Germany found that the smaller amounts in comparison to what non-disabled employees received constituted indirect discrimination against disabled persons. Following ECJ case law (C-152/11, *Odar*) the Court held that the discrimination was not justified by objective factors unrelated to the disability. In the end, the early pension statute aimed at leveling the playing field, taking into account difficulties disabled persons face. Adjusting the payment to a lower level would render the advantage granted to disabled employees futile.

The question whether employees can forgo potential claims under national legislation implementing the Framework Directive – for example, compensation for discriminatory dismissal – engaged the Danish Western High Court in 2019 (**EELC 2020/32**). In this case, the employee, assisted by her professional organisation, and her employer entered into consultation on the terms of her dismissal, which resulted in a signed agreement. Two years later the same professional organisation challenged the dismissal based on discriminatory claims. The High Court factored in two main circumstances: during the negotiation, the fairness of the termination was not questioned by any party even though the consultation procedure was based on a provision concerning justification of dismissal and the agreement was favourable to the employee compared to her statutory rights. Thus, the agreement represented a final settlement of any claims arising out of the dismissal and the employee was barred from claiming compensation.

Conclusion

Compared to last year, 2020 featured many gender discrimination cases highlighting the relevance and timeliness of topics like parental leave and protection of pregnant employees. It will be interesting to see what the case reports in 2021 will bring, especially with the rise in home office working arrangements.

Dismissal and related topics

Attila Kun[6]

EELC 2020 featured some really noteworthy and topical cases concerning dismissal law. These are mostly – and not surprisingly – national judgments, as dismissal law is a field regulated by EU law only to a very limited extent and where there are remarkable differences between European countries' laws. However, there are still many general, commonly applicable – mostly procedural – principles,[7] which might be distilled from specific national judgments. Despite the various governmental financial support schemes for employers during the Covid-19 'crisis', it is obvious that dismissals and collective redundancy have become central issues in practice probably more than ever.

One Covid-related case from the UK (**EELC 2020/46**, *Morales – v – Premier Fruits (Covent Garden) Ltd*) underlined the general principle of how important it is for employers to ensure that all stages of – pre-dismissal – investigations and disciplinary proceedings are carried out fairly and that trade union members and officials are not treated differently on account of their status. This is crucial as the pandemic has seen rising union activity in response to employers' measures, increased anxiety over workplace health and safety and the risk of redundancies. The case in hand was about an automatically unfair dismissal on grounds of trade union activity. The employee was dismissed for using a trade union to bring a grievance over measures his employer had taken on account of the Covid-19 pandemic. The disputed measure was a proposed, but refused, pay cut after which the management had clearly acted extremely adversely towards the 'non-cooperative' employee. The Employment Tribunal awarded the powerful remedy of 'interim relief', ordering the employer to immediately reinstate the employee until the case was finally decided. According to EELC commentators, the Employment Tribunal's decision might signal a potential rise in claims for interim relief in future cases (including Covid-related cases).

Another unfair dismissal case from the UK (**EELC 2020/11**, *Royal Mail Group Ltd – v – Jhuti*) further strengthened the dismissal protection applicable in whistleblowing situations. In the UK, a dismissal related to a 'protected disclosure' qualifies automatically as unfair dismissal. The employee in the *Jhuti* case was dismissed for unsatisfactory performance, but the dismissing manager did not know about the former whistleblowing disclosures made by the employee, because this manager was manipulated by another manager. The Supreme Court ruled that the dismissal was still automatically unfair because the real reason for the dismissal was the protected disclosure (even though the dismissing manager had acted in good faith, being manipulated by another manager who wanted to get rid of the employee because of the whistleblowing). Correspondingly, whistleblowing enjoys a very strong, full, 'absolute' protection in this regard. It is a timely and important message also for EU Member States that need to clarify the concept (and scope) of whistleblowers'

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7. See for more details: G.H. van Voss & B. ter Haar, 'Common Ground in European Dismissal Law', *European Labour Law Journal*, 3(3), 2012, pp. 215-229.

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protection as the EU's 'Whistleblowing Directive' – 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 – needs to be implemented by 17 December 2021.

Following and broadening the logic of the previous case (*Jhuti*), the courts extended the same reasoning to other 'ordinary' unfair dismissal cases (**EELC 2020/20**, *Uddin – v – London Borough of Ealing*). It is not new at all that the 'real' reason for dismissal always needs to be taken into account. However, even in those – rather rare, specific – cases, when the decision-maker might have been manipulated by another manager (for example, by transmitting false information) in order to drive an employee's dismissal, the dismissal can still qualify as unfair. In the UK, the same logic has also been applied in anti-union cases. For example, in *Cadent Gas Ltd – v – Singh* ((2019) UKEAT 0024/19) the Employment Appeal Tribunal upheld a finding that an employee was unfairly dismissed because the disciplinary process was manipulated by a manager who was motivated by dislike of the employee's union activities. This maxim underlines again the above-mentioned general precaution, according to which employers must always conduct a thorough investigation – based on full and transparent information – into performance, misconduct or disciplinary accusations before pursuing the actual dismissal. Even if this principle is now specifically underscored by courts in the UK, it could easily be regarded as a general, universal principle for dismissal law all over Europe (where the fundamental protection against unjustified dismissal prevails in line with the Charter of Fundamental Rights of the European Union, Article 30).

Although the collective redundancy-related cases in EELC 2020 are not yet necessarily directly related to the pandemic, they can all help in clarifying the related legal requirements, also stemming from EU labour law (Directive 98/59/EC).

The *Bundesarbeitsgericht* (German Federal Labour Court) clarified in a case (**EELC 2020/19**) the relationship between time of notification of collective redundancies and time of notice of termination (following the logic of the 'classic' ECJ decision in the case of *Junk*, C-188/03). Accordingly, the notice of collective redundancies required to be given to an employment agency can only be effectively submitted if the employer has already decided to terminate the employment contract at the time of its receipt by the employment agency. Notices of termination in collective redundancy proceedings are therefore effective – subject to the fulfilment of any other notice requirements – if the proper notice is received by the competent employment agency before the employee has received the letter of termination. The timeliness of the notification of collective redundancies does not depend on when the employer submitted the notice of termination or signed it, but on when it reached the employee. This also follows from the general principles of (German and other) contract law. The main general message of the case is that in the course of a collective redundancy procedure, specific attention must be paid to compliance with all the formalities, as breaches of the procedural requirements can lead to the invalidity of a large number of terminations. This is especially difficult, but still necessary in the turbulent times of the Covid-19 pandemic.

Also, the Court of Justice has delivered an important decision in 2020 related to collective redundancies (11 November 2020, C-300/19, *Marclean Technologies SLU*). One of the conditions that trigger the Directive's (98/59/EC) applicability pertains to the number of dismissals that take place over a given period (30 or 90 days, depending on the choice made by each Member State). The Court decided that in determining if the threshold for a collective redundancy is actually triggered, employers must look at 'both directions', i.e. at any period of dismissals and not merely *ex post* or *ex ante* the concerned employee's dismissal date. In other words, the actual 'aggregation period' is a rolling period: it will be those 30 or 90 consecutive days which include the dismissal in question and the highest number of other redundancy dismissals. The Court of Justice rejected the alternative proposition whereby the relevant period would be the period specifically either before or after the dismissal in question. The main idea behind this decision derives from the very objective of the Directive, according to which greater protection is to be awarded to workers dismissed collectively. Only time will tell what implications the decision will have in practice, but it is for sure that significant practical issues can arise (for example, how to plan collective dismissals prudently).

When it comes to employment disputes, including – and especially – unfair dismissal cases, simplified, quick, streamlined processes are desirable and are often in the interests of all parties. It is not unprecedented in national systems that – besides courts – various, often quasi-judicial bodies have a role either in the process of dismissal (for example works councils in Germany), or in related dispute settlement (for example Employment Tribunals in the UK and tripartite Labour Courts in Finland). In Ireland, the Workplace Relations Act 2015 has introduced provisions meaning that all employment rights disputes would be dealt with by adjudication officers of the newly established Workplace Relations Commission (WRC) with a right of appeal to the Labour Court. A recent challenge to the overall constitutionality of the WRC has failed and the procedures introduced by the Workplace Relations Act 2015 have now been declared sufficient from a fair procedures perspective by the High Court. One of the main conclusions of the Court was that the WRC does not exercise judicial functions per se (**EELC 2020/34**).

Last but not least, a unique case (with cross-cutting legal dilemmas) is to be mentioned. A recent Dutch case – 'Non-Seafarers Work Clause: contributing to better employment conditions or not?' (**EELC 2020/45**, decided by the Court of Rotterdam (Summary Proceedings) on 27 August 2020) – gives rise to at least three general considerations. First, even if transnational company/collective bargaining agreements, TCAs (or global

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framework agreements) are not 'hard laws', and they don't have crystal clear legal status or have (yet) significant case law, they can still be a basis for traditional-like legal disputes and serve as '*de facto*' sources of labour law. Second, the potential clash between labour law and competition law has probably never been as timely as nowadays (see also the seminal Court of Justice decision in *FNV KIEM*[8] and related legal scholarship[9]). Third, the Covid-19 pandemic has created (or exacerbated) very specific labour law (and health and safety) hurdles in various sectors of the economy, this case being a particular example of the maritime sector. More concretely, in a summary proceeding, the Court of Rotterdam has had to evaluate the validity of the so-called Non-Seafarers' Work Clause (also known as the Dockers' Clause), introduced by the sector's 'IBF Framework Agreement' (which is considered an international collective labour agreement) as of 1 January 2020. The clause aims to protect the labour market position of dock workers, who are members of ITF[10] affiliated unions. This clause also protects seafarers from being obliged to perform dangerous cargo handling services. The Court has held that it is not clear whether the clause, prohibiting lashing work ('cargo handling services') on board of container ships being carried out by the crew, does indeed contribute to better employment and/or working conditions of seafarers. As a result, that clause – at this stage – cannot be held to be outside the scope of competition law (in line with the so-called Albany formula[11]) and the claim for compliance with the provision must be rejected. The Court of Rotterdam refrained from immediately ordering a shipowner and manning agents to comply with the clause. Since then, in the media, unions have stated that they will continue to seek compliance with the debated clause. It remains to be seen whether a court in main proceedings will reach a similar verdict. More extensive judicial review would be necessary to examine the several factual and legal questions. This complex and unique case can have implications in terms of transnational collective bargaining (whether TCAs can qualify as collective agreements), European competition law, European freedom to provide services, negative trade union freedom, freedom of choice of employment, health and safety issues during the pandemic and the (Dutch) standards of reasonableness and fairness. In sum, it is not unlikely that the clause (agreed in the process of transnational social dialogue) prevents or restricts competition within the internal market. It will be interesting to see how the complaint against the ITF and affiliated unions regarding this clause will evolve, which the Charterers (companies active in the European short sea and feeder transport routes) have submitted to the European Commission (to the Directorate-General for Competition). It is also possible that the trade unions will initiate main proceedings (*bodemprocedure*) in order to have another attempt to force shipping (crew) companies to comply with the Dockers' Clause.

8. Court of Justice, 4 December 2014, Case C-413/13 *FNV Kunsten Informatie en Media (KIEM) – v – Staat der Nederlanden* [ECLI:EU:C:2014:2411].
9. Cf. among others: I. Lianos, N. Countouris & V. De Stefano, 'Re-thinking the competition law/labour law interaction: Promoting a fairer labour market', *European Labour Law Journal*, 10(3), 2019, pp. 291-333.
10. International Transport Workers' Federation (ITF).
11. ECJ, 21 September 1999, Case C-67/96 *Albany International BV – v – Stichting Bedrijfspensioenfonds Textielindustrie* [ECLI:EU:C:1999:430].

Fixed-term work and part-time work

Luca Calcaterra[12] *and Francesca Maffei* [13]

An analysis of the most recent ECJ judgments or national judgments concerning fixed-term and part-time employment contracts shows very interesting data from a sociological and legal point of view.
National courts more and more frequently assess the compatibility of national law with European law, leading to a decrease in references to the ECJ for preliminary rulings. The legal process of integration between European and national law seems to have reached a satisfactory outcome, since national judges are able to manage European legal principles without any intervention from the ECJ.
There is no doubt that the Court of Justice has played a central role in speeding up this process of integration. Indeed, the large number of ECJ judgments and decisions has given domestic judges a great deal of material to rely on.
The following pages are dedicated to analysing the most interesting recent rulings about fixed-term and part-time work.

Fixed-term work

As far as fixed-term contracts are concerned, it seems that equal treatment is the most weighty issue, followed by some statements concerning the rationality of successive fixed-term contracts and the effectiveness of the national measures in preventing abuses.
The first part of this report will be dedicated to the rulings regarding clause 4 of the framework agreement annexed to Council Directive 1999/70/EC introducing the principle of equal treatment for fixed-term workers, while the second part of it will refer to court judgments which, in accordance with clause 5 of the framework agreement, assess the legitimacy of national measures preventing the successive use of fixed-term contracts.

- *Principle of equal treatment (clause 4)*

The principle of equal treatment (with regard to comparable workers on contracts for indefinite periods of time), as stated in clause 4 of the framework agreement annexed to Council Directive 1999/70, implies (for fixed-term workers) equal pay, equal access to

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training, and the prospect of obtaining an open-ended contract if the employment relationship continues beyond the previously agreed fixed period of time.

Since Directive 1999/70 does not define the concept of *comparable* workers, the real application of 'equal treatment' depends on the national perspective. And the national legislator has often minimised the meaning of the concept of 'comparable' worker. For example, in December 2019 the Danish Supreme Court held that four fixed-term workers employed as surveyor assistants at a government agency were not comparable with the agency's permanent employees. Under the applicable collective agreement, the claimants were not entitled to, among other things, sick pay and certain holidays as opposed to permanent employees. Nevertheless, the Court refused to acknowledge any form of discrimination against them, because of lack of comparability.

According to the fixed-term workers' defence they had been discriminated against, as the permanently employed unskilled workers had more favourable conditions simply due to the fact that they were employed on a permanent basis.

However, the Danish Act on Fixed-Term Employment (which implemented Directive 1999/70) defines a comparable permanent employee as a permanent employee in the same establishment who is engaged in the same or similar work or occupation **with due regard being given to qualifications and skills**. If there is no comparable permanent employee in the same establishment, the comparison must be made on the basis of the collective agreements that usually apply to the industry in question or a similar industry.

Despite this wide definition, the Danish Supreme Court (referring in particular to the preparatory works of this Act) stated that the simple fact that a permanent and fixed-term worker may be covered by the same collective agreement does not in itself sufficiently establish that the two workers perform the same or similar tasks.

Indeed, the assessment of what constitutes the same or similar work must rather be based on a number of factors, including qualifications, skills and the actual work performed by the employee, whereas the job title or – as in the case at hand – the applicable collective agreement cannot generally be the determining factor.

This trend of 'minimisation' of the equal treatment principle, especially for what concerns the public sector, is verifiable also in European rulings. Indeed, as is known, differential treatment may be justified on 'objective' grounds. An analysis of the recent case law of the ECJ shows that the Court emphasised these objective grounds to justify different treatment provided for in national legislation between fixed-term and permanent workers.

This was the case in *Baldonedo Martin* (C-177/18), in which the ECJ returned to trace the boundaries of the principle of equal treatment emphasising some objective grounds to justify different treatment provided for in national legislation between fixed-term and permanent workers. The facts of the case can be summarised as follows. The Municipality of Madrid appointed an employee as an interim civil servant with the task of maintaining green spaces. The appointment decision specified that the employee would be employed to cover a vacant post until such time as the post was filled by an established civil servant. After some years of work the employee was informed that her post had been filled, that same day, by an established civil servant and that consequently her employment was terminated. The employee requested payment of compensation equivalent to 20 days' remuneration per year of service by the Municipality of Madrid for termination of her employment (as provided for in Article 53(1)(b) of the Spanish Workers' Statute in case of termination of a permanent employment contract). The Municipality of Madrid refused the request, on the grounds that the 20 days' remuneration are provided only in case of dismissal of a permanent employee and not in case of a fixed-term contract expiring.

The ECJ was so asked to verify whether there is an objective reason justifying the fact that the termination of the employment relationship of an interim civil servant does not give rise to payment of compensation, whereas a contract worker under a contract of indefinite duration is entitled to compensation when dismissed on one of the grounds set out in Article 52 of the Workers' Statute.[14]

On this point, the Court held that the specific purpose of the compensation for dismissal laid down in the national provision and the particular context in which that compensation is paid **constitute an objective reason justifying a difference in treatment**.

Indeed, according to the ECJ's opinion, the termination of a fixed-term employment relationship falls within a significantly different context from that in which the employment contract of a permanent worker is terminated under Article 52 of the Workers' Statute.

In particular, it follows from the definition of a '[fixed-term] employment contract or relationship' in clause 3(1) of the framework agreement that an employment relationship of that kind ceases to have any future effect on expiry of the term stipulated in the contract, the term identified as a specific date being reached, the completion of a specific task, or, as in the present case, the occurrence of a specific event. Thus, the parties to a fixed-term employment relationship are aware, from the moment that it is entered into, of the date or event which determines its end. That term limits the duration of the employment relationship without the parties having to make their intentions known in that regard after entering into the contract.

14. Under Article 52 of the Workers' Statute, 'objective grounds' which may justify the termination of the employment contract are: the worker's incompetence, which became apparent or developed after the worker actually joined the undertaking; the worker's failure to adapt to reasonable technical changes made to their job; economic or technical grounds or grounds relating to organisation or production when the number of posts lost is lower than that required in order to classify the termination of employment contracts as a 'collective dismissal'; and, subject to certain conditions, repeated absence from work, even if justified.

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By contrast, the termination of a permanent employment contract on one of the grounds set out in Article 52 of the Workers' Statute, on the initiative of the employer, is the result of circumstances arising that were not foreseen at the date the contract was entered into, and which disrupt the normal continuation of the employment relationship. The compensation provided for in Article 53(1)(b) seeks precisely to compensate for the unforeseen nature of the severance of the employment relationship for such a reason and, accordingly, the disappointment of the legitimate expectations that the worker might then have had as regards the stability of that relationship. Subject to verification by the referring court, it was clear from the case file before the court that the employment contract was terminated on the grounds that an event foreseen for that purpose had occurred, namely that the post that she occupied on a temporary basis was filled definitively by the appointment of an established civil servant. In those circumstances, clause 4(1) of the framework agreement must be interpreted as not precluding a national law that does not provide for the payment of any compensation for termination of employment to fixed-term workers employed as interim civil servants whereas it provides for the payment of such compensation to contract workers employed for an indefinite duration upon the termination of their contract of employment on an objective ground.

On the contrary, in the case *Universitatea Lucian Blaga Sibiu and Others* (C-644/19) the ECJ did not legitimise a different treatment between fixed-term and permanent comparable workers.

The case concerned members of the teaching staff of a university continuing to work there after reaching the statutory retirement age. In particular, the Court was asked to verify the compliance with the equal treatment principle of a national legislation under which only lecturers with doctoral supervisor status may retain their status as tenured lecturers, while lecturers without doctoral supervisor status may conclude only fixed-term employment contracts, for which lower remuneration was provided.

In other terms, the ECJ had to examine whether employment conditions of the fixed-term employment contracts concluded by a lecturer without doctoral supervisor status, in particular the system of lower remuneration associated with them, amounted to a difference in treatment contrary to clause 4(1) of the framework agreement or if there was an objective justification for the difference in treatment.

According to the Court, the difference was not justified by an objective ground. Indeed, the difference in treatment was only intended to address the worrying increase in the number of teaching posts at the level of professor and lecturer at the University in comparison with the number of teaching posts of assistant lecturers and teaching assistants, and to achieve a financial balance between sustainability and the University's development in the short- and medium-term. In the Court's reasoning, such goals, which are related essentially to personnel management and budget considerations, and which, moreover, are not based on objective and transparent criteria, cannot be considered objective reasons justifying a difference in treatment such as that at issue in the main proceedings.

- *Measures to prevent abuse from the use of successive fixed-term employment contracts (clause 5)*

As already noted, the second purpose of Directive 1999/70 is to prevent the use of successive fixed-term contracts or relationships (clause 1). While the principle is generally fixed, the framework agreement (clause 5) assures to the Member States freedom to choose what kind of measure they consider best to prevent abuse from the use of successive fixed-term employment contracts (for example providing for *objective reasons justifying the renewal of such contracts or relationships*). According to clause 5, Member States can also adopt more than one measure and differentiate one from another depending on the sector and category of workers. What is important is that measures are proportionate, dissuasive and effective.

At the same time, clause 5 leaves Member States free to determine under what conditions fixed-term employment contracts or relationships shall be regarded as 'successive' or shall be deemed to be contracts or relationships of indefinite duration.

In the case *Sánchez Ruiz and Fernández Álvarez et al.* (Joined Cases C-103/18 and C-429/18) the ECJ clarified that the national legislator is not free to exclude from the concept of 'successive fixed-term employment contracts or relationships', a situation in which a fixed-term worker occupied, in the context of several appointments, the same post continuously over several years and continuously performed the same functions. Indeed, the continuation of that worker in that vacant post is the result of the employer's failure to comply with its legal obligation to organise within the relevant deadline a selection procedure seeking to definitively fill that vacant post and, in this way, the employment relationship thereby implicitly extended from year to year has to be considered as an open ended one.

Moreover, the European Court also underlined that successive renewal of fixed-term employment relationships cannot be considered justified for 'objective reasons' (within the meaning of paragraph 1(a) of clause 5), on the sole ground that that renewal responds to the reasons for recruitment covered by national legislation. Namely grounds of need, urgency or for the development of programmes of a temporary, auxiliary or extraordinary nature, cannot be a sufficient justification for the renewal in so far as such national legislation and case law does not prevent the employers concerned from responding, in practice, by such renewals, to fixed and permanent staffing needs.

In a recent judgment from Romania the Craiova Court of Appeal – relying on the findings of ECJ case C-614/15 – ruled that continuous extensions of a fixed-term employment based on national provisions was not in accordance with the European jurisprudence. In

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order to understand the importance of this decision it might be useful to summarise the facts of the claim. Council Directive 1999/70 has been transposed into Romanian law by Law no. 53/2003 – Labour Code. According to it, a fixed-term employment contract may not be concluded for a period exceeding 36 months. The 36-month period may be extended however, subject to certain conditions, and for a limited period, by written agreement of the parties for the period needed to complete a project, programme or specific piece of work.
In the case of establishments dealing with the slaughter of animals, official inspections are carried out by specialised staff employed within the Veterinary Health and Food Safety Directorate under fixed-term employment contracts. Moreover, a specific provision provides that in this sector employment contracts which were concluded for the maximum term provided for by the labour legislation can be extended, if the parties so agree, as long as the circumstances in which they were concluded continue to exist, provided that the financial resources available in that respect are guaranteed, and until a new individual open-ended employment contract is concluded following the organisation of a competition in this respect. In the case at hand, an employee was hired as a veterinary assistant within Gorj Veterinary Health and Food Safety Directorate based on a number of fixed-term employment agreements, for a total period of 14 years. At the end of the last contract the employee instituted proceedings against his former employer claiming all his contracts to be requalified as a 'contract of indefinite duration'.
The Court of Appeal applied the findings of the ECJ in case C-614/15, *Popescu*, respectively that the renewal of successive fixed-term employment contracts must aim to cover temporary needs and that a national provision as the one applicable in the case at hand, namely to employees engaged in veterinary health inspections based on fixed-term employment contracts, must not be used to satisfy permanent needs.
The Craiova Court of Appeal also made reference to the Court's consideration for the need to perform a case-by-case analysis, respectively to take into account, among others, the number of employment contracts concluded with the same person and the scope for which they were concluded.
In the case, given the extended collaboration of the parties for over 14 years, with no interruptions of activity, and in view of performing the same inspection activities, the Court considered that Gorj Veterinary Health and Food Safety Directorate should have concluded an employment agreement for an indefinite time. The national court also rejected the arguments of the national authority which claimed that such renewals were based on the fact that the inspections performed by the staff were non-permanent by nature due to the variations in volume of the activities of the establishments to be inspected, as well by budgetary considerations, respectively of the funds destined for personnel expenses.
The Court also emphasised the failure to objectively justify the need for such renewals by making reference to the ECJ jurisprudence, which determined that an 'objective reason' must be understood as referring to precise and concrete circumstances characterising a given activity, which is therefore capable, in that particular context, of justifying the use of successive fixed-term employment contracts.
In the case at hand, the national authority chose to justify its renewals only on financial reasons, thus failing to observe the ECJ requirements.
Another very interesting ruling was the one decided by the Federal Labour Court of Germany (BAG). In this case the influence of the European legislation – that considers indefinite contracts to be the standard model to protect employees – is even more evident than in the rulings mentioned above. Indeed, the national Court decided to consider a certain number of fixed-term contracts as a single indefinite contract even though they concerned a seasonal employment that is normally considered as a legitimate objective reason for fixed-term contracts, according to European law.
The case concerned an employee of a local municipality in the federal state of Niedersachsen who worked almost exclusively in an outdoor public pool and who was employed as a full-time employee for the season from 1 April to 31 October each year.
Despite this clear provision contained in the contract – that restricted the mutual duties to a certain time period for the yearly season – the employee argued that his contract was not terminated by the above-mentioned provision and that the employer had to employ him during the off season.
The BAG rejected the revision. Indeed, the Court found that, even though he did have an indefinite contract (and not an unlimited number of fixed-term agreements), the employer was not obliged to employ and pay him during the off season due to the valid provision of fixed-term employment for the time from April to October during the time of the season.

- *Part-time work*

As far as part-time contracts are concerned, an analysis of recent rulings shows that the ECJ is very strict in ensuring that national legislation on this matter is compliant with the European principle of equal treatment between part-time and full-time workers. This is justified by the fact that differences in treatment of part-time workers often result in discrimination between men and women.
In this regard, the case *Schuch-Ghanaddan* (C-274/18) is particularly important. The ECJ was asked to verify whether the Austrian legislation concerning fixed-term contracts for employees of Austrian universities (Universities Act 2002 (the 'UG')) was compliant with clause 4(1) of the framework agreement on part-time work. Section 109(2) of the UG provides that:

a. employees whose employment is linked to either a project financed by third party funds or a research project in general (regardless of its financing),

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b. university staff that are only active in teaching, and
c. persons substituting other employees,
d. can conclude consecutive fixed-term contracts for a maximum total duration of six years for full time workers or eight years for part-time workers.

Additionally, for the same categories, there can be one more renewal linked to the completion of a project or publication resulting in a maximum total duration of ten years (full-time workers) or twelve years (part-time workers) respectively.

As this regulation provides different maximum total durations for full-time workers as opposed to part-time workers, it is evident that it could violate Directive 97/81/EC by potentially discriminating against part-time workers. Furthermore, in many sectors, women make up a significantly larger part of part-time workers and thus are more likely to be affected by such measures. Consequently, this raises the question whether the provisions of Section 109(2) UG also indirectly discriminate against women, and therefore violate Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

As for compliance of Section 109(2) UG with the Directive on part-time work, the ECJ followed the opinion of the claimant that this regulation is in fact disadvantageous for part-time workers. It stated that **the regulation seems to diminish part-time workers' prospects for a permanent position compared to full-time workers' chances**. But, given this theoretical premise, the ECJ underlined that the question whether or not the provision is *de facto* disadvantageous to part-time workers shall be answered by the national court. A disadvantageous unequal treatment could, however, still be compliant with the Directive when it could be justified by objective reasons. This question was left for the national court to decide but the ECJ still elaborated on the requirements for the potential justification brought forward by the Austrian government and the respondent (Medical University of Vienna). This was based on the argument that part-time workers hereby get the chance to reach the same level of knowledge and experience as full-time workers within a shorter working time. The ECJ critically assessed this argument and emphasised that this conclusion is in many cases not true and has to be regarded as a case-by-case decision. The national court therefore has to carry out an individual assessment of the relation between actual hours worked and the acquisition of experience and skills regarding the personal scope of Section 109(2) UG.

Also, the ECJ clarified that the percentage of disadvantaged female employees has to significantly exceed the number of disadvantaged male employees to assume an indirect discrimination of women resulting from the unequal treatment of part-time workers. This assessment shall only cover employees who fall into the personal scope of this very regulation, which is to be carried out by the national courts of the Member States using their national regulations or customs for such discrimination cases. By affirming that point the ECJ allowed for the possibility of any kind of evidence on a national level. This also applies to evidence based on statistics. And if, as in this case, the claimant could not gain access to the statistics needed for the very group affected by the regulation in question, the ECJ can grant the right to use statistics representing part-time workers in Austria in general for *prima facie* evidence according to Article 19 of Directive 2006/54.

Free movement and social insurance

Jean-Philippe Lhernould[15]

The **determination of the applicable social security legislation** is a strategic and highly sensitive subject, in a context where alleged fraud from companies wishing to take advantage of low-rate social security contributions from some Member States often comes before domestic courts. In a case dealing with cross-border lorry drivers formally employed by a company from Cyprus who entered into fleet management agreements with transport undertakings established in the Netherlands , the Court held that:

> the employer of an international long-distance lorry driver […] is the undertaking which has actual authority over that long-distance lorry driver, which bears, in reality, the costs of paying his or her wages, and which has the actual power to dismiss him or her, and not the undertaking with which that long-distance lorry driver has concluded an employment contract and which is formally named in that contract as being the employer of that driver.

By so ruling, the Court of Justice aims to avoid situations where the real employer, established in one Member State, hides behind a purely formal employer established in another Member State where social security contributions are lower. In order to identify the real employer of a cross-border lorry driver, it remains necessary to have regard not only to the information formally contained in the employment contract but also to how the obligations under the contract incumbent on both the worker and the undertakings in question are performed in practice. It is necessary to identify the entity which actually exercises authority over the worker, which bears, in reality, the relevant wage costs and which has the actual power to dismiss that worker. In this case, the drivers, who always maintained their place of residence in the Netherlands throughout those periods, had, before the conclusion of the employment contracts with the Cyprus company, been chosen by the transport undertakings themselves. A number of them were, prior to conclusion of the employment contracts

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with the Cyprus company, previously employed by the Dutch transport undertakings (*AFMB*, C-610/18).

The **fight against social security fraud** is also at stake in two cases concerning the legal value of A1 certificates. In the first case, the Court of Justice confirmed the very strict conditions under which the alleged fraudulent forms can be disregarded by national institutions and courts and also indicated that in a situation where an employer has, in the host Member State, acquired a criminal conviction based on a definitive finding of fraud made in breach of EU law, a civil court or tribunal of a Member State is not bound by that criminal ruling whenever an A1 certificate has been issued and not withdrawn. Therefore, an employer does not have civil liability to pay damages to a worker or to a social security institution based on the criminal ruling (*CRPNPAC*, C-370/17 and C-37/18). In the second case, the Court ruled that since A1 certificates have binding effects limited solely to the obligations imposed by national legislation in the area of social security, these forms have no legal impact on matters relating to the employment relationship itself. Consequently, the fact that a worker holds a valid A1 certificate does not prevent him from being considered as a clandestine worker under national labour law rules. It follows that a worker may be posted under social security rules but, although he holds an A1 certificate, at the same time be considered as employed in the same country under employment rules. The lack of coordination between social security and employment law rules is highly problematic in practice (*Bouygues TP*, C-17/19).

There is **no right for individuals to choose the social security legislation applicable**. It is also not possible to take advantage of two or more legislations simultaneously. This is the reason why a migrant Union citizen, who was residing in Germany where she had ceased to work could not claim a benefit in Austria, her country of origin. Since the country of residence is in this case competent by virtue of the rules of conflict of law of Regulation 883/2004, there is no European legal grounds for claiming benefits in the country of origin, notwithstanding the fact the person used to work in that country or that the competent Member State does not provide any equivalent benefit (*CW*, C-135/19).

Implemented in the fields of social security coordination and free movement of workers, **the principle of assimilation**, which is a powerful instrument to encourage cross-border mobility, has been applied in a series of interesting cases. In the first one, the Court of Justice illustrated the polymorphic nature of the principle of assimilation set out in Article 5 of Regulation 883/2004. That principle, which applies only to benefits falling within the material scope of the Regulation and relating to a social security risk, is two-fold: If conditions set out by Article 5(a) are not met, assimilation may be granted under Article 5(b) which provides that where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State must take account of such facts or events occurring in any Member State as though they had taken place in its own territory. Concretely, in the case of a French teacher residing in Germany who had worked in both Germany and France, the French institutions must take into account, for the purposes of calculating the French worker's pension, of the increase in career duration to which she is entitled in respect of the raising of her disabled child. Indeed, if the French child-rearing allowance for a disabled child and the German assistance for integration of mentally disabled children and young people cannot be considered to be benefits of an equivalent nature for the purposes of Article 5(a), in order to determine whether the level of the child's permanent incapacity required by French law to justify the increase in the pension rate has been met, French authorities cannot refuse to take into account similar facts occurring in Germany which can be established by any evidence, and in particular by medical reports, certificates or even prescriptions for treatment or medicines. Article 5(b) looks like a 'plan B' to proceed to assimilation whenever Article 5(a) is not applicable. This dynamic interpretation is the best illustration of the importance and the potential impact of the principle of assimilation (*CARSAT*, C-769/18).

In a more classic case where pensioners were denied the right to receive an early retirement pension because the national institution refused to take into account the pension received in another Member State, the Court of Justice held that Article 5(a) precludes legislation of a Member State which requires, as a condition for a worker to be eligible for an early retirement pension, that the amount of the pension to be received must be higher than the minimum pension that would be due to that worker upon reaching the statutory retirement age under that legislation, where the term 'pension to be received' is interpreted as referring only to the pension from that Member State, and not including the pension which that worker may receive through equivalent benefits payable by one or more other Member States. Even if the response was expected, this case is interesting as it focuses on the coordination between the neighbouring principles of equality of treatment and assimilation, the latter being a specific expression of the former which remains the main guiding principle (*Bocero Torrico*, C-398/18 and C-428/18).

The principle of assimilation applied by social security coordination rules is indeed a mere development of the same principle known in the context of free movement rules. A recent case is a good illustration. The Court ruled that Article 45(1) TFEU precludes national legislation that, for the purpose of determining the remuneration rate of a person working as a school teacher with a local authority, takes into account that person's previous periods of activity with an employer, other than that local authority, situated in another Member State, only up to a maximum of three years in total, when that activity is equivalent to that which that person is to perform in the context of his or her school teaching duties. Indeed, according to settled case law, national

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legislation which does not take into account in full previous periods of equivalent activity completed in a Member State other than the Member State of origin of a migrant worker is likely to render less attractive the freedom of movement for workers, in breach of Article 45(1) TFEU (*WN*, C-710/18).

Two cases are brought to our attention in the field of **cross-border healthcare**. The first case deals with the right for Jehovah's Witnesses to receive healthcare treatments in another Member State, when care provided in their country of insurance does not comply with their religious beliefs. Balancing the technical social security coordination principles and the fundamental principle of prohibition of discrimination on the grounds of religious beliefs, the Court of Justice reached two conclusions. On the grounds of Regulation 883/2004, a Member State is entitled to make the authorisation to enjoy a planned hospital treatment abroad dependent upon exclusively medical considerations, thereby disregarding other reasons such as the person's religious beliefs. On the grounds of Directive 2011/24 on the application of patients' rights in cross-border healthcare, since the authorisation would imply no extra costs for the healthcare system issuing it, it is forbidden to refuse to grant the authorisation to receive planned hospital care abroad whenever the method of treatment used in the country of insurance is contrary to that patient's religious beliefs, unless the refusal is objectively justified by a legitimate aim relating to maintaining treatment capacity or medical competence, and is an appropriate and necessary means of achieving that aim, which it is for the referring court to determine. This important case should encourage Member States which have not yet done so to formally set up two distinct procedures of prior authorisation for planned hospital healthcare abroad, one based on the Regulation and one on the Directive (*Veselibas*, C-243/19). The second case is a mere application of the well-established case law regarding the rules on access to planned hospital care. If the case is worth pointing out, it is for two reasons. Firstly, it confirms that the matter of access to cross-border healthcare must be understood through the complex combined application of primary and secondary rules on free moment of workers and on freedom of services. As case law and numerous field issues show, simplification of the rules applicable would be much welcome. Secondly, it demonstrates that the patients' interests remain at the heart of the ECJ decisions, especially when emergency care is needed (*WO*, C-777/18).

Other cases in the field of coordination are worth being reported. **The coordination of unemployment benefits** is subject to rules on derogation and will remain so after the revision of the existing coordination regulations. In one case, a worker residing in Germany used to work in Switzerland before being employed in Germany for a couple of months. He was then made redundant. German institutions, which are competent to pay the unemployment benefits according to Regulation 883/2004, calculated their amount on the basis of a theoretical German salary much lower than that of the actual salary paid to the employee. For the Court of Justice, this method was a violation of Article 62 of Regulation 883/2004. The case is worth mentioning as it confirms the validity of that Regulation provision with regard to the Treaty goals as well as to the coordination regulations. This said, this case far from clarifies the matter. Member States retain several options for the concrete calculation of the 'reference salary' provided that, in the end, the equality of treatment between cross-border and other workers is guaranteed (*ZP*, C-29/19).

As it is known, the **concept of social advantage under Regulation 492/2011** can be used as an alternative legal instrument to protect migrants' rights when a benefit is excluded from the material scope of Regulation 883/2004. The year 2020 gives examples. If an additional benefit paid to certain high-level sports persons who have represented a Member State or its legal predecessors in international sporting competitions is not an 'old-age benefit' under the coordination regulation, it is a social advantage under Regulation 492/2011. Therefore, a Member State which grants such a benefit to its national workers cannot refuse to grant it to workers who are nationals of other Member States (*UB*, C-447/18). Similarly, a family allowance is a social advantage and should be paid without any discrimination on the grounds of nationality (*FV*, C-802/18).

Concerning **free movement**, the Court of Justice continues to refine the interpretation of the rules on the right to stay. In one case, a migrant citizen, even though he was non-active, enjoyed the right to stay with his children attending schools in the Member State where they stayed together. The Court added that this European citizen cannot be seen as being in the same situation as non-active citizens in *Dano* or *Garcia-Nieto*. Consequently, notwithstanding Article 24(2) of Directive 2004/38 which was not relevant in this case, the non-active citizen, who used to be a worker in that country, cannot be automatically excluded from benefits aiming to provide minimum income (*JD*, C-181/19). For the first time to our knowledge, the Court of Justice interpreted Article 17(1)(a) of Directive 2004/38 according to which, by way of derogation from Article 16, the right of permanent residence in the host Member State can be enjoyed before completion of a continuous period of five years of residence in some circumstances. When is a person to be regarded as having stopped working for the purpose of this provision? Following a strict interpretation of what constitutes a derogation to the five-year condition, the Court of Justice held that the conditions that a person must have been working in a Member State at least for the preceding 12 months and must have resided in that Member State continuously for more than three years apply to workers who, at the time they stop working, have reached the age laid down by the law of that Member

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State for entitlement to an old age pension. Indeed, while Article 17(1)(a) extends the scope of the derogation provided for in that provision to workers who cease paid employment to take early retirement, it cannot be inferred that it was necessarily intended to exempt the other workers from the conditions, set out in that provision, that already applied to them under Regulation 1251/70 or Directive 75/34. Furthermore, the residence directive introduced a gradual system as regards the right of residence in the host Member State, which reproduces, in essence, the stages and conditions set out in the various instruments of EU law and case law preceding that directive and culminates in the right of permanent residence. In practice, a Romanian citizen, who reached the legal pensionable age on 28 January 2015, who worked in Austria from 1 October 2013 until 31 August 2015 and then between 1 April 2016 until 1 February 2017, did not qualify for the permanent right to stay (*AT*, C-32/19).

Frontier workers' social rights are regularly jeopardised by national legislation which refuses to treat these workers as any other migrant worker for the sole reason that their residence is situated in another country. The broad concept of 'social advantage' is used by the courts to denounce the residence clauses and more broadly discrimination on the grounds of nationality they are confronted with. Hence, the Court of Justice ruled that the notion of social advantage means that national legislation which makes the payment of school transport costs by a German Land subject to a requirement of residence in the territory of that Land constitutes indirect discrimination, in that it is intrinsically liable to affect frontier workers more than national workers. Practical difficulties linked to the effective organisation of school transport within a Land do not constitute an overriding reason in the public interest that is capable of justifying a national measure categorised as indirect discrimination (*PF*, C-830/18). In a second case, the Court held that a Member State cannot deny family benefits to frontier workers who work in that country for the reason that the children concerned are not their children but their partners' whereas the condition of a legal parent/child relationship is not required for children who reside with the worker in that country (*FV*, C-802/18).

Transfer of Undertaking

Niklas Bruun[16]

Introduction

The Transfers of Undertakings Directive 2001/23/EC is one of the labour law instruments within the European Union that has given rise to and continues to cause numerous court cases on both an EU and a national level. During the year 2020 the ECJ (CJEU) issued three important preliminary rulings regarding the interpretation of this Directive. In the following I will briefly refer to and discuss these three judgments before I draw some general conclusions based on them.

Grafe and Pohle (C-298/18)

SBN, a German company operating public bus passenger transport had, in 2008, executed a tender contract with Landkreis Oberspreewald-Lausitz. In September 2016, it chose not to participate in a new tender and subsequently ceased business operations. The winner of the tender was KVG/Rhenus Veniro GmbH & Co, which set up a new wholly owned subsidiary, OSL Bus to provide the transport service. OSL Bus recruited many of the bus drivers and some of the management staff from the former operator, SBN. By letter of 10 April 2017, the new operator informed SBN that it would not purchase or lease or otherwise use the tangible assets – buses, depots, workshops and operating facilities – which the latter owned. In subsequent proceedings, in order to direct their respective claims, the question arose whether there had been a transfer of undertaking. OSL dismissed the claims, as it had not taken over any tangible assets, relying on the well-known *Oy Liikenne* case (C-172/99) to argue that there could be no transfer of an undertaking within the meaning of Article 1(1) of Directive 2001/23.

When these questions ended up at the ECJ, the Court pointed to its decision in *Oy Liikenne*. However, it also held that the transfer of buses cannot be the sole factor determining whether a transfer had taken place – all particular circumstances must be taken into account. In this respect, according to the Court, it was apparent from the order for reference that compliance with the new technical and environmental standards required by the contracting authority as regards operating resources did not enable, from both an economic and legal point of view, the successful tenderer to take over the operating resources of the undertaking previously holding the contract for the public transport services at issue in the main proceedings. It would not have been sensible, from an economic point of view, for a new operator to take over an existing bus fleet consisting of vehicles which, having reached the end of the period of operation authorised and not complying with the constraints imposed by the contracting authority, could not be operated. Even if the old operator would have continued the tender, it would have had to replace the buses. In this context, according to the Court, the fact that no buses were transferred did not necessarily preclude a transfer.

The Court stressed that it is for the referring court to determine whether other factual circumstances support the conclusion that there has been a transfer of an undertaking. It pointed out that the bus transport was essentially similar to the previous undertaking, that service had not been interrupted and probably been operated on many of the same routes for many of the same passengers. It also noted that the presence of experienced bus drivers in a rural area such as the Landkreis is crucial for the purpose of ensuring quality of public

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transport. In particular, they must have sufficient knowledge of routes, timetables in the area, fare conditions as well as information on other regional bus routes, railway routes and existing connections, not only to sell tickets but also to provide adequate information to passengers.

In that context, the group of workers might constitute the economic entity, which could maintain its identity if a major part, in terms of their numbers and skills, of the employees specifically assigned to the task are transferred.[17]

In the light of all the foregoing considerations, the Court concluded that the answer to the questions referred is that Article 1(1) of the Directive must be interpreted as meaning that in the context of the take-over by an economic entity of an activity, the pursuit of which requires substantial operating resources, such as under the factual circumstances in the present case, the taking-over of the majority of the employees and the pursuit, without interruption, of that activity, make it possible to establish that the identity of the economic entity concerned has been retained. The Court finally noted that this is a matter for the referring court to assess.

ISS Facility Services NV (C-344/18)

Ms Govaerts had been employed by (predecessors) of ISS since 1992 and had become a project manager of the cleaning and maintenance tasks of ISS in Ghent (Belgium). These activities had been divided into three lots, being (1) museums and historical buildings, (2) libraries and community centres and (3) administrative buildings. Following a call for tenders, ISS lost all three lots, (1) and (3) to Atalian, and (2) to Cleaning Masters NV.

ISS took the view that Ms Govaerts had transferred to Atalian following Belgian law, but Atalian disagreed. Ms Govaerts brought actions against both companies. In appeal proceedings, ISS maintained that Ms Govaert's contract had transferred in a proportion of 85% to Atalian and a proportion of 15% to Cleaning Masters. The Higher Labour Court of Ghent (Belgium) *inter alia* asked the ECJ whether this was possible.

According to the Court, the first paragraph of Article 3(1) of Directive 2001/23 provides that a transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of the transfer are, by reason of that transfer, to be transferred to the transferee, but does not envisage a situation where a transfer involves a number of transferees. The Directive intends to safeguard employees' rights in the event of a change of employer by enabling them to continue working on the same terms and conditions. The purpose of that Directive is to ensure, as far as possible, that the contract of employment or employment relationship continues unchanged with the transferee, in order to prevent the workers concerned from being placed in a less favourable position solely as a result of the transfer.[18] However, that Directive cannot be invoked in order to obtain an improvement of remuneration or other working conditions on the occasion of a transfer of an undertaking.[19]

Still, the position of the transferee, who must be in a position to make the adjustments and changes necessary to carry on its business, cannot be disregarded[20] since the Directive does not aim solely to safeguard the interests of employees in the event of transfer of an undertaking, but seeks to ensure a fair balance between the interests of the employees and the transferee. That being the case, the fact that the economic entity has been transferred to one or more transferees has no effect on the transfer of the transferor's rights and obligations arising from a contract of employment existing on the date of the transfer of that entity.

Rejecting that a transfer had taken place at all – which had been considered by the referring court – would not safeguard the rights and obligations of the employee, and hence would deprive the Directive of any effectiveness. The Court therefore analysed two options.

The first option was to transfer the employee to the acquirer that had taken on the most part of the work. However, that option disregarded the interests of the transferee, which then would have to provide a full-time employment to the worker while it only had taken on part of his/her tasks.

The second option would be to allow 'proportionate transfers'. As regards that option, the Court stated, in the first place, that, in accordance with Article 2(2) of the Directive, that it is to be without prejudice to national law as regards the definition of a contract of employment or employment relationship. Accordingly, it is for the referring court to determine how any distribution of the contract of employment might take place. In that regard, the referring court may take into consideration the economic value of the lots to which the worker is assigned, as suggested by ISS, or the time that the worker actually devotes to each lot, as proposed by the European Commission. In the second place, to the extent that such a possibility amounts to dividing one full-time employment contract into a number of part-time employment contracts, it must be borne in mind that, under Article 2(2)(a) of the Directive, the Member States may not exclude from the scope of that Directive contracts of employment or employment relationships solely because of the number of working hours performed or to be performed. Consequently, such a division cannot be excluded merely because it involves the transfer to one of the transferees of a contract of employment that covers a small number of hours of work. According to the Court, such transfer in principle makes it possible to ensure a fair balance between the protection of interests of workers and transferees, as the

17. Here the CJEU refers to the judgment *CLECE*, C-463/09, EU:C:2011:24.

18. The CJEU refers to the judgment *Colino Sigüenza*, C-472/16, EU:C:2018:646, para. 48.

19. *Scattolon*, C-108/10, EU:C:2011:542, para. 77.

20. See the judgment *Werhof*, C-499/04, EU:C:2006:168, para. 31.

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rights of the first are safeguarded while the transferee takes on only part of the obligations.
Regarding the practicability of such situation, the Court held that under Article 4(1) of the Directive, while the transfer of an undertaking or part of an undertaking cannot constitute in itself a ground for dismissal for the transferor or the transferee, other than in the situations mentioned in Article 4(1) of the Directive, that provision does not however preclude the possibility of dismissals occurring for economic, technical or organisational reasons entailing changes in the workforce. Further, Article 4(2) states that if the contract of employment is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer is to be regarded as having been responsible for termination. This also applies in this situation, even if the termination was initiated by the worker.
In the light of this reasoning, the answer given by the Court to the question referred was that, where a transfer of undertaking involves a number of transferees, Article 3(1) of the Directive must be interpreted as meaning that the rights and obligations arising from a contract of employment are transferred to each of the transferees, in proportion to the tasks performed by the worker concerned. This conclusion is valid provided that the division of the contract of employment as a result of the transfer is possible and neither causes a worsening of working conditions nor adversely affects the safeguarding of the rights of workers guaranteed by that Directive, which it is for the referring court to determine. If such a division were impossible to carry out or would adversely affect the rights of that worker, the transferee(s) would be regarded as being responsible for any consequent termination of the employment relationship, under Article 4 of that Directive, even if that termination were to be initiated by the worker.

TMD Friction (Joined Cases C-674/18 and C-675/18)

The two cases in the main proceedings concerned two employees who saw themselves confronted with transfers of establishments which took place after the opening of insolvency proceedings and which were carried out by the insolvency administrator, transfers in which both the employment contracts and the assurances which ensued from the supplementary occupational pension scheme were transferred to the transferees. The employees brought legal proceedings against those transferees, claiming that the transferees were also liable with respect to their rights to a retirement pension for the periods of employment completed before the opening of insolvency proceedings since, under national law, the occupational pension guarantee association (PSV) was not liable with respect to those rights or was liable to only a limited degree. The referring court asked the ECJ whether the German law was compatible with both Articles 3 and 5 of Directive 2001/23 and Article 8 of (Insolvency) Directive 2008/94.
The Court noted that the exception of Article 5(1) did not apply as the insolvency procedure was aimed at ensuring the continuity of the undertaking. Article 5(2)(a) also did not apply to this specific issue. The Court then recalled that according to Article 3(4)(a) of Directive 2001/23, the transfer of all rights and obligations does not need to apply to *inter alia* old-age benefits, although Member States must then still ensure protection of the (former) employees' interests in them.
In such a situation, it must be held that, first, a Member State 'provides otherwise', within the meaning of the clause in Article 3(4)(a) of that Directive, solely with respect to that portion of the rights of employees to a retirement pension under a supplementary occupational pension scheme which must be transferred to the transferee. Second, the obligation to adopt the measures necessary to protect the interests of the employees is incumbent on that Member State, under Article 3(4)(b) of that Directive, both with respect to that portion of those rights which are transferred to the transferee and with respect to those rights which remain capable of being relied on only against the transferor, where necessary, in insolvency proceedings opened with respect to the transferor.
The Court then noted that the wording of Article 3(4)(b) of the Directive reproduces, in essence, that of Article 8 of the Insolvency Directive and that Article 5(2)(a) of the Directive, which concerns transfers of undertakings in the event of insolvency proceedings, expressly requires a protection that is at least equivalent to that provided for in the situations covered by the Insolvency Directive. It follows that the measures necessary for the protection of the interests of employees that must be adopted by the Member States under Article 3(4)(b) of the Directive must be understood to include, in any event, the measures prescribed by the Insolvency Directive 2008/94, designed to deal with the insolvency of their employer, whether the employer is the transferee or, as in this instance, the transferor.
The Court therefore concluded that, in the event of the transfer of an undertaking after the opening of insolvency proceedings, the protection of the employees with respect to their rights conferring immediate or prospective entitlement to old-age benefits under supplementary occupational or inter-occupational pension schemes, for the purposes of Article 3(4)(b) of the Directive, must be at a level that is at least equivalent to the level of protection required by Article 8 of Directive 2008/94.
The Court then went on to determine the level of protection required by Article 8 of Directive 2008/94 and concluded that Article 3(4)(b) of Directive 2001/23, read together with Article 8 of Directive 2008/94, must be interpreted as precluding national legislation which provides that, on the occurrence of an event that confers eligibility to old-age benefits under a supplementary occupational pension scheme after the opening of insolvency proceedings in the course of which a transfer of an undertaking has been made, with respect to the portion of those benefits for which the transferee is not liable, the insolvency guarantee body established under

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national law is not required to intervene where the rights conferring prospective entitlement to old-age benefits had not already become definitive at the time when those insolvency proceedings were opened, if the consequence of that legislation is that the employees are deprived of the minimum protection guaranteed by Article 8. In the same context, Article 3(4)(b) precludes legislation which provides that, for the purposes of determining the amount relating to the portion of those benefits liability for which falls on that body, the calculation of that amount is to be based on the gross monthly remuneration earned by the employee concerned at the time when those insolvency proceedings were opened. Last but not least, the Court also answered that Article 8 of Directive 2008/94 might be capable of having direct effect, provided that PSV meets the applicable requirements to qualify as a State body.

Conclusions

The case law from the EJC in 2020 covers three important cases focussing on 'new' issues in the context of Directive 2001/23. All three cases can be characterised as borderline cases, where we are in the outskirts of the application of the Transfers of Undertakings Directive. The first two cases were related to situations where the transfer of undertakings were related to a public procurement procedure, the third clarified the relationship between the Directive and the Insolvency Directive 2008/94. In all three cases the Court emphasised that a strict interpretation of the Transfers of Undertakings Directive in order to protect employees during transfers must be adopted, but it also recalled that the interests of the transferee must be taken into account.

The first case dealt with the minimum requirements that must be fulfilled in order for an entity to retain its economic identity within the context of the transfer.

Traditionally since the *Schmidt* case[21] the Court has made a distinction between activities based essentially on manpower, such as cleaning and surveillance, and activities based essentially on assets, such as public transport or catering. Therefore, in the case of providers of services whose activities are based essentially on manpower, the taking over by the new employer of a major part, in terms of their numbers and skills, of the employees specifically assigned by its predecessor to the provision of the services in point can result in the maintenance of the identity of the entity.[22] Similarly, in the case of providers of services whose activities are based essentially on assets, the taking over by a new operator of the assets indispensable for the provision of the services can result in the maintenance of the identity of the entity, even when the essential part of the staff has not been taken over. However, the identity is not maintained when the new operator does not take over the assets indispensable for the provision of the services.[23]

In the case *Grafe and Pohle* (C-298/18) the Court clearly modified its earlier views in this regard and deviated from the interpretation favoured in the case *Liikenne* (C-172/99) in 2001. In *Liikenne* the Court had stated that:

> However, in a sector such as scheduled public transport by bus, where the tangible assets contribute significantly to the performance of the activity, the absence of a transfer to a significant extent from the old to the new contractor of such assets, which are necessary for the proper functioning of the entity, must lead to the conclusion that the entity does not retain its identity (para. 42).

Furthermore, the Court concluded in *Liikenne* that the Transfers of Undertakings Directive does not apply "in a situation such as that in the main proceedings, where there is no transfer of significant tangible assets between those two undertakings" (para. 44).

The main arguments for why the activity retained its economic identity in *Grafe and Pohle* was that it was apparent that:

> the members of staff taken on by the new operator are assigned to the same or similar tasks and hold specific qualifications and skills which are essential to the pursuit, without interruption, of the economic activity concerned (para. 40).

The Court also referred to the lack of competent and experienced bus drivers in the region and to the circumstances for why the tangible assets or buses could not be part of the transfer in this case.

The conclusion is that the transfer of the employees' know-how, skills and knowledge can form assets which constitute an economic identity in the context of a transfer of an undertaking even in cases where existing tangible assets are not transferred.[24] The problem we will face in the future in similar situations in light of the new Court practice is how to avoid that a transferee can influence the scope of application of the Directive by simply refusing to take on any employees.

Also, in the *ISS Facility Services* case (C-344/18) the Court entered into new territory regarding the interpretation of the Directive. Here the question was whether it can be regarded as a transfer under the Directive when the economic activity is split into three parts and taken over by different economic undertakings. Here the Court is rather cautious although it accepts the principle that a transfer under the Directive can take place to sev-

21. In this case, the Court held that one employee who cleans a bank can be an undertaking within the meaning of the Directive, ECJ 1994, C-392/92 (*Schmidt*).
22. ECJ 1998, C-173/96 and C-247/96 (*Sánchez Hidalgo*).
23. ECJ 2001, C-172/99 (*Liikenne*).
24. The fact that when a very limited transfer of assets has occurred, this is not sufficient for concluding that no transfer of undertaking has taken place was also confirmed in the Supreme Court of the Netherlands (Hoge Raad der Nederlanden) in case ECLI:NL:HR:2019:1858. This case involved KLM and it was decided in 2019 before the *Grafe and Pohle* case. Here the question at stake was whether a transfer can take place even when no airplanes are taken over by the new owner. A special feature in the KLM case was that KLM had full control over the transferor, which belonged to the same group of companies as KLM. See further EELC 2020 No 2, 118-120.

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eral transferees. Indeed, a cautious approach is well founded since the circumstances in which we find several transferees can vary very much.
In the third case(s) *EM* and *FL – v – TMD Friction* the Court gave a welcomed clarification regarding the relationship between the Transfers of Undertakings Directive and the Insolvency Directive in situations regarding transfers of rights related to supplementary occupational pension schemes.

Annual leave

Jan-Pieter Vos[25] *and Luca Ratti* [26]

Covid-19

What happened to the right to annual leave in 2020? Well, we didn't exactly use it! We were in lockdowns, holiday accommodations and borders were closed or only open under severe restrictions. There was an ever-impending threat of even stricter measures. We stayed at home, waiting for this pandemic to be over.
With all this untaken leave being piled up, employers throughout Europe tried to encourage employees to take their leave nevertheless. A period of rest and relaxation was perhaps more necessary than ever, but of course employers have more than just an interest in employees taking their leave regularly. It could be that there simply wasn't any work to do, but there are also other business interests to consider rather than simply having employees take their leave regularly.
If an employee refuses to take leave, can an employer force them? In **EELC 2020/52**, it turned out that a French employer could not force the employee to take so-called 'deferred leave' (deferred because of sickness) without any notice. The comments from other jurisdictions suggest that every country has its own approach in this regard. This is a topic which has not been regulated by the Directive,[27] and indeed, although the ECJ has imposed various limitations to the following condition, in principle "it is for the Member States to lay down, in their domestic legislation, conditions for the exercise and implementation of the right to paid annual leave, by prescribing the specific circumstances in which workers may exercise the right."[28]
However, one could doubt whether the function of annual leave, 'to enable the worker to rest and to enjoy a period of relaxation and leisure', could be fulfilled.[29] Advocate General Bot argued something similar in his opinion in the *Max-Planck* case about an employee facing unemployment.[30] Still, one can equally argue that taking annual leave still enables a period of rest, relaxation and leisure, even if employees could not spend it in their preferred way.[31]

Annual leave before the ECJ

Last year, we ended our review with the *AKT* and *TSN* cases (C-609/17 and C-610/17), in which the ECJ held that both Article 7 of Directive 2003/88 and Article 31(2) of the Charter of Fundamental Rights of the European Union only apply to the minimum of four weeks' holiday. The ECJ reiterated this in 2020, in Case C-119/19 P (*Commission – v – Carreras Sequeros and Others*), an internal staff case. The Commission's decision to reduce certain staff holiday entitlements was not in breach of the Charter, as the remaining 24 days still exceeded the minimum. The Court's refusal to discuss the normative content of the right to annual leave – can we reduce it? – makes that it has some additional value for the meaning of Article 31(2) as a provision of the Charter. The ECJ underlined that paid leave only comes within the scope of Article 31(2) when it concerns the minimum of four weeks' holiday.
The scope of the right to annual leave (as well as weekly rest) was also explored in the *Fetico* case (C-588/18). The referring Spanish court sought clarification on whether various forms of special leave could overlap with the rights to weekly rest and annual leave. In particular, Spanish collective agreements provide for forms of special leave that are more favourable than those provided by the Spanish Labour Statute, and cover special events such as marriage, the birth of a child, hospitalisation, surgery, the death of a close relative, and the performance of representative trade union functions.
The employees claimed their right to retain both the special leave and the annual leave, in a way that annual leave is retained during sick leave. Based on the opinion by Advocate General Saugmandsgaard Øe,[32] the Court determined that the forms of special leave were "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."[33] This allowed the ECJ to conclude that "national rules providing for special leave on days when workers are required to work which do not allow those workers to claim that leave insofar as the needs and obligations met by that special leave arise during weekly rest periods or periods of paid annual leave" fall outside the scope of application of Articles 5 and 7 of Directive 2003/88.[34]

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27. Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time, OJ 2017/C 165, p. 32.
28. See, e.g., *Max-Planck* (C-684/16), para. 34.
29. ECJ 20 January 2009, Joined Cases C-350/06 and C-520/06 (*Schultz-Hoff* and *Stringer*), para. 25.
30. Opinion of Advocate General Bot in the *Max-Planck* case (C-684/16), ECLI:EU:C:2018:338, para. 61.
31. As indicated by one of the authors in his comment to **EELC 2020/52** and in an article in a Dutch journal (J.R. Vos, 'Vakantie in tijden van Corona', *TAP* 2020/131).
32. Opinion of Advocate General Saugmandsgaard Øe in the *Fetico* case (C-588/18), ECLI:EU:C:2019:1083, para. 110.
33. ECJ 4 June 2020, Case C-588/18 (*Fetico and Others*), para. 36.
34. Para. 42.

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The most important judgment on annual leave this year was the one in Joined Cases *Varhoven kasatsionen sad na Republika Bulgaria* (C-762/18) and *Iccrea Banca* (C-37/19). This judgment, which unfortunately has not been published in the English language, concerned the question whether a worker is entitled to annual leave in the period between their (unlawful) dismissal and the date of reinstatement by the court, or compensation for the leave that would have been accrued based on Article 7(2) of the Directive. Advocate General Hogan analysed the case concluding that Directive 2003/88 (Article 7(1)) and Article 31(2) of the Charter preclude national legislation or case law or practices according to which a worker is not entitled to paid annual leave for the period from the date of dismissal until the date of reinstatement.[35] Although this may be only a technicality, the Court's considerations are interesting in a broader perspective. As a starting point, the objective of annual leave (rest, relaxation and recreation) presupposes that the employee has worked, which is why the entitlement is determined by reference to the periods of actual work.[36] The Court then went on to investigate situations in which this principle cannot be applied (such as sickness). Recalling its considerations in *Dicu* (C-12/17) the Court held that it has departed from this principle when an employee has been incapacitated to work, and this has not been foreseeable and beyond the worker's control, as was the case here.[37] Given that the Court repeats these considerations, this could be a newly established rule. The pattern had become a bit scattered (sickness: yes; parental leave and short-time working arrangements: no), but in this case the ECJ appears to have given some clarification, equating the period between the date of the unlawful dismissal and the date of the employee's reinstatement into their employment to a period of effective work.[38]

Work as a prerequisite

Quite a number of national cases dealt with work as a prerequisite for enjoying annual leave as well. In **EELC 2020/10**, the German Federal Labour Court changed its position from its earlier case law and held that a worker enjoying a sabbatical (unpaid special leave) did not accrue rights to annual leave as the employee had not worked. In **EELC 2020/40**, the same Court held something similar in a retirement scheme where the employee was still in the service of their employer but had already stopped working.

In **EELC 2020/26**, a Dutch court could not apply this principle to an employee put on garden leave, as Dutch law prescribes that an employee accrues annual leave if they receive a wage. The court therefore carefully navigated its way through ECJ case law and ultimately held that the leave had lapsed, relying on the ECJ's findings in the *Maschek* case (C-341/15).

35. Opinion of Advocate General Hogan in Joined Cases *Varhoven* (C-762/18) and *Iccrea Banca* (C-37/19), ECLI:EU:C:2020:49, para. 62.
36. Para. 58, referring to ECJ 4 October 2018, C-12/17 (*Dicu*), para. 28.
37. Paras. 66-68.
38. Para. 69.

Better late than never

Sometimes it takes a long time for ECJ case law to settle in national case law, particularly when it concerns case law that is not directly at odds with legislative texts. EELC featured two such examples on the right to annual leave. In **EELC 2020/25**, the Greek Supreme Court finally applied the *Schultz-Hoff* and *Stringer* judgment (C-350/06 and C-520/06) to long-term sick leave – which wasn't really regulated by law – and held that "an employee on sick leave which continued up until the end of his employment relationship and due to this reason he was not able to exercise his right to paid annual leave" must not deprived of such right. **EELC 2020/42** saw a Romanian Court of Appeal granting employees paid leave at multiple jobs as well (before, they were only entitled to unpaid leave for those additional jobs), a conclusion that was later confirmed by the same Romanian legislator (Law no. 31 of 31 March 2020).

Outlook and preliminary questions

What do we expect in 2021? The past has taught us that interesting cases continue to find their way to EELC, so we do not expect this to be different this year. Indeed, this Issue already contains a German case report on a preliminary question (**EELC 2021/11**), discussing how to combine the possible lapse of accrued annual leave during sick leave after a transitional period of 15 months (*KHS*, C-214/10) with the duty to inform employees of such lapse (*Max-Planck*, C-684/16, and *Kreuziger*, C-619/16). Other pending questions are on the level of holiday pay during sickness, when sick pay is lower than normal pay (**EELC 2020/41**) and whether the allowance in lieu for untaken leave is due if the employee has terminated their employment agreement with immediate effect, but without good cause and therefore at least is partly responsible in not being able to take the holiday (**EELC 2020/52**). Also pending is another case (C-514/20) where the ECJ must decide whether the annual leave taken can trigger payment of higher overtime payments, since not including them could deter an employee from taking leave. We hope that the ECJ will answer at least some of these questions in 2021.

But, most of all, we hope that this year we will be able to enjoy our annual leave in the way we intend to!

Posting of workers and applicable law

Andrej Poruban[39]

The Court of Justice of the European Union (CJEU) continues in a remarkable trend in which decisions directly affect employers and employees. In late 2019 and in 2020, the CJEU issued a trinity of stimulating posting of workers-related judgments. These include case C-16/18 *Dobersberger* (**EELC 2020/1**) in which

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Advocate General Szpunar made a remark about Agatha Christie's novel Murder on the Orient Express in his opinion. The plot took place on a train which crosses several countries on its journey from Istanbul to Calais. Moving on to the present day, the Administrative Court of Austria sought clarity on the interpretation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (PWD) in regard to highly mobile cross-border workers.

The Austrian Federal Railways (ÖBB) awarded a service contract for on-board services (such as cleaning and food and drink services for passengers) for some trains to an Austrian company D. GmbH. Trains departed from Budapest (Hungary) to Salzburg (Austria) or Munich (Germany) and stopped in Vienna (Austria) and after reaching the terminus station returned to Budapest. However, those services were provided by a Hungarian company Henry am Zug via a series of subcontracts involving H. GmbH, which also had its head office in Austria. Henry am Zug used its own workers and workers employed by another Hungarian undertaking, which were hired out to the former in the posting country. All of them had their domicile, social insurance and centre of interests in Hungary and began and ended their shifts in Hungary. They loaded goods in Budapest, where they also had to check the stock and calculate turnover. In fact, everything except the work carried out on the trains took place in Hungary. After an inspection in Vienna, Mr Dobersberger, managing director of Henry am Zug, was found guilty of breaching various administrative requirements of the Austrian implementation legislation of the PWD.

The questions referred to the CJEU can be summarised as follows: Must Article 1(3)(a) PWD be interpreted as meaning that it covers the provision, under a contract concluded between an undertaking established in a Member State and an undertaking established in another Member State, which is contractually linked to a railway undertaking established in that same Member State, of on-board services carried out by salaried employees of the first undertaking, or by workers hired out to it by an undertaking also established in the first Member State, on international trains crossing the second Member State, where those workers carry out a significant part of the work inherent in those services in the territory of the first Member State and where they begin or end their shifts there?

The CJEU concluded that on-board services on international trains do not fall within the scope of Article 1(3)(a) PWD concerning the posting of workers if most of the work is performed in one Member State. Firstly, although the freedom to provide services in the field of transport shall be governed by Article 58(1) of the Treaty on the Functioning of the European Union (TFEU), and not by Article 56 TFEU, on-board services are only incidental, but not inherently linked to, the service of rail passenger transport. Such services fall within the scope of Articles 56 to 62 TFEU, with the exception of Article 58(1) TFEU and, as a consequence, may by covered by the PWD. Secondly, the CJEU introduced an entirely novel concept, never mentioned either in the PWD or in previous case law. It added to the definition of a posted worker the test of 'sufficient connection' with the territory of the Member State. That interpretation derives from the scheme of the PWD and, in particular, Article 3(2) thereof, read in the light of recital 15 (very limited provisions or services). Moreover, the same logic underpins the optional exemptions referred to in Article 3(3) and (4) PWD.

The CJEU insisted on 'sufficient connection' and developed its reasoning around this concept in the recent ruling C-815/18 *Netherlands Federation of Trade Unions (FNV) – v – Van den Bosch* (**EELC 2021/1**). Van den Bosch and two other sister companies that are established in the Netherlands, Germany and Hungary, belong to the same group of companies. All three have the same shareholder. These companies concludeded charter contracts for international transport, for which they used drivers coming from Germany and Hungary. These drivers have employment agreements with the German and Hungarian companies. The charter operations started in the Netherlands and the journeys ended there. However, most of the transport took place outside of the Netherlands. It was in this context that the Supreme Court of the Netherlands posed a number of questions to the CJEU, inquiring as to how, and also, if at all, the PWD is applicable to drivers in international road transport. The CJEU confirmed that the PWD applies to the road transport sector and a worker is posted if his/her work has a sufficient connection with the host country. The existence of such a connection is determined in the context of an overall assessment of factors such as the nature of the activities carried out by the worker concerned in that territory, the degree of connection between the worker's activities and the territory of each Member State in which the worker operates, and the proportion represented by those activities in the entire transport service. Leading on from this, in 2020 the EU adopted Directive 2020/1057 which explicitly states that the PWD applies to the road transport sector.

Additionally, for more details and focus on the posting of workers in the aviation sector which is characterised by a very mobile workforce reference can be made to the article 'The (Non) Application of the Posting of Workers Directive to Aircrew: How a lack of legal certainty leads to a failure to apply the posting rules in the aviation industry' (**EELC 2020/44**). This piece is based on a research report which the authors Gautier Busschaert and Pieter Pecinovsky drafted in 2019 with funding from the European Commission.

Last but not least, in December 2020 the CJEU also dismissed the actions brought by Hungary (C-620/18) and Poland (C-626/18) seeking the annulment of Directive (EU) 2018/957 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. The CJEU stated that those Member States relied on, *inter alia*, pleas in law claiming the choice of an incorrect legal basis for the adoption of that Directive, an infringement of Article 56 TFEU, guaran-

teeing the freedom to provide services, and an infringement of the Rome I Regulation.

On a national level the Dutch Supreme Court dealt with an interesting question in the context of the applicable law (**EELC 2020/37**). In ruling ECLI:NL:HR:2020:958 at stake was whether an employment contract was more closely connected with a country other than that in which the work was habitually carried out. In this case the contract concluded between a Turkish airline and a Dutch co-pilot stipulated that Turkish law governed the agreement, and that Turkish courts had jurisdiction over possible disputes. However, that same contract nominated Amsterdam as the co-pilot's base residence. The airline terminated the employment contract for business reasons. Termination in case the airline 'ceases to carry on business or meet its financial obligations' on a 15-day notice was provided for in the employment contract, but this was not in accordance with Dutch law. In the Netherlands, there is extensive employee protection when it comes to termination of the employment agreement on the employer's initiative. The employee took the view that mandatory provisions of Dutch law applied to his employment agreement and asked the Dutch court to annul his termination accordingly and summoned the employer to pay various heads of compensation with respect to Dutch law. The airline asserted that Turkish law was applicable and the habitual place of work – the Netherlands – should have been put aside as from the circumstances as a whole the contract was more closely connected to Turkey, so that Turkish law should apply. It put forward several circumstances supporting this claim. Amongst these arguments were the claim that the co-pilot paid his wage taxes and social security contributions in Turkey and that the salary was set in accordance with Turkish law. The Supreme Court applied the CJEU's *Schlecker* judgment (C-64/12) and observed that the Court of Appeal had taken into account the same circumstances to deny that the contract was more closely connected to Turkey than to the Netherlands (Article 8(4) Rome I) as it did to decide that the Netherlands was the habitual place of work (Article 8(2) Rome I). It had mentioned some of the arguments that were put forward to support the employer's claim that the contract was more closely connected to Turkey. However, it had not explicitly taken into account these arguments (where the co-pilot paid his wage taxes, the social security of which country he was covered by and the parameters relating to the salary determination) in its ruling on the matter of whether or not Article 8(4) Rome I would be triggered. Hence, the Court of Appeal had failed to take into account some of the elements suggestive of a close connection to Turkey. The case was referred back to a different Court of Appeal.

Employment status, working time and collective bargaining

Anthony Kerr[40]

The status of 'platform workers' and other non-standard forms of employment in the 'gig economy' continued to generate a wide variety of contributions to EELC throughout 2020: see, in particular, the article by Andrzej Świątkowski (**EELC 2020/29**).

The UK Supreme Court has now unanimously upheld the majority decision of the English Court of Appeal (on which see **EELC 2020/43**) that the Employment Tribunal had been correct in concluding that Uber drivers were 'workers' for minimum wage and working time purposes: see *Uber BV – v – Aslam* [2021] UKSC 5.

The decision highlights, as Luca Ratti points out (**EELC 2020/30**), that, in some European jurisdictions, employment law now distinguishes between three types of people in the labour market. At one end of the spectrum, there are those employed under a contract of employment ('employees') who are seen as being in a subordinate and dependent position as regards their employer and, hence, need protection, for instance, from being paid too little for the work they do or being required to work excessive hours. At the opposite end, there are those who are in business on their own account undertaking work for clients/customers ('self-employed') who are seen as having a sufficiently independent position to be treated as being able to look after themselves in such matters as pay or working time.

Then there is an intermediate class of 'worker' who are self-employed but who provide their services as part of a profession or undertaking carried on by someone else. Because the degree of dependence of these workers is essentially the same as that of employees, they are regarded as being in economically the same position. Accordingly, the UK Supreme Court ruled that the Uber drivers enjoyed some, but not all, of the rights to which employees are entitled.

As the CJEU ruling in Case C-692/19 *B – v – Yodel Delivery Network Ltd* (**EELC 2020, Issue 2**) demonstrates, those who provide their services through digital platforms may still be regarded by the courts as self-employed. Here, it will be recalled, a parcel courier contended that he was a worker for the purposes of the UK Working Time Regulations. The CJEU concluded that the Working Time Directive did not apply to persons who were afforded the discretion to provide substitutes, to choose whether to accept tasks, to provide services to third parties and to fix their own working hours. The CJEU did add, however, that it was a matter for the referring tribunal to decide whether, in spite of all this apparent discretion, the courier's 'independence' was merely notional and whether there was a relationship of 'subordination'.

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As the comments from other jurisdictions demonstrate, the issue is not confined to the UK. In Ireland, it was reported that the High Court had upheld a decision that pizza delivery drivers were 'employees' (**EELC 2020/12**); similarly, in Belgium, there were rulings that Deliveroo riders were also employees, albeit that these rulings were subsequently annulled because of procedural reasons (**EELC 2020/43**). In Germany, however, it was reported that the Munich Higher Labour Court had ruled that 'crowdworkers' were generally self-employed (**EELC 2020/43**).

Although not reported in EELC, the Italian Court of Cassation (by decision No. 1663 of 21 January 2020) considered the employment status of a number of persons who made home food deliveries on behalf of Foodora. The Turin Employment Tribunal had rejected their claims for a declaration that they were in an employment relationship but the Appeal Court, although holding that they were not 'employees', determined that they fell within an intermediate category lying between subordinate employment and genuine self-employment and thus were entitled to some of the protections, such as working hours and holidays but not dismissal, available to employees. The company's appeal to the Court of Cassation was rejected with the Court going further and ruling that the riders were entitled to the full application of all employee protections.

Outside of the statutory protections available to individual employees, the most powerful of the rights available is the right to engage in collective bargaining. Competition law throughout Europe prohibits agreements between 'undertakings' which have as their object or effect the prevention, restriction or distortion of competition in services, with 'undertakings' routinely being defined as including individuals engaged for gain in the provision of a service. Trade unions and employers engaging in voluntary collective bargaining on pay and other terms of employment for employees, however, are not subject to competition law.

This leads into Thomas Dullinger's article on the collective bargaining agreement in Austria for bicycle deliverers (**EELC 2020/12**). The author notes that "only those who can be qualified as employees" fall within the scope of the agreement and locates its negotiation within the context of combatting bogus or false self-employment. What remains to be seen is whether persons in the intermediate category of 'employee-like workers' would be allowed by the relevant national competition authority to come within the scope of such an agreement. In that regard, the comment from Germany is intriguing in that collective bargaining agreements there can 'in principle' also apply to self-employed persons, such as those who are 'economically dependent'; in order to be so considered, more than half of the income must be earned with only one client.

This resembles the position in Ireland where, subject to ministerial approval, collective agreements can be negotiated on behalf of 'fully dependent self-employed workers', which term is defined as individuals who perform services for another person and "whose main income in respect of the performance of such services is derived from not more than two persons": see the Competition (Amendment) Act 2017.

Fundamental rights: from the right to strike to freedom of expression

Filip Dorssemont[41]

Although the Court of Justice of the European Union (CJEU) does not have an uncontested record in upholding the right to collective action ever since the (in)famous judgments in *Viking* and *Laval* of 2007, its General Court issued a judgment on 29 January 2020 in an annulment procedure which will be applauded by the trade unions. In *Aquino and Others – v – European Parliament,* it annulled an order to requisition a number of interpreters after a strike notice was issued by a trade union in the EU civil service (Inter-Trade Union Committee).[42] The existence of a right to strike of EU civil servants can hardly be challenged since the entry into force of the Charter of Fundamental Rights of the European Union (CFREU) (due to the Lisbon Treaty). Contrary to other human rights instruments such as Article 6 of the European Social Charter, no specific exemption was provided for the public administration in Article 28 of the CFREU. The European Parliament did not even dare to contest the existence of such a right.

The CFREU does not at all ensure that Member States have to recognise a right to strike in their domestic legal order. The provisions of the Charter are primarily adressed to EU institutions (Article 51 of the Treaty on the Functioning of the European Union (TFEU)). They will only apply to Member States insofar as they implement EU law. The likelihood of any EU instrument regulating the right to strike being implemented at all is close to zero, since the subject of strike is excluded explicitly from the EU Social Policy Title (Article 153(5) TFEU). This leads to the paradoxical situation that EU civil servants are better protected by Article 28 CFREU than 'ordinary' workers.

The judgment stands out as a landmark judgment, since the Court has never had the opportunity to recognise the existence of a right to strike in the specific ambit of EU civil servants, although the formal and generic recognition of the right to collective action in *Viking* and *Laval* as a general principle of EU law prior to the entry into force of the CFREU had to be relevant for EU civil servants as well. In a previous staff case, the General Court only recognised a general principle of labour law that workers are not entitled to receive a remuneration in case of a strike, clearly indicating that the recognition

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42. General Court, 29 January 2020, T-402/18 (*Roberto Aquino and Others – v – European Parliament*).

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of this principle did not entail any recognition of the right to strike [(CJEU, 18 March 1975, Joined Cases 44, 46 and 49-74 (*Acton and Others – v – Commission*)].
Hence, the General Court had to examine whether this restriction of the right to collective action was consistent with Article 52(1) TFEU. This horizontal provision provides a tool to assess whether restrictions of Charter rights constitute violations. In order for a restriction to be in conformity with Article 52 CFREU it needs to pass a test of legality, legitimacy and proportionality. Since the system to requisition interpreters was deprived of any sufficiently precise and clear legal basis, the restriction could not be seen to be valid. Subsquently, the decision was annulled. With the exception of the European Central Bank, the Staff Regulations of these institutions are mute on the issue of a right to strike and for this reason on the issue of the restrictions.
Inevitably, the question might arise how the EU institutions will react to this judgment. They might of course continue to requisition workers, knowing that the annulment of such decisions requires lengthy procedures and that the General Court refused in this same case to suspend the decision (See General Court, 4 July 2018, T-402/18R). In my view, interpreters could in fact refuse to respect such decisions, since they are illegal. Refusing to abide by an illegal exercise of managerial authority cannot constitute a cause for *stante pede* dismissal (summary dismissal) . The EU institutions could of course make arrangements with trade unions on the establishment of a minimum service. The Staff Regulations indeed allow for the conclusion of agreements between trade unions and the EU institutions. In my view, these agreements cannot be binding upon civil servants themselves. One might even argue that such agreements allowing for a requisitioning would affect the Staff Regulations contrary to Article 10 *quater* of these Regulations.
The Strasbourg Court had to deal with two cases on the issue of the freedom of expression of workers (ECtHR, 3 September 2020, no. 57462/19, *Yacob Mahi – v – Belgium*; ECtHR, 5 November 2019, no. 11608/15, *Herbai – v – Hungary*). In both cases workers exercised that freedom outside the physical boundaries of the workplace and outside their working time. However, in both cases the Court recognised that the existence of an employment relationship could constitute a source of restrictions of the freedom of expression outside the workplace. In both cases that restriction was considered to be prescribed by law. In *Herbai – v – Hungary*, the code of ethics of a bank provided a blanket prohibition not to publish formally or informally any information relating to the functioning and activities of the employer. Furthermore the Hungarian Labour Code provided a generic obligation to refrain from jeopardising the legitimate economic interests of the employer. In the case of *Yacob Mahi – v – Belgium*, a teacher of Islam in public schools was subject to some general obligations to take into account the interests of the State and of public teaching and the need to refrain from compromising the honour and the dignity of his function.
In the case of *Herbai –v –Hungary* a contractual worker of a bank, working as an expert on salaries in the HR department had started a website for Human Resource Management (HRM) related publications and events for the use of HRM experts. He had published opinions of his colleagues and had also written and published a piece himself on a personal income tax reform and the question whether it had an impact on remuneration policies in the private sector. He was dismissed for breaching his employer's confidentiality standards. In the case of *Yacob Mahi,* the teacher of Islam was transferred to another school for writing an open letter in the aftermath of the terroristic attack on Charlie Hebdo in Paris. This letter was sent in a situation of growing tensions in the school where he was teaching. Some pupils of the school had attacked a colleague who had defended the freedom of expression of the journalists of Charlie Hebdo and even another pupil who refused to sign a petition against the aforementioned teacher. In his letter, Yacob Mahi reacted to the fact that certain people in the media accused him of being behind these troubles, thus forcing him to react. He denounced the attacks in the name of Islam against Charlie Hebdo, but also called the freedom of expression exercised by the cartoonists abusive. He also argued that homosexuality was a troublesome phenomenon against that mental construct we call 'human nature'. On top of that he also invoked the authority of a person who denied the Shoa.
The Court considered that the restrictions of the freedom of expression of the Hungarian HRM expert were disproportionate. It criticised the fact that the Hungarian judges did not convincingly demonstrate to have made a fair balance between the legitimate interests of the bank (e.g. its reputation) and the freedom of expression. Thus, the judges were satisfied with the standard of 'potential damage' stemming from the mere fact that the expert had written on issues related to his employment tasks or based upon his professional experience, without demonstrating that any secrets had actually been divulged or that the reputation of the bank had been damaged.
In sum, the Court's decision shows that a clause which is interpreted as a blanket waivering of the freedom of expression is problematic. Such a clause still needs to pass a proportionality test.
In the case of the teacher of Islam, the Court was convinced that the sanction served a legitimate purpose, *id est* the preservation of the order in the school, of its reputation and that of the Federal entity to which it belonged. Neither was the sanction deemed disproportionate, since the teacher did not lose his job and since the new school was a small distance from his previous one (50km). Although the broad interpretation from public order as including order within the premises of the school is 'interesting', the judgment cannot be dissociated from the difficult context in which the teacher was exercising his freedom of speech, requiring more reserve than usual. The Court also reiterated its conviction that the expression was of a written nature and not a spontaneous reaction in an oral communication. It did

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not in my view sufficiently take into consideration that reputation works both ways. It puts restrictions on the freedom of expression, but it also provides additional legitimacy for a person to express himself or herself to defend their reputation when it is under attack. The Court considered that the claim was manifestly ill-founded.

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